

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.614 OF 2019
WITH CA/13155/2022 IN SA/614/2019 WITH CA/13814/2019 IN
SA/614/2019

SHIVAJI BHIMRAO SAPATE AND ANOTHER
VERSUS
VETAL KISHAN DEDE AND OTHERS

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Advocate for Appellants : Mr. V. R. Dhorde
Advocate for Respondents : Mr. R. P. Adgaonkar

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CORAM : R.M. JOSHI, J

DATE : APRIL 11, 2023

PER COURT :

1. Heard.
2. Appellants are original defendants in Spl.C.S. No. 154/2003, which was filed by the plaintiff for specific performance of contract. It is the case of the plaintiff that he is tenant of the two rooms in municipal house no. R-2-230 situated at Netaji Nagar, Latur, which is owned by defendant no. 1. It was agreed by Defendant No. 1 to sell suit house to plaintiff for consideration of Rs. 5,10,001/- and accordingly, agreement to sale was executed by him in favour of plaintiff on 19.07.2002. Plaintiff further claims to have paid earnest money @ Rs. 1,60,001/- to defendant

no. 1 and balance amount of Rs. 3,50,000/- was to be paid at the time of execution of sale deed. In the said suit, apart from defendant no. 1, his wife and children were also joined as party defendants. Plaintiff has also joined Shivaji Sapate, who has purchased the suit house during the pendency of the suit. As defendant no. 1 refused to execute sale deed, plaintiff filed suit for specific performance of contract and the possession of the suit house.

3. Except for defendant no. 1, none of these defendants contested the suit. Defendant no. 1 filed written statement denying the execution of agreement to sale in favour of plaintiff and receiving of any amount from him. It is, however, not disputed that plaintiff is tenant of two rooms in the suit property. It is further claimed by these defendants that suit property is joint family property of himself, his wife and children and therefore, defendant no. 1 alone cannot alienate the suit property in favour of plaintiff.

4. Learned Counsel for defendant no. 1 states that learned trial Court as well as first appellate Court have committed error in not appreciation of

evidence on record in proper perspective. He drew attention of the Court to the evidence of handwriting expert who has opined about the variance in signature of the admitted signatures of defendant no. 1 as compared to the signature on agreement to sale. He states that learned trial Court has recorded the findings against defendant on surmises and not on the evidence. He also argued that the suit house is a joint family property and therefore, unless it was shown by the plaintiff that the same is sold for the legal necessities of the family, learned trial Court ought not to have decreed the suit. Finally, it is stated that the agreement to sale is of year 2002 and considering the steep increase in price of the properties, it is a fit case for not granting specific performance but for refund of earnest money.

5. Learned Counsel for the plaintiff supported the impugned judgments and decree.

6. There was initial burden on plaintiff to prove that defendant no. 1 had executed agreement to sell dated 19.07.2002 (Exh. 57). Apart from her testimony, plaintiff examined Rajendra Pawar - PW 2 (Exh. 52) who

is scribe of the said document. His testimony shows that document was written as per the instructions of defendant no. 1. Similarly, examination of Arjun Thakur - PW 3 (Exh. 53) proves execution of the agreement to sell by defendant no. 1 in his presence. From the cross-examination of these witnesses, defendant no. 1 was unable to bring anything on record to discard their testimony with regard to the execution of said document by defendant no. 1. As plaintiff was successful in discharging the initial burden on her to prove the execution of the agreement to sale, onus has shifted on defendant no. 1 to substantiate his case.

7. The case of this defendant is of total denial of execution of agreement to sell. To support his contentions, he has placed reliance on the handwriting expert's evidence. Perusal of his testimony shows that the signature on documents and admitted signature of defendant no. 1 did not tally. In this regard, learned trial Court has rightly taken into consideration the evidence on record which indicates that even the said signature on the document in dispute does not tally with the admitted signatures of defendant no. 1 on

written statement as well as on Vakalatnama. This fact clearly shows that the opinion of the handwriting expert cannot be considered as conclusive proof of the fact that the agreement to sell was not executed by defendant no. 1. On the other hand, evidence led by plaintiff is reliable to hold that defendant no. 1 executant thereof.

8. The civil cases are required to be decided on preponderance of probabilities and considering the facts and circumstances on record, it is more probable that defendant no. 1 has signed the said agreement to sell and later on denied its execution. This Court finds no fault on the part of the trial Court as well as First Appellate Court in considering the said aspect and recording finding of the fact that the agreement to sell was executed by defendant no. 1 himself.

9. With regard to the case of defendant no. 1 that it is the joint family property and therefore, he has no right to execute the sale in respect of the same is concerned, once it is proved by the plaintiff that defendant no. 1 has executed agreement to sell and has also received earnest money, it is now not open for

this defendant to take such defence. Though the members of his family were party to the suit, they chose not to oppose the suit. In absence of any written statement no separate claim is raised by them over suit property.

10. Once more aspect brought on record by way of evidence supports the case of the plaintiff about the execution of agreement to sell and intention of defendant no. 1 to sale the suit house is that during the pendency of the suit, in breach of order of injunction the defendant no. 1 has sold suit house to defendant no. 2 by executing sale deed. This fact sufficiently establishes that the defendant no. 1 was always intending to effect sale of his property and was having authority to alienate the properties. Since the sale deed is executed during the pendency of suit and in breach of injunction it is not binding on the plaintiff.

11. Learned trial Court has rightly observed that though there is a discretion with the Court to grant or refuse specific performance of contract but such discretion must be used judiciously. From the conduct of defendant no. 1 of entering into the sale in respect

of same property with defendant no. 2, there was no other reason or justification for the trial Court to refuse grant of specific performance to the plaintiff.

12. It is finally contended on behalf of defendant no. 1 that the agreement is of year 2002 and there is huge increase of the prices of properties and therefore, it is not the fit case for granting specific performance. It is trite law that the subsequent rise in the price of suit property cannot be treated as hardship to defendant and ground to refuse specific performance. Rise in price is normal change of circumstances. No doubt Court may take rise of this fact and considering other facts and circumstance may pass appropriate directions. However, herein this case, it is material to note that the defence of defendant no. 1 denying the execution of the agreement to sell is not *bona fide*. Furthermore, his conduct on executing sale deed in favour of defendant no 2, in contravention with the injunction issued against him dis-entitles him to seek any discretion from Court. Thus there is no reason or justification to refuse decree of specific performance on this ground. In the result, the

concurrent judgments and decree granting specific performance cannot be interfered into.

13. Appellant has failed to show any perversity in the findings recorded by both Courts below while decreeing suit. Similarly, for want of involvement of any substantial question of law this appeal stands dismissed with cost. Pending applications, if any, are also disposed of.

(R.M. JOSHI, J.)

Malani