

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD

SECOND APPEAL NO. 915 of 2006
WITH CA/10606/2006
WITH CA/10649/2008
IN SA/915/2006

1. Gojrabai W/o Shenu Sonawane,
age 63 years,
2. Siddhartha S/o Shenu Sonawane,
age 48 years,
3. Gautam S/o Shenu Sonawane,
age 38 years,
4. Mukunda S/o Shenu Sonawane,
age 33 years,
All agriculturists by occupation and
R/o Galwada Taluka Soygaon
District Aurangabad

... Appellants
(Orig.Defts. No.1 to 4)

Versus

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| 1 | Rukminibai W/o Motiram Lathe,
age 58 years occupation household
R/o Amkheda Tal. Soygaon
Dist. Aurangabad | ...(Orig. plaintiff) |
| 2. | Sanjay S/o Motiram Lathe,
age 38 years occupation household
R/o as above. | ...(Orig.Deft.No.8) |
| 3. | Rajendra S/o Motiram Lathe,
age 31 years occupation agriculture
R/o as above. | ...(Orig.Deft.No.9) |
| 4. | Suman W/o Pandit Birare,
age major occup. household
R/o Pimpaldari Taluka Soygaon
Dist. Aurangabad | ...(Orig.Deft.No.5) |
| 5. | Vidya W/o Gautam Salwe,
age major Occup household
R/o Amedkar Nagar road, No. 17,
Bhopal (M.P.) | ...(Orig. Deft.No.7) |
| 6. | Aruna W/o Bhagwat Gaikwad
(Died) | ..(Orig. Deft. No.6) |

...Respondents

Mr. V.D. Sonawane, Advocate for appellants
Mr. B.S. Shinde, Adv., h/f. Mr. A.S. Bayas, Adv. for Respt.
No.1
None appears for respondents No. 2 to 6

CORAM : AVINASH G. GHAROTE, J.

Reserved for Judgment : on 3rd Sept., 2019
Pronounced on : on 6th Sept. 2019

ORAL JUDGMENT:

1. This is a second appeal at the behest of original defendants No.1 to 4. The parties for the sake of convenience, are being referred to as they were before the Trial Court. This second appeal challenges the judgment and decree dated 15/02/2003 passed by the Civil Judge (Junior Division), Soygaon Dist. Aurangabad, in Reg. civil suit No. 110 of 2000, a suit for specific performance of the agreement dated 24/07/1997 executed by one Shenuba (husband of the original defendant No.1 and father of defendants No. 2 to 7) in favour of Shri Motiram Lathe (husband of original plaintiff Rukminibai) in respect of agricultural field admeasuring 1 acre out of Gat No. 16 totally admeasuring 2H. 6 Gunthas, situated within the outskirts of village Vetawadi, Taluka Soygaon, for the total consideration of Rs. 75,000/-, out of which Rs. 50,000/- stood paid, leaving a balance of Rs. 25000/- payable after two years on 30/05/1999, whereby the learned Trial Court was pleased to decree the suit for specific performance. The judgment of the Trial Court was

challenged by original defendants No.1 to 4 in appeal by Reg. civil appeal No. 280 of 2003, which came to be dismissed on 27/07/2006, consequent to which, the present second appeal was filed. It is an admitted position on record that Motiram passed away on 01/08/1998, pursuant to which, his widow Smt. Rukminibai filed the suit for specific performance in which legal heirs of Motiram were arrayed as defendants No. 8 & 9.

2. By order dated 05/05/2009, the present second appeal was admitted on the following substantial questions of law:

- (I) Do appellants prove that in the interest of justice and for giving fair opportunity to the appellants, it is necessary to remand the matter to the Trial Court for allowing it to cross examine plaintiff and plaintiff's witnesses and lead evidence ?
- (ii) Do appellants prove that application Exh. 32 and 34 given in the District Court ought to have been allowed as permission for granting amendment was necessary in the interest of justice and that production of documents ought to have been allowed ?
- (iii) Do appellants prove that the respondent/plaintiff is not entitled to decree of specific performance of agreement of sale or refund of earnest money in the alternative ?

