

Pallavi

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO.553 OF 2018
WITH
INTERIM APPLICATION NO.10177 OF 2022**

Shri Kamlakar Basanna (Basappa) Shetty ... Appellant
Versus
Shri Chandrakant Ganpat Sarkale ... Respondent

Mr. Ajay Joshi, for the Appellant/Applicant.

**CORAM: MADHAV J. JAMDAR, J.
DATE : 14th DECEMBER, 2022**

P.C.:

1. Heard Mr. Ajay Joshi, learned counsel appearing for the appellant.
2. Appellant is the original defendant. Plaintiff i.e. the Respondent filed the suit for specific performance of registered agreement for sale dated 24th March 2006 in favour of the Respondent in respect of the suit land. The learned Trial Court recorded finding that the Appellant agreed to sell the suit land to the Respondent, Appellant refused to execute the sale deed, Respondent proved his readiness and willingness. Although most of the findings are recorded in favour of the Respondent, the learned Trial Court dismissed the suit on the ground that it has not been proved that the Appellant is the owner of the suit property.

3. The learned First Appellate Court on the basis of the Index-II extract produced by the Respondent at Exh.46 found that it has been proved that the Appellant is the owner of the suit property and therefore, set aside the judgment and decree passed by the learned Trial Court and decreed Reg. Civil Suit No.144 of 2012 seeking specific performance directing the Appellant to execute sale deed in respect of the suit property, by accepting the balance consideration of Rs.13,000/-.

4. Mr. Joshi submitted that following two substantial questions of law are involved in the present appeal:-

- 1) Whether the learned Judge of Appellate Court committed serious error by exercising discretionary power under section 20 of the Specific Relief Act 1963, in absence of finding to be recorded by the Appellate Court in respect of statutory mandate provided under section 16 of the Act of 1963?
- 2) Whether on the basis of Index-II extract finding can be recorded that the Appellant is the owner of the suit property?

5. At the outset, it is to be noted that the learned Trial Court has clearly found that the Appellant has executed the agreement in favour of the Respondent, the Appellant is not ready and willing to perform his part of the contract and that the Respondent is ready and

willing to perform his part of the contract. Although the learned Appellate Court has observed that the Appellant has not challenged the findings regarding the readiness and willingness, execution of agreement and payment of earnest money however, that is not the only reason given for granting decree of specific performance. It has been taken into consideration that the defendant has not even bothered to enter into witness box and therefore, adverse inference needs to be drawn against the defendant. Thus, there is no substance in the first substantial question of law raised by Mr. Joshi.

6. As far as the second substantial question of law raised on behalf of the Appellant that on the basis of Index-II extract, it cannot be concluded that the Appellant is the owner of the suit property, it is very important to note that the Appellant executed the suit agreement dated 24th March 2006 with the Respondent. Section 55 of the Transfer of Property Act, 1882 specify the rights and liabilities of buyer and seller. As per section 55, it is the responsibility of the seller to satisfy the buyer about the marketable title of the seller. Thus, the contention that it is for the plaintiff i.e. Respondent to prove that the Appellant is the owner of the suit property cannot be accepted. There is concurrent finding recorded regarding execution of an agreement dated 24th March 2006 by the Appellant in favour of the Respondent. Once execution of agreement is proved, it is the responsibility of the

seller to satisfy about his marketable title. In any case, on the basis of Index-II extract produced by the Respondent at Exh.46, the learned Appellate Court has recorded a finding that the Appellant is the owner of the suit property. As set out earlier Appellant/Defendant has not adduced any evidence and has not entered into the witness box and therefore, adverse inference is required to be drawn against the Appellants. In any case, nothing is pointed out to show that finding regarding ownership of the Appellant is not proper. Therefore, there is no substance in the second substantial question of law raised on behalf of the Appellant.

7. Second Appeal is dismissed with no order as to costs. In view of dismissal of Second Appeal, nothing survives in the Interim Application and the same is also dismissed.

(MADHAV J. JAMDAR, J.)