

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

31 SECOND APPEAL NO.11 OF 2022
WITH CA/351/2022 IN SA/11/2022

- 1) Prakash s/o Eknath Rane,
Age 57 years, Occ. Business,
R/o. 250, Navi Peth, Jalgaon,
Tq. & Dist. Jalgaon.
- 2) Sanjay s/o Balwant Chaudhari,
Age 50 years, Occ. Business,
R/o. 250, Navi Peth, Jalgaon,
Tq. & Dist. Jalgaon.

... **Appellants**
(Orig. Deft. Nos. 2 & 3)

VERSUS

- 1) Suresh s/o Eknath Rane (deceased)
Through legal heirs.
- 1A) Smt. Sunandabai w/o Suresh Rane,
Age 70 years, Occ. Household,
R/o. Plot No 40/1 Near Swami
Samarth Kendra, Pratap Nagar,
Jalgaon Tq. & Dist. Jalgaon,
at present Vayankatesh Apartment,
Ring Road, Jalgaon, Tq. & Dist. Jalgaon
- 1B) Rahul s/o Suresh Rane,
Age 48 years, Occ. Civil Construction,
R/o Vayankatesh Apartment,
Ring Road, Jalgaon, Tq. & Dist. Jalgaon
- 1C) Atul s/o Suresh Rane,
Age 46 years, Occ. Civil Construction,
R/o Vayankatesh Apartment,
Ring Road, Jalgaon, Tq. & Dist. Jalgaon.
- 1D) Sau. Dhanashri w/o Pranay Patil,
Age 38 years, Occ. Architect,
R/o. Plot No 40/1 Near Swami
Samarth Kendra, Pratap Nagar,
Jalgaon Tq. & Dist. Jalgaon,
at present Vayankatesh Apartment,

Ring Road, Jalgaon, Tq. & Dist. Jalgaon.

- 2) Chandrakant s/o Eknath Rane,
Age 48 years, Occ. Agriculture,
R/o. 250, Navi Peth, Jalgaon,
Tq. & Dist. Jalgaon.
R/o. A-1, Kalash Bungalow,
Seren Meadows Colony,
Gangapur Road, Nashik,
Tq. & Dist. Nashik.

... **Respondents.**
(Orig. Plaintiff No. 2 &
Deft. No. 1)

...
Advocate for Appellants : Mr. Gajanan Kadam
Advocate for Respondent Nos. 1A to 1C : Mr. S.B. Yawalkar.

CORAM : MANGESH S. PATIL, J.
DATE : 31.01.2022.

ORAL JUDGMENT :

Heard both the sides.

2. The original defendant Nos. 2 and 3 have preferred this appeal being aggrieved and dissatisfied by the consistent findings of the courts below holding the original plaintiff who was the predecessor of the respondent Nos. 1A to 1D to be entitled to specific performance of an agreement to sell the suit property dated 10.04.1997 and in the process cancelling the sale-deed dated 23.07.1997 executed by the respondent No. 2 who was the original defendant No. 1 in their favour.

3. For the sake of convenience the parties are hereinafter referred to by their status in the suit.

4. The plaintiff propounding the agreement dated 10.04.1997 claimed that the defendant No. 1 had agreed to sell the suit property to him. However, instead of selling the suit property to him, the defendant No. 1

executed a sale-deed in favour of the defendant Nos. 2 and 3 on 23.07.1997. He pleaded that he was ever ready and willing to perform his part of contract by parting the remainder of the consideration and claimed specific performance and also prayed for cancellation of the sale-deed.

5. All the defendants filed a joint written statement. They denied that the defendant No. 1 had ever agreed to sell the suit property to the plaintiff. They contended that even before the alleged agreement of sale the defendant No. 1 had agreed to sell the suit property to the defendant Nos. 2 and 3 and even the latter had parted with part of consideration from time to time and it is pursuant to such an agreement that the sale-deed was executed on 23.07.1997. They would, therefore, contend that there was no reason to cancel the sale-deed and the plaintiff was not entitled to claim specific performance.

6. The trial court framed necessary issues and decreed the suit *inter alia* directing the plaintiff to part with the remainder consideration of Rs. 5,60,000/- within two months.

7. Being aggrieved only the defendant nos. 2 and 3 preferred the appeal before the District Court under Section 96 of the Code of Civil Procedure. By the judgment and order under challenge, the District Court dismissed the appeal and confirmed the decree.

8. The learned advocate Mr. Kadam for the appellants vehemently submits that both the courts below have grossly erred in appreciating the evidence on the record. The observations and conclusions are perverse and arbitrary. No concrete evidence regarding existence of any agreement of sale was led before the trial court. Even the plaintiff had not come with clean hands. In spite of a settled legal position that being a discretionary relief, a party is not entitled to claim specific performance if it is not coming with clean hands, both the courts below have granted such discretionary relief to the plaintiff. The appellate court also failed to consider that the

trial court had not weighed the evidence in the proper perspective and has illegally refused to interfere with. The learned advocate would cite the decision in the case of **Lourdu Mari David and Ors. vs Louis Chinnaya Arogiaswamy; A.I.R. 1996 Supreme Court 2814**. He submits that substantial questions of law as mentioned in the memo of appeal arise and appeal be admitted.

