

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.452 OF 2019

KESHARBAI JAGANNATH MARKAD AND ANOTHER
VERSUS
SUMAN KESU MARKAD AND OTHERS

...
Mr. C. K. Shinde, Advocate for appellants.

...

CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 09.08.2021

ORDER :-

. Present appeal has been filed by original plaintiffs. They had filed Regular Civil Suit No.13 of 2009 for specific performance of contract before the learned Civil Judge Junior Division, Pathardi, Dist. Ahmednagar. The said suit was dismissed on 05.11.2011, holding that they have failed to prove the agreement to sell. Present appellants/plaintiffs filed Regular Civil Appeal No.474 of 2011. It was heard by learned District Judge-8, Ahmednagar. The appeal came to be partly allowed. Claim of the plaintiffs for specific performance of the contract was rejected; however, defendants No.1 to 3 were directed to repay amount of Rs.90,000/- with interest to the plaintiffs. Now, the appellants want to challenge the refusal of decree in respect of specific performance of the contract.

2. Heard learned Advocate Shri. C. K. Shinde for appellants. In view of the decision of the Hon'ble Supreme Court in *Ashok Rangnath Magar Vs. Shrikant Govindrao Sangvikar*, [(2015) 16 SCC 763], it is not necessary to hear the respondents at the stage of admission of the second appeal.

3. It has been vehemently submitted that learned first Appellate Court has rightly reversed the finding of the Trial Court and held that plaintiffs have proved that defendants had agreed to sell suit property to them by executing agreement to sell on 21.11.1999. It was also held by the Appellate Court that plaintiffs were ready and willing to perform their part of the contract; however, committed error in not granting the decree for specific performance. Only refund of earnest amount has been given. The agreement to sell was in respect of immovable property and therefore, in view of Section 10 of Specific Relief Act, the decree for specific performance ought to have been granted. It was held to be proved that amount of consideration was Rs.1,00,000/- and earnest amount that was paid was to the tune of Rs.90,000/-. That means, only Rs.10,000/- was outstanding, which were agreed to be paid at the time of execution of sale-deed. In spite of all these facts proved by plaintiffs, decree for specific performance has been refused and therefore, substantial questions of law are arising in this case, requiring admission

of the appeal.

4. At the outset, it is to be noted that the plaintiffs had come with a case that the defendants had agreed to sell agricultural land by executing agreement to sell on 21.11.1999. The consideration was fixed at Rs.1,00,000/- and an amount of Rs.90,000/- was paid as earnest. It was also contended that possession of the suit land was handed over to them on the same day and they are possessing it since that date. They were ready and willing to perform part of their contract. After the claim of the plaintiffs were resisted by defendants, parties have led oral as well documentary evidence. The learned Trial Judge had come to the conclusion that plaintiffs have failed to prove the execution of the agreement to sell, payment of earnest and handing over of possession. Suit was dismissed in entirety. Plaintiffs came in appeal and the learned Appellate Court has held that the agreement is proved, so also the payment of earnest by plaintiffs to defendants. It was held that the plaintiffs were not put in possession. Relief of specific performance has been refused and though refund of earnest amount was not prayed, the defendants have been directed to refund that amount together with interest. Now at least, at this stage, the defendants have not filed any appeal challenging those findings of the Appellate Court. Now, it is required to be considered as to whether the appellants have made out a

case for framing substantial questions of law, as contemplated under Section 100 of Code of Civil Procedure.

5. As aforesaid, original defendants have not filed appeal as on today, therefore, we will have to go by the findings of the Appellate Court. At the cost of repetition, the Appellate Court has held that the agreement to sell is proved and plaintiffs had paid earnest amount. Plaintiffs had contended that they were put in possession of the suit land on the date of agreement. However, it is to be noted that the said agreement is not registered. If possession would have been handed over by the same instrument, then it would have been compulsorily registered in view of Section 17 of the Indian Registration Act. We, therefore, cannot hold that the possession has been parted with by the defendants. It is to be noted that the learned Appellate Court has assigned reasons for not granting relief of specific performance. Section 10 of the Specific Relief Act provides that the specific performance of any contract may in the discretion of the Court be enforced. That means, it is discretionary relief. Explanation provides for presumption. Important point is that though agreement to sell was executed on 21.11.1999, the suit has been filed in 2009. Only amount of Rs.10,000/- was remaining to be paid and it has been held that, that amount was agreed to be paid at the time of execution of the sale-deed. There was

stipulation in the agreement, that prior permission from Collector should be obtained by defendants. No efforts appears to have been made by the defendants to bring such permission. Though that condition was contemplating action by defendants, but it has been rightly observed by the learned First Appellate Court that plaintiffs have done nothing to insist defendants to bring the required permission within reasonable time. Period of 9 years is too long. Definitely the prices of the property have gone up in the meantime. It is only because of the in-action on the part of plaintiffs that execution of sale-deed appears to have got delayed. The balance has been properly achieved by directing the defendants to pay the earnest amount together with interest to the plaintiffs. In fact, there was no such specific prayer made, in the alternative, by the plaintiffs in the suit. Learned Appellate Court has properly exercised the discretion in this case.

6. No substantial question of law is arising in this case, as contemplated under Section 100 of Code of Civil Procedure. Second appeal, therefore, stands dismissed at the admission stage itself.

[SMT. VIBHA KANKANWADI, J.]

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