

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.8 OF 2013
WITH CA/173/2013 IN SA/8/2013

VINODKUMAR S/O SHANTILAL JAIN AND ORS
VERSUS
SMT. MUBARAKBANO SHOUKATALI AND ORS

...

Mr. A. P. Bhandari, Advocate for appellants.
Mr. P. S. Shendurnikar, Advocate for respondent Nos.2 to 5.
Mr. S. H. Tripathi, Advocate for respondent No.6.

...

CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 20.08.2021

ORDER :-

. Present appeal has been filed by the original plaintiffs challenging the concurrent judgment and decree passed by the Courts below. They had filed Special Civil Suit No.209 of 1992 before the learned Civil Judge Senior Division, Jalgaon for specific performance of contract and also for relief of declaration that sale-deed of suit property executed by defendant No.1 in favour of defendant No.2 is illegal and void. Original plaintiff was also praying for possession of the suit property with relief of injunction restraining defendants from alienating the suit property. The said suit came to be dismissed by the learned Civil Judge Senior Division on 28.04.2005. The said judgment and decree was challenged

before the District Court, Jalgaon by filing Regular Civil Appeal No.137 of 2005 by the legal representatives of the original plaintiff. The said appeal was heard by learned District Judge-1, Jalgaon and was dismissed on 29.06.2012. Hence, this second appeal.

2. Though the second appeal is filed in the year 2013, it was pending for admission only.

3. Heard learned Advocate Mr. A. P. Bhandari for appellants, learned Advocate Mr. P. S. Shendurnikar for respondent Nos.2 to 5 and learned Advocate Mr. S. H. Tripathi for respondent No.6.

4. It has been vehemently submitted on behalf of appellants – original plaintiffs that both the Courts below have not considered the facts involved in the case properly along with the law points. Both the Courts have wrongly held that the suit filed by present appellants was barred under Order II Rule 2 of the Code of Civil Procedure. It was also held that the original plaintiff was not ready and willing to perform his part of the contract. It was held that defendant No.2 was *bona fide* purchaser for a value without notice. Plaintiff is not entitled to get any kind of relief. Both the Courts below have taken note of the fact that original defendant No.1 had admitted the agreement to sell dated 19.03.1990 between him and the original plaintiff. A public notice was

also issued on 05.04.1990 inviting any objections. The parties had decided to get the sale-deed executed during the period from 19.03.1990 to 16.04.1990. On 16.04.1990, the plaintiff remained present before the Sub-Registrar, Bhadgaon carrying remaining amount of consideration i.e. Rs.85,000/- after sending telegram by defendant No.1. Thereafter also, the original plaintiff was insisting and requesting original defendant No.1 to execute the sale deed, however, defendant No.1 avoided. The plaintiff then filed Regular Civil Suit No.20 of 1990 before the learned Civil Judge Junior Division, Bhadgaon for injunction restraining defendant No.1 from alienating the suit property to anybody else. Defendant No.1 appeared in that proceedings and there was compromise. He agreed to execute the sale-deed and, therefore, the suit was disposed of accordingly. Thereafter, the plaintiff gave some amount to original defendant No.1 for purchase of stamps. Accordingly, stamps were purchased. The draft of the sale-deed was scribed on 04.11.1991, however, dispute arose between original defendant No.1 and his brother. They both, thereafter, went away without executing sale-deed. Original plaintiff then deposited those stamps in the office of Sub-Registrar to claim refund. Defendant's brother instituted Regular Civil Suit No.78 of 1990 for partition before the learned Civil Judge Junior Division, Bhadgaon. Because of the same, the sale-deed could not be executed.

However, that suit came to be withdrawn on 02.12.1991. Thereafter, the sale-deed was executed by defendant No.1 in favour of respondent No.6. - Mairajbi by accepting Rs.1,35,000/- on 28.11.1991. All these events would show that all the time, the plaintiff was ready to get the sale-deed executed in his favour by paying remaining amount of consideration. If this position has been proved, then both the Courts ought to have considered the prayer of granting specific performance of the contract to the plaintiff. Provisions of Order II Rule 2 of the Code of Civil Procedure will not be applicable here when, in fact, fresh cause of action arose to the appellant after Regular Civil Suit No.78 of 1990 was withdrawn by the brother of defendant No.1 on 02.12.1991. The cause of action for Regular Civil Suit No.20 of 1990 and Special Civil Suit No.209 of 1992 between the plaintiff and original defendant were different and it could not have then barred the subsequent suit under Order II Rule 2 of the Code of Civil Procedure. Therefore, definitely, substantial questions of law are arising in this case requiring admission of the second appeal.

