

Arjun

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.225 OF 2022
WITH
INTERIM APPLICATION NO.1672 OF 2022
IN
SECOND APPEAL NO.225 OF 2022

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Mr. Avadhoot Vitthal Moye & Anr. ...Appellants/
Applicants

Versus

Mrs. Jhimli Sandeepkumar Ghosh ...Respondent

Mr. Rajendra Sorankar, for the Appellants/Applicants.

Mr. Prem Sood i/b Mr. T. K. Sinha, for the Respondent.

CORAM : MADHAV J. JAMDAR, J.
DATE : 13th DECEMBER, 2022

P.C.:

1. Heard Mr. Rajendra Sorankar, learned counsel appearing for the Appellants and Mr. Prem Sood learned counsel appearing for the Respondent.

2. The Appellants are original Defendants. The Respondent i.e. Plaintiff filed suit for declaration that the agreement to sale in the nature of MOU dated 16th December, 2002 is null and void and for possession of the suit property and also for compensation of Rs. 3,08,000/-.

3. The learned Trial Court decreed the suit directing Appellants to handover possession of the suit property and restraining the Appellants from creating third party interest in the suit property.

4. The Appellants challenged the said decree by filing Regular Civil Appeal Nos. 206 of 2016. The Learned First Appellate Court dismissed the Appeal and directed the Appellants to pay compensation amount of Rs. 15000/- p.m. to the Respondent till actual handing over the possession of the suit property.

5. Mr. Sorankar, learned counsel appearing for the Appellants submitted that, three substantial questions of law are involved in the present Second Appeal as under :

- i) Whether the possession of the Appellants of the suit property is protected under Section 53-A of the Transfer of Property Act?
- ii) Whether the learned Courts below could have decreed the suit on the ground that the Appellants have not filed the suit for specific performance?
- iii) Whether the finding that the Appellants are not ready and willing to perform his part of contract is

contrary to the evidence on record?

iv) Whether the decree passed by the learned Courts below is contrary to the evidence on record to the effect that the Respondent is not absolute owner of the suit property?

6. Before considering the substantial questions of law raised by learned counsel appearing for the Appellants, it is necessary to set out certain factual aspects. The MOU was executed between the Appellants and the Respondent by which the Appellants agreed to purchase a plot adm. 1250 sq. ft. for total consideration of Rs. 9,50,000/-. The purchaser agreed to pay amount of Rs. 1,50,000/- on the date of execution of the MOU, amount of Rs. 3,00,000/- within one week and balance amount of Rs. 5,00,000/- within 45 days. It is also mentioned in MOU that, the owner shall produce certain documents.

7. Admittedly, the said MOU dated 16th December, 2002 is not registered document. It is the case of the Appellants that, after the payment of said amount of Rs. 4,50,000/- out of total consideration of Rs. 9,50,000/-, possession of the suit property was handed over as agreed in clause (6) of the

MOU, whereas it is the case of the Respondents, that some amount was given by cash and some was given through cheques and cheques were dishonored.

8. It is significant to note that, on 16th October, 2004, the Respondent sent notice to the Appellants and in the said notice, it has been pointed out that only an amount of Rs. 3,90,000/- has been paid and one cheque of Rs. 3,00,000/- has been dishonored for reason of lack of sufficient funds. In the said notice, it is further contended that, if the balance amount is not paid, it would be presumed that, the possession of the suit property is illegally held and that intention of the Appellants is dishonest and the Respondent has been cheated. It is further mentioned in the said notice that, if within a period of 15 days Appellants fail to pay entire balance consideration, then it would be presumed that, there is no intention to complete the transaction and, thereafter, appropriate action for eviction would be taken and criminal case would be lodged.

9. It is the contention of the Respondents that, the notice sent through RPAD came back with remark that intimation delivered and notice sent through UPC did not return back. It

is the contention of the Appellants that, the said notice was sent to the wrong address. However, perusal of the MOU shows that, the same was sent on the address which has been mentioned in the MOU. It is also significant to note that, the notice sent by RPAD is only returned with the remark that intimation was given and not that not residing at the said address or the address was wrong. The evidence on record shows that, the notice sent through UPC is not returned back. Thus, it has to be presumed that the Appellants have received the notice. Both the Courts have concurrently recorded finding in that behalf.

10. It is also significant to note that, the MOU is dated 16th December, 2002. The letter on record of the Appellants is dated 6th June, 2006 by which readiness was shown to comply with terms and conditions of the MOU. Thereafter, on 29th August, 2006, the Respondent pointed out how and in what manner, terms and conditions of the MOU were breached. In the said letter again the factual position reiterated *inter alia* about dishonor of the cheque. The said letter has been admittedly received by the Appellants.

