

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

SECOND APPEAL NO.673 OF 2014

Ajit Nandalal Tatiya	..	Appellant
Vs.		
Anil P. Bhandari & Anr.	..	Respondents

**ALONG WITH
SECOND APPEAL (ST.) NO.34042 OF 2014**

Ashok Kartaram Agarwal & Anr.	..	Appellants
Vs.		
Anil P. Bhandari & Anr.	..	Respondents

Mr.S.C. Wakankar for the appellant in SA No.673 of 2014 and for the respondent nos.2 in SAST No.34042 of 2014.

None for the appellants in Second Appeal (St.) No.34042 of 2014.

Mr.R.D. Soni i/by Ram & Co. for the respondent no.1 in both the second appeals .

**CORAM : R.D.DHANUKA, J.
DATE : 19th August 2019**

P.C.:

. Both these second appeals are filed under Section 100 of the Code of Civil Procedure, 1908 inter alia impugning the judgment and decree dated 21st May 2014 passed by the District Judge-15, Pune arising out of the judgment and decree dated 12th May 2011 passed by the 6th Joint Civil Judge, Senior Division, Pune in Special Civil Suit No.488 of 1996.

2. The appellant in Second Appeal No.673 of 2014 is the original defendant no.1. The appellants in Second Appeal (St.) No.34042

of 2014 are the original defendant nos.2 and 3. The plaintiff had filed a suit for specific performance of the agreement entered into between the plaintiff and the defendant no.1. Admittedly, the plaintiff had made part payment to the defendant no.1 under the said agreement. Since the defendant no.1 did not execute the sale deed in favour of the plaintiff, the plaintiff had filed a suit for specific performance. The said suit was resisted by the defendant no.1 by filing written statement. During the pendency of the said suit, the plaintiff had entered into sale deed with the defendant nos.2 and 3 on 28th November 1994. The plaintiff impleaded the defendant nos.2 and 3 as parties to the suit.

3. Learned trial Judge framed 10 issues for determination. Parties led oral and documentary evidence. Learned trial Judge after considering the oral and documentary evidence rendered a finding of fact in favour of the plaintiff and directed the defendant no.1 to execute sale deed in respect of the suit property in favour of the plaintiff after depositing the remaining amount of consideration by the plaintiff within 6 months from the date of the said judgment and decree dated 12th May 2011. The trial Court also declared the sale deed dated 28th November 1994 registered at Sr.No.1665 of 1994 in the office of Sub-Registrar, Haveli No.5 (Pimpri Chinchwad) between the defendant no.1 and the defendant nos.2 and 3 as cancelled.

4. Being aggrieved by the said judgment and decree dated 12th May 2011, the defendant no.1 and the defendant nos.2 and 3 had filed two separate appeals bearing Civil Appeal Nos.498 of 2012 and 700 of 2013 before the Court of District Judge-15, Pune. By a judgment and decree dated 21st May 2014, the learned District Judge dismissed both the appeals preferred by the defendant no.1 and the defendant nos.2 and 3. The defendant no.1 and the defendant nos.2 and 3 have thus filed two separate second appeals impugning the said judgment and decree which are heard by this Court.

5. Though the second appeals have been preferred in the year 2014, the same were not placed on board. Mr.Soni, learned counsel for the respondent no.1 had made a statement before this Court that the decree which is subject matter of these second appeals is already executed. The mutation entries are already effected on the basis of the sale deed. The demarcation of the suit property is also concluded. Mr.Wakankar, learned counsel for the appellant in Second Appeal No.673 of 2014 does not dispute this position.

6. It is submitted by the learned counsel for the appellant in Second Appeal No.673 of 2014 that since the agreement for sale executed between the plaintiff and the defendant no.1 was not stamped, the said document was not admissible in evidence.