5. Per contra, both the learned Advocates appearing for respondent Nos.2 to 5 and 6 supported the reasons given by both the Courts below and submitted that no substantial questions of law as contemplated under Section 100 of the Code of Civil Procedure are arising in this case requiring admission of the second appeal.

6. At the outset, it is to be seen that there are restrictions/limitations to this Court to scan the facts and evidence before both the Courts below. If it is shown that the findings arrived at by the Courts below are perverse, then only we can consider the facts and the evidence in detail. If both the Courts below have considered all the facts involved in the case together with correct proposition of law made applicable to the case in hand, then in general it can be said that such circumstance will not lead to formulation of any substantial question of law. Merely because bar of a suit under Order II Rule 2 of the Code of Civil Procedure is involved will not give rise to the admission of the second appeal. It is to be noted that both the Courts below have considered all the aspects in detail and correctly arrived at the conclusion that the suit is barred under Order II Rule 2 of the Code of Civil Procedure.

7. At the outset, it is to be noted that there is no dispute that the agreement to sell was executed by original defendant Late Shaukatali - owner of the suit land in favour of Late Shantilal to sell the suit land. The agreement to sell has been produced at Exhibit-145. It was specifically mentioned in the agreement itself that the original plaintiff would get the sale-deed executed during 19.03.1990 to 16.04.1990. The amount of consideration that was fixed was Rs.95,000/-. Out of which Rs.10,000/- was paid as earnest. Remaining amount was agreed to be

paid at the time of execution of the sale-deed. It can be seen that it is almost not in dispute that the original plaintiff had sent telegram asking original defendant No.1 to remain present before the Sub Registrar on 16.04.1990. According to plaintiff, he was present, but defendant No.1 did not turn up. He had, thereafter, filed Regular Civil Suit No.20 of 2019 for injunction. It is then required to be seen as to whether plaintiff could have sought specific performance of agreement dated 19.03.1990 in Regular Civil Suit No.20 of 1990. The necessary documents i.e. certified copy of the plaint, decree passed therein, has been produced at Exhibit-123 and 146 respectively. No doubt, that suit was compromised and original defendant No.1 had admitted that such agreement was entered into and he promised to execute the sale-deed. That means the base for the said suit was the same as it is in the present Special Civil Suit No.209 of 1990. Another fact that is to be noted is that both the Courts below have considered that the time was essence of the contract taking into consideration the fact that original defendant No.1 was suffering from cancer and he was in need of money for treatment. There is absolutely no explanation by the witness examined by the plaintiffs as to why in Regular Civil Suit No.20 of 1990, claim for specific performance was not prayed. When the document was not disputed at all by original defendant No.1, how only the compromise to execute

sale-deed in future would have satisfied the original plaintiffs in that suit is a question. Reliance can be placed on the decision in ***Smithline Beecham Consumer Healthcare Gmbhy and others Vs. Hindustan Lever Limited and another***, [2002 (1) Mh.L.J. 453], wherein it is stated that “the term “cause of action” though has been used in several provisions of the Code of Civil Procedure, it has not been defined by the Code. The fact which gives a person a right to judicial relief constitutes cause of action. Facts, which taken with the law applicable, give the plaintiffs right to relief constitute a cause of action and the act of the defendant which makes it necessary for the plaintiff to institute the suit is also part of the cause of action.” It has been further observed that, “the scheme of the Civil Procedure Code is that a plaintiff should raise all the grounds available to him on the subject in dispute in his first suit. The Civil Courts do not have jurisdiction to try the suits, institution of which is contrary to the scheme of the Code of Civil Procedure, which discourages repeated litigation on the same subject, between the same parties...” “It is clear from the provisions of Order II Rule 1 of the Code of Civil Procedure that it obliges a plaintiff to frame his suit in such a manner that a final decision can be rendered by the Court in that suit on the subject in dispute. It goes without saying that if a particular ground is not within the knowledge of the plaintiff, though it is on the same

subject, when the suit is filed, no fault can be found with the plaintiff, therefore, phrase “as far as practicable” has been used in Order II Rule 1 of the Code of Civil Procedure...” “Order II Rule 2 of the Code of Civil Procedure obliges the plaintiff to include whole claim, which he is entitled to make in respect of a cause of action. It also provides for the consequences of the plaintiff’s failure to do so.” The said case i.e. ***Smithcline Beecham Consumer Healthcare Gmbhy and others Vs. Hindustan Level Limited and another***, went in appeal before the Division Bench of this Court and the said decision is reported in ***2003 Vol. 105 (2) Bom. L. R. 547***. In the said decision of Division Bench of this Court, it has been observed :-

“ A perusal of Order II, Rule 2 of the C.P.C. clearly reveals that this provision applies to cases where the plaintiff omits to sue portion of the cause of action on which such a suit is based either by relinquishing the cause of action or by omitting a part of it. The provision has, therefore, no application to cases where the plaintiff bases his suit on separate and distinct causes of action and chooses to relinquish one or the other of them. In such a case, it is always open to the plaintiff to file a fresh suit on the basis of a distinct cause of action which he may have so relinquished.

