

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.614 OF 2019
WITH
CIVIL APPLICATION NO. 1251 OF 2019
IN
SECOND APPEAL NO. 614 OF 2019

Shri Dnyaneshwar Dhonduji Dongare .. Appellants
(since deceased through his heirs and
legal representatives

Versus

Manohar Rasuji Bhadrige and ors .. Respondents

...

Mr. Uday Nighot for the appellants.

Mr.A.V. Anturkar, Sr. Advocate for the respondents.

CORAM: BHARATI DANGRE, J.

DATED : 30th MARCH, 2022

JUDGMENT:-

1 Heard learned Advocate Shri Uday Nighot for the appellants and learned Senior Advocate Shri A.V. Anturkar, with Shri Prathamesh Bhargude for the respondent.

2 The subject matter of the Appeal is land admeasuring 20 Ares in the South West corner in Old Gat No.2635 (New Gat No.2635/1), situated at Ane Malshej Road in the jurisdiction of Gram Panchayat of Ale, Taluka Junnar, District Pune, which

include a Saw mill. The suit property was owned by late Rasu Bhadrige, which was his ancestral property and the defendant nos.1 to 3 are his legal heirs. The deceased Rasu, being karta of Hindu Undivided Family, executed registered agreement to sale in respect of the suit property in favour of the plaintiffs, the agreement to sale being registered on 17/9/1976. As per the said agreement, the sale deed was to be executed after obtaining N.A. permission within one month from the date of the agreement.

The consideration for the property was determined as Rs.11,500/- and the amount of Rs.10,800/- was agreed to be paid at the time of execution of the sale deed.

3 Rasu Bhadrige did not obtain the N.A. permission and avoided execution of the sale deed. After his death, in 1979, the plaintiff met the defendant nos.1, 6 and 7 and requested to obtain the necessary permission, but even they avoided to perform their part of agreement.

This constrained the plaintiff to send notice for execution of the sale deed but the defendants denied existence of the agreement to sale. Another subsequent event, being the defendant no.1, 6 and 7 partitioned the property and their sisters relinquished their shares and they sold the suit property to defendant nos.4 and 5 and even the defendant no.1 encumbered the said property.

Since Rasu Bhadrige avoided to adhere to the terms and conditions of the agreement during his life time, and after his death, the subject property came to be mutated in the name of defendant nos.1, 6, 7 as well as in the name of two sisters and they became joint holders of the said property by succession. Since the agreement to sale was not executed in favour of the plaintiff, though the part consideration of Rs.11,500/- was paid to Rasu Bhadrige, the above cause of action, constrained the plaintiff to file a Suit for specific performance of the agreement dated 17/9/1976, executed by the predecessor in title of the defendant nos.1 to 3, 6 and 7 in respect of the suit property. The plaintiff also sought a declaration to the effect that the registered sale deed dated 23/9/1993 executed by defendant nos.1, 6 and 7 in favour of defendant nos.4 and 5, be declared as illegal and void ab initio and not binding upon the plaintiffs.

4 The defendant no.1 filed his written statement, on appearance and denied the claim set out in the plaint. He admitted the relationship between the parties and the ownership of his father, but denied the alleged transaction, including acceptance of earnest money, execution of receipt and execution of the alleged agreement to sale.

He also raised the issue of limitation, alleging that since the execution of the alleged agreement to sale, is in the year 1976, till 1994, the plaintiff has not taken any action and in the mean time, due to partition between the defendants, the

description of the property and its boundaries have undergone substantial change. The relief in the Suit was also opposed on the ground that it was not maintainable for non-joinder of necessary party. It was specifically pleaded that since long time, defendant nos.4 and 5 were put in possession as tenants and from 1993, they have become the owners.

5 The defendant nos.4 and 5 have also filed written statement (Exhibit-58) and specifically pleaded that the property agreed to be sold to the plaintiff, does not exist. It was specifically pleaded that the defendants had taken the suit property on rent from defendant nos.1, 6 and 7 since 1989 and had purchased the same in the year 1993, on which their house is standing, and even a saw mill is also running in the suit property. Claiming that they are the bonafide purchasers for valuable consideration, their possession cannot be disturbed, is what was submitted. The claim that the permission for sale was required to be obtained, was also denied by stating that, at the earlier point of time, whole Gat No.2635 was under acquisition for APMC.

6 The trial Court framed the following issues ;

- (1) Is it proved that the deceased Rasu agreed to sell the suit land to the plaintiffs for the consideration of Rs.11,500/-?
- (2) Is it proved that the deceased Rasu receiving Rs.1,000/- executed Sathekhat ?

7 The trial Court determined the issues that arose for consideration, the primary issue being, whether deceased Rasu agreed to sell the suit land to the plaintiffs for consideration of Rs.11,500/- and whether he has received Rs.1,000/- on execution of the agreement to sale. Another issue which was settled as a central issues in the Suit for specific performance, is whether the plaintiff was, and is ready and willing to perform the contract. The ancillary issue as to whether the Suit is within limitation was also framed. On consideration of the evidence brought on record, both documents and oral evidence, the issues came to be adjudicated in favour of the plaintiff.

