

SGA

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 614 OF 2022
AND
CIVIL APPLICATION NO. 13080 OF 2022
IN
SECOND APPEAL NO. 614 OF 2022

Priya Abhijeet Dharurkar

... Appellant

Versus

Vinaram Motaji Choudhari
and another

... Respondents

...
Mr.F.R. Tandale – Advocate for Appellant

....
CORAM : GAURI GODSE, J.
DATE : 30th January, 2023

PER COURT :

1. This appeal is preferred by the defendant no.2 for challenging the judgment and decree dated 22nd November, 2018 passed by the Joint Civil Judge, Senior Division, Aurangabad in Special Civil Suit No.298 of 2012 as well as the judgment and decree dated 14th January, 2022 passed by learned District Judge-7, Aurangabad in Regular Civil Appeal No.39 of 2019. By the impugned decree, the suit for specific performance filed by respondent no.1 is dismissed, however, respondent no.1-plaintiff is held entitled to recover amount of Rs.14,75,000/- from the

defendants. The appellant is defendant no.2 and respondent no.2 is defendant no.1.

2. The appellant and respondent no.2 are husband and wife and joint owners of the suit flat. It is the case of the plaintiff that the defendants had agreed to sell the suit flat by an agreement dated 10th February, 2012 for a total consideration of Rs.25,00,000/- by accepting an earnest amount of Rs.7,00,000/-. It is further the case of the plaintiff that out of remaining consideration, Rs.5,00,000/- was paid on 17th February, 2012 and balance of consideration of Rs.13,00,000/- was to be paid on 15th April, 2012 at the time of registration of the sale deed. The plaintiff had issued notice dated 1st July, 2012 and showed his willingness and readiness to perform his part of contract, however, inspite of receipt of notice, the defendants had neither replied the notice nor complied with their part of the agreement. Hence, the plaintiff had filed the suit for specific performance.
3. The appellant/defendant no. 2 appeared in the suit and had filed her written statement. She disputed the execution of the sale deed as well as receipt of any consideration amount as pleaded by the plaintiff. She also pleaded about ignorance in respect of public notice that was published by the plaintiff. So far as

defendant no.1 is concerned, though he appeared in the suit has failed to file written statement and there was order of “no written statement” passed against defendant no.1.

4. Learned Trial Court framed the issues in respect of execution of agreement, payment of the earnest amount as pleaded by the plaintiff, as well as the issue with respect to readiness and willingness of the plaintiff to perform his part of contract. Learned Trial Judge has examined oral as well as documentary evidence for the purpose of recording findings with respect to execution of agreement as well as the payment of earnest amount as pleaded by the plaintiff. The plaintiff has produced on record the payment receipts as well as examined the banker from whose bank the payment was made to the defendants and has also examined himself in support of the case of plaintiff. The plaintiff has also examined one attesting witness to the agreement.
5. So far as the appellant is concerned, she also examined herself in support of the case made out by her in the written statement. After examining the evidence on record, the learned Trial Judge held that the plaintiff had proved the execution of agreement for sale for total consideration of Rs.25,00,000/- as well as accepted

the case of the plaintiff that an amount of Rs.14,75,000/- was paid to the defendants by way of earnest amount. Learned Trial Judge also recorded findings with respect to readiness and willingness in favour of the plaintiff, however, did not pass a decree for specific performance, as there was already a decree for specific performance passed in respect to the suit flat in favour of a third party in Special Civil Suit No.247 of 2012 filed against the defendants.

