IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

SECOND APPEAL NO. 121/2023

Smt. Kausalyabai w/o Baburao Borkar and Ors. Vs. Smt. Sunita Suresh Patne

Office Notes, Office Memoranda of Coram, appearances, Court's orders of directions and Registrar's orders	Court's or Judge's orders

Mr. V. K. Kolte, Advocate for appellants.

CORAM : ANIL L. PANSARE, J.
ARGUMENTS WERE HEARD ON : 31.07.2023
ORDER PRONOUNCED ON : 18.08.2023

Heard Mr. Kolte, learned counsel for the appellants.

2. The appellants/original defendants have challenged the judgment and decree dated 09.11.2019 passed by District Judge – 5, Nagpur in Regular Civil Appeal No.115/2015, arising out of judgment and decree dated 03.05.2014 passed by Civil Judge Senior Division, Nagpur in Special Civil Suit No.40/2011. The appellants shall, hereinafter, be referred to as the "defendants" and the respondent as the "plaintiff".

3. The plaintiff had filed a suit for specific performance of contract as also for possession of the suit property viz. house bearing Corporation House No.268, City Survey No.2142, sheet no.285/54, mouja Indora, Ward No.33/56 area admeasruing 745.40 Sq. Ft., Nazul land held by defendants on lease. The total area of the plot is said to be 1208 sq.ft. Thus, it appears that specific

performance was sought and granted for the plot admeasuring 745.4 Sq.Ft.

4. The plaintiff's case was that she and defendants entered into an agreement to sell in respect of the suit property on 10.06.2009 for a valuable consideration of Rs.8,25,000/-. The plaintiff had paid Rs.2,00,000/- in cash and Rs.2,00,000/- by cheque. The cheque was drawn in favour of the defendant no.2. The plaintiff averred that the defendants handed over possession of the shop admeasuring 200 sq. ft. and the room behind the shop on ground floor and permitted the plaintiff to repair, alter and renovate the shop and the room. The plaintiff alleged that she incurred Rs.4,00,000/- towards the repair and renovation works. The defendants agreed to supply no objection certificate and other documents required for execution of the sale deed within six months. The plaintiff came to know that the suit property was mortgaged with Vidarbha Premier Cooperative Housing Society Ltd. Nagpur. There were outstanding dues of Rs.2,96,225.95/- The plaintiff made repeated requests to the defendants to perform their part of contract but the defendants failed to do so, though the plaintiff was always ready and willing to perform her part of contract. Hence, the suit.

5. The defendants resisted the suit by filing written statement. The defendants contended that the defendants along with Milind Mahadeo Borkar were the joint owners of the suit property, which was originally

leased to one Hagru Borkar and after his death, the property was inherited by Bapurao Borkar and Mahadeo Borkar. The defendants are legal representatives of Bapurao Borkar. According to defendant, Bapurao and Mahdeo had orally partitioned the property but did not omit their names from the lease deed. It is then pleaded that the suit property was mortgaged with the Vidarbha Premier Cooperative Housing Society Ltd, Nagpur and the plaintiff was aware of the said fact.

6. According to the defendants the relationship between the plaintiff and defendant was that of landlord and tenant. The plaintiff agreed to deposit Rs.2,00,000/- as advance rent and to pay Rs.5,000/- per month with 10% increase in each year. The defendant no.2 accepted the proposal as she had to pay loan amount. She requested the plaintiff's husband to execute the rent agreement. He took advantage of the opportunity and instead of drafting the rent agreement, prepared an agreement to sell. It is further the case of the defendants that the defendant no.2, out of the amount received, deposited Rs.50,000/- with the Vidarbha Premier Cooperative Housing Society Ltd. towards repayment of loan and the balance amount was utilized for renovation of shop occupied by the plaintiff. Thus, according to the defendants, the plaintiff's husband played a fraud.

7. Both the Courts below have held that the disputed agreement was nothing but an agreement to sell the suit property. They have also held that the plaintiff

was always ready and willing to perform her part of contract. The trial Court, despite recording the aforesaid finding in favour of the plaintiff, dismissed the suit by giving erroneous reasons. The reasons put forth by the trial Court were that the plaintiff was aware that the suit property was mortgaged. She did not show her readiness and willingness to repay the loan amount. Unless the loan amount was repaid, further transaction could not have been entered as it would create multiplicity of proceedings, if the suit for specific performance of contract is decreed.

8. The said finding has been correctly set aside by the first appellate court. Duty to pay the amount of loan would naturally be upon the defendants. The plaintiff is not duty bound to pay the loan amount. Rather defendant no.2 has already paid Rs.50,000/-. The defendants have not assigned any reason why the balance amount of loan has not been paid despite receiving Rs.4,00,000/-. In the circumstances, once the agreement under question was found to be an agreement to sell the suit property and once the trial Court held that the plaintiff was always ready and willing to perform her part of contract, the settled principles of law would require the Court to grant specific performance of contract. Having not done so, the trial Court committed error of applying law to the facts which has been rightly corrected by the first appellate court.

9. The contention raised by the appellant is that the specific performance of contract cannot be granted where property has been mortgaged. Thus, it is argued that the mortgaged property cannot be sold. Learned counsel for the appellant though sought time to file judgments supporting this contentions, could not submit even one.

10. In my considered view, the mortgaged property, if sold, would carry with it the charge of the borrower on the mortgaged property. The borrower will be at liberty to take necessary steps for recovery of the amount. There is no bar to sell the mortgaged property. In any case, the defendants herein agreed to furnish necessary documents for executing the sale deed, which naturally will include "No Dues Certificate", from the mortgagee. In the circumstances, specific performance of contract can be granted subject to payment of mortgage money to the mortