Arjun

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.23 OF 2023
WITH
INTERIM APPLICATION NO.237 OF 2023
IN
SECOND APPEAL NO.23 OF 2023

Sou. Govindi Jaswant Thapa ...Appellant/ Applicant

V/s.

Shri. Manishkumar Shamprasad Agrawal & Ors. ...Respondents

Mr. Abhijeet A. Joshi, for the Appellant/Applicant.
Mr. Drupad Patil, for the Respondents.

CORAM : MADHAV J. JAMDAR, J.
DATE : 17th JANUARY, 2023

P.C.:

1. Heard Mr. Abhijeet A. Joshi, learned counsel appearing for the Appellant/Applicant and Mr. Drupad Patil, learned counsel appearing for the Respondents.

2. Mr. Joshi submitted that the following substantial question of law is involved in this Second Appeal:-

> "Whether the finding regarding readiness and willingness recorded by the learned Trial Court and learned First Appellate Court can be arrived

at on the basis of evidence on record?"

3. It is the main submission of Mr. Joshi that, both the Courts have concurrently held that, the Plaintiffs have failed to prove the payment of cash. He submitted that, the agreement in question dated 21st July, 2010 is regarding purchase of flat and total agreed consideration was Rs.34,51,000/-. As per the contention of the Plaintiffs, from time to time part payment of aggregate amount of Rs.19,66,600/- was made. He submitted that, out of the said payment of Rs.19,66,600/-, as per the Plaintiffs' case, cash component was of Rs.3,80,000/-, Rs.1,60,000/-, Rs.1,50,000 and Rs.49,000/-. Therefore, as per the Plaintiffs' case, the total aggregate consideration paid in cash comes to Rs.7,39,000/-.

4. Mr. Joshi, learned counsel appearing for the Appellants submitted that, both the Courts have concurrently held that, the Plaintiffs have failed to prove the said payment of cash. He submitted that, once the said finding is arrived at, it has to be held that, the Plaintiffs have failed to prove their readiness and willingness.

5. Apart from said point of failure to prove readiness and willingness, it is the contention of Mr. Joshi that, this is a suit for specific performance which is equitable relief and, therefore, conduct of the Plaintiffs is also required to be taken into consideration. He submitted that, false case is made out regarding cash payment and, therefore, both the Courts have committed serious illegality and irregularity in decreeing the suit for specific performance. He submitted that, at the most alternate prayer (f) seeking refund of amount proved to be paid by the Plaintiffs could have been granted. To substantiate his contention, he relied on the decision of the Supreme Court in ***Ram Kumar Agarwal & Anr. Vs. Thawar Das (Dead) Through LRS.***[1] as well as decision of the Patna High Court in ***Bishwanath Mahto Vs. Srimati Janki Devi.***[2]

6. On the other hand, Mr. Drupad Patil, learned counsel appearing for the Respondents submitted that, both the Courts have concurrently held that, the Plaintiffs have proved their readiness and willingness. He pointed out, the relevant dates and submitted that, readiness and willingness is completely proved. He submitted that, the finding recorded by both the Courts that, there was no sufficient evidence to

1 (1999) 7 SCC 303
2 AIR 1978 Pat 190

prove the cash payment and, therefore, non proving the payment made by cash will not affect finding regarding readiness and willingness and the same cannot be considered adversely on the conduct of the Respondents.

7. Before considering the rival contentions, it is necessary to set out the factual position. The agreement in question is dated 21st July, 2010, by which, Plaintiffs agreed to purchase Flat No.4, admeasuring 1055 sq.ft. (built-up area) situated at Ghorpadi, Tal-Haveli, Dist-Pune. It is the claim of the Plaintiffs that, aggregate consideration amount paid is of Rs.19,66,600/-. The details of the same are given in the Plaint as follows :-

Date	Amount	By cheque/cash
20.07.2010	Rs.2,51,000/-	Cheque
21.07.2010	Rs.51,000/-	Cheque
23.07.2010	Rs.3,80,000/-	Cash
26.07.2010	Rs.25,600/-	D.D./Cash
27.07.2010	Rs.1,60,000/-	Cash
02.08.2010	Rs.1,50,000/-	Cash
07.08.2010	Rs.49,000/-	Cash
23.08.2010	Rs.9,00,000/-	Cheque

8. The evidence on record shows that, the L.I.C. Housing Finance Ltd. approved loan of Rs.25,00,000/- on 30th July, 2010 i.e. within a period of 9 days from the date of agreement. On 2nd August, 2010, the Plaintiffs got Title report of the suit premises. On 26th July, 2010 amount of Rs.25,000/- by way of D.D. and additional amount of Rs.600/- in cash were paid to the Society. The said payment was made on behalf of the Defendant No.1. The Defendant No.2-Society issued no objection for the said transaction on 10th August, 2010. On 9th September, 2010, the Plaintiffs deposited Rs.30,000/- towards registration charges and also paid the stamp duty of Rs.1,53,400/-.

