

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 272 OF 2015

ALONGWITH

CIVIL APPLICATION NO. 600 OF 2015

Nagnath Hariba Kalagote

.....Appellant

V/s.

Gurubasappa Tipanna Kuntoji

....Respondent

* * * *

Mr. Uday P. Warunjikar a/w. Mr. Siddhesh Pilankar,
Advocate for the appellant.

Mr. R.S. Alange, Advocate for the respondent.

CORAM : SANDEEP K. SHINDE, J.

Monday, 25th February, 2019.

P.C. :

1. Heard learned Counsel for the parties.
2. This appeal is preferred by the defendant and I will refer the parties as per their status in the suit.

3. I have perused the suit agreement, plaint, written statement and notes of evidence. I have also perused the order dated 3rd May, 2017 passed by this Court in Civil Application No. 473 of 2017.

4. That, since the defendant refused to execute the sale-deed, the suit was filed by the plaintiff for specific performance of the contract dated 9th December, 2013 (“the suit agreement” for short). Both the Courts have rendered findings of fact consistent with the evidence that the plaintiff has established his readiness and willingness to perform his part of the contract.

5. It is the defendant's case that, he had executed the suit agreement in favour of the plaintiff as a security, for repayment of handloan advanced to him. In support of it, he has referred to and relied on document dated 21st December, 2015 in his written statement, however, the trial Court declined to accept this defence.

6. The learned Counsel for the appellant has produced on record an agreement dated 21st December, 2015 which he has referred to in his written statement to contend that the loan amount was fully repaid, then borrowed in December, 2013. Admittedly, this document was not proved, hence not exhibited.

7. I have perused this document which was allegedly executed by the parties on 21st December, 2015. It refers to loan transaction between the parties made on 28th October, 2003 in the sum of Rs.1,17,000/- which has no nexus with the suit transaction at all. Be that as it may, though the plaintiff was confronted with this document in cross-examination, he denied its execution. More so, the trial Court while answering the Issue no.4, has held that, the defendant could not establish that, suit agreement was executed for securing the advance to the defendant. In view of this, I do not see any reason to interfere with this finding being consistent with the evidence on record.

8. It is further contended by the learned Counsel for the appellant that, the plaintiff in the suit for specific performance of the contract had not asked for possession of the suit property and in absence of such a prayer, the Courts below had no jurisdiction to pass the decree of possession. It appears, pending Second Appeal, an application was filed by the plaintiff to amend the plaint and incorporate the prayer for possession of the suit property. The application was heard and by order dated 3rd May, 2017 the plaintiff was permitted to amend the plaint and incorporate the prayer for possession in view of the proviso to Section 22(2) of the Specific Relief Act. This order was not challenged by the appellant, hence attained finality.

9. The learned Counsel for the appellant would submit that, the plaintiff has claimed and asserted his possession in the suit property; however, having asked and prayed for possession in the present proceedings, without establishing as to when he lost the possession and thus plaintiff has not approached the Court with clean hands. It

is further submitted that, though by order dated 3rd May, 2017 the plaintiff was permitted to amend his prayer, it is contended that, such amendment is not saved by limitation. In my view, both the submissions are unfounded and are to be rejected.

10. Under Section 22(2) of the Specific Relief Act, if the plaintiff has not claimed relief as contemplated by Clause (a) or Clause (b) of sub-section (1) of Section 22, he may seek it, at any stage of the proceedings. If such amendment is allowed, it will relate back to the date when the suit was filed. Besides, order dated 3rd May, 2017 passed by this Court permitting to amend plaint has attained finality.

11. The Appeal does not give rise to any substantial question of law. The Appeal is dismissed. In view of dismissal of the Appeal, Civil Application No. 600 of 2015 does not survive. The same is accordingly disposed of.

12. At this stage, the learned Counsel for the appellant submits that, the interim relief granted by this Court restraining the plaintiff from creating third party interest be continued for four weeks.

13. Taking into consideration the facts of the case, the prayer is rejected. Interim relief is not continued.

12. Send records and proceedings back to the Executing Court as the Darkhast proceedings are pending.

(SANDEEP K. SHINDE, J)