

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**SECOND APPEAL NO. 190 OF 2022
WITH CIVIL APPLICATION NO. 9921 of 2022**

Smt. Alka Chandrashekhar Choudhary
Age : 65 years, Occu.: Household
Resident of: At Laxminagar,
Near Yashwant Arts College, Wardha,
District Wardha.

... APPELLANT
(Org. Defendant/ Appellant)

VERSUS

Shri. Ratansing Ramsing Rajput
Age : 85 years, Occupation : Agriculture
Resident of : At Ganeshpur,
Taluka Sakri, District Dhule.

... RESPONDENT
(Orig. Plaintiff/ Respondent)

Mr. Pratap Mandlik, Advocate for the appellant
Mr. V. B. Patil, Advocate for the respondent

CORAM : R. M. JOSHI, J.
RESERVED ON : 15/03/2023
PRONOUNCED ON : 23/03/2023

JUDGMENT :-

1. This appeal is filed under Section 100 of the Code of Civil Procedure taking exception to the judgment and decree passed in Reg. Civil Appeal No. 111/2015 dated 13/12/2021 confirming judgment and decree passed in Special Civil Suit No.58/2008 dated 17/08/2015 by Jt. Civil Judge, Senior Division, Dhule.

2. Appellant is the original defendant in the suit filed by plaintiff for specific performance of contract. It is case of the plaintiff

that defendant is owner of plot No. 19 of survey No. 20/2 of Shri Maharana Pratap Co-operative Society Ltd. Dhule. The defendant agreed to sell suit plot by agreement to sale dated 07/04/2003 for total consideration of Rs.15,51,000/- out of the said consideration earnest money of Rs.1,51,000/- was paid on the date of execution of agreement to sale. The balance amount was to be paid after within three years. However, plaintiff paid additional sum of Rs.50,000/- in the year 2008. In the year 2008 plaintiff found that the defendant is avoiding to execute sale deed and hence suit came to be filed.

3. Defendant by filing written statement denied the intention to sell suit plot. Amongst other contentions, it is her case that her husband was a drunkard and he borrowed sum of Rs.1,51,000/- from plaintiff and obtained her signatures on blank papers. She also claimed that the loan amount is already repaid. It is further case of the this defendant that the suit property is given on rent to Ishwar Bhavsar and she is no more in possession thereof.

4. Before Trial Court on behalf of plaintiff, his son, as a constituted attorney, led evidence at Exhibit 64. Plaintiff also examined Pundlik at Exhibit 69. He relied upon agreement to sale (Exhibit 73), notice issued to the defendant (Exhibit 58), envelope (Exhibit 71) and power of attorney (Exhibit 74). Defendant failed to cross-examine

plaintiff and his witness nor led any evidence before the Trial Court.

5. Learned Trial Court by passing judgment and decree dated 17/08/2015 decreed the suit holding that the plaintiff has proved the execution of agreement to sale of suit property by defendant and also his readiness and willingness to perform his part of the contract. The Trial Court also considered and recorded the findings on the issues in respect of the objection raised about non joinder of the parties and that the suit property is in the possession of the tenant. Trial Court did not find those contentions to be an impediment in granting the decree of specific performance in favour of plaintiff.

6. Defendant challenged the said judgment by preferring RCA No.111/2015. The said appeal was heard and order dated 17/03/2020 came to be passed by affirming finding of Trial Court but thereafter drawing conclusion that defendant needs to be given an opportunity to cross-examine plaintiff and his witness allowed parties to lead evidence. Thereafter parties to the appeal including present appellant filed joint pursis (Exhibit 25) seeking permission to lead her evidence before the First Appellate Court. It is matter of record that though the defendant has cross-examined plaintiff but failed to lead evidence and closed the evidence with the pursis. Thereafter the First Appellate Court passed judgment and decree dated 13/12/2021 whereby the judgment

of the learned Jt.CJSD was upheld. Being aggrieved by the said judgment present appeal is preferred by the defendant.

