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IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****SECOND APPEAL NO. 156 OF 2018
WITH
CIVIL APPLICATION NO. 364 OF 2018
IN
SECOND APPEAL NO. 156 OF 2018**

Shri. Dhondiba Sopanrao Pimpale
(Deceased through LR's)

.....Appellants

V/s.

Vishal Chaitanya Coop Hsg.
Society (Through Chairman)
Shri. Shantaram D. Chorge

.....Respondent

Mr. Atul Damle Senior Advocate i/b Mr. Ashok B. Tajane for the
appellants
Mr. S. S. Kanetkar for the respondent

CORAM : NITIN W. SAMBRE, J.

DATE : FEBRUARY 11, 2020.

P.C.

Special Civil Suit No. 1005 of 1995 was initiated by the
respondent-plaintiff for specific performance based on Agreement
of Sale, Exh.36, dated 10/07/2009.

2] Said suit came to be partly decreed on 19/01/2009 whereby appellant was directed to refund consideration of Rs. 3500/-.

3] Respondent, feeling aggrieved, preferred First Appeal being Appeal No. 592 of 2012 wherein claim of the plaintiff was decreed in toto vide Judgment and Order dated 15/01/2018. As such, this Second Appeal.

4] Case of the respondent-plaintiff is, Agreement Exh. 36 deals with total land admeasuring 2300 Sq. Meters out of which in a scheme sanctioned under Section 20 of Urban Land (Ceiling and Regulation) Act, land to the extent of 2000 Sq. Meters was released. As such, Sale Deed was executed in favour of respondent-plaintiff for said 2000 Sq. Meter of Land. Recitals in the covenant i.e. Exhibit 36 in express terms provides that after the balance land of 300 Sq. Meters will be released by the Urban Land Ceiling Authorities, Sale Deed of same will also be executed in favour of respondent-plaintiff by the appellant-defendant.

5] It is not in dispute that Urban Land (Ceiling and Regulation)

Act stood repealed on 28/11/2007 and said amendment is applicable from 01/12/2007 in the State of Maharashtra.

6] In the aforesaid background, Shri. Damle learned senior counsel for appellant-original defendant would urge that both the courts below have committed an error apparent on the face of record in decreeing the suit particularly when it is not established that the subject matter i.e. 300 Sq. Meters of land was very much available on the date Appellate Court decreed the suit in toto.

7] According to him, Urban Land Ceiling Authorities at Exhibit 86 rejected prayer of the appellant/defendant to release the land to which both the courts were aware of. He would urge that inspite of the same, findings are recorded that the appellant must execute the Sale Deed for 300 Sq. Meters of land i.e. initially for 150 Sq. Meters and after processing the prayer with the Urban Land Ceiling Authorities for release of balance land of 150 Sq. Meters. Learned counsel would further urge that while decreeing the suit, Appellate Court as such has lost sight of fact that the very subject matter of the suit is not within the ambit or control or at the

disposal of the appellant-defendant and that being so, the Court below ought not to have decreed the suit.

8] Shri. Kanetkar, learned counsel for respondent-plaintiff would urge that there are concurrent findings. According to him, appellant-defendant cannot take benefit of his own wrong or default, particularly when Urban Land (Ceiling and Regulation) Act stood repealed in 2007 and as such, land to the extent of 300 Sq. Meters can be inferred to be very much available at the disposal of the appellant. He sought dismissal.

9] Considered rival submissions.

10] Agreement Exhibit 36 dated 10/07/2009 was duly proved by the respondent-plaintiff based on which he has sought to establish his claim to the extent of 300 Sq. Meters of land as admittedly for 2000 Sq. Meters of land, appellant has executed the Sale Deed and parted with the possession.

11] Recitals of Exhibit 36 further speaks of it was the appellant

who was required to take steps for getting release 300 Sq. Meters of land and has accepted part consideration of Rs. 3500/-. Land to be purchased by respondent-plaintiff from the appellant after its release by the competent authority, was to be processed by the appellant can be very much inferred from the recitals of Exhibit 36.

12] Once it is established that the burden to take steps for getting the land released was on the appellant, he should have discharged his onus of demonstrating the efforts in getting the land released and if not, bring on record, so also to the notice of the respondent-plaintiff, cause for rejection of such prayer by the competent authority/State Government.

13] Admittedly, appellant has failed to discharge such onus.

14] Rather by effect of repeal of Urban Land Ceiling Act, by virtue of legal fiction, possession of the land which was not already taken over by Urban Land Ceiling Authorities/Revenue Authority, remained with the appellant and the appellant is unable to demonstrate that part of 300 sq. Meters of land after repeal of the

Urban Land Ceiling Act does not remained with it.

15] In the aforesaid background, since the fact remains that appellant, after 2007 remained in possession of 300 Sq. Meters of land which is subject matter of the proceedings, decree for specific performance ordered by the Lower Appellate Court appears to be just and proper and in tune with the provisions of Section 20 of the Specific Performance Act.

16] No interference is called for. Appeal as such fails, stands dismissed.

17] In view of dismissal of Second Appeal, Civil Application also stands disposed of.

[NITIN W. SAMBRE, J.]