6. It is not disputed that the defendants had already executed another agreement with respect to the same suit flat and the Special Civil Suit No.247 of 2012 was filed against them. In view of the decree for specific performance of contract passed in Special Civil Suit No.247 of 2012, learned Trial Judge refused to grant decree of specific performance, however held that the plaintiff will be entitled to recover the amount of Rs.14,75,000/- with interest @ 8% from the defendants.
7. The decree of Trial Court was challenged by the present appellant i.e. defendant no.2. The first appellate court has gone through the oral as well as documentary evidence on record and specifically the payment receipts as well as the further payments that were made by the plaintiffs. The first appellate court has

also examined the oral evidence, which was on record in support of case of the plaintiff regarding the payment of earnest amount to the defendants. The first appellate court has also examined the documents at Exhibit-30 and the receipt at Exhibit-31, as the present appellant had come out with a theory that signatures on the said documents were not made by her. Though, she attempted to decline the execution of the agreement and payment receipt, the documents which were produced at Exhibit-30 and Exhibit-31 contained signatures and the photographs of the signatories on the documents. The first appellate court has relied upon the said documents and held that the appellant had not come out with any theory that defendant no.1 i.e. husband of the appellant had himself managed to affix the photographs and/or signatures on the said document. The appellant had not attempted to bring on record her own evidence with respect to the same. The first appellate court has also relied upon the evidence of PW-3 i.e. the Senior Manager of the Bank through whom the payment was made. The appellant though denied the signature on the agreement, she has not come out with any case that she had anytime made a grievance in respect to her signatures, which according to her were forged on the

agreement. The attesting witness to the documents, who appear to be a close acquaintance of defendants has supported the case of the plaintiff with respect to the payment made to the defendants.

8. The appellant has sought to make out a case that there were disputes going on with her husband i.e. defendant no.2 and hence has sought to take benefit with respect to the same by contending that she was not aware about the execution of the agreement. It is not disputed that the amounts were in fact by way of demand draft but the only contention raised was that the amounts were encashed in the joint account of defendants, hence the appellant pleaded ignorance with respect to the amount, which according to her were accepted by defendant no.2.
9. By relying upon these oral as well as documentary evidence, both the Courts have recorded positive finding of fact that the plaintiff was successful in proving that the amounts were in fact paid to the defendants, hence decree for refund of the earnest amount, was passed.
10. In the present second appeal, learned counsel appearing for the appellant submitted that even for passing a decree for refund of

earnest amount, it was obligatory on the part of the plaintiff to prove the readiness and willingness of the plaintiff to perform the contract. He has relied upon the application, which was filed in the first appellate court for producing the evidence to show that bank accounts of the plaintiff would reveal that he had no funds to make payment of the balance amount of consideration and thus it was clear that he was not ready and willing to perform his part of contract. It was thus submitted that, the plaintiff was not successful in proving the readiness and willingness to perform his part of contract, hence the plaintiff will not be entitled to even any decree for refund of amount.

11. It is further contended that so far as the agreement for sale is concerned, the same is an unregistered document and hence it cannot be relied upon for the purpose of granting refund of the earnest amount. Learned counsel for the appellant has relied upon the decisions of the Hon'ble Supreme Court in the case of *Vijay Kumar & others V/s Om Parkash in Civil Appeal No. 10191 of 2018 decided on 3rd October, 2018* as well as in the case of *Balram Singh Vs. Kelo Devi in Civil Appeal No.6733 of 2022 decided on 23rd September, 2022* and contended that on the basis of an unregistered document, there could not have been

any decree passed for refund of earnest amount.

12. I have gone through the said decisions. So far as the decision in the case of *Balram Singh* is concerned, the same was with respect to the suit that was filed for permanent injunction and hence, the decision in the case of *Balram Singh* of the Hon'ble Supreme Court is with respect to the facts of those case for holding that an unregistered document of sale could not be a basis for grant of injunction. In the decision of the Hon'ble Supreme Court in the case of *Balram Singh*, the Hon'ble Supreme Court has in fact observed that though relief was claimed on the basis of the agreement for sale, there was no prayer made for a specific performance and only the relief of permanent injunction was prayed. Hence in the peculiar facts of those case, the unregistered document was not relied upon for grant of decree for permanent injunction. Hence, the said decision is of no assistance to the present case where the refund of earnest amount is granted in respect of an agreement for sale in a suit for specific performance.
13. The decision of the Hon'ble Supreme Court in the case of *Vijay Kumar* was in respect of the suit for specific performance. In the said decision, the decree for specific performance was