7. Learned counsel for the defendant submits that the learned First Appellate Court has committed serious error of law in initially dismissing the judgment and decree passed by the Trial Court by judgment and order dated 17/03/2020 and later reversing the same by upholding the decree by passing impugned judgment. He further contended that since the First Appellate Court has after recording of evidence afresh went on to record findings of the fact for the first time and thus the present appellant has lost his right to prefer first appeal against said findings. It is a submission that in the second appeal it is not open for the appellant to assail to finding of the fact and therefore order impugned has caused miscarriage of justice. Thus, according to him this is a fit case for setting aside the impugned judgment of the First Appellate Court and for remand of the matter back to the Trial Court for decision afresh.

8. Learned counsel for the plaintiff/respondent opposed the said contention by submitting that though the First Appellate Court has in the operative part of the judgment dated 17/03/2020 has recorded that decree of the Trial Court is set aside, but the perusal of the body of judgment indicates that the finding recorded by the Trial Court were

infact upheld by the First Appellate Court. He drew attention of the Court to Exhibit 25 filed before the First Appellate Court which indicates that parties submitted themselves to the jurisdiction of the First Appellate Court and agreed to record evidence before it. Thus, according to him appellant is estopped from challenging act of recording evidence by Appellate Court. He states that it is not the case where the defendant was taken by surprise by the order passed by First Appellate Court. He further states that even after conducting cross of plaintiff, defendant has failed to lead evidence. Thus, no fresh evidence is brought on record which required consideration of the same by the Trial Court. Thus, according to him this is not the case wherein any substantial question of law is involved and hence appeal is sought to be dismissed.

9. From the pleadings before the Trial Court it is clear that defendant is owner of the suit plot. Plaintiff has pleaded about agreement to sale executed by the defendant in respect of the suit plot on 07/04/2003 after accepting earnest money of Rs.1,51,000/-. Plaintiff has also pleaded about his readiness and willingness to perform his part of the contract. Plaintiff examined his son Vijay (Exhibit 64) and also laid evidence of Pundlik (Exhibit 69). Though the plaintiff has led evidence through the constituted attorney but the attorney is son of the plaintiff. There is nothing brought on record by the defendant to indicate that the witness had no personal knowledge about the transaction. This

is not the case wherein the constituted attorney was deposing only on the basis of the power of attorney given to him by the plaintiff without personal knowledge. Being son of plaintiff personal knowledge can be attributed to him to the facts of the case. Even otherwise from the cross-examination of this witness defendant was unable to bring anything on record to discard his testimony, for want of personal knowledge. As such this Court finds no infirmity in the findings recorded by Trial Court as well First Appellate Court in accepting the evidence led by plaintiff sufficient to substantiate his case.

10. Once the plaintiff was successful in proving execution of agreement to sale, payment of part consideration and his readiness and willingness to perform his part of the contract, the burden shifts upon defendant to prove her case. It is the case of the defendant that she had never executed agreement to sale but the plaintiff has obtained her signatures on blank paper. She further claims that her husband was drunkard and he had obtained loan of Rs.1,51,000/- from plaintiff. She also claimed that the loan amount is already repaid to the plaintiff. In this regard there is however absolutely no evidence led by the defendant. Not only before the Trial Court but also after the learned First Appellate Court granted opportunity to the defendant to lead evidence no evidence is brought on record. The only inference which can be drawn from the said conduct of the defendant of not entering in to

the witness box is that the case of the defendant is not true and hence she avoided to face cross-examination.

11. The defendant before the Trial Court has also sought to raise issue in respect of the existence of the Co-operative Housing Society of plots in order to claim that she is not the owner of the plot. However, there is no dispute about the fact that she is the member of the society and he has purchased the said plot. Merely because there is a Co-operative Society of the owners of the plot, defendant cannot claim that she is not the owner thereof. Learned Trial Court has rightly appreciated the facts as well as the position of law in this regard and recorded relevant finding in the judgment. It is also claimed by the defendant that she has inducted Krusna Bhavsar as a tenant in the suit plot. First of all there is no evidence to prove the said contention. Even, accepting the same to be true, induction of tenant in the suit plot does not debar the grant of specific performance of the contract. The Trial Court has rightly appreciated all objections raised by the defendant and dealt with the same appropriately, which are confirmed by Appellate Court. This Court finds no infirmity in the findings recorded by the Courts below in that regard.