3. Heard the learned Counsel for the parties at length.

Shri V.D. Sonawane, learned Counsel for the appellants/defendants No.1 to 4, strenuously urged that the matter was required to be remanded in the light of the position that a reasonable and fair opportunity was not given to the appellants for allowing to cross-examine the plaintiff/respondent No.1 and plaintiff's witnesses and to lead evidence by the Trial Court.

4. He further contended that, rejection of the application at Exh. 32 (an application under Order 41 Rule 27 of C.P.C. for permission to file additional documents and to adduce evidence filed at the appellate stage in the month of March 2006) by the first Appellate Court was incorrect inasmuch as the application at Exh. 32, satisfied the requirement of Order 41 Rule 27(1)(aa) of the Civil Procedure Code.
5. In so far as application at Exh. 34 (permission to amend the written statement also filed at the appellate stage on 29/03/2006), it was contended by the learned Counsel for the appellants that an application for amendment of the written statement could be filed at any stage, including the appellate stage and failure of the Appellate Court to consider this position, vitiated the impugned judgment by the lower Appellate Court.
6. As regards the merits of the matter, the learned

Counsel contended that the agreement of sale dated 24.07.1997 as well as payment of the part consideration of Rs. 50,000/- under the agreement was not proved. He further contended that the appropriate court fee was not paid under the said claim and the first Appellant Court had misdirected itself by rendering a finding that the plaintiff was placed in possession of the suit property under the agreement of sale. He further contended that even presuming otherwise as to the existence of the agreement dated 24/07/1997, the date fixed for payment of balance consideration was 30/05/1999 and it was not permissible for the plaintiff to seek tender of the same prior to the date fixed. He further contended that there was no clause in the agreement regarding delivery of possession, in the light of which it was not permissible for the Trial Court to grant a decree for possession.

7. As against this, Adv. Shri Balaji S. Shinde, holding for Adv. Shri A.S. Bayas for respondent No.1/plaintiff, has supported the judgments below. He contends that the provisions of Order 41 Rule (1)(aa) of C.P.C. have not been satisfied by the appellants/defendants No.1 to 4, inasmuch as the reason given for withholding the documents was not genuine and the issue of due diligence has not been addressed at all. He further contended that except for the bare denial of the plaint averments, they have pleaded ignorance regarding the agreement and what

transpired thereafter.

8. I have given my anxious consideration to the judgments of the Trial Court as well as the first Appellate Court and the arguments advanced by the learned Counsel for the parties.

9. The contention of the learned Counsel for the appellants in respect of the rejection of the application under Order 41 Rule 27 of C.P.C. cannot be accepted, in light of the specific mandate of Order 41 Rule 27(1)(aa) of C.P.C., which mandates that the party seeking to produce additional evidence, has to establish that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not after exercise of due diligence be produced by him at the time when the decree appealed against was passed. In this context, it is material to note that the agreement in question is dated 24/07/1997. The suit was filed on 25/01/2000, in which the present appellants had filed their written statement at Exh. 20 and consequent to the trial, the suit came to be decreed on 15/02/2003. This decree of the Trial Court was challenged by the appellants/defendants No.1 to 4 by way of appeal dated 17th March 2003 bearing R.C.A. No. 280/2003. Neither in the written statement before the Trial Court nor in the memo of appeal in R.C.A. 280/2003 there is any mention about the documents, which