refused as the plaintiff was unable to prove his readiness and willingness to perform his part of contract. However, in the said decision in spite of the said finding, there was an order passed for refund of the earnest amount. In the present case, there is a finding recorded that the plaintiff was in fact ready and willing to perform part of his contract, however, since there was already a decree for specific performance passed in Special Civil Suit No.247 of 2012 in respect of third party, the decree for specific performance was not granted and only a decree for refund of earnest amount was granted. Thus, the decision of the Hon'ble Supreme Court in the case of *Vijay Kumar* is of no assistance to the appellant.

14. Learned counsel for the appellant also relied upon the decision of this Court in the case of *Ajay Avinash Solanke and others Vs. Asha Umesh Yadav and others* reported in *2018(3) Mh.L.J. 231*. The said decision is relied upon on the proof of documentary evidence, wherein it is held that the initial burden of proof of agreement is always on the plaintiff. There cannot be any debate with respect to the said proposition of law, however, in the present case, on the basis of the documentary as well as oral evidence, both the courts have recorded findings of fact that

execution of agreement for sale was proved as well as the payment of the earnest amount to the defendants was also proved.

15. With respect to the submissions made on behalf of the appellant regarding the application for producing additional documents is concerned, though there is no specific order rejecting the application, the application was dealt with by the first appellate court. The proposed documents sought to be produced by way of additional evidence are on the point of readiness and willingness of the plaintiff. It is sought to be submitted that the proposed documents would show that there were no funds available in the bank accounts of the plaintiff at the relevant time, which would show that the plaintiff was not ready and willing to perform his part of contract. In my opinion there is no merit in this submission, for the simple reason that readiness and willingness of a party though, would depend upon the capacity of a party to pay, the same would depend upon various facts and circumstances. Only relying upon certain bank statements would not mean that a party has no capacity to pay and therefore is not ready and willing to perform his part of contract. Even otherwise, there is no ground made out for leading additional

evidence at appellate stage. The first appellate court has considered the application for leading additional evidence and has rightly not found it correct to allow the appellant to lead additional evidence.

16. Basic challenge in the second appeal is with respect to the refund of earnest amount. There is already a finding of fact recorded with the respect to the proof of payment of the earnest amount. The documents sought to be produced have no bearing with respect to the said fact. Hence, since the application is already considered by the first appellate court. There being no specific separate order passed on the said application, is no reason to entertain the second appeal. Even other wise the same will have no bearing on the findings of facts recorded by both the courts with respect to payment of earnest amount. Hence, the same would not raise any question of law in the second appeal.
17. The findings recorded by both the courts clearly show that the defendants have not only accepted the amount from the plaintiff but have also executed another agreement in favour of third party in respect of the same suit flat. The first appellate court has recorded that the filing of Special Civil Suit No.247 of 2012 by the third party in respect of the same suit flat is an admitted fact.

The documentary evidence on record supported by the oral evidence clearly shows that the amount was paid by the plaintiff to the defendants. The contention of the appellant with respect to the amounts paid by demand draft that was encashed by defendant no.1 alone, though in the joint account of defendants, is concerned, the same is inter-se dispute between the defendants. Since execution of the agreement is held to be proved, the inter-se dispute amongst the defendants cannot be a ground to refuse refund of earnest amount that was paid by the plaintiff to the defendants. The submission made on behalf of the appellant are purely based on facts of the case. There are concurrent findings of facts recorded by both the courts, on appreciation of evidence. Second Appeal does not raise any substantial question law. Hence the second appeal is dismissed. There will be no order as to costs.

18. Since second appeal is dismissed, the civil application also stands dismissed as infructuous.

[GAURI GODSE, J.]