

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

SECOND APPEAL NO.401/2019

Sharad s/o Nanaji Gaiki and another
...Versus...
Kishor Haribhau Shrikhande and others

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

Court's or Judge's orders

Shri P.A. Kadu, Counsel for appellants
Shri Omkar Deshpande, Counsel h/f Shri Anand Parchure, Counsel for respondent nos.1 & 2

CORAM : AVINASH G. GHAROTE, J.
DATE : 21/02/2020

1. Heard Shri P.A. Kadu, learned Counsel for the appellant and Shri Omkar Deshpande, learned Counsel holding for Shri Anand Parchure, learned Counsel for the respondent nos.1 and 2.
2. The present appeal challenges the judgment and decree passed by the Trial Court dated 15/10/2016, granting specific performance to the plaintiffs/respondents, as confirmed by the Appellate Court by the judgment dated 7/3/2019. The facts of the present case in brief are that by an agreement of sale dated 19/3/2006, the defendants agreed to sell the land of Survey No.8, admeasuring 4.59 HR, situated at Mouza Mahamudabad, Morshi to the plaintiffs for

the total consideration of Rs.11,34,000/-, out of which a part consideration of Rs.2,71,000/- stood paid on the date of the agreement itself. The date for execution and registration of the deed of sale was fixed as 31/3/2007, which is claimed to have been extended by the plaintiffs to 12/4/2007 orally and on the other hand, is claimed to have been preponed by the defendants. The agreement had two conditions, (1) the defendants were to clear all the dues upon the property and (2) to measure the same. On 12/4/2007, the plaintiffs were present before the Sub Registrar with the requisite stamps, however, the defendants did not turn up, resultant to which a notice was issued on 18/4/2007, to which there was no reply. On 19/4/2007 a public notice was also published in the local newspaper.

3. A suit for specific performance came to be filed on 21/5/2007. The learned Trial Court held that the plaintiffs were always ready and willing to perform their part of the contract. It further held that the defendant nos.1 and 2 had committed breach of the agreement by executing and registering a sale-deed in respect of part of the suit property in favour of the defendant no.3 on 15/10/2007, when they were under an order of *status quo* dated 28/5/2007. It therefore granted a decree of specific performance and declared the sale-deed dated 15/10/2007 in favour of the defendant no.3 as illegal and not binding upon the plaintiffs.

4. In appeal by the original defendants, the First Appellate Court upheld the finding that the defendant nos.1 and 2 had committed breach of the agreement dated 19/3/2006 and the plaintiffs were always ready and willing to perform their part of the contract and therefore, dismissed the appeal as filed by the defendants.

5. Shri Kadu, learned Counsel for the appellants/original defendants contends relying upon the judgment of this Court in the case of *Khatunbi wd/o Mohammad Sayeed and others...Versus...Aminabai w/o Mohammad Sabir*, reported in *2006 (6) Mh.L.J. 759* specifically para no.15, that the judgment of the First Appellate Court suffers from illegality, inasmuch as having answered point no.4 in the affirmative, it ought to have set aside the judgment of the Trial Court. Point no.4 as framed by the First Appellate Court reads as under :-

“4] Whether the appellants prove that the respondent Nos.1 & 2 are not entitled for any reliefs claimed in the suit and awarded in the disputed judgment and decree ?

.....In affirmative.”

6. It would however be material to note that while considering the discussion, as made in respect of point no.4 as occurring in paragraph no.31 of the judgment of the First Appellate Court, it has been held thus :-

“31. As the Court concluded that the appellant Nos.1 & 2 breach the contract dated 19/03/2006, in respect of the suit property, so also, the appellant Nos.1 & 2 had committed mistake by entering into the sale deed dated 15/10/2007 in favour of the respondent no.3 in respect of the suit property, then the plaintiff is entitled for decree of specific performance and declaration of cancellation and nullity of the sale deed dated 15/10/2007, in respect of the suit property executed by appellant Nos.1 & 2 and in favour of the respondent No.3 executed by the appellant Nos.1 & 2, then the plaintiffs/respondent Nos.1 & 2 are entitled for each and every relief claimed and awarded by the disputed judgment and decree as consequential reliefs. Hence, the Court answer point No.4 in the affirmative.”

7. A perusal of the above, thus, makes it apparent that the finding recorded against point no.4 is merely a typographical error and does not permit the advancement of an argument that the entire judgment and decree of the Trial Court be set aside. This is more so, when the discussion in respect of point no.4 as contained in para 31, of the judgment of the First Appellate Court specifically confirms the judgment and decree as passed by the Trial Court. The judgment in the case of *Khatunbi* (supra) as relied upon by

the learned Counsel for the appellants therefore is of no assistance to the appellants as the same dealt with a case where the judgment was sans any reasons whatsoever.

8. Shri Kadu, learned Counsel then submits that though the agreement contained a clause to measure the land by the defendants, however, the plaintiffs had already got it measured from a private surveyor and had satisfied themselves as to the area and as such the insistence upon measurement, by the plaintiffs was not justified. The factum of the land having been measured by the plaintiffs by private surveyor is admitted by the plaintiff in his cross-examination, however, that does not absolve the defendants from complying with the terms of the agreement. It is not the case that the plaintiffs had waived up the requirement. That being so, the contention is clearly without any merits.

9. No other argument was canvassed. Considering the above situation, I do not find any question of law, much less a substantial, involved in the present second appeal. The same is, therefore, without any merits and is accordingly dismissed. No costs.

JUDGE