7. The next submission of the learned counsel is that under the agreement for sale entered into between the parties, transaction was to be concluded within a period of one year from the date of execution of agreement. Time being an essence of contract, learned trial Judge thus could not have granted decree for specific performance in favour of the plaintiff in view of the transaction not having been concluded within a period of one year from the date of entering into the agreement for sale.

8. It is submitted that in so far as the rights claimed by the defendant nos.2 and 3 in the suit property under the sale deed dated 28th November 1994 is concerned, the said sale deed was executed fraudulently by the defendant no.2 by obtaining signature of the defendant no.1 on the said sale deed and thus the same was not binding on the defendant no.1.

9. Mr.Soni, learned counsel for the respondent no.1 (plaintiff), on the other hand, submits that when the said agreement for sale entered into between the plaintiff and the defendant no.1 was tendered in evidence, no objection regarding alleged insufficiency of payment of stamp duty was raised by the defendant no.1. The said document was already marked in evidence as exhibit. The said issue was not raised even subsequently. Issue of insufficiency of payment of stamp duty is raised for the first time by the defendant no.1 and the defendant nos.2 and 3

before the appellate Court. He submits that the appellate Court has rightly rejected the contention belatedly raised by the defendant no.1 on one hand and the defendant nos.2 and 3 on the other hand on various grounds.

10. In so far as the issue raised by the learned counsel for the appellant that transaction was not concluded within a period of one year from the date of execution of agreement for sale is concerned, it is submitted by the learned counsel that time was not an essence of contract. The defendant no.1 had accepted part payment even after expiry of one year and had assured to execute the sale deed in favour of the plaintiff after providing approach road by the defendant no.1 as contemplated in the agreement for sale. It is submitted by the learned counsel that the findings rendered by the two Courts below being concurrent findings and being not perverse cannot be interfered with under Section 100 of the Code of Civil Procedure, 1908.

11. None appeared for the appellants (defendant nos.2 and 3) in Second Appeal (St.) No.34042 of 2014 on last several dates when the said appeal had appeared on board. The defendant nos.2 and 3 are claiming their rights through defendant no.1.

12. In so far as the submission of Mr.Wakankar, learned counsel for the appellant (defendant no.1) that the document was insufficiently stamped and thus no decree for specific performance could be granted in

favour of the plaintiff and could not have been confirmed by the appellate Court is concerned, though the said document was tendered in evidence by the witness examined by the plaintiff, no objection about alleged insufficiency of payment of stamp duty was raised by the defendant no.1. Admittedly the said document was marked in evidence as exhibit. No objection was raised even thereafter. This objection was raised only for the first time by the defendant nos.2 and 3 before the appellate Court. The appellate Court has rightly rejected this contention for the reasons recorded in the impugned judgment and decree dated 21st May 2014. In my view, such objection is rightly rejected by the appellate Court on the ground that the document was already marked in evidence as exhibit and when the said document was tendered, no such objection was raised by either of the defendants.

13. In so far as the submission of the learned counsel for the defendant no.1 that time was an essence of contract and thus no decree for specific performance is granted is concerned, Mr.Wakankar, learned counsel for the defendant no.1 could not dispute that after expiry of one year, his client had accepted part payment from the plaintiff. The trial Court had rendered a finding that the defendant no.1 on one hand had agreed to execute sale deed in favour of the plaintiff after providing approach road. Time for enforcement of the said agreement was thus extended and thus it was rightly held that time was not an essence of

contract. The appellate Court has independently considered the evidence led by the parties and has recorded separate findings in favour of the plaintiff.

14. I do not find any infirmity in the judgment and decree passed by two Courts below. Since the contention of the defendant no.1 was negated by the trial Court as well as the appellate Court, it is established that the defendant no.1 did not have any right in the suit property. The defendant nos.1 and 2 who are claiming through the defendant no.1 also accordingly would fail in Second Appeal (St.) No.34042 of 2014. No substantial question of law arises in these second appeals. Both the second appeals are devoid of merits and are accordingly dismissed. No order as to costs.

R.D.DHANUKA, J.