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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.63 OF 2021
WITH
INTERIM APPLICATION NO.402 OF 2021
WITH
INTERIM APPLICATION NO.17562 OF 2023

Sikandar Jainuddin Shaikh, since deceased through LRs Shaikh Lalbee Sikandar & Ors. … Appellants

V/s.

Mahendrasingh Surendrasingh Pardeshi … Respondent

Mr. Shriram S. Kulkarni with Mr. Monish K. Vig for the appellant.

Mr. Girish R. Agrawal with Ms. Naina P. Boraste for the respondent.

CORAM : AMIT BORKAR, J.

DATED : DECEMBER 8, 2023

P.C.:

1. For the reasons stated therein, Interim Application No.17562 of 2023 is allowed. Amendment to be carried out forthwith.

2. The original defendants have filed present second appeal challenging concurrent judgment and decree passed by the Courts below granting specific performance of an agreement to sell.

3. The respondent is the original plaintiff who filed Special Civil Suit No.311 of 2013 for the specific performance of an agreement to sell dated 18th January 2011. It is alleged that the total consideration agreed was Rs.27,77,000/-. On the date of the agreement to sell, the plaintiff paid Rs.13,20,000/- in cash. The agreement to sell was registered. As per the terms of the agreement, the defendants were to clear the bank loan and get encumbrances lifted. However, on their failure, the plaintiff issued notice to the defendants to execute the sale deed. As the defendants refused, the plaintiff filed suit for specific performance on 12th June 2013.

4. The appellants-defendants contested the suit by raising a plea that the agreement to sell was not to be acted upon. The only purpose of executing such an agreement to sell was to get the property cleared from a bank loan as per the plaintiff's promise. According to the defendants, the plaintiff was misusing the said agreement. Therefore, he filed a counterclaim for cancellation of the agreement to sell. The plaintiff contested the counterclaim by filing a written statement and prayed for dismissal of the counterclaim.

5. The Trial Court, after framing necessary issues, decreed the suit for specific performance, directing the defendants to execute the sale deed in favour of the plaintiff. The plaintiff challenged the decree by way of Regular Civil Appeal No.236 of 2017. The Appellate Court, by the impugned judgment, dismissed the appeal. Hence, the appellants filed a present appeal.

6. Learned advocate for the appellants-defendants submitted that the burden to prove receipt of consideration as alleged in the agreement to sell was on the plaintiff. Admissions given by the plaintiff in his cross-examination indicate that the plaintiff did not have sufficient funds on the date of agreement to sell. He further admitted that he never approached the bank after an agreement to sell. The agreement in question was never intended to be given effect. Since on the date of agreement to sell the suit property was attached by the bank, therefore, agreement to sell was unenforceable. The plaintiff further admitted that except for bare words, he does not have evidence to show that he paid an earnest amount to the defendants.

7. Per contra, learned advocate for the respondent submitted that the agreement to sell in question is a registered instrument. The plaintiff accepts the execution of the agreement. Therefore, it raises a presumption of payment of consideration by the plaintiff and the ownership of the defendants to show that they have not received the consideration, which the defendants have failed to prove. He submitted that both the Courts below have recorded a finding of fact that the plaintiff has proved payment of consideration of earnest amount and, therefore, such finding of fact need not be interfered in the second appeal.

8. I have carefully considered the submissions made on behalf of both sides. It is well settled that the question of payment of consideration is a question of fact, which must be decided on the evidence brought on record. In order to arrive at a correct conclusion, one has to take note of the surrounding circumstances and situations of the parties.

9. It must be noted that if the plaintiff sues the defendant for specific performance based on an agreement to sell, the burden of proving the existence of facts, upon which the defendant's legal liability depends, lies on the plaintiff. When the plaintiff has proved the execution of the agreement to sell by the defendant, either by producing evidence or by an admission made by the latter, and the document contains an acknowledgment of the receipt of consideration, the defendants must show that what they themselves admitted in the document to be true was, as a matter of fact, false and that he did not receive the consideration.

10. This rule is also evident from section 102 of the Indian Evidence Act, 1872. The test prescribed by that section is simple. The burden rests upon the party who would fail if no evidence at all, or no more evidence, as the case may be, were given on either side.

11. Let us apply this test to the case set out in the facts of the present case. The agreement to sell, on which relief of specific performance is based, is admitted to have been executed by the defendants, and it contains an admission by them that they have received consideration. If neither party produces evidence, the Court must decide the case in favour of the plaintiff, as the execution of the document is established, and the declaration therein as to the payment of consideration is not proved to be false.

12. The person denying the consideration is confronted with his own admission, and he must prove that it was falsely made. The self-harming evidence furnished by his own admission and not the nature of the document embodying it determines the allocation of the burden of proof. The quantum of evidence required to discharge the onus may vary with the documents' character.

13. According to the appellants, admissions in the cross-examination by the plaintiff that he does not pay income tax; he has no proof that he had earnest amount at the time of agreement to sell; except his bare words, he does not have evidence to show that he paid earnest amount and on the date of agreement earnest amount was not available in his bank account proves that the defendants discharged the burden of proof. However, it must be noted that the defendants cannot explain why they executed a registered agreement to sell in favour of the plaintiff for sale of the suit property if they had not received the consideration and had not helped the defendants to discharge the loan amount. The so-called admissions referred by the appellants are insufficient to discharge the onus against the defendants that they received the consideration under the registered instrument. The defendants were required to place on record positive evidence to show non-receipt of consideration. The natural conduct of the vendor in cases where the registered instrument evidences receipt of consideration and is not paid as a matter of fact, such person would have immediately called upon the purchaser to pay the earnest amount as agreed in the agreement to sell. However, the defendants have not placed on record such evidence. Therefore, the defendants have failed to discharge onus discharging onus of receipt of consideration under the registered instrument.

14. The Courts concurrently decide the rest of the issues below, holding that the plaintiff has proved readiness and willingness to perform his part of the contract. Therefore, no substantial question of law is involved.

15. The second appeal stands dismissed. No costs.

16. In view of the dismissal of the second appeal, nothing survives in the pending interlocutory application, and the same stands disposed of as infructuous.

17. Learned advocate for the respondent makes a statement that the respondent will not execute the decree for four weeks from today.

(AMIT BORKAR, J.)