8 In order to establish the claim in the plaint, plaintiff no.5 i.e. the son of the original plaintiff entered into the witness box along with one Eknath Tukaram Abhay, who was confronted with the documents in question i.e the agreement to sale dated 17/9/1996, with his signature being affixed thereupon. Another witness examined by the plaintiff, is also a signatory to the very said documents and was examined as Witness No.3. On behalf of the defendants, the defendant no.4 entered into the witness box.

9 Appreciating the evidence brought on record through the aforesaid witnesses, the First Court relied upon the testimony of the plaintiff and his witness, and appreciated the evidence, on record, to the effect that they have corroborated the version of PW 1 and stated that the executant had agreed to obtain necessary permission of sale. The trial Court also relied upon the

version of PW 3 who had signed the agreement and since his testimony remained unchallenged, it came to be accepted, and the suit property described in para 1 was held to be correctly described in the plaint, except the re-numbered Gat as 2635/1 instead 2635.

The evidence of the defendant to the effect that the defendant no.4 is in possession of the land since 1980-81 and since he admitted the description of the suit property, as per the plaint to be correct, the trial Court recorded the finding that, in such circumstances, the execution of the agreement dated 7/9/1977 executed by Rasu Bhadrige, has been meaninglessly challenged by the defendants, because it is registered agreement executed prior to 30 years and has more evidentiary value as per law. The plaintiff's case that Late Rasu, being Manager of the HUF under legal necessity had taken earnest amount of Rs.1,000/- from the father of the plaintiff and executed a registered sale deed at Sub-Registrar's office, as per Exhibit-50 for total consideration of Rs.11,500/- was accepted. The condition precedent in the said agreement that the registered sale deed is to be executed within one month from the date of N.A. permission, was read as failure of the defendant no.1, 6 and 7, who failed to obtain the said permission and refrained from transferring the property in favour of the plaintiff but instead, transferred it to defendant nos.4 and 5. Holding that the defendant nos.4 and 5 are not the bonafide purchasers of the suit property, without

notice, the attempt on part of the plaintiff to point out that it was a fraudulent transfer and it was hit by Section 53 of the Transfer of Property Act, was accepted. Resultantly, the Suit came to be decreed, declaring that the plaintiffs are entitled for specific performance of contract and defendant nos.1, 6 and 7 were directed to execute a registered sale deed of the suit property. The registered sale deed executed by defendant nos.1, 6 and 7 in favour of defendant nos.4 and 5 on 23/9/1993, in respect of the suit property was declared as illegal and void *ab initio*, not binding upon the plaintiff nos.1 to 6, i.e. the legal heirs of the original plaintiff.

10 It is this decision based on the finding recorded by the trial Court which came to be assailed before the Appellate Court in an Appeal filed u/s.96 of the Code of Civil Procedure. The Appellate Court formulated the point for it's consideration to the following effect :-

- (1) Does defendant/appellant prove that the learned trial Court has not properly appreciated the pleadings, evidence and misinterpreted the law?
- (2) Does defendant/appellant prove that Judgment and decree passed by the learned Trial Court is illegal, improper and requires any interference ?

11 The Appellate Court, re-appreciated the evidence on record, where the plaintiff's witness i.e. son of the original

plaintiff had specifically deposed that he was running a transport business at Arvi, District Pune and educated in Mumbai. He deposed that he is not aware about the exact place where the alleged agreement was executed, nor is he aware about the persons present at the relevant time and he had no personal knowledge about the transaction, as his father i.e. the original plaintiff never disclosed it to him. He admitted that the agreement to sale at Exhibit-5 does not reveal exact area of Old Gat No.2635 and also admitted that the suit property mentioned in the said agreement is not in existence, as on today.

In the cross-examination, he gave the following admission :-

“It is true to say that the suit property mentioned in alleged agreement is not in existence as on today. It is true to say that the suit property mentioned in alleged agreement is not in existence as on today. It is true to say that since 1976 to 1993 myself or the other heirs of the plaintiff never demanded about the performance of contract in writing from the defendants. It is true to say that the agreement vide Exh.50 does not reveal that they had legal necessity for the members of Hindu Joint Undivided family. It is also true to say that the agreement, does not find place that the defendant executed the agreement in the capacity of Karta of H.U.F. It is true to say that my father did not pay the amount of Rs.1,000/- to the father of defendant R.S. Bhadrige. It is true to say that agreement also does not find place when the said amount was paid. I do not know as to whether at

the time of execution of the said agreement, the permission to sell the land was not required”.