are sought to be produced under application at Exh. 32. It is further to be pointed out that on a query made by the Court, it was informed by the learned Counsel for the appellants that Exh. 32 was filed in April 2006. The first Appellate Court in its judgment has refused to permit appellants/defendants No.1 to 4 to lead additional evidence and I think rightly so, in the light of the position that there was absence of due diligence as contemplated by the provisions of Order 41 Rule 27(1)(aa) of C.P.C. inasmuch as the documents, which are sought to be filed, are dated 15/06/1997 and 20/06/1997, as reflected from para No.3 of affidavit of one Siddhartha S/o Shenu Sonawane/appellant No.2 dated 16/03/2009 filed in pursuance to the order of this Court dated 05/02/2009. It is nobody's case, as reflected from the record, that these documents were not in possession of the appellants/defendants No.1 to 4, after the demise of their father, late Shenuba and as a result of this they were unable to place them on record. In fact, upon being requested application Exh.32 was handed-over for the perusal of this Court by the learned Counsel for the appellants, which in fact, categorically states in paragraph No. 1 itself that the said documents were given to the Advocate but the same were not produced in the Trial Court, which would indicate that right since the beginning these documents were within the knowledge and in custody of the appellants. The learned Counsel for respondent No.1/plaintiff has relied upon the

case of *Mahavir Singh Vs. Naresh Chandra – AIR 2001 Supreme Court 134*, in which the parameters for exercise of the powers under Order 41 Rule 27 have been laid down. As already observed above, the mandate of the due diligence clause, as contained in Order 41 Rule 27(1)(aa) of C.P.C., is not satisfied and the application at Exh. 32, has rightly been rejected by the first Appellate Court.

10. The next contention of the learned Counsel for the appellants that the rejection of the application for permission to amend the written statement at the appellate stage, in the light of the documents referred to above, was incorrect, is also without any merits for the reason that in the Trial Court, the entire transaction, as emanating from the agreement dated 24/07/1997, was denied by appellants/defendants No.1 to 4 and the documents sought to be produced under the application under Order 41 Rule 27 of C.P.C., referred to above were already in their possession, even before filing of the written statement and any pleas which they now wanted to raise, were equally available to them, even before filing their written statement. Having not done so, it was not permissible for them to raise the same for the first time at the appellate stage. That apart, the entire transaction having been denied by them, the burden was upon the plaintiff/respondent No.1, as such, no prejudice whatsoever was caused to the appellants due to rejection of the application for

amendment by the first Appellate Court.

11. In so far as the next contention of the learned Counsel for the appellants that there was absence of reasonable and fair opportunity in the matter of cross examining the witnesses of respondent No.1/plaintiff or to lead evidence is concerned, it is material to note that before the Trial Court defendants No.1 to 6(appellants No 1 to 4 & respondents No.4 & 6) had filed their written statement at Exh. 20, whereas, respondent No.5/defendant No.7 was proceeded ex-parte. On behalf of the plaintiff, two witnesses, namely, P.W. 1 the plaintiff herself and P.W. 2 one Bhagwan Daulat Bodkhe were examined. It is reflected from the judgment of the Appellate Court that when the plaintiff's witnesses were examined, the Counsel for the defendants/appellants had withdrawn his power and after completion of evidence of the plaintiff, the original defendants No.2 & 3/appellants No.2 & 3 had filed an application seeking leave to cross examine the plaintiff's witnesses by their new counsel, whose *Vakalatnama* was filed on 28/01/2003. The learned Trial Court had allowed the application on payment of costs of Rs. 300/-, which reflects the grant of opportunity. However, this cost was not paid. It is further reflected from the judgment of the Appellate Court that the case was fixed on 04/02/2003 before the Trial Court for cross-examination of the

plaintiff's witnesses, however, on that date the defendants as well as their Counsel remained absent, as a result of which, the learned Trial Court was left with no option than to proceed ahead in the matter, by hearing the arguments and fixing the matter for judgment. The judgment of the Appellate Court further discloses that on 13/03/2003 when the matter was fixed for judgment before the Trial Court, another application was filed on behalf of the defendants for permission to pay the costs of Rs. 300/-, which was allowed and the defendants were given one more chance to cross-examine the plaintiff's witnesses for which the matter was fixed on 15/02/2003, on which date also, the defendants instead of cross-examining the plaintiff's witnesses, filed an application for adjournment, which came to be rejected and the judgment was pronounced. This clearly indicates ample opportunity being granted on more than one occasion by the Trial Court to the defendants to cross-examine the plaintiff's witnesses, which was not availed of by the defendants, for which they themselves are to blame. Thus, no case for remand is made out by the appellants/defendants, either on the plea of denial of reasonable opportunity in the matter of cross-examination of the plaintiff's witnesses or even otherwise and the plea in this regard is, thus, rejected.

