

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***CIVIL APPELLATE JURISDICTION*****SECOND APPEAL NO. 544 OF 2018****ALONGWITH****CIVIL APPLICATION NO. 1146 OF 2018****ALONGWITH****CIVIL APPLICATION NO. 1670 OF 2018****Dilip Bhausahab Pawar****..... Appellant****VERSUS****M/s.Vijay Developers, Satara & Ors.****..... Respondents**

Mr.P.B.Shah, i/b. Mr.K.P.Shah for the Appellant.

Mr.V.S.Talkute for the Respondent nos. 1 to 4.

CORAM : R.D. DHANUKA, J.**DATE : 27th AUGUST, 2019****P.C.**

By this appeal filed under section 100 of the Code of Civil Procedure, 1908, the appellant (original defendant) has impugned the judgment and decree dated 3rd January, 2018 passed by the learned District Judge – 2 dismissing Regular Civil Appeal No.327 of 2015 and confirming the judgment and decree dated 16th May, 2014 passed by the 2nd Joint Civil Judge, Senior Division, Satara in Special Civil Suit No.290 of 2009 thereby decreeing the suit for specific performance filed by the respondents (original plaintiffs).

2. The consideration agreed by and between the parties under the sale deed was Rs.48 lacs. There were several tenants in the suit premises. The plaintiffs have already paid a sum of Rs.20 lacs with the defendants under the said agreement. Since the defendant did not comply with his part of the obligation under the agreement for sale, the

defendant filed a suit for specific performance. The suit was resisted by the defendant by filing a written statement. Both the parties led oral and documentary evidence before the learned trial judge. The learned trial judge after considering the oral and documentary evidence, decreed the said suit for specific performance by the judgment and decree dated 16th May, 2014.

3. The First Appellate Court formulated seven points for determination and after oral and documentary evidence, independently rendered findings of facts and dismissed the regular civil appeal by a judgment and decree dated 3rd January, 2018.

4. This appeal was though filed within the time prescribed was not pursued by the appellant for quite some time. In the meanwhile the plaintiffs filed execution application before the executing court. The plaintiffs have deposited the balance amount before the executing court. Pursuant to the order passed by the executing court, the court commissioner appointed by the executing court has already executed a sale deed in favour of the plaintiffs on 30th April, 2019. The executing court has also issued the possession warrant.

5. Mr. Shah, learned counsel for the appellant invited my attention to the findings rendered by the two courts below and would submit that the plaintiffs have failed to prove their readiness and willingness to comply with their part of the obligation under the said agreement for sale all throughout. It is submitted that the balance amount of Rs.28 lacs was not paid by the plaintiffs to the defendants within the time prescribed under the agreement for sale. He submits that the plaintiffs though initially deposited the balance amount with the trial court on

their own, the said amount was withdrawn subsequently. It is submitted that the balance amount was deposited recently and not within the time prescribed by the trial court. Since the plaintiffs had not established their readiness and willingness to perform their part of the obligation by making payment of the balance amount, the trial court ought not to have passed a decree for specific performance in favour of the plaintiffs. He submits that the appellate court thus ought to have interfered with the decree and judgment passed by the learned trial court.

6. A perusal of the findings rendered by the two courts below clearly indicates that the averments made by the plaintiffs in the plaint about their readiness and willingness has not been disputed in the written statement filed by the defendant. This aspect is considered in detail by the appellate court in the judgment and decree passed by the appellate court on 3rd January, 2018. The deposition of the witness examined by the plaintiffs to prove their readiness and willingness also was not shattered in the cross examination by the defendant. Both the courts below thus have rendered various findings of fact that the plaintiffs were already ready and willing to perform their part of the obligation under the agreement for sale entered into between the parties.

7. Insofar as the submission of the learned counsel for the defendant that the plaintiffs had withdrawn the amount during the pendency of the appeal on 21st January, 2017 before the first appellate court is concerned, the first appellate court has rendered a finding that since the defendants did not pursue the said appeal in spite of the remand by the High Court to the first appellate court for quite

sometime, in these circumstances, the plaintiffs were justifying in withdrawing the said amount during the pendency of the said appeal on 21st January, 2017.

8. Mr. Shah, learned counsel for the defendant does not deny that during the pendency of the appeal before the learned District Judge, there was an understanding between the parties that the defendant would not deal with the property.

9. In my view, the first appellate court has rightly held that since the defendant did not pursue the appeal for quite sometime, the plaintiffs were right in making an application for withdrawal of the amount deposited. I am thus not inclined to accept the submission of Mr. Shah, learned counsel for the defendant that the plaintiffs were not ready and willing to comply with their part of the obligation at all. On the contrary, the defendant was not able to remove the tenants against whom the litigation filed by the defendant was pending.

10. There is no dispute that during the pendency of the second appeal, the court commissioner appointed by the executing court has already executed the sale deed in favour of the plaintiffs.

11. The findings rendered by the two courts below being concurrent and not perverse, cannot be interfered with by this court in this second appeal filed under section 100 of the Code of Civil Procedure, 1908. I, therefore, pass the following order :-

(a) Second appeal is dismissed.

(b) Insofar as Civil Application No. 1670 of 2018 for amendment to the schedule is concerned, no case is made out for such amendment and the same is accordingly rejected.

(c) Civil Application Nos.1146 of 2018 for stay does not survive and is accordingly dismissed. No order as to costs.

[R.D.DHANUKA, J.]