

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***CIVIL APPELLATE JURISDICTION*****SECOND APPEAL NO. 441 OF 2018
ALONGWITH
CIVIL APPLICATION NO. 945 OF 2018
IN
SECOND APPEAL NO. 441 OF 2018****Arun Govind Shete****..... Appellant/
Applicant****VERSUS****Vidyadhar Shankarrao Dadake & Anr.****..... Respondents**

Mr.Sachin S.Punde for the Appellant/Applicant.

Mr.P.M.Arjunwadkar for the Respondent nos. 1 and 2.

CORAM : R.D. DHANUKA, J.**DATE : 16th AUGUST, 2019****P.C.**

By this second appeal filed under section 100 of the Code of Civil Procedure, the appellant (original defendant) has impugned the judgment and order dated 18th September, 2017 passed by the learned District Judge – 6, Solapur at Solapur in Civil Appeal No. 213 of 2015 dismissing the appeal preferred by the appellant confirming the judgment and decree dated 18th September, 2017 passed by the Joint Civil Judge, Senior Division, Solapur at Solapur in Regular Civil Suit No.695 of 2012 in favour of the respondent nos.1 and 2 (original plaintiffs).

2. It was the case of the plaintiffs that there was an oral agreement for sale between the parties upon which the plaintiff no.1 had made

payment of Rs.2,75,000/-upto 8th October, 1996 and Rs.1,25,000/- between 19th December, 1996 to 11th April, 1999 out of the total consideration of Rs.4,52,000/- agreed by and between the parties.

3. The plaintiffs issued a notice to the defendant on 30th January,2003 calling upon the defendant to perform his part of the allegation under the oral agreement. The defendant responded to the said notice by reply dated 3rd February, 2003 and contended that the defendant was always ready and willing to execute the sale deed of the flat subject to making the payment by the plaintiffs of Rs.4,52,000/- and also rent of the flat mentioned in the said reply.

4. The plaintiff accordingly filed a civil suit *inter alia* praying for specific performance of the oral agreement. The plaintiffs examined two witnesses including the handwriting expert. The defendant did not enter the witness box. The trial court framed seven issue for consideration including issue of limitation. The trial court passed a judgment and decree on 11th September,2015 directing the defendants to execute the sale deed in favour of the plaintiff no.1 in respect of the suit flat after receipt of the balance consideration amount of Rs.1,75,000/- from the plaintiff no.1. The trial court directed the plaintiff no.1 to deposit the balance consideration of Rs.1,77,500/- within 30 days from the date of the said decree before the trial court with liberty to the defendant to withdraw the said amount after execution of the sale deed.

5. The appellate court framed seven points for determination and dismissed the appeal preferred by the defendant on various grounds.

6. Mr.Punde, learned counsel for the appellant invited my attention to the averments made in the written statement filed by his client, reply issued to the notice issued by the plaintiffs and the findings rendered by the two courts below and would submit that though there was averments in the reply to the legal notice and in the written statement that his client was ready and agreeable to execute the sale deed, the said averment was conditional averment and was on condition of payment of lumpsum amount of Rs.4,52,000/- by the plaintiffs to the defendant. He submits that neither the oral agreement was proved by the plaintiffs nor the consideration of Rs.4,52,000/-.

7. It is submitted by the learned counsel that the plaintiffs were not able to prove their readiness and willingness to comply with their part of the obligation under the oral contract. The next submission of the learned counsel is that though the suit is barred by law of limitation, the trial court rejected the said plea raised by the defendant without recording sufficient reasons.

8. Mr.Arjunwadkar, learned counsel for the plaintiffs on the other hand invited my attention to the reply issued by the defendant to the notice of demand issued by the plaintiffs and also various paragraphs in the written statement filed by the defendant and would submit that the defendant had admitted in the reply to the notice as well as in the written statement that there was an oral agreement for sale of the suit property for consideration of Rs.4,52,000/-. He submits that out of the said amount, though it was the case of the plaintiffs that they had paid a sum of Rs.4,00,000/- to the defendant, the plaintiffs could prove the payment of Rs.2,75,000/- to the defendant. He had produced a copy of the chit which was in the handwriting of the defendant before the

learned trial judge. The said chit clearly indicates that the plaintiffs had atleast paid a sum of Rs.2,75,000/- out of the said sum of Rs.4,52,000/- to the defendant. He submits that the handwriting expert was cross examined by the defendant's counsel. The evidence of the handwriting expert was not shattered in the cross examination.

