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IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****SECOND APPEAL NO. 317 OF 2020
WITH
CIVIL APPLICATION NO. 1069 OF 2019**

Shri. Ashok Tukaram Fadke Thr. POAAppellant
Shri. Sampat Tukaram Fadke

V/s.

Shri. Dhakuvitthal Margale and othersRespondents

Mr. R. M. Haridas a/w Mr. Prashant Hagare a/w Mr. Tushar
Sonawane for the appellant
Mr. Sushant Prabhune for respondent no. 1

CORAM : NITIN W. SAMBRE, J.

DATE : FEBRUARY 18, 2020.

P.C.

This appeal is by original-plaintiff to Special Civil Suit No. 8 of 2013.

2] Based on Agreement dated 21/09/2010 Exh. 66, appellant initiated a suit for specific performance, perpetual injunction and declaration. It is the case of appellant that he has paid an amount

of Rs. 2,50,000/- to the respondent-defendant out of total consideration of Rs. 21 Lakhs for purchase of 40R land. It is further claimed by the appellant-plaintiff that the amount of Rs. 2 Lakhs was paid by bearer cheque whereas amount of Rs. 50,000/- paid in cash.

3] Appellant-plaintiff so as to establish his case, has relied on the terms of the Agreement Exh. 66 so as to claim that after paying aforesaid earnest amount of Rs. 2,50,000/-, respondent-defendant was duty bound to secure permission from the revenue authorities, as property in relation to which transaction is alleged is allotted by the revenue authorities. As such, time was not the essence of the contract.

4] Claim was resisted by respondent-defendant. According to him, though the Agreement was executed, amount of consideration of Rs. 2,50,000/- was never transferred to him. Rather he has come out with a case of loan transaction and sought dismissal of the suit.

5] Considering rival claims, following issues were framed by the Trial Court.

<u>Sr. No.</u>	<u>Issues</u>	<u>Findings</u>
1	Does plaintiff prove that defendants agreed to sell the suit property for consideration of Rs. 21,00,000/- and accepted Rs. 2,50,000/- as an earnest by way of cheque and cash?	Yes
2	Does plaintiff prove that he was ever ready and willing to perform his part of the contract?	Yes
3	Does plaintiff prove that defendants have obtained decree in Civil Suit No. 33/13 by misleading the Court?	Yes
4	Whether plaintiff is entitled to declaration that the decree in civil Suit No. 33/13 is not binding on his rights?	Yes
5	Does plaintiff prove alleged overacts of the defendants?	Yes
6	Whether plaintiff is entitled to specific performance as per agreement to sell dtd. 21-9-2010?	Yes
7	Whether alternatively plaintiff is entitled to receive Rs. 21,00,000/- as compensation from the defendants?	No
8	Whether plaintiff is entitled to perpetual injunction as prayed?	Does not survive
9	Does defendant prove that the suit property was mortgaged by his brother for an amount of Rs. 2,50,000/- which were lend by the plaintiff with interest @ 25%?	No
10	Does defendant prove that his brother has returned entire amount of Rs. 2,50,000/- with interest to the plaintiff?	No
11	Whether defendants are entitled for perpetual injunction as prayed?	No
12	Does defendants No. 2 to 5 prove that the suit property is joint family property?	No
13	What Order and decree?	The suit is decreed.

6] Trial Court decreed the suit whereas appeal preferred by the respondent-defendant came to be allowed and the Judgment of the Trial Court decreeing the suit was set aside and the suit claim was dismissed. As such, this Second Appeal.

7] Learned counsel for the appellant while relying on the Judgment of the Apex Court in the matter of **Santosh Hazari Vs. Purushottam Tiwari (Deceased) by LR's [(2001) 3 Supreme Court Cases 179]** would urge that just because a different view is possible after re-appreciation of the evidence, Appellate court ought not to have set aside the Judgment of the Trial Court. According to him, Order 41 of the Code of Civil Procedure contemplates that the Appellate Court is required to respect the view expressed by the Trial Court and merely because a different view is possible on the same set of facts, ought not to have set aside the Judgment of the Trial Court. Relying on the terms of the Agreement Exh. 66 dated 21/09/2010, the testimony of defendant and his brother, it is claimed that brother so also that of evidence of bank manager, he would urge that payment of amount of Rs. 2 Lakhs through a bearer cheque was very much established.

8] As such, according to him, this Court should frame a question of law by entertaining Second Appeal on following points:

(A) In view of law laid down by the Apex court in the case of **Santosh Hazari** [cited supra], whether Appellate Court has committed an error of law apparent on the face of record by setting aside the Judgment and Decree of the Trial Court?

(B) Whether Appellate Court has committed an error in re-appreciating the evidence?

9] In the backdrop of question of law as is sought to be put forth, if this Court looks into the evidence of the rival parties, it has to be noticed that appellant examined himself and his witness Mr. Bharat Avhad.

10] It appears that appellant has issued bearer cheque of Rs. 2,00,000/- out of consideration of Rs. 21 Lakhs and the said cheque was encashed through banker when said Avhad was

present. Presence of said witness of the appellant could be established from his own evidence, evidence of bank manager and also admission by witness Bharat Avhad.

11] As such, factum of withdrawal of the cash of Rs. 2 Lakhs was very much established from the account of appellant, however, it is not established that the amount after withdrawal was passed on to respondent-defendant towards part consideration.

12] Rather it has come on record in the testimony of the defendant that amount was withdrawn by said witness Bharat Avhad and was carried away towards his transaction charges/commission in the transaction in question.

13] In the aforesaid background, Appellate court, in my opinion was justified in drawing conclusion based on re-appreciation of evidence that amount of consideration is never reached to the respondent-defendant.

14] Once it is established that appellant has not parted with part

consideration, Appellate court in my opinion has rightly held that appellant has failed to establish his case particularly about payment of part consideration. In the aforesaid background, claim of the appellant that evidence of witness of the respondent-defendant was not appreciated by the Trial Court could be of hardly any consequence in the background of the fact that it is appellant-plaintiff to establish and prove his case.

15] As such, in my opinion, no fault could be noticed with the Judgment impugned delivered by the First Appellate court. Appeal, as such, lacks merits, stands dismissed.

16] It is claimed by appellant that he is in possession of the property. Be that as it may, let there be status-quo ordered in the Second Appeal for a period of 10 weeks from today.

17] Needless to clarify that appellant will be at liberty to take such steps consequent to the findings recorded by this Court, when the suit itself is not maintainable before any other authority, in accordance with law.

18] As a consequence of this order, pending civil applications also stand disposed of.

[NITIN W. SAMBRE, J.]