

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

SECOND APPEAL NO. 273 OF 2022

Jamshid Khan Mohd. Khan __ Vs. __ Sheikh Jamil Sheikh Hamid and anr

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Mr. Vinay Dahat, Advocate for appellant.

CORAM : AVINASH G. GHAROTE, J.

DATE : 05/09/2022

1] Heard Mr. Dahat, learned counsel for the appellant.

2] The appellant challenges the concurrent findings recorded by the Courts below, whereby the learned trial Court granted specific performance in respect of the agreement of sale dated 1.7.2013, which has been in turn confirmed by the learned appellate Court by its judgment dated 2.5.2022.

3] Mr. Dahat, learned counsel for the appellant raises four contentions; (1) that the agreement in question was not an agreement of sale, but an agreement of loan for the security of which the document was executed, (2) that both the courts below have incorrectly decided about the readiness and willingness of the plaintiff, (3) due to passage of time, the consideration becomes inequitable and (4) it is further contended that since the property was mortgaged to Bank of

Maharashtra, an entry in respect of which was made in 7/12 extract, it was not permissible for the respondent to have sought specific performance, unless a decree for redemption was also claimed.

4] In respect of the first point, it is material to note that the appellant who is the original defendant has admitted the execution of the agreement of sale dated 1.7.2013. That being the position, the execution of the agreement, its terms and conditions stand admitted. The burden therefore then shifts to the defendant to prove that the nature of the transaction was not one as was disclosed from the agreement dated 1.7.2013, but was of a different nature viz. a nominal document executed for the purpose of security for the loan claimed to have been taken of the earnest amount received under the agreement. For this purpose, it was necessary to establish that the person who was being examined (DW-2 in this case) was a person who was privy to the negotiations done prior to the execution of the agreement, or was a person present at the time of the agreement. This is not the position in regard to DW-2, as no material has been brought on record to indicate his presence at the time of the negotiation or execution of the agreement. That apart, the evidence of PW-2, the attesting witness to the agreement, copy of which was tendered across the bar, does not indicate that any question was put to PW-2 to establish the presence of DW-2 during the negotiation or

execution of the agreement in question, which would indicate that DW-2 was a total stranger in respect of negotiation or execution of the agreement, considering which his evidence has rightly been not relied upon by the Courts below. This position would indicate the failure of the plea that the agreement dated 1.7.2013 was not what it was.

5] In so far as the plea that there was absence of readiness and willingness on part of the plaintiff/respondent is concerned, it is a settled position of law that to prove his readiness and willingness, it is not necessary for the plaintiff to vouchsafe a concluded scheme of finance or indicate ready consideration available. In fact, in the instant matter, since the property stood mortgaged to Bank of Maharashtra and since the terms of the agreement after recording the mortgage indicated an obligation upon the defendant/appellant to redeem the mortgage and then execute a sale deed in favour of the plaintiff/respondent, it was necessary for the defendant/appellant to have so done, which is not indicated from the material on record. Therefore, the plea of readiness and willingness in favour of the plaintiff has rightly been decided.

6] In so far as the plea regarding not granting a relief for specific performance unless a plea for redemption is made, in my considered opinion, there is

no merit in this contention, for the reason that merely because the property is mortgaged, there is no bar for the Court to decree specific performance unless a relief of redemption is first claimed. In fact, when the terms of the agreement itself contemplate clearance of the mortgage by the defendant, in order to transfer clear title, that is an obligation which the defendant has to perform and the plaintiff therefore cannot be non-suited on this ground, since it would be permissible for the Court to decree specific performance even of a mortgaged property in such a case.

7] In so far as the plea regarding the inadequacy of the consideration due to passage of time is concerned, it was permissible for the defendant to have expressed his readiness to execute and register the sale deed upon receipt of the notice in which case the defendant/respondent would have received the balance consideration then and there. Merely because the litigation has resulted in a delay, that would not be a ground to exercise any discretion in favour of the defendant for enhancement of the consideration.

8] I therefore do not see any substantial question of law being made out. The second appeal therefore fails. No costs.

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JUDGE

Rvjalit