12 Another admission given by him in the cross examinations respect of the defendant nos.4 and 5 running the saw mill in the suit property and he having knowledge about the same is to the following effect :

“It is true to say that I often used to visit my brother-in-law Gunjal at Alephata, and my other family members. It is true to say that Ale phata is a big market place. The village Ale phata is developed since 1985. It is true to say that in Gat No.2635, the defendant nos.4 and 5 run a saw mill and there is a house of their own there. Since 1980-81. It is true to say that myself or my father never raised any objection in writing. Witness volunteers that it was raised orally. So also, I never filed civil suit against them, in the Court. It is not true to say that we have no concern with the suit property and hence, no civil suit was filed earlier. It is true to say that the land at Ale phata faces the value Rs.2 lac to 3 lacs per guntha. It is true to say that the defendant no.2 and have no concern with the suit property at present. I do not know as to whether defendant nos.6 and 7 were in service at the time of alleged agreement and defendant Manohar was cultivating the land as an agriculturist. It is true to say that agreement vide Exh.50 does not bear the signature of my father”.

13 Apart from the above, the star witness of the plaintiffs, who deposed on behalf of all the plaintiffs, admitted

that no documentary evidence is brought on record by them to show that the plaintiffs met the defendants, showing their willingness for performance of the contract. He clarified that he personally never met the defendants as regards the suit transaction.

14 Another witness examined by the plaintiff who claimed to be the signatory to the agreement dated 17/9/1976, which is an agreement to sale was executed by the father of defendant no.1 in favour of the original plaintiff Dnyaneshwar. He admitted to have signed the documents in the office of Sub-Registrar, which fixed the total consideration of Rs.11,500/-. He also deposed that the agreement is relating to the land situated in Gat No.2635 at Village Ale, admeasuring about 20 gonthas from the western side. He specifically deposed that Rasu signed the documents in the office of Sub-Registrar in his presence and the earnest money of Rs.1,000/- was already paid. In the cross-examination, when specifically suggested that when Rasu Bhadrige never signed the agreement in his presence, after taking 7 to 8 minutes to think, he did not answer either in the negative or in the affirmative.

The third witness of the plaintiff was confronted with Exhibit-50 and he admitted that it bear his signature, and he recognized it to be an agreement executed at Narayangaon in the office of Sub-Registrar.

This witness, however, do not depose anything about the agreement being signed by the plaintiff's father or by the original defendant - Rasu.

15 The evidence brought on record through the said witnesses is appreciated by the Appellate Court to consider the issue about execution of the agreement to sell in favour of the original plaintiff on 17/9/1976 and whether on this day, an amount of Rs.1,000/- was paid as earnest money. Appreciating the vital admissions given by the plaintiff and his witnesses, the Appellate Court arrived at a conclusion that the trial Court has failed to consider the admissions brought on record. The case of the plaintiff, as pleaded in the plaint, being to the effect that an agreement to sell was executed by Rasu, being Manager of joint Hindu family and it was agreed that the sale deed shall be executed within one month after obtaining permission .for sale and permission of N.A and the remaining consideration was to be paid at the time of execution of the sale deed. The plaintiff failed to make good the said pleadings through his evidence. The PW No.1, is completely unaware of the alleged transaction and he is unable to prove the said agreement.

The Appellate Court also concluded that in his evidence, the last document exhibited is Exhibit-47. Necessarily, meaning that Exhibit-5 i.e. the agreement to sell is not proved by him, but the said document is directly exhibited, but he came to

be cross-examined on the basis of Exhibit-50. This lacunae on part of the Trial Court was held to be going to the root of the matter, since the trial Court is not clear about exhibiting the said document i.e. the agreement to sell and through whom the document is brought on record. As far as the aspect of readiness and willingness is concerned, the Appellate Court again referred to the evidence of PW 1, who has clearly admitted in cross-examination that he personally never met the defendants as regards the suit transaction and there is no document with him to show that in the year 1993, the plaintiffs met the defendants, expressing their willingness for performance of the contract. On what basis the trial court recorded that the plaintiff was ready and willing to pay the remaining consideration is not understood. With PW No.1 giving an admission that since 1976 to 1993, he or anyone never demanded performance of contract in writing from the defendants, goes against the version of the plaintiff that they were always ready and willing to perform their part of the contract.

The trial Court has thus failed to appreciate the evidence placed before it and rendered a finding, which amount to a perversity. The decree for specific performance being a discretionary relief, the Court is not bound to grant relief of specific performance, merely because it is lawful to do so, and particularly, when the plaintiff has failed to make out a case for grant of specific performance. Here is the plaintiff, who has failed

to establish his readiness and willingness to perform his part of the contract in accordance with the terms of the agreement and in absence of the burden being discharged by the plaintiffs to make them entitle for specific performance of contract, the Appellate Court rightly interfered with the finding rendered by the trial Court and set aside the decree for specific performance.

16 In the wake of the aforesaid factual scenario, since no substantial question of law arises in the Appeal, the Appeal do not warrant any consideration and it is dismissed.

 In view of the dismissal of Second Appeal, Civil Application No.1251/2019 do not survive and is disposed off.

(SMT. BHARATI DANGRE, J.)