9. The next submission of the learned counsel is that the defendant admittedly did not enter the witness box in support of his case in the written statement. Insofar as the issue of limitation raised by the defendant is concerned, it is submitted by the learned counsel that the learned trial judge has rightly rejected the said plea on the ground that the defendant had accepted the payment of Rs.2,75,000/-. The suit was filed within three years from the date of the last payment made by the plaintiffs and accepted by the defendant. He submits that in any event, since the plea of limitation is a mixed question of fact and law, the defendant was required to enter the witness box to prove such plea of limitation.

10. It is submitted that both the courts below have rendered the findings of fact about existence of oral agreement of the sale between the parties in respect of the suit property and about payment of Rs.2,75,000/- made by the plaintiffs to the defendant. He submits that both the courts have also rendered a finding on the readiness and willingness on the part of the plaintiffs to comply their part of the obligation under the oral agreement for sale between the parties. He submits that this court cannot interfere with such concurrent findings of fact which are not perverse.

11. A perusal of the judgment and decree passed by the trial court indicates that the trial court had framed seven points for determination. The plaintiffs had examined two witnesses including an handwriting expert. In the reply to the notice of demand issued by the plaintiffs, the defendant admitted the existence of the oral agreement between the parties. The defendant also admitted that he was ready and willing to execute the sale deed if the plaintiff makes payment of Rs.4,52,000/-.

12. A perusal of the written statement filed by the defendant also clearly indicates that the defendant had admitted the existence of the oral agreement between the parties and also consideration of Rs.4,52,000/-. It was however the case of the defendant that an amount of Rs.4,52,000/- was a lumpsum payment for consideration.

13. The plaintiff no.1 had entered the witness box and had proved the writing i.e. the chit in the handwriting of the defendant showing the receipt of the consideration of Rs.2,75,000/-. To prove their case that the said chit was in the writing of the defendant, the plaintiffs had examined an handwriting expert. The handwriting expert was cross examined by the defendant's counsel. In cross examination of the handwriting expert as well as the plaintiffs, their evidence was not shattered. The trial court as well as the appellate court after considering the oral and documentary evidence led by the plaintiffs and the fact that the defendant did not enter the witness box rendered various findings of fact and more particularly on the issue that the oral agreement between the parties for sale of the suit flat was proved. Even the plaintiff had already paid a sum of Rs.2,75,000/- out of Rs.4,52,000/-. Both the courts below also considered the reply of the defendant to the legal notice as well as various averments made in the

written statement filed by the defendant. I do not find any perversity in the findings rendered by the two courts below.

14. Insofar as the issue of limitation raised by the learned counsel for the defendant is concerned, a perusal of the order passed by the trial court indicates that the issue of limitation was raised before the trial court before the commencement of the evidence and has been dealt with in paragraph (26) of the impugned judgment and decree. The defendant had accepted the part payment from the plaintiffs. The suit was filed by the plaintiffs within the period of limitation. I do not find any infirmity in the finding on the issue of limitation rendered by the trial court.

15. In my view, the issue of limitation being mixed question of fact and law and the issue whether the plaintiffs were liable to pay consideration as lumpsum payment or not, the defendant was required to enter the witness box which admittedly he failed to enter. In these circumstances, the finding of issue of limitation and on the issue of readiness and willingness rendered by the trial court does not warrant any interference. No substantial question of law arises in this appeal. Second appeal is devoid of merit and is accordingly dismissed.

16. In view of dismissal of the second appeal, civil application does not survive and is accordingly disposed of. No order as to costs.

[R.D.DHANUKA, J.]