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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 833 OF 2012
WITH
CIVIL APPLICATION NO. 1615 OF 2012

Bapu Ramajan Makubale and others .....Appellants/Original defendants

V/s.

Shri. Dada Ramachandra Magdum .....Respondent/Original plaintiff

Mr. N. V. Walawalkar Senior Advocate i/b Mr. Gajanan M. Savagave for the appellant
Mr. P. S. Dani Senior Advocate i/b Mr. Manoj A. Patil for respondent nos. 1 & 2

CORAM : NITIN W. SAMBRE, J.

DATE : FEBRUARY 4, 2020.

P.C.

Suit is initiated by original defendant for specific performance being Special Civil Suit No. 247 of 1987 which came to be dismissed on 12/01/1998.

2] Plaintiff, feeling aggrieved, preferred R.C.A. No. 278 of 2006 which was allowed on March 31, 2012 whereby claim for specific performance moved by original plaintiff-respondent came to be allowed. As such, this Appeal.

3] The question of law which is sought to be agitated by the appellant is:

> *"Whether the Decree for declaration on the basis of doctrine of Lis Pendens is legal and valid one, particularly when both the courts i.e. Trial Court and the Appellate Court have not framed any point for consideration?"*

4] Whether the Court below has committed an error in decreeing the suit at appellate stage particularly when the appellant-original defendant nos. 4 & 5 were not party to Agreement to Sale dated 11/06/1983.

5] Facts necessary for deciding the Appeal are as under:

(I) It is the case of the plaintiff that defendant agreed to sell suit

property for a consideration of Rs. 55,000/- and as such, Agreement dated 11/06/1983 came to be entered into. Original defendant no. 3 i.e. appellant herein on behalf of himself and defendant nos. 4 & 5 claimed to have signed the Agreement. In the Agreement it was agreed that loan of Rs. 25,000/- will be repaid by respondent-plaintiff of which defendant-appellants were beneficiaries, so also repayment of outstanding loan to Society and Tagai Loan (Crop Loan). It is claimed by respondent that having repaid entire loan and having received remaining consideration, since the appellant failed to execute the Sale Deed, suit was brought into action.

6] Suit is also based on readiness and willingness of the respondent-plaintiff to perform their part of contract.

7] The claim was resisted by the appellant-defendant by filing written statement wherein it is claimed that consideration was never received nor there was any authorisation to the plaintiffs to repay the loan on behalf of defendant. The issue of limitation was also raised.

8] Considered rival claims. Issues were framed at Exhibit 15 which reads thus:

> *"1. Do the plaintiffs prove execution of agreement to sell by the defendants as alleged?*
>
> *2. Do the plaintiffs prove further that they are ready and willing to perform their part of contract and it is the defendants who have committee the breach of contract as alleged?*
>
> *3. Is the suit barred by limitation? Are the plaintiffs entitled to the relief of specific performance?*
>
> *4A. Are the plaintiffs entitled to possession of suit field from defendants?*
>
> *4B. Do defendants prove that suit is not property valued for court fee? If yes, what is its effect?*
>
> *4C. Are the plaintiffs entitled to mense profits together with interest will recovery of possession as claimed?*
>
> *5. Are the plaintiffs entitled to the recovery of earnest money and damages in the alternative?"*

9] Suit, after appreciation of pleadings and evidence came to be dismissed vide Judgment and Order dated 12/01/1988 which was reversed by Appellate Court in R.C.A. No. 278 of 2006 thereby decreeing the suit vide Judgment and order dated March 31, 2012.

10] If the question of law as is sought to be canvassed, if appreciated in the backdrop of provisions of Order 41 Rule 30 of Code of Civil Procedure, 1908 and requirement under Section 20 of the Specific Relief Act, this Court is required to appreciate points which were considered by the Lower Appellate Court while decreeing the suit in favour of respondent-plaintiff.

11] The Appellate Court has specifically framed a point for consideration as to whether plaintiffs are entitled to get relief of specific performance and answered such point in favour of respondent-plaintiff. While doing so, Appellate Court has dwelled upon the conduct of appellant during the pendency of the suit proceedings and noted that registered mortgage was executed by defendant nos. 3 to 5 i.e. appellants herein in relation to 0.64 R land

on October 14, 1994.

12] Fact remains that execution of registered Agreement on October 14, 1994 was pleaded by the respondent-plaintiff by way of amendment to his plaint which is not disputed.

13] What is contended during the course of hearing of Second Appeal was that the registration of mortgage and the issue of lis pendense was never framed and argued by the party.

14] If the aforesaid submissions are appreciated in the backdrop of discretion conferred in a Court while dealing with claim in the backdrop of provisions of Section 20 of the Specific Relief Act, the Court is duty bound to analyse the very conduct of the parties during and before the suit in question such as readiness and willingness to perform part of the contract and steps each of the party have taken before the trial. The claim of non consideration of lis pendese during the course of the trial of the suit can be viewed as intentional step on the part of the appellant so as to defeat the claim

of the plaintiff.

15] In the aforesaid background, finding recorded on the part of the conduct of the appellant are based on material which was available on record. Even if presuming that issue was not argued, however, the Court cannot ignore the very basic requirements while exercising powers under Section 20 of the Specific Relief Act. The court as such analyzed the very conduct of the defendant and has proceeded to record a finding which in any case cannot be termed to be prejudicial to the interest of the appellant. As such, the claim that Judgment of the Appellate court particularly observations made in para 34 on-wards are contrary to provisions of Order 41 Rule 30 does not appeal to this Court to frame a question of law to be substantial one so as to cause interference.

16] Apart from above, the fact remains that while recording aforesaid findings, Appellate Court was sensitive to the fact of execution of registered mortgage on October 14, 1994 as such fact was brought to the notice of the Court below by way of amendment

by adding defendant no. 8. Defendant nos. 3 to 5 claimed to have mortgaged the land by registered Deed. Since the aforesaid factual position is even not controverted before this Court, the finding recorded that defendant nos. 4 & 5 were not party to Agreement of Sale dated 11/06/1983 and Will, the Court has gone into the conduct of such parties, cannot be of any legal help of the appellant.

17] Rather the appreciation of consideration by the Appellate Court while decreeing the suit particularly in the conduct of the appellant as reflected, has prompted this Court to observe that Appellate Court has rightly exercised its discretion.

18] No question of law is involved which warrants consideration. Appeal as such fails, stands dismissed.

[NITIN W. SAMBRE, J.]