

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO. 1000 OF 2018

Sarala Suresh Kote and another ... Appellants (Original Plaintiffs)

Versus

Shrikrishna Narayan Dandavate and another ... Respondents (Original Defendants)

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- Mr. S.C. Naidu instructed by Mr. Pankaj Das for the Appellants (Original Plaintiffs).
- Mr. Ram Apte, Senior Advocate instructed by Mr. S.C. Wakankar for Respondent No.1.
- Mr. Vinay J. Bhanushali for Respondent No.2.

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CORAM : AKIL KURESHI AND
S.J. KATHAWALLA, JJ.

DATED : JUNE 06, 2019.

P.C. :-

1. The Appellants (Original Plaintiffs) have filed the above Appeal to impugn the Judgment dated 8th October, 2014, passed by the Learned 3rd Joint Civil Judge, Senior Division, Pune, in Special Civil Suit No.1688 of 2008 allowing the Application - Exhibit-36 filed by Defendant No.1 under Order VII, Rule 11(a) of the Code of Civil Procedure and thereby rejecting the Plaint.

2. The facts which have led to the filing of the above Appeal, are in brief, set out hereunder :

2.1 The Appellants (Original Plaintiffs) filed Special Civil Suit No.1688 of 2008 in the Court of the 3rd Joint Civil Judge, Senior Division, Pune, seeking specific performance of the Agreement for Sale-cum-Memorandum of Understanding dated 31st May, 2004.

2.2 On 24th February, 2009, the Respondent No.1 (Original Defendant No.1) filed an Application under Order VII, Rule 11(a) of the Code of Civil Procedure, contending that the Agreement for Sale-cum-Memorandum of Understanding dated 31st May, 2004, relied upon by the Appellants (Original Plaintiffs) is a forged document ; that the suit property is the subject matter of Civil Appeal No.28 of 2002, which is pending before the District Court, Pune ; that it is specifically stated in the alleged Agreement that within one month after the decision of the Civil Appeal, the Plaintiffs will have to obtain clearance from the Urban Land Ceiling Office and will have to pay the alleged consideration to the Defendants, when the vendors will execute the conveyance in favour of the vendees i.e. the Plaintiffs ; that therefore, the Suit is premature, and no cause of action has arisen ; and that the Plaint may therefore be rejected for want of cause of action under Order VII, Rule 11(a) of the Code of Civil Procedure.

2.3 The Plaintiffs have filed their say (Exhibit - 43) wherein they have denied and disputed the claim of the Defendant No.1 that the Suit discloses no cause of action.

2.4 The above Application was adjourned from time to time on approximately 55 occasions. The Advocates have informed the Court that on some occasions, the adjournments were sought at the instance of the Plaintiffs and/or the Defendants and on most

of the occasions the Application was adjourned since the Court was preoccupied with other matters.

2.5 A perusal of the Roznama produced before the Court, shows that on 27th August, 2014, Advocates for both the parties were present and arguments were advanced by the Defendants. The matter was adjourned to 6th September, 2014, on which day the Advocate for Defendant Nos.1 and 2 made their submissions on facts and the matter was adjourned to 10th September, 2014. On 10th September, 2014, the Advocates for both the sides were present, when the Advocate for the Defendants pointed out the case law on the subject and the matter was adjourned to 18th September, 2014, for arguments of the Plaintiffs. On 18th September, 2014, the Advocate for both the sides were present. However, the matter was not taken up and the matter was adjourned to 20th September, 2014 for arguments of the Plaintiffs. On 20th September, 2014, the Plaintiffs and their Advocates were absent. Hence, the matter was closed and adjourned for orders. Ultimately the impugned Judgment was passed.

2.6 Being aggrieved by the said Judgment and Order, the Appellants (Original Plaintiffs) have filed the above Appeal.

3. The Advocate for the Plaintiffs has made the following submissions :

3.1 That the Application - Exhibit-36 was not maintainable and the same was liable to be rejected ; the Learned Trial Judge failed to appreciate that the Appellants initiated Special

Civil Suit No. 1688 of 2008, in view of threats issued by the Respondents to terminate and revoke the Agreement dated 31st May, 2004 ; the Learned Trial Judge also ignored the fact that the Respondents also threatened the Appellants that they are going to create third party interest in respect of the suit property and that they are going to handover possession of the suit property to a third party ; that the averments made in paragraph 11 of the Plaint, clearly spell out the cause of action which has accrued in favour of the Appellants to institute the Suit ; that the Learned Trial Judge failed to appreciate that the Respondents in their Written Statement have challenged execution of the Agreement/MOU dated 31st May, 2004 ; the Learned Trial Judge totally ignored the fact that the Respondents have filed a counter-claim seeking a declaration that the Agreement/MOU dated 31st May, 2004 is illegal, null and void and not binding on the Respondents ; the Learned Trial Judge ought to have appreciated that there were triable issues in the Suit and ought not to have closed the case and allowed the application without giving one more opportunity to the Advocate for the Plaintiffs to remain present and make his submissions.

4. The Learned Advocate for Respondent Nos.1 and 2 submitted that the Learned Trial Judge had given an opportunity to the Plaintiffs to appear before the Court and make their submissions. However, they chose to remain absent. The impugned Order cannot be faulted on merits or otherwise.

5. This Court has perused the impugned Order as well as all the relevant papers and documents. It is true that the Learned Trial Judge has, in the impugned Judgment not dealt with the submissions which are now made before this Court. The Learned Trial Judge cannot

be faulted, since the Plaintiffs failed to remain present on the relevant day. However, as stated earlier, the matter was adjourned on 55 occasions. The Plaintiff was not responsible for most of the adjournments and it cannot be said that the Plaintiff persistently remained absent on the dates fixed for hearing. We are therefore of the view that in the interest of justice, an opportunity ought to have been granted to the Advocate for the Plaintiffs to remain present and advance their submissions, if necessary, upon payment of costs. The fault lies at the door of the Advocate for the Plaintiffs, who was admittedly not present to advance his submissions on the day specifically fixed for that purpose. It is the Plaintiffs who will therefore suffer grave loss, injury and prejudice if the impugned Order is not set aside and their Advocate is not given an opportunity to make his submissions before the Learned Trial Judge, which he has sought to advance before us.

6. In the above circumstances, without going into the merits of the matter, we pass the following Order :

(a) The impugned Judgment passed by the Learned 3rd Joint Civil Judge, Senior Division, Pune in Special Civil Suit No.1688 of 2008, only upon hearing the Defendants is set aside, subject to the Appellants paying costs of Rs.1,00,000/- to the Respondent No.1 and costs of Rs.5,000/- to Respondent No.2, on or before 13th June, 2019.

(b) The parties shall appear before the Learned 3rd Joint Civil Judge, Senior Division, Pune, on 14th June, 2019 at 10.30 a.m., and after producing a copy of this Order obtain necessary directions from the Learned Trial Judge.

(c) The Learned 3rd Joint Civil Judge, Senior Division, Pune, shall endeavor to dispose of the Application within a period of four weeks from 14th June, 2019.

(d) All contentions of the parties are kept open.

(e) The Appeal is accordingly disposed of.

(f) All concerned to act on an ordinary copy of this Order duly authenticated by the Associate of this Court.

(S.J.KATHAWALLA, J.)

(AKIL KURESHI, J.)