

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

16 SECOND APPEAL NO. 910 OF 2018

GORAKSHANATH JAGANNATH KOLSE
VERSUS
NANDA MININATH KOLSE AND OTHERS

.....

Mr. A.V.Hon, Advocate for Appellant.

.....

CORAM : V.L.ACHLIYA, J.

DATE : 08/07/2019

.....

ORAL ORDER :

1. Being aggrieved by the concurrent decisions rendered by the Courts below, the appellant/original plaintiff has preferred this appeal.
2. Heard learned counsel for appellant. Perused the Judgment and decree passed by the Courts below.
3. I have carefully considered the submissions advanced in the light of Judgment and orders passed by the Courts below. The appellant/plaintiff has filed Suit for specific performance of contract and in alternative claimed decree for earnest money. The plaintiff has approached with the case that deceased Mininath Kolse, the father of respondents/original defendants was suffering from serious illness. He was in dire need of money. In order to meet the expenses of medical treatment, deceased father of respondents

agreed to sale suit land for the consideration of Rs. 35,000/-. The plaintiff has paid amount of Rs. 35,000/- through two cheques. The agreement entered between the plaintiff and deceased Mininath was drawn on 13/10/2005 in the office of notary. The father of respondents/defendants i.e. Mininath died on 31/12/2005. In terms of agreement, the amount of Rs. 35,000/- taken from the plaintiff was agreed to be returned within two years from the date of execution of agreement of sale and failure to repay the amount, deceased Mininath had agreed to execute sale deed in favour of plaintiff. The defendants/legal heirs of deceased Mininath have neither repaid the amount nor executed the sale deed in favour of plaintiff. He has, therefore, filed Suit seeking specific performance of agreement to sale executed on 13/10/2005 by deceased Mininath and alternatively claimed the decree for refund of Rs. 35,000/- with interest.

4. The respondents/defendants appeared in the matter and resisted the suit claim by filing Written Statement. They have admitted the relationship between the plaintiff and deceased Mininath as real brothers. The defendants have approached with the case that the deceased was in dire need of money for the purpose of his medical treatment. He, therefore, borrowed Rs. 35,000/- from the plaintiff. As a security of amount advanced to deceased Mininath, the plaintiff has got executed the mortgage deed in

respect of suit property. It is contended that the possession of suit property never handed over to plaintiff and same remained with the defendants. They have offered to pay Rs. 35,000/- to redeem the mortgage in terms of alleged agreement of sale dated 13/10/2005. They have also send notice on 26/10/2007 [Exh.17] calling upon the plaintiff to redeem the mortgage by accepatng the amount of Rs. 35,000/-. However, the plaintiff has not responded to notice issued.

5. On due consideration of rival pleadings and evidence adduced in the case and more particularly the alleged agreement to sale [Exh.16] forming the basis of filing of Suit, the trial Court has partly decreed the Suit. The relief claimed by way of specific performance of contract was refused. The trial Court has passed decree to refund the amount of Rs. 35,000/- with interest @ 6% per annum from 13/10/2005 till realization of amount. Being aggrieved the appellant/plaintiff preferred appeal before the District Court, Ahmednagar. The Judgment and decree dated 21/01/2013 passed in R.C.S. No. 517/2010 challenged in appeal came to be confirmed by way of Judgment and order dated 03/04/2018 passed in R.C.A. No. 65/2013 by learned District Judge-2, Ahmednagar. Aggrieved by the concurrent decisions rendered by the Courts below, the appellant/plaintiff has preferred this Second Appeal.

6. In brief it is the contention of appellant/plaintiff that the Courts below have erred in refusing to pass decree for specific performance of contract in favour of plaintiff. It is submitted that appeal raises number of substantial questions of law and appeal deserves to be admitted.

7. I have carefully considered the Judgments and Orders passed by the Courts below. Learned Judge of trial Court has reproduced the contents of alleged agreement of sale [Eh.16] in para 12 of the Judgment, which itself spell out that amount was advanced to meet dire need of deceased Mininath, who was suffering from serious illness. The terms of alleged agreement of sale/mortgage deed provides that the amount advanced to be returned to plaintiff within two years from the date of execution of alleged agreement [Exh.16] and failure to pay the amount, the sale deed to be executed in favour of plaintiff by accepting the sale consideration to be determined as per Govt. valuation. It is not disputed that the possession of suit land was never parted by deceased Mininath as well as his heirs i.e. the defendants. The notice issued by the defendants spell out that they were ready to repay the amount of Rs. 35,000/- to seek redemption.

8. The Courts below have refused to exercise the discretion in favour of plaintiff to pass decree of

specific performance of contract based upon overall facts of the case and evidence adduced. It is well settled principle of law that the relief of specific performance of contract is a discretionary relief. Section 20 of Specific Relief Act broadly enumerate the circumstances in which Court may exercise its discretion not to grant the relief of specific performance of contract. The appellate Court has discussed this aspect in minute detail, in para Nos. 11 and 12, which reads as under :

*"11. It is necessary that Court should exercise discretion judiciously and find out the circumstance whether by the agreement, any of the party is given any undue advantage or unfair advantage over the other party, whether defendant entered into contract. Under such circumstances, though not rendering the contract voidable makes it inequitable to enforce the specific performance as is provided under section 20 (2) (c) of the Specific Relief Act. **It appears from the plain reading of Exh. 16 the document that for meeting the need of expenses of hospitalization, the document came into existence. While executing the document, the***

plaintiff/appellant has written so many things including delivery of possession when actually possession was not delivered and, therefore, the plaintiff has sought the relief of recovery of possession in para No. 6 (c) of the plaint. This means the plaintiff was in dominating position at the time of execution of the agreement and he has obtained unfair advantage while making the payment of Rs. 35,000/- to his real brother or the medical treatment of his brother and at the time of execution of document. The unfairness on the part of plaintiff is required to be considered by the Court while exercising the discretion at the time of exercising discretion for grant or refusal of specific relief. The very fact that executant died within two months from the date of execution of the document shows that when the document was executed, the deceased Mininath was suffering from serious illness and it was so dire necessity of the concerned family that they should

get funds for medical treatment at any cost. Instead of going to any other person in the society, Mininath approached his brother the plaintiff/appellant.

12. It seems that plaintiff/appellant has played mischief by putting clause that possession of the land is delivered when it was not so delivered and he was aware of this fact even at the time of making pleading in the present suit. Such a person of unfair character is not entitled to get any relief much less the discretionary relief at the hands of Court. ”

9. On due consideration of the submissions advanced in the light of Judgment and decree passed by the Courts below, I am of the view the appeal raises no substantial question of law. There are concurrent decisions rendered by the Courts below. The relief of specific performance of contract is a discretionary relief. The Courts below have thoroughly examined the case and refused to exercise judicial discretion in favour of plaintiff to grant relief of specific performance of contract. In that view,

there is absolutely no infirmity and illegality in the Judgments and orders passed by the Courts below. In absence of substantial question of law involved in appeal, the appeal deserves no consideration. I am, therefore, not inclined to entertain the appeal. Accordingly, the appeal is dismissed.

[V.L.ACHLIYA]
JUDGE

KNP.