

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**930 SECOND APPEAL NO.352 OF 2020
WITH
CA/5807/2020 IN SA/352/2020**

BANDU NAGNATH GHONE
VERSUS
SANTOSH SHIVAJIAPPA RESHAME AND ANOTHER

...
Advocate for Appellants : Mr. Swami Sandeep C.
Advocate for Respondent No.1 : Mr. S. M. Vibhute
...

CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 10-02-2021.

ORAL ORDER :

1. Present appeal has been filed by the original defendant No.2 to challenge the concurrent Judgment and decree. Present respondent No.1 is the original plaintiff who had filed Special Civil Suit No.135 of 2010 before learned Civil Judge, Senior Division, Latur for specific performance of contract and perpetual injunction. The said suit came to be partly decreed. The decree for specific performance was granted as against the defendant No.1 and the prayer of injunction was rejected.

2. It will not be out of place to mention here that the plaintiff had come with a case that there was an agreement to sell between him

and defendant No.1, however defendant No.2 got himself added as party defendant No.2 during the pendency of the suit. After the suit was partly decreed, defendant No.2 came in appeal by filing Regular Civil Appeal No.12 of 2017 before learned District Court, Latur. The said appeal was heard by the District Judge -4, Latur and it came to be dismissed on 03-07-2020. The said Judgment and decree is challenged in this second appeal.

3. Heard learned Advocate Mr. S. C. Swami for appellant and learned Advocate Mr. S. M. Vibhute for respondent No.1. In order to cut short it is stated that both the learned Advocates have strongly supported their respective cases.

4. It is an admitted position that defendant No.1 is the original owner of the suit property Block No.58 in village Warwanti Taluka and District Latur.

5. The plaintiff has come with a case that an agreement to sell was entered into by defendant No.1 in his favour on 31-08-2009. Defendant No.1 agreed to sell the said land for an amount of Rs.10 lakh and accepted earnest amount of Rs.5 lakh on the day when the agreement was entered into. It was agreed that the rest of the

amount would be paid at the time of the execution of the sale deed. The said agreement to sell is a notarized document. Possession was agreed to be given at the time of sale deed. It is the further case of the plaintiff that defendant No.1 had requested him to give more amount i.e. amount of Rs.4 lakh towards the rest of the consideration and agreed to adjust it in the consideration amount. Plaintiff gave him amount of Rs.1,73,000/- by cheque and the rest of the amount was given by cash. Thereafter, despite several requests, defendant No.1 did not execute sale deed in favour of the plaintiff and, therefore, suit for specific performance has been filed. It was stated by the plaintiff that he was always ready and willing to perform his part of the contract by giving the balance amount of the consideration. It appears that by way of amendment, after it was brought on record that the defendant No.1 has sold the suit land to defendant No.2 on 19-07-2010, further prayer was added that the said sale deed is not binding on the plaintiff. Alternate prayer was also made for directing defendant No.1 to refund the amount that was paid by the plaintiff till then to the plaintiff. Both the defendants have resisted the suit by filing their respective written statements. The defendant No.1 contended that the alleged agreement to sell dated 31-08-2009 is a bogus document. He never

entered into that document. He was in need of money and, therefore, he accepts that he has received only amount of Rs.1,73,000/- which was given by cheque from plaintiff. It is his say that his signatures were obtained on blank stamp paper and blank papers for creating the agreement, and receipts for the amount of Rs.5 lakh. It was tried to be contended that it was not possible that such a huge amount would have been paid by cash. Defendant No.2 tried to contend that he has purchased the suit land for value and, therefore, he is a bonafide purchaser for valuable consideration. He has developed the land by converting the same to non-agricultural use.

6. After the issues were framed, only the plaintiff has led oral as well as documentary evidence. It appears that thereafter the defendants No.1 and 2 did not adduce any evidence. After considering the evidence on record as aforesaid, the learned lower Court partly decreed the suit and the appeal filed by defendant No.2 was dismissed.

7. The scope of the present appeal which is filed by original defendant No.2 is very much narrow in a sense that he could agitate only the rights that may be available to him. He cannot point out or

he cannot rely on any defects in the evidence led by the plaintiff in respect of the agreement to sell dated 31-08-2009, receipts those were executed, nor he can try to agitate that the said document which is in favour of the plaintiff is a bogus document. He was not party to the said document nor it can be said that he has stepped into the shoes of defendant No.1. It was tried to be contended by the defendant No.2 that in fact there was an agreement to sell in his favour executed by defendant No.1 on 17-07-2008, that is much prior to the agreement in favour of the plaintiff, and it is the contention of the defendant No.2 that plaintiff had put him in possession on the day of that agreement to sell itself. Important point to be noted is that the document has not even being produced nor got proved by the defendant No.2 or defendant No.1. If the possession would have been handed over then such agreement to sell would become compulsorily registerable document in view of Section 17 of the Indian Registration Act, however it has been fairly admitted by the learned Advocate appearing for the appellant that said document is not registered. Therefore, we cannot accept the contention of the defendant No.2 i.e. present appellant, that the possession has been handed over to him and, thereafter, he has developed the said land. Now as regards the sale deed is

concerned, it is admittedly after the suit was filed. Unless there would have been a evidence that any right has been created in favour of the defendant No.2 prior to the filing of the suit by the plaintiff, then we could have stated that he would have been the necessary party in this case, and further, the said sale deed though executed later on could be binding on the plaintiff. However, as aforesaid, the alleged agreement of sell dated 17-07-2008 was never tried to be produced on record by the defendants.

8. It was tried to be argued that the evidence led by the plaintiff is doubtful. There is variance between the story that was given by the plaintiff, the notary in whose presence the alleged agreement to sell dated 31-08-2009 came to be executed and the attesting witness. As aforesaid, defendant No.2 has no locus standi to challenge the said evidence. Even if for the sake of arguments we accept that he has such locus standi, yet mere variance in the evidence which is not going to the root of the case, will not give rise to substantial question of law which is mandatory for entertaining second appeal under Section 100 of Code of Civil Procedure. The agreement (Exhibit 85) has been held to be duly proved by both the Courts below who were supposed to assess the facts. Further

defendant No.1 has not adduced any evidence in rebuttal. Therefore, now no substantial question of law can be said to be arising on the basis of the testimonies of the witnesses of the plaintiff.

9. Though the defendant No.2 claimed to be the bonafide purchaser for value without notice, he has not adduced any evidence. Learned Advocate appearing for the appellant also submitted that he would pray for remand for getting an opportunity to lead evidence, however he has failed to point out as to why though the opportunity was made available by the learned Trial Court, he has not led the evidence. The defendant No.2 is not coming with a case that his Advocate has not properly represented him and he did not appear also in the matter. If the Judgment passed by learned Civil Judge Senior Division is considered, then it can be seen that the Advocate engaged by defendant No.1 is the same who was engaged by defendant No.2. Further, after the order was specifically passed below Exhibit 01, that the matter would proceed without the evidence of defendants No.1 and 2 on 21-09-2016, thereafter the learned Advocate representing the defendants had submitted his final arguments, therefore no such ground is

shows even for remand of the matter. Therefore, after taking into consideration the entire evidence and both the Judgments, it can be said that both the Courts below have correctly appreciated the facts, evidence and applied proper law. Therefore, no substantial question of law is arising in this case requiring admission of the second appeal or interference by this Court under Section 100 of Code of Civil Procedure. Appeal, therefore, stands dismissed.

10. In view of the dismissal of the second appeal, Civil Application No.5807 of 2020 stands disposed of accordingly.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-