

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

918 SECOND APPEAL NO.134 OF 2023
WITH CA/2938/2023 IN SA/134/2023

USHA W/D MARUTI JADHAV,
VERSUS
MANOHAR BABURAO DOLASE,

...

Advocate for Appellant : Mr. V.S. Bhale
Advocate for Respondent : Mr. Sandeep B. Rajebhosale

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CORAM : ARUN R. PEDNEKER, J.
DATED : 11/07/2023

ORDER :

1. By the present second appeal, the appellant is challenging the judgment and order dated 22.12.2022 passed by the learned District Judge-4, Ahmednagar in Regular Civil Appeal No. 171/2019, dismissing the appeal filed by the present appellant/original defendant and confirming the judgment and decree dated 20.3.2019 passed by the learned 8th Joint Civil Judge, Senior Division, Ahmednagar in Special Civil Suit No. 179/2019, filed by the present respondent/original plaintiff for specific performance of agreement to sell.

2. Brief facts, giving rise to the present second appeal, can be summarized as under :-

The appellant/defendant herein owned and possessed the suit property bearing Gat No. 281 admeasuring 3 H. 37 R. situated at village Walunj, district Ahmednagar. The defendant/appellant entered into an agreement dated 11.4.2016 with respondent/plaintiff in respect of northern half share of the suit property admeasuring 1 H. 68.5 R. as described in the

plaint out of total agricultural land admeasuring 3 H. 37 R. In terms of the agreement dated 11.4.2016, the total value of sale price was Rs.50,00,000/- (Rupees fifty lakh) and that Rs.4,50,000/- was paid at the time of execution of the agreement to sell and that the sale deed was to be executed within six months from the date of agreement to sell and the plaintiff was required to pay remaining consideration within next six months from the date of execution of the agreement to sell. The defendant failed to honour the agreement and as such, the plaintiff has filed suit for specific performance of the above agreement.

3. It is the case of the plaintiff that he is ready and willing to perform his part of the contract and after execution of the agreement to sell, the defendant has accepted amount of Rs.30,50,000/- towards the consideration for sale and the plaintiff has paid total amount of Rs.35,00,000/- to the defendant since the agreement to sell. The plaintiff is ready and willing to pay remaining amount of Rs.15,00,000/-. However, the defendant on the pretext of ill health of her husband avoided to accept the remaining amount and execution of the sale deed. Therefore, the plaintiff issued notice dated 24.10.2016 to the defendant through advocate. The notice was received by the defendant on 25.10.2016. The defendant replied to the notice that the plaintiff failed to make payment within stipulated period and therefore, the plaintiff is not entitled for execution of the sale deed of the suit land. The plaintiff, therefore, was constrained to file the suit for specific performance of the contract.

4. The defendant resisted the suit and filed written statement by submitting that time was essence of the contract. In the written statement, the defendant denied that defendant received any amount beyond

Rs.4,50,000/- as was stated in the agreement to sell. The defendant also contended that the husband of the defendant suffered severe heart attack on account of notice issued by the plaintiff and died and therefore, she prayed for dismissal of the suit with compensation of Rs.25,00,000/-.

5. The Trial Court framed following issues and recording findings against each of them, which are as under :-

Issues	Findings
1) Whether the plaintiff proves that, the defendant has agreed to sale suit property in his favour for consideration of Rs.50,00,000/- ?	Yes.
2) Whether the plaintiff proves that, the defendant has executed notarized agreement to sale dated 11/04/2016 by accepting earnest amount of Rs.4,50,000/- ?	Yes.
3) Whether the plaintiff proves that, the defendant has accepted further consideration of total Rs.30,50,000/- from him in respect of aforesaid transaction ?	Yes.
4) Whether the plaintiff proves that, he is and was all the while ready and willing to perform part of contract ?	Yes.
5) Whether the plaintiff proves that, the defendant has committed breach of contract ?	Yes.
6) Whether the defendant proves that, time was an essence of the contract ?	No.
7) Whether plaintiff is entitled for relief of specific performance, as prayed ?	Yes.
8) Whether the plaintiff is alternatively entitled for amount of Rs. 50,00,000/- from defendant towards damages, as prayed ?	No.
9) What order and decree ?	Suit is partly

decreed.

6. The Trial Court, after consideration of the material on record, held that the plaintiff has accepted consideration of 4,50,000/- at the time of execution of agreement to sell and after execution of agreement to sell accepted fund amount of Rs.30,50,000/- on different dates and thus, defendant has accepted total amount of Rs.35,00,000/-. The Trial Court held that on the agreement to sell endoresement is made on the backside of the first page of having received the various amounts and that it is signed by the witnesses. The signatures of the defendant along with her husband and other witnesses are on the said document. The Trial Court took into consideration all the facts that the amounts were paid on different dates and on one occasion, one cheque was also issued of Rs.5,00,000/- of Oriental Bank of Commerce which was also encashed by the husband of the defendant and the amounts were received in presence of the witnesses.

7. The Trial Court also noticed that the plaintiff had issued notice to the defendant, which was received by the defendant. In the said notice, the plaintiff has specifically mentioned the dates on which the amounts have been paid to the defendant/appellant. At the time of reply to the notice of the plaintiff, the defendant had opportunity to deny the above contentions specifically that is defendant had not received an amount beyond Rs.4,50,000/- towards sale consideration. However, there was no specific denial that the defendant had not received an amount of Rs. 35,00,000/- which was mentioned in the legal notice by the plaintiff to the defendant. The Trial Court on examination of the entire evidence and after considering totality of circumstances held that the plaintiff has paid an amount of

Rs.35,00,000/- in total to the defendant and directed specific performance of contract by paying remaining balance amount of Rs.15,00,000/-.