12. The other contentions of the learned Counsel in so far

as the merits of the matter are concerned, also do not stand to reason, as self-destructive pleas have been raised in the written statement by the defendants. On the one hand, the appellants/defendants have contended that the agreement of sale produced by the plaintiff/respondent No.1 and alleged to be executed by Shenuba was a false and forged document and, on the other hand, they have pleaded that they had no knowledge about the alleged agreement of sale as Shenuba did not inform them about the said agreement. That apart, the plaintiff examined herself as well as P.W.2 Bhagwan Daulat Bodkhe, the witness to the agreement, who has deposed that in his presence Shenuba had signed the said agreement in his presence after having received Rs. 50,000/- in cash, at which time the plaintiff and the defendants were also present. Thus, the agreement as well as the receipt of the part consideration of Rs. 50,000/- have found to have been proved to the satisfaction of both the Courts below and being a finding of fact, it is not liable to be disturbed in the second appeal.

13. The further contention of the learned Counsel for the appellants/defendants No.1 to 4 that even presuming the existence of the agreement, it was not permissible for the plaintiff to seek tender of the balance sale consideration before the date fixed in the agreement needs only to be mentioned to be rejected,

as there is no law which prevents a prospective purchaser in tendering the balance consideration, before the date fixed, rather, on the contrary, such tender would go to show his/her bonafides and readiness and willingness. In the instant case, it has come on record that the date fixed for the payment of balance consideration was 30/05/1999, prior to which by a notice dated 24/05/1999 at Exh. 33, the plaintiff expressed her readiness to make payment of balance consideration and called upon the defendants to execute and register the sale deed, which in fact, not only demonstrates her bonafides and also clinches the issue of readiness and willingness in her favour.

14. The learned Counsel for the appellants has also contended that though there was no clause in the agreement for delivery of possession, the Trial Court by directing delivery of possession in its judgment and decree dated 15/02/2003, has misdirected itself. It is a settled law that even if the agreement does not contain a clause for delivery of possession, it is permissible for the Trial Court while decreeing specific performance to grant a decree for possession, as without such a relief for possession being granted, simplicitor directing the execution and registration of a sale deed, would render a decree for specific performance merely a paper decree and would not effectually be a decree for specific performance. Even otherwise,

in the instant case, while decreeing the suit for specific performance of an agreement of sale of immovable property, the Court has to ensure that a clear and marketable title passes on to the person in whose favour the decree is passed, which would include a decree for possession also. Mr. B.S. Shinde, learned Counsel for respondent No.1/plaintiff in support of the above proposition has relied on *Babu Lal Vs. M/s. Hazira Lal, AIR 1982 Supreme Court 818* and *Kisan Shripat Patil Vs. Ragho Vedu Patil, 2007 (4) Mh.L.J. 311*, which squarely covers the above proposition.

15. The learned Counsel for the appellants has further contended that the proper court fee was not paid upon the claim in the suit. Non-payment of proper court fee, in my humble opinion, cannot be a substantial question of law, so as to upset the concurrent findings of the facts rendered by both the Courts below.

16. Thus, considering the entire conspectus of the matter the second appeal fails. The appeal stands dismissed accordingly. In the circumstances, there will be no order as to costs.

17. Needless to state that in view of the disposal of the second appeal, interim relief granted by this Court stands vacated.

18. In view of disposal of the second appeal, pending civil applications No.10606/2006 and 10649/2008 stand disposed of.

(AVINASH G. GHAROTE, J.)

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