9. As Defendant No.1 failed to execute the sale deed, suit for specific performance was filed on 29th November, 2010. The factual aspects clearly show that, the Plaintiffs are ready and willing to perform his part of the contract.

10. The only contention raised by Mr. Joshi is that, the Plaintiffs have failed to prove cash payment. In that behalf, it is significant to note the findings recorded by the learned Trial Court and the learned First Appellate Court. Both the Courts have held that, it is the case of the Plaintiffs' that, cash payment was made of Rs.3,80,000/- on 23rd July, 2010, Rs.1,60,000/- on 27th July, 2010, Rs.1,50,000/- on 2nd August, 2010 and Rs.49,000/- on 7th August, 2010. To substantiate his contention, the Plaintiffs have produced statement of account issued by bank. The said statement reflectes that, the Plaintiffs have withdrawn Rs.3,80,000/- on 23rd July, 2010, however, there is no entry of withdrawal of other amount of Rs.1,60,000/-, Rs.1,50,000/- and Rs.49,000/-. Both the Courts have concurrently held that, there is no documentary evidence that, Plaintiffs have made cash payment of Rs.7,39,000/- to Defendant No.1 and, that, there is no separate receipt about cash payment and endorsement on the agreement about above cash payment. In view of said evidence on record, both the Courts held that, Plaintiffs have failed to establish cash payment of Rs.7,39,000/- to Defendant No.1. Thus, what is held by both the Courts is that Plaintiffs failed to establish payment made by cash payment. The said finding recorded by the Courts do not establish that the Plaintiffs have come up with false case and, therefore, not entitled to relief of specific performance. In fact, the factual position on record clearly shows that, the Plaintiffs have proved his readiness and willingness to perform his part of the contract. The finding of both the Courts is that, the Plaintiffs have failed to prove such cash payment, as there is no evidence to support the said contention.

11. Reliance of Mr. Joshi on the decision of the Supreme Court in *Ram Kumar Agarwal & Anr. (supra)* is totally misconceived. In that case, it was the contention of the Plaintiffs that entire consideration was paid by cash and, therefore, the Supreme Court has said, a person who falsely alleges to have paid Rs.2000/- and also attempts at proving the plea at the stage of the trial cannot be said to have been ever ready and willing to pay Rs.7000/- which under the contract it was his obligation to pay. The Supreme Court has come to the conclusion that, the same is not a case where a plea as to payment was raised bona fide but abandoned at or before the trial for inability to prove.

12. In this particular case, substantial payment was made by Cheque, the dates mentioned hereinabove clearly shows that, L.I.C. Housing Finance Ltd. has approved loan of Rs.25,00,000/-. Both the courts have concurrently held that, the Plaintiffs could not establish payment made by cash due to inadequate evidence. Therefore, the decision of the Supreme Court in *Ram Kumar Agarwal & Anr. (supra)* is not applicable to the facts of the present case. As far as the decision of the Patna High Court in *Bishwanath Mahto Vs.*

Srimati Janki Devi (supra), the finding is recorded in that csae that, the Plaintiffs have falsely asserted to have paid the sum of Rs.200/- and that the Plaintiffs were ready to pay balance consideration amount. The Court has recorded the finding that, the case of part payment was false case. Therefore, the said decision of the Patna High Court is also not applicable to the facts of the present case. In this case finding of both the Courts is not that the Plaintiffs have come up with false case of cash payment but the finding is that the Plaintiffs failed to prove the said case.

13. Mr. Joshi also submitted that, there is no evidence to show that L.I.C. Housing Finance Ltd. has actually disbursed said balance consideration amount and, that, there is nothing on record to show that, Demand Draft was issued by L.I.C. Housing Finance Ltd. However, the factual position on record clearly shows that, even the applicable stamp duty of Rs.1,53,000/- and the registration charges of Rs.30,000/- were paid. Therefore, there is no substance in the said submission of Mr. Joshi.

14. Mr. Joshi has also raised other contentions on facts. However, the jurisdiction of this Court is well defined under

Section 100 of the Code of Civil Procedure, 1908. This is not a case where, the Appellant could make out that any substantial question of law is involved in this case. Therefore, the Court exercising jurisdiction under Section 100 will only look into whether the substantial question of law is raised or not. As Mr. Joshi has failed to make out that the substantial question of law as raised by him is involved in this case, the Second Appeal deserves to be dismissed. There is no other substantial question of law involved in this Second Appeal.

15. Therefore, the Second Appeal is dismissed, however with no order as to costs.

16. In view of dismissal of the Second Appeal, nothing survives in the Interim Application and the same is also disposed of.

(MADHAV J. JAMDAR, J.)