8. The said judgment was challenged before the Appellate Court. The Appellate Court on re-examination of entire material has framed following points for determination which are as under :-

Sr. No.	POINTS	FINDINGS
1.	Whether the plaintiff proves that, the defendant has agreed to sell suit-property to him for consideration of Rs.50 lakh ?	Yes
2.	Whether the plaintiff proves that, the defendant has executed notarized agreement of sale dated 11/04/2016 by accepting earnest amount of Rs.4,50,000/- ?	Yes
3.	Whether the plaintiff proves that, the defendant has accepted further consideration amount from him i.e. total Rs.30,50,000/- towards this transaction ?	Yes
4.	Whether the plaintiff proves that, he was and is all the while ready and willing to perform his part of contract ?	Yes
5.	Whether the plaintiff proves that, the defendant has committed breach of contract ?	Yes
6.	Whether the defendant proves that, the time was essence of contract ?	No
7.	Whether the plaintiff is entitled to the relief of specific performance, as claimed ?	Yes
8.	Whether the plaintiff is alternatively entitled for amount of Rs.50,00,000/- from defendant towards damages ?	No
9.	Whether the impugned Judgment and decree passed by Ld. Trial Court needs any interference ?	No
10.	What order and decree ?	As per final order

9. The Appellate Court on consideration of the material placed on record held that the plaintiff has established that he has paid in all total amount of Rs.35,00,000/- . The Appellate Court also held that defendant has accepted

her signatures and signature of her husband on the backside of the first page in respect of the payments shown to be made, though it was the contention of the defendant that the signatures on the backside of the agreement to sell were misused. But, inference is drawn by the Appellate Court that her signatures are there on the backside of the first page. The Appellate Court also took into consideration the fact that cheque of Rs.5,00,000/- was drawn and payment was made to the husband of the defendant and as there was no other transaction between the plaintiff and defendant and though this money is received by the defendant/appellant, there was no acceptable explanation of the same. It was sought to be explained by the defendant that the cheque of Rs. 5,00,000/- received by the husband of the defendant could have been for any other purpose or for any other transaction. However, the Appellate Court noticed that the said cheque was accepted as a part payment of the agreement to sell.

10. The Appellate Court also held that the plaintiff has placed on record indexes at Exhs. 25, 26 and 28 in respect of the transaction done by him about the immovable property. The Appellate Court held that the plaintiff is having capacity to purchase the property. The Appellate Court also examined the legal notice and response given by the defendant to the legal notice. The Appellate Court has concluded that total amount of Rs.35,00,000/- was paid to the defendant and plaintiff was ready and willing to perform his part of contract and if the specific performance is not granted, the plaintiff would suffer irreparable economic loss. In view of the aforesaid findings, the Appellate Court has upheld the judgment passed by the Trial Court and confirmed the same. The said order of the Appellate Court is challenged in this second appeal.

11. The contention of the appellant/defendant is that apart from Rs.4,50,000/- as mentioned in the agreement to sell, the defendant has not received any other amount from the plaintiff towards part payment of the agreement and therefore, decree of specific performance should have not been granted. It is further contention of the appellant/defendant that it is not possible to believe that such huge amounts were paid in cash to the defendant/appellant and that an endoresement being made on the backside of the agreement that amount is received. Thus, the learned counsel for the appellant submits that in absence of any evidence of receipt of further payment as contemplated under the agreement, specific performance ought not have to be granted.

12. I have gone through the material on record and the findings rendered by the Trial Court and the Appellate Court. Agreement to sell dated 11.4.2016 refers to the payment of Rs.4,50,000/- at the time of execution of agreement to sell. Further payment of amount under the agreement had to be completed within a period of six months from the date of agreement. On the backside of the first page of the agreement to sell, there is endoresement of the payment being received by the defendant of various amounts on different dates, totaling into Rs.30,50,000/- after the execution of agreement to sell. The endoresements bear signatures of the defendant, her husband and the witnesses. One of the payment also indicated that payment of Rs.5,00,000/- was given through cheque to the husband of the defendant/appellant as part consideration of the price of the suit land. The plaintiff has given details of the payment in the notice given to the defendant. The defendant has responded to the notice, however, there is no clear denial from the defendant about not having received the additional

amount of Rs.30,50,000/-. It was necessary and at the first opportunity, if the defendant had not received the additional money, the defendant should have clearly stated in her reply that she has not received the amount as part consideration of the agreement to sell as stated in the legal notice by the plaintiff. The appellant/defendant in the cross examination has stated that she had received legal notice and she responded to the notice of the plaintiff and that there is no denial in the reply of non receiving of the payment by the defendant. Evidence is also adduced in the form of attesting witnesses in whose presence the amounts were received by the defendant.

13. In the totality of the circumstances, both the Courts below have rendered findings that the defendant/appellant has received total consideration of Rs.35,00,000/- towards part payment of the suit property. Thus, the Courts below have also rendered finding that the plaintiff was always ready and willing to perform his part of the contract. In view of the same, I do not see that the findings rendered by the Courts below are perverse in any manner. As such, no substantial question of law arise for consideration in the present second appeal. In the result, the second appeal is dismissed. In view of the dismissal of the second appeal, civil application does not survive and stands disposed of accordingly.

[ARUN R. PEDNEKER J.]

SSC/