9. Mr. Yawalkar learned advocate for the plaintiff's heirs submits that since it is an appeal under Section 100 of the Code of Civil Procedure, when there are concurrent findings of facts recorded by the courts below, this Court should not cause any interference by reappreciating the evidence. Therefore, for this reason alone, the appeal does not deserve to be admitted. Mr. Yawalkar would then submit that it was a suit for specific performance of a contract which was initially opposed by the defendant No. 1, he had given clinching admissions during his cross-examination and even never chose to challenge the judgment and decree granting specific performance.

10. Mr. Yawalkar would further submit that though the defendant nos. 2 and 3 are now seeking to challenge the decree, they had never stepped in the witness box and are bound by the admissions given by the defendant No. 1 during his cross-examination. Even the defendant No. 1 filed a specific pursis before the first appellate court admitting the claim as also the decree passed by the trial court. It is in view of such state of affairs, no substantial question of law arises for the determination of this Court and the appeal may be dismissed.

11. One need not delve deep to reiterate the principles imposing limitations on the powers of this Court while considering a second appeal under Section 100 of the Code of Civil Procedure. This being not a fact finding Court it is not expected to enter into the realm of disputed questions of fact, more so, in the matters like the present one where the Courts below have concurred over the disputed questions of fact. Though in an

appropriate case, failure of the courts below in appreciating the evidence in the proper perspective or where their observations and conclusions are grossly perverse and arbitrary, this Court may venture into the disputed questions of facts.

12. Bearing in mind the above proposition if one examines the matter in hand, it is quite apparent that in order to defeat the claim of the plaintiff, all the defendants filed a common written statement alleging that even before the alleged agreement was executed in favour of the plaintiff on 10.04.1997, the defendant No. 1 had agreed to sell the suit property to the other two defendants on 18.11.1996. However, conspicuously, except the bald statement in the written statement and shaky testimony of the defendant No. 1, who alone was examined on behalf of all the defendants, nothing could be brought on record to substantiate the claim regarding existence of any agreement prior in point of time. For that matter, even the sale-deed that was executed by the defendant No. 1 in favour of the defendant nos. 2 and 3 did not conspicuously refer to any agreement having preceded the sale-deed.

13. Apart from this, during cross-examination the defendant No. 1 gave clinching admissions to the effect that he had never received the amounts that were mentioned as having been received Rs. 50,000/-, Rs. 40,000/- and Rs. 50,000/- as part of the consideration. Not only this but he specifically admitted that there was no agreement entered by him with the defendant nos. 2 and 3 before execution of the sale-deed and also admitted absence of any recital in the sale-deed. He even went to the extent of admitting that he had disclosed to the defendant nos. 2 and 3 that he had entered into an agreement to sell the suit property with the plaintiff and had even received part of consideration of Rs. 1,40,000/-. The fact about receipt of such part consideration of Rs. 1,40,000/- was not a stray admission. Even in the reply to the notice issued by the plaintiff he had admitted that fact.

14. If such is the state of evidence, irrespective of any other thing, one can easily reach a conclusion that the defendant No. 1 had agreed to sell the suit property to the plaintiff and had accepted an amount of Rs. 1,40,000/- towards part of the consideration. As against which though he had executed a sale-deed in favour of the defendant nos. 2 and 3, he did so after he had entered into the agreement with the plaintiff. Further, even there was no evidence regarding agreement to sell the suit property to the defendant nos. 2 and 3. In view of such state of affairs, coupled with the fact that the defendant No. 1 had not chosen to prefer any appeal and only the defendant nos. 2 and 3 had challenged the decree before the first appellate court, it was expected of them to have come out with some grounds in the appeal memo that was filed before the first appellate court, with an attempt to resile from the clinching admissions given by the defendant No. 1 who was no longer fighting the cause with them. Still, the appeal memo in the first appeal is conspicuously silent in this regard.

15. Admittedly, the defendant Nos. 2 and 3 have never graced the witness box. In spite of being aware that the defendant No. 1 had perhaps changed over to the other side, they could have availed of the opportunity to examine themselves as witnesses. Apart from the fact that they failed to do so, even no such request was ever made before the first appellate court. The result is inevitable. They are bound by the admissions of the defendant No. 1 and no amount of argument seeking to resile from such admissions can be now made the basis of challenging the concurrent findings recorded by the courts below which are based on plausible and reasonable appreciation of evidence on record.

16. Though the learned advocate for the defendant nos. 2 and 3 vehemently seeks to demonstrate that they are the *bona fide* purchasers, the statement cannot be accepted for two reasons. Firstly, because, no such specific plea was taken in the written statement and secondly, they could not taken such a plea since they had caused joint appearance with the

defendant No. 1 before the trial court and had not filed any separate written statement, and even had failed to grace the witness box to substantiate such a stand.

17. So far as the decision in the case of **Lourdu Mari David and Ors. (supra)**, the question is as to if the defendant nos. 2 and 3 are entitled to reap any benefit from the principles laid down therein, when the courts below have exercised the discretion which by no stretch of imagination can be said to be misplaced. The answer can only be emphatic no, they are not entitled to rely upon the decision.

18. In view of such state of affairs, no substantial question of law arises for the determination of the Court.

19. The Second Appeal is dismissed in limine, with costs.

20. Pending Civil Application is disposed of.

(MANGESH S. PATIL, J.)

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