

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO.698 OF 2015
WITH
CIVIL APPLICATION NO.1479 OF 2015**

Shri Bhupal Ramgonda Patil
Since deceased through
legal heirs

... Appellants

Vs

Shri Jaykumar Shridhar Herale
& Anr.

... Respondents

...

Mr. T.S.Ingale for the Appellants.

Mr. Umesh Mankapure for the Respondents.

CORAM : SANDEEP K. SHINDE J.
DATE : 4 JANUARY, 2019

ORAL ORDER :

Heard the learned counsel for the Parties.

2 This second appeal is preferred by the defendant in the Regular Civil Suit No.192 of 1995. The suit was instituted for the specific performance of the contract dated 2nd September, 1989 ('Suit Agreement' for short) in respect of property Gat No.64

admeasuring 3 H 15 R situated at Village Shirgaon (Kavathe), Taluka: Tasgaon, District: Sangli ('**Suit Property**' for short).

3 The learned Trial Judge partly decreed the suit and held that the plaintiffs are entitled to recover earnest money of Rs.5000/- from the defendant paid at the time of execution of the suit agreement.

4 The plaintiffs being, aggrieved by the decree passed by the trial Court preferred the Regular Civil Appeal No.96 of 2006. The learned Appellate Court vide judgment and decree dated 29th May, 2015 allowed the appeal and decreed the suit, whereby legal heirs of the vendor/defendant were directed to execute the sale deed in favour of the plaintiffs in terms of the suit agreement, within 60 days.

5 Aggrieved by the decree passed by the Appellate Court , this Appeal is preferred by the defendant.

6 The learned counsel for the Appellant has urged that following substantial question of law arises for consideration in the Second Appeal namely;

“3 Whether the Lower Appellate Court was justified in law in passing decree for specific performance of the agreement for sale dated 02.09.1989 against the legal heirs of deceased Original Defendant the Vendor even though admittedly the suit property under the said agreement was already sold by the deceased vendor to third persons under registered sale deed dated 18.09.1995 and handed over possession of the same to the said purchasers who are in possession of the same since then and as such the impugned decree passed in respect of possession being unexecutable against the legal heirs and representatives of deceased original defendant the Vendor who have no right, title and interest including possession of the suit properties left at the time of passing Decree ?”

7 The learned counsel for the appellant submitted that the Appellate Court could not have granted decree of specific performance in toto, since vendor, Bhupal Ramgonda Patil had no exclusive rights to sell the suit property in-as-much as his brother Adgonda Ramgonda Patil had 2 Anna and 3 paise share therein.

. It is next submitted that recitals of the suit agreement

clearly indicates that the sons and wife of the defendant/vendor had undivided share in the property besides, share of his brother. It is, therefore, submitted that without first obtaining their consent and being impleaded as party respondents, the appellate Court could not have granted the decree in toto.

8 As against this, it is submitted by the learned counsel for the respondents that in December, 1986, partition had taken place between the defendant/vendor and his brother Adgonda Ramgonda Patil. He has invited my attention to the cross-examination of the defendant/vendor wherein he admitted that in accordance with the terms of the partition, suit property, i.e., Gat No.64 had fallen to his share and Gat No.151 had fallen to the share of his brother, Adgonda Ramgonda Patil.

. In view of this fact, the submission of the appellant/defendant that the decree could not have been passed in toto in respect of the suit property cannot be accepted and it is hereby rejected.

9 In fact, the learned Trial Judge in its judgment has held that since brother of the defendant has undivided share in the property, specific performance of whole contract was not enforceable but the plaintiffs are entitled for decree of specific performance of the contract to the extent of the share of the defendant. It appears the learned trial Judge has missed the admission by the defendant in his cross-examination that partition had taken place in December, 1986 and the suit land had fallen to the share of the defendant. Thus, decree passed by the Appellate Court cannot be faulted with.

10 It is an admitted fact that pending suit, undertaking was given by the defendant that he would not alienate the suit property. In spite of an undertaking, the defendant and his sons sold the suit property to the third person by registered sale deed dated 18th September, 1995. The said alienation is void. Thus, in my view, this conduct of the defendant cannot be overlooked while exercising jurisdiction under Section 20 of the Specific Relief Act, 1963.

11 Though it is submitted that the suit agreement was not enforceable without first obtaining consent of sons and wife of the defendant. I do not see any force in the argument. Vide clause 7 of the suit agreement, vendor had agreed that he would obtain or take the necessary consent of his wife and two sons before executing the sale deed.

12 Mr. Ingle the learned counsel for the appellant submitted that the suit agreement was executed way back in the year 1989 and considering the substantial rise in the prices of the properties, this Court may decline the relief of specific performance. Reliance was placed on the judgment in the case of **Niwas Builders v. Chanchalaben Gandhi**¹. I have gone through the said judgment. Ordinarily, the plaintiff is not to be denied the relief of specific performance only on account of phenomenal increase of price during the pendency of litigation. While balancing the equities, one of the considerations to be kept in view is as to who is the defaulting party.

1 [2003(3)Mh.L.J.

13 I am not inclined to accept the submissions of the learned counsel for the appellant. It is for the reason that rise in the price of the property during the pendency of the litigation as one of the considerations cannot be sole consideration for denial of specific performance. However, equities are to be balanced and especially conduct of the parties is required to be taken into consideration. Rise in the price of the property during the pendency of the litigation in the cited case was held to be one of the considerations in the first appeal proceedings. In the case in hand, the defendant though made a statement before the trial Court that he would not alienate the property during the pendency of the suit in breach of the statement/undertaking, the property was sold by the defendant by the registered sale deed of 18th September, 1995. Besides, the trial Court had refused specific performance only for the reason that the brother of the vendor/defendant had undivided share to the extent of 2 Anna and 3 paise share and, therefore, agreement was not executable. However, in cross-examination the defendant had

admitted that partition had taken place between his brother and himself and the suit property had fallen to his share.

14 Thus, for the reasons aforesaid, I am not inclined to consider question of law sought to be raised as substantial question of law in the Second Appeal. In the result, the appeal is dismissed with no order as to costs. The Civil Application is accordingly, disposed of.

(SANDEEP K. SHINDE, J.)