Order II, Rule 2 requires that the cause of action in

the earlier suit must be the same on which the subsequent suit is based and unless there is identity of causes of action in both the suits the bar of Order II, Rule 2 will not get attracted. If there is recurring cause of action or there is fresh cause of action and if the plaintiff is pursuing the suit on such cause of action the bar under Order II, Rule 2 would not be attracted.”

8. Further, the principles laid down by the Hon’ble Apex Court in ***Kevalsing Vs. Lajwanti, [AIR 1980 SC 161]*** have been considered by both the Courts below. At no stretch of imagination it can be said that no cause of action arose for the present original plaintiff to seek relief of specific performance in Regular Civil Suit No.20 of 1990. It cannot be said that it is a continuous cause of action, because when the specific performance is refused either directly or impliedly, then the period of limitation would start. We need not go into the aspect as to whether the acceptance of original defendant No.1 in Regular Civil Suit No.20 of 1990 that he would execute the sale-deed would amount to extension of period of limitation or not. However, the fact is certain that the original plaintiff could have definitely claimed specific performance at that time and it also appears that the original defendant was ready to sell the land. It was for the plaintiffs to explain as to why immediately after the decision in Regular Civil Suit No.20 of 1990, or even at the time of

entering into the compromise before the Court in that suit itself, the sale-deed was not got executed.

9. Both the Courts below have correctly held that the present suit i.e. Special Civil Suit No.209 of 1992 was barred under Order II Rule 2 of the Code of Civil Procedure.

10. Both the Courts below have further considered the facts in detail though they could have disposed of the suit when it was held to be barred under the provisions of law. Both of them have considered the facts and come to the conclusion that the acts of the original plaintiff would show that he was not ready and willing to perform his part of the contract. For this purpose, it was considered that the time was essence of the contract and the sale-deed was to be executed between the period 19.03.1990 to 16.04.1990. As aforesaid, original defendant No.1 had agreed to sell the land because he was suffering from cancer and was in need of money for his treatment. There is no serious dispute about the fact that the said fact about the reason for sell was within the knowledge of the original plaintiff. Though it has not been expressly mentioned in agreement of sale dated 19.03.1990 that the time was the essence of the contract, but certainly when original defendant No.1 was suffering from cancer and the fact was known to the plaintiff, there was implied term

about time was essence of the contract. The plaintiffs have also stated that the draft was ready and being scribed when dispute arose between original defendant No.1 and his brother. The fact then remains is that if the plaintiff is accepting that the brother was having right in the suit property, then without making him party to the agreement to sell, the sale-deed could not have been got executed. Only original defendant No.1 had entered into the contract. Original defendant No.1 and his brother were Muslim and, therefore, they would have had fixed share in the property. Without the consent of the co-tenant, the agreement could not have been entered into. When the plaintiff disclosed the fact that the draft sale-deed was being scribed and the dispute arose, he could have sorted out the said dispute by further negotiations with the brother of original defendant No.1. But then both of them left and original plaintiff returned the stamps and claimed the refund. He has not taken immediate action by filing suit, but allowed by his own conduct to infer that he was not interested in getting the sale-deed executed by solving the dispute between original defendant No.1 and his brother. The conduct of the original plaintiff has been considered by both the Courts below and they have come to the conclusion that the plaintiff has failed to prove that he was ready and willing to perform his part of the contract. Consequential to this finding, it has been also held that the

original plaintiff is not entitled to get refund of the earnest amount, which was his alternative prayer.

11. Since both the Courts have given detailed judgments considering all the facts and circumstances in this case, especially on bar under Order II Rule 2 of the Code of Civil Procedure, it can be concluded that no substantial question of law as contemplated under Section 100 of the Code of Civil Procedure is arising in this case. Second appeal stands dismissed.

12. In view of dismissal of second appeal, Civil Application No.173 of 2013 stands disposed of.

[SMT. VIBHA KANKANWADI, J.]

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