IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.634 OF 2018

DAGDU PITAMBAR MALI AND OTHERS
VERSUS
MADHUKAR SHRIDHAR MARATHE
DIED THR L.RS.
…..
Advocate for Appellants : Mr. G. S. Rane
Advocate for Respondents No.1A to 1E : Mr. V. P. Patil.
…..

CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 12-10-2021.

ORDER :

1. Present appeal has been filed by the original defendants to challenge the concurrent Judgments and findings.

2. Present original respondent was the plaintiff who filed Special Civil Suit No.139 of 2001 before 2nd Joint Civil Judge, Senior Division, Jalgaon, for specific performance of the contract and in the alternative for refund of the earnest amount. The said suit came to be partly decreed on 29-01-2010. The relief of specific performance was rejected, however, the defendants were directed to pay amount of Rs.80,000/- to the plaintiff together with interest @ of 6 % per annum from the date of filing of the suit till its actual realization. The original defendants then challenged the said Judgment and decree by filing

Regular Civil Appeal No.943 of 2012. The appeal was dismissed by learned Ad-hoc District Judge-2, Jalgaon, on 08-07-2015. Hence, this second appeal.

3. Heard learned Advocate Mr. G. S. Rane for the appellants and learned Advocate Mr. V. P. Patil for respondents No.1A to 1E.

4. It has been vehemently submitted on behalf of the appellants that both the Courts below have not appreciated the evidence to the extent of holding that the defendants were liable to refund the earnest amount together with interest. In fact, both the Courts have held that though the plaintiff had proved the agreement to sell and also that he was ready and willing to perform his part of the contract, yet there was litigation pending and then no permission as contemplated under Section 12 of the Hindu Minority and Guardianship Act, 1956, wherein the interest of the minor in an undivided property of the joint family was involved was ever taken. So also there was legal hurdle in view of Section 48 (d) of the Maharashtra Co-operative Societies Act, 1960. As per the said provision, the member who had taken loan from the society cannot alienate whole or part of the land nor can create any interest in it. Therefore, in view of Section 23 of the Indian Contract Act, the

specific performance was refused, however, both the Courts have not considered Section 48 (e) which ought to have been considered along with Section 48 (d) of the Maharashtra Co-operative Societies Act. If both the provisions are read together then if any transaction takes place in violation or contravention of Section 48 (d) then it would be a void, and in that case ,the refund of the earnest amount ought not to have been ordered.

5. Further submissions have also been made that both the Courts went wrong in holding that the plaintiff has proved the agreement to sell and unnecessary relied upon the report of the handwriting expert when in fact the defendants had denied the execution itself. Therefore, substantial questions of law are arising in this case.

6. Per contra, the learned Advocate appearing for the respondents No.1A to 1E i.e. the legal representatives of the original plaintiff supported the reasons given by both the Courts below and submitted that the plaintiff's legal representatives are accepting the alternative relief that has been granted by the Courts below.

7. At the outset, it is to be noted that though the defendants had categorically denied the execution of the agreement dated 16-11-

1998 by denying the signature as well as thumb mark on the same, yet it has been got proved by examining the attesting witness P.W.2 Murlidhar. The evidence has been scanned by the learned Trial Court in detail. As regards the defendants are concerned, D.W.2 Babu Mali deposed that the suit property is the ancestral property, he as well as his brother had not made any signature or thumb mark. Important point to be noted is that on the application made by the plaintiff the handwriting expert was appointed and the opinion was called. The opinion is in favour of the plaintiff. Therefore, apart from the proof of the agreement to sell by proper procedure even the experts opinion has also been sought. Therefore, the conclusion drawn by both the Courts below that the plaintiff proved the execution of the agreement will have to be upheld.

8. As regards the readiness and willingness is concerned, again both the Courts below have held that the plaintiff has shown readiness and willingness to perform his part of the contract. He had paid the earnest amount at the time of execution of the sale deed. Further, it is to be noted that in the agreement to sell itself, the recitals are appearing and the fact has been proved that the

possession of the suit property was handed over by the defendants to the plaintiff. The defendants are contending that the dispute was going on between them. Under such circumstance, unless that dispute gets settled, plaintiff was not expected to do anything more to get the sale deed executed in his favour. Ultimately he had issued notice to the defendants. Though initially the defendants contended that they had replied notice, however, after the order was passed by the Court allowing the plaintiff to read secondary evidence, he filed the reply notice at Exhibit 106. It showed the refusal on the part of the defendants which gave cause of action to the plaintiff to file the suit. Under such circumstances, again both the Courts were justified in holding that the plaintiff had proved readiness and willingness to perform his part of the contract.

9. In spite of both the main points answered in favour of plaintiff, yet both the Courts have held that the plaintiff is not entitled to get specific performance for the reason that the property was in dispute and the suit was pending. So also since the minors undivided interest in the joint family property was involved, unless the guardian seeks permission from the competent authority it could not have been directed to the defendants to execute the sale deed. It

was then held that Section 12 of the Hindu Minority and Guardianship Act, 1956 does not permit the guardian to enter into such agreement. Further, as aforesaid the bar under Section 48 (d) of the Maharashtra Co-operative Societies Act was also considered.

10. The point that both the Courts below have not considered Section 48 (e) of the Maharashtra Co-operative Societies Act raised by the appellant is concerned, it is to be noted that the said Section i.e. 48 (e) provides that, *"any alienation made in contravention of the provisions of clause (d) shall be void."* In order to appreciate this provision, we will have to consider the provision in *Section 48 (d)* of the Act, which runs thus :-

> "no member shall alienate the whole or any part of the land or interest therein, specified in the declaration made under clause (a) or (b) until the whole amount borrowed by the member together with interest thereon, is repaid in full :
>
> Provided that, it shall be lawful to a member to execute a mortgage bond (in respect of such land or any part thereof in favour of a Co-operative Agriculture and Rural Multipurpose Development Bank] or of the State Government] under the Bombay Canal Rules made under the Bombay Irrigation Act, 1879 or under any corresponding law for the time

> being in force for the supply of water from a canal to such land, or to any part thereof :
>
> Provided further that, if a part of the amount borrowed by a member is paid [the society with the approval of the Central Bank to which it may be indebted] may, on an application from the member, release from the charge created under the declaration made under clause (a) or (b), such part of the movable or immovable property specified in the said declaration, as it may deem proper, with due regard to the security of the balance of the amount remaining outstanding from the member.

The conjoint reading of both the decisions would read that the alienation made in the contravention is void. Alienation can be interpreted that the ultimate transfer of title, agreement to sell cannot create any title in favour of proposed buyer. Therefore, there is no prohibition for entering into agreement to sell but the further part that is the sale is then prohibited. Under such circumstances, when there is bar for further action, it was not granted by the Courts below. It can be therefore said that the discretion that was available with the Courts below under Section 20 of the Specific Relief Act was exercised by them judiciously. The transaction of agreement to sell was not void or illegal and, therefore, the amount received by the defendants as earnest amount should be refunded by them to the plaintiff. They cannot claim unjust enrichment.

11. Both the Courts below have appreciated the evidence properly. So also the judicial discretion has been exercised properly. No interference is required. No substantial question of law is arising in this case as tried to be posed by the appellants requiring admission of the second appeal. The appeal deserves to be dismissed at the threshold in view of *Kirpa Ram (since deceased through L.Rs.) and Others vs. Surendra Deo Gaur and Others, reported in 2021 (3) Mh.L.J. 250*, as it is not giving rise to the substantial questions of law as contemplated under Section 100 of the Code of Civil Procedure. The appeal, therefore, stands dismissed.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-