

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**920 SECOND APPEAL NO.564 OF 2021
WITH CA/12348/2021 IN SA/564/2021**

**JITENDRA SHAMSUNDAR BIHANI
VERSUS
SUMAN ASHOK PERIWAL AND OTHERS**

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Mr. A.M. Gaikwad, Advocate h/f Mr. N.V. Gaware, Advocate for the appellant
Mr. A.M. Gholap, Advocate for the respondent No.1

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 23rd NOVEMBER, 2021

ORDER :

1 Present appeal has been filed by the original defendant No.2 to challenge the concurrent Judgment and Decree passed by the Courts below.

2 Present respondent No.1-original plaintiff filed Special Civil Suit No.175/2010 before Civil Judge Senior Division, Ahmednagar for specific performance of the contract and possession with alternative relief of refund of earnest amount with interest. The said suit came to be decreed on 27.11.2015 and the present appellant along with other two i.e. original defendant Nos.1 and 3 filed Regular Civil Appeal No.19/2016. The said

appeal has been dismissed by learned District Judge-7, Ahmednagar on 05.04.2021. Hence, this Second Appeal.

3 The facts which are undisputed are that original defendant No.1 was the owner of plot No.129 admeasuring 3000 sq.ft. on Sy.No.87/A situated at Savedi (Riddhi Siddhi colony) within the limits of Ahmednagar Municipal Corporation. Defendant No.1 had purchased the said property in the year 2006 and thereafter constructed the structure over it. However, he entered into an agreement to sell on 21.11.2009 with the plaintiff in respect of the suit property. It was agreed between the parties to sell the suit property for a consideration of Rs.38,51,000/-. The earnest amount of Rs.2,01,000/- was paid on the date of the agreement. Plaintiff had assured that she would pay the amount of Rs.15,00,000/- to the defendant No.1 in the month of December, 2009. Thereafter, after the payment of remaining amount the sale deed was to be executed within a period of four months. It is also not in dispute that the defendant No.2 i.e. present appellant was residing in the suit property on leave and licence basis. It is further fact come on record that defendant No.1 sold the suit property to defendant No.3 for a consideration of Rs.43,90,000/-. Further fact has come on record that defendant No.3 executed sale deed in respect of suit property in favour of defendant No.2 on 07.03.2012.

4 Plaintiff has come with a case that it was agreed at the time of agreement to sell between her and defendant No.1 that defendant No.2 would hand over the possession of the suit property to the plaintiff. Plaintiff was ready and willing to perform her part of the contract and accordingly she had paid amount of Rs.15,00,000/- to the defendant No.1 on 25.12.2009. Defendant No.1 has given endorsement in his own handwriting on the agreement to sell. As per the term No.9 of agreement to sell, the defendant No.1 was required to repay the loan of ICICI Bank which was raised by him, but it was not repaid, though it was reminded by the plaintiff, from time to time. Plaintiff was asking for conveyance and she remained present before the office of Sub-Registrar on 20.03.2010 by giving intimation to defendant No.1 in advance that he should remain present before the Sub-Registrar by accepting the remaining consideration of Rs.21,50,000/-, however, defendant No.1 remained absent. Plaintiff issued notice dated 10.04.2010. It was falsely replied by defendant No.1 on 29.04.2010. Plaintiff had also then issued notice to defendant No.2 dated 30.05.2010 asking him to hand over the possession to the plaintiff and clear indication that his leave and licence agreement will not be extended. When there was no response from the defendants, suit has been filed.

5 Defendant No.1 took up a defence that in fact, plaintiff was to

repay the loan that was taken by him from the bank, however, that amount has not been paid and, therefore, plaintiff herself has committed breach of terms and conditions of the agreement to sell. Therefore, he sold out the property, due to economic reasons, to defendant No.3. The new purchaser has repaid the said loan. Defendant No.2 filed the written statement and submitted that he is a bona fide purchaser for value without notice, as he has purchased the property from defendant No.3. He was occupying the premises as tenant of defendant No.1. After the property was sold to defendant No.3, he became tenant of defendant No.3 and thereafter he has purchased the property from defendant No.3 and thereby he is in continuous possession.