12. It is pertinent to note that the judgment of the Trial Court was challenged before the First Appellate Court in Reg. Civil Appeal No.

111/2015 and the defendant had sought leave to record evidence on the ground that she did not get fair opportunity to cross-examine the plaintiff and witness and also to lead her evidence. The First Appellate Court by following settled position of law has taken the said issue for consideration at the time of final hearing of the appeal. Perusal of the judgment dated 17/03/2020 passed by the First Appellate Court indicates that the First Appellate Court had considered the submissions of both sides and material evidence on record led before the Trial Court and recorded finding on each point framed for determination. However, the First Appellate Court found it appropriate to give opportunity to defendant to lead evidence. The judgment also shows that parties to the appeal expressed their willingness to proceed the matter expeditiously and filed pursis at Exhibit 25. On insistance by the parties including appellant and in view of the powers of First Appellate Court and to decide the matter is expeditiously, the parties were given opportunity to lead evidence before the First Appellate Court. It is thus clear that though the First Appellate Court had in operative part of order dated 17/03/2020 set aside the judgment and decree, but for all practical purposes the appeal was kept pending, undecided. The said order can only be interpreted to say that only for the purpose of allowing defendant to lead evidence it came to be passed. The pursis (Exhibit 25) filed by appellant herein in clearly indicates that this

appellant was fully conscious of the fact that the evidence was to be lead before the First Appellate Court itself. In such circumstances it is now not open for the appellant to claim that the First Appellate Court has committed error in deciding the appeal again.

13. Now only argument remains for consideration he as to whether the appellant herein is deprived of his right of first appeal against the findings recording by the First Appellate Court in the impugned judgment and decree. Perusal of the record indicates that even after the First Appellate Court gave an opportunity to the defendant to cross-examine plaintiff and his witness, no evidence was led by defendant and as such no fresh facts were brought on record by the defendant. Even otherwise in the cross-examination defendant was unable to disprove the case of the plaintiff. Most pertinently defendant has not led any evidence even before the First Appellate Court and closed her evidence by filing pursis. It is thus clear that no fresh evidence has come on record before the First Appellate Court in order to record any findings of facts for the first time in the first appeal. Had it been so, the appellant was justified in claiming prejudice to her as she lost an opportunity to file first appeal and to challenge such findings. In such circumstances, learned First Appellate Court has practically appreciated the evidence which was already before the Trial Court and that this is not the case where any prejudice much less any irreparable

loss has been caused to the appellant by passing of the impugned judgment and decree.

14. It is well settled law that if the findings of the fact is perverse or the same has been reached in ignorance of material available on record or by misleading of evidence on record it is open to the interference by exercising power under Section 100 of CPC or otherwise some other substantial question of law ought to be involved therein. This Court does not find any infirmity in the findings recorded by Trial Court as well as First Appellate Court as the said findings are in consonance with a material available on record, nor any error of law is committed. As such no substantial question of law is involved in the present case.

15. In the result, appeal stands dismissed with costs. Pending civil applications, if any, stand disposed of.

(R. M. JOSHI, J.)

1. After pronouncement of the judgment learned counsel for the appellant states that the order of status-quo which is continued till today be extended for a period of six weeks.

2. Learned counsel for the respondent opposes to the request with the contention that the decree is already executed and he is in

possession of the suit property.

3. If it is so, no prejudice will cause to the respondent if the status-quo is extended by six weeks.

4. Hence status-quo to remain in force till 4th May, 2023.

(R. M. JOSHI, J.)

ssp