

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR

SECOND APPEAL NO.16/2019
Bismillakhan Usmankhan Mistri and ors
..VS..
Amol Sharadchandra Labhsetwar and ors

.....
Office Notes, Office Memoranda of Coram,
appearances, Court orders or directions
and Registrar's orders

Court's or Judge's Order

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Shri A.S.Deshpande, Counsel for the Appellants.
Shri A.S.Dhore, Counsel for Respondent No.1.
Shri S.Raisuddin, Counsel for Respondent Nos.2 to 5.

CORAM : V.M.DESHPANDE, J.
DATED : AUGUST 06, 2019.

1. Heard learned counsel Shri A.S.Deshpande for the appellants, learned counsel Shri A.S.Dhore for respondent No.1, and learned counsel Shri S.Raisuddin for respondent Nos.2 to 5.

2. Respondent No.1 filed suit i.e. Regular Civil Suit No.14/2010 for specific performance of contract. In the said suit, present appellants were joined as defendant Nos.5 to 7. Respondent Nos.2 to 5 herein were defendant Nos.1 to 4.

3. According to respondent No.1/plaintiff, he entered into agreement of sale with respondent Nos.2 to 5/defendant Nos.1 to 4 on 27.2.2009 in respect of suit property No.203 situated at ward No.6 of Darwha. Total consideration agreed between them to transfer the title was Rs.12,93,675/-. In pursuance to the said agreement, respondent Nos.2 to 5/defendant Nos.1 to 4 received

.....2/-

Rs.2,60,000/- from respondent No.1/plaintiff and also Rs.1.00 lac subsequently. Since the defendants were avoiding to execute sale deed, the suit for specific performance of contract was filed. In the plaint, at paragraph No.3, it was pleaded by respondent No.1/plaintiff that appellants/defendant Nos.5 to 7 are in possession of 300 square feet of land from and out of the suit land. Respondent No.1/plaintiff did not pray in the plaint that after execution of sale deed in his favour, appellants/defendant Nos.5 to 7 should be evicted.

4. Appellants/defendant Nos.5 to 7 filed their written statement and denied the claim made by respondent No.1/plaintiff in paragraph No.3 of the plaint. Though they admitted their possession, they denied ownership of respondent Nos.2 to 5/defendant Nos.1 to 4 over the land which in their possession.

5. Learned Judge of Trial Court partly decreed the suit thereby only granted decree of refund of earnest amount in favour of respondent No.1/plaintiff, resulted into filing of two different appeals before Lower Appellate Court, one is Regular Civil Appeal No.27/2014 by respondent No.2 to 5/defendant Nos.1 to 4 and another is Regular Civil Appeal No.36/2015 by respondent No.1/plaintiff challenging refusal of specific performance of contract. Both these appeals were decided by learned 1st District Judge, Darwha by common judgment on 15.12.2018. Learned Judge of the Lower Appellate Court dismissed appeal filed by respondent No.2 to 5/defendant Nos.1 to 4, however granted decree of specific

performance of contract in favour of respondent No.1/plaintiff by allowing Regular Civil Appeal No.36/2015. Respondent Nos.2 to 5/defendant Nos.1 to 4 against whom decree for specific performance of contract was passed did not challenge the said decree before this Court by filing second appeal.

6. Defendant Nos.5 to 7 are before this Court. Appellants/defendant Nos.5 to 7 were never parties to agreement dated 27.2.2009. Though in paragraph No.3 of the plaint respondent No.1/plaintiff claimed that appellants/defendant Nos.5 to 7 are in possession of 300 square feet of land from and out of the suit land, decree for their eviction was never passed by respondent No.1/plaintiff. Though appellants/defendant Nos.5 to 7 admitted their possession over 300 square feet of land and though they claimed that they are there by virtue of title in their favour, they did not file any counter claim and challenge agreement dated 27.2.2009 that respondent Nos.2 to 5/defendant Nos.1 to 4 were not entitled to execute the agreement of sale in favour of respondent No.1/plaintiff in respect of area inclusive of area which is in their possession.

7. Since respondent No.1/plaintiff himself admitted possession to the extent of 300 square feet in the pleadings and also in his evidence, appellants/defendant Nos.5 to 7 cannot be evicted without following due process of law.

8. Since the suit is for specific performance of contract and the decree is passed against respondent Nos.2

to 5/defendant Nos.1 to 4, in my opinion, the present second appeal cannot be entertained especially when it does not give rise to any substantial question of law. However, it is made clear that appellants/defendant Nos.5 to 7 cannot be evicted either by respondent No.1/plaintiff or respondent Nos.2 to 5/defendant Nos.1 to 4 without following due process of law.

9. With the above observations, the second appeal is dismissed and disposed of accordingly.

JUDGE

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