6 Defendant No.3 by filing written statement contended that since plaintiff had committed breach of terms of agreement has no *locus standi* to file the suit.

7 Parties went to trial and as aforesaid, the suit was decreed and the appeal filed by all the defendants together came to be dismissed. However, the only defendant No.2 has approached this Court by filing Second Appeal.

8 Heard learned Advocate Mr. A.M. Gaikwad holding for learned

Advocate Mr. N.V. Gaware for the appellant-original defendant No.2 and learned Advocate Mr. A.M. Gholap for the respondent No.1-original plaintiff as caveator.

9 It has been vehemently submitted on behalf of the appellant that both the Courts below failed to consider the main point that was agitated is that there was breach of terms and conditions of the agreement to sell by the plaintiff herself and, therefore, she was not entitled to get relief of specific performance of the contract. He has taken this Court through the contents of the agreement Exh.54 and especially pointed out Clause No.9, which runs thus -

9) सदर मिळकतीमध्ये असलेले आय.सी.आय.सी.आय. या बँकेचे जे काही कर्ज (लोन) आहे ते मी तुम्हास खरेदी खताअगोदर विलअर करून तशी एन ओ सी तुम्हास देईल.

It was then submitted that the defendant No.2 was staying in the suit premises on the date of the agreement to sell also and it has been reflected in the agreement to sell. It was stipulated that after the sale deed would be executed within the period of four months, the purchaser would get the agreement executed with defendant No.2 and if need arises for getting the premises vacated, then it would be done by the defendant No.1. It was submitted that since time limit of four months was stipulated in the

agreement itself and it had come on record that defendant No.1 was in need of money, time was essence of the contract. No steps were taken by the plaintiff to clear the loan within the period of four months and, therefore, it amounted to breach of terms, for which the plaintiff had lost the right to ask for specif relief.

10 It has been further submitted on behalf of the appellant-original defendant No.2 that defendant No.2 though was residing in the suit premises as licensee or tenant and it was for 11 months which was to come to an end on 30.05.2010, he was unaware about the agreement to sell between the plaintiff and the defendant No.1. He has categorically stated that as he was supposed to purchase the property by taking loan from the bank he had taken search report from Advocate and it was reported to him that there was no encumbrances or any legal hitch in purchasing the property. This shows that he had taken the precautions before purchasing the property. He ought to have been considered as bona fide purchaser. The reason given by both the Courts below that in his cross-examination he was admitting that the defendant No.1 was showing the property to proposed purchasers and defendant No.2 had knowledge about the same, it can be presumed that he had knowledge about the transaction between plaintiff and defendant No.1. This is a perverse finding. Section 52 of the Transfer of property Act has been

wrongly applied against the defendant No.2 when he had purchased it by taking all precautions. Though it was contended by the plaintiff that he had issued notice to defendant No.2 on 22.05.2010 and was received by the defendant No.2, in fact, it was issued at a different address and it is stated that the said notice was received by the father of the defendant No.2. When it was denied, it ought to have been proved. Substantial questions of law, as contemplated under Section 100 of the Code of Civil Procedure, are therefore arising in this case, requiring admission of the Second Appeal and till the decision of the Second Appeal the impugned decree deserves to be stayed.

11 Per contra, the learned Advocate for the respondent No.1 supported the reasons given by both the Courts below and submitted that no substantial questions of law are arising in this case.

12 At the outset, it is to be noted that the defendant No.1 has admitted that he had entered into agreement to sell Exh.54 on 21.11.2009. If we peruse the said agreement, then on the date of the agreement he had received the amount of Rs.2,01,000/- as earnest. The second condition was that the plaintiff should pay amount of Rs.15,00,000/- in the month of December, 2009. Accordingly, the endorsement on the same Exh.54, which has been admitted by the defendant No.1, states that he has received amount

of Rs.15,00,000/- on 25.12.2009. Therefore, these two conditions were fulfilled by the plaintiff. Now, the dispute is raised in respect of clause No.9. As reproduced, the meaning of clause No.9 would be that the defendant No.1, who was giving the document in writing as “ लिहून देणार ” would clear the loan prior to the sale deed and would give NOC to “ लिहून घेणार ” i.e. the plaintiff. By no stretch of imagination it can be said that it was the duty of the plaintiff to repay the loan amount raised by defendant No.1 within a period of four months from the date of agreement and then get the sale deed executed. If that intention would have been of the parties, then it could have been specifically stated while bifurcating the amount of consideration or it could have been specifically written that the consideration which was fixed by them to Rs.38,51,000/- is apart from the loan, which was then outstanding (by specifying it). When the intention of the parties was not to make that outstanding amount as part of consideration, the performance of the same cannot be expected from the plaintiff. Therefore, it cannot be said that there was any kind of breach of terms of conditions by the plaintiff.

13 Another fact, that is, also required to be considered is that taking into consideration the contents of para No.5 regarding possibility of getting the suit premises vacated from defendant No.2, who was then occupying the property under the leave and licence agreement, which was to come to an

end on 30.05.2010; which itself was beyond the period of four months, then the time was not essence of the contract. A conduct of defendant No.1 is also then required to be considered. Prior to the notice reply to the plaintiff he never made a communication to the plaintiff stating that the alleged term was to be complied by him, but then immediately after the reply was given on 29.04.2010 he sold out the property on 14.05.2010 to defendant No.3. Further, in view of the fact now that defendant No.3 has sold the property to defendant No.2, we need not enter into the arena of the point, as to whether defendant No.3 could have been held to be bona fide purchaser for value without notice. But that would be applicable to defendant No.2 for the simple reason that he was already residing in the suit premises, may be under the different capacity.

14 As regards defendant No.2 is concerned, definitely he has purchased the property after the present suit was filed. Merely taking the search report will not be then sufficient. It ought to have been then considered, as to whether any litigation is pending or not. Defendant No.2 is denying to have received the notice dated 22.05.2010 but he is not disputing the address on the notice and, therefore, the presumption under Section 27 of the General Clauses Act would come into play. It will have to be presumed that the notice was received by the defendant No.2. The facts do not end

here. What was not considered by both the Courts below was and it was an important fact that the suit was filed on 28.07.2010, the first order of issuance of suit summons for settlement of issues was passed by the learned Trial Judge on 03.08.2010. Summonses were issued and the report was received on 25.08.2010. By order dated 05.01.2011, it has been held that despite the service of summons as per Exh.8 dated 25.08.2010 defendant No.2 has remained absent and, therefore, suit to proceed *ex-parte* against him. It appears that later on he might have appeared and filed the written statement. He has filed his written statement on 05.02.2014. It was then specifically asked to the learned Advocate representing respondent No.1 that since the defendant No.2 had purchased the property during the pendency of the suit, then under what capacity he was made defendant when the suit was filed. It was replied that since he was in possession of the property and the possession was to be sought, he was made defendant No.2. Therefore, when the suit summons was served on the defendant No.2, he remained absent and thereafter he filed the written statement in the capacity as a purchaser, will not make him a bona fide purchaser for value without notice.

15 Both the Courts below have considered all the points properly. The oral evidence and the legal points involved are correctly decided. Even the discretion has been properly used. Both the Courts correctly held that the

plaintiff was ready and willing to perform his part of the contract as contemplated under Section 16(C) of the Specific Relief Act and, therefore, no substantial question of law, as contemplated under Section 100 of the Code of Civil Procedure, 1908, is arising in this case, requiring admission of the Second Appeal. It deserves to be dismissed at the threshold. Accordingly, it is dismissed. Civil Application stands disposed of.

(Smt. Vibha Kankanwadi, J.)

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