11. In the above circumstances, the Respondent filed

Special Civil Suit No.138 of 2007 on 21st February, 2006. It is significant to note that, although MOU is dated 16th December, 2002 for the first time in the year 2006 the Appellants raised the claim that they are in position to fulfill terms and conditions of the MOU. Thus, this is a case where Appellants failed to take any action for long period of about more than 4 years to comply with terms and conditions of the MOU wherein maximum time limit was agreed of 45 days.

12. It is further significant to note that, the Courts below have concurrently held that, certain cheque was given by the Appellants and the same has been dishonored. Both the learned Trial Court as well as learned First Appellate Court have held that, the cheque was dishonored and the terms and conditions of the MOU has been breached by the Appellants. The Appellants have not taken any steps after the agreement is terminated by the Respondent by letter dated 16th October, 2004 and Appellants have failed to prove that, they have fulfilled the terms and conditions of the MOU.

13. The Substantial questions which have been raised by the Appellants are required to be examined on the basis of the above factual position.

14. The reliance on Section 53-A of the Transfer of Property Act is totally misconceived. It is admitted position that, the said MOU is not registered and, therefore, the protection of Section 53-A of the Transfer of Property Act is not available to the Appellants in view of the amendment of Section 53-A which has been brought into effect w.e.f. 24th September, 2001. By amending Act 48 of 2001 words “the contract, though required to be registered, has not been registered, or” is omitted from Section 53-A. The said amendment came into effect on 24th September, 2001 and the said MOU is dated 16th December 2002 and, therefore, the protection of Section 53-A will not apply to the present case.

15. As far as the Second Substantial question of law is concerned that, the Courts below have decreed the suit *inter alia* on the ground that the Appellants have not filed suit for specific performance within time limit, perusal of the judgment of the learned Trial Court as well as the learned First Appellate Court shows that, various reasons are given for passing the decree including dishonoring of the cheque, breach of terms and conditions of MOU etc. One of the reason is that, the MOU was terminated by notice dated 16th October,

2004 and, thereafter, the suit for specific performance has not been filed. Thus, there is no legality or perversity in said approach as the both the Courts have concurrently find that the Appellants have breached the terms and conditions of the MOU, thereby holding that, the Appellants are not ready and willing to perform their part of the contract. In fact, both the Courts have found that the Appellants secured the possession of the suit property by handing over the cheques and cash and one of the cheque has been dishonoured.

16. There is no substance in the third substantial question of law raised on behalf of the Appellants that, the finding that the Appellants were not ready and willing to perform his part of the contract is contrary to the evidence on record. Evidence on record factually shows that the cheque which has been given by the Appellants has been dishonored and in any case, as per the MOU, the possession was to be handed over only after receipt of Rs. 4,50,000/- and the same has been handed over after receipt of cash and cheque and in view of dishonored of the cheque, the Respondent has received only amount of Rs. 3,90,000/-.

17. It is further contention of the Appellants that, the

Respondent has failed to prove that she is the absolute owner of the suit property. Admittedly, the suit property was of the ownership of the Respondent's husband who died at very young age and at that time, the Respondent was only of 31 years. It is apparent that the Respondent was young widow having two small girls and, therefore, in need of money, and entered into the transaction. It is apparent that as the Respondent was badly in need of money therefore, time limit was prescribed in the MOU. The factual position on record clearly shows that not only one cheque was dishonored, but no attempt is made to pay balance amount within reasonable period and in any case till the filing of suit and even thereafter. It is admitted position that, the Appellants have been put in possession of the suit property immediately after the execution of the MOU. Therefore, there is no substance in the said substantial questions of law submitted by the Appellants. The Appellants while executing MOU with Respondent and while obtaining possession of the suit property has not challenged the ownership of the Respondent. In any case, it is clear that, Respondent is at least co-owner of the suit property as her deceased husband

was the absolute owner of the same. This is a case where the Appellants have taken advantage of the situation as the Respondent was young widow having responsibilities of two small children. Hence, there is no substantial question of law involved in the Second Appeal. The Second Appeal is dismissed with cost of Rs. 25000/-. The cost to be paid to the Respondent within a period of 3 weeks from today.

18. In view of the dismissal of the Second Appeal, nothing survives in the Interim Application and the same is also disposed of.

(MADHAV J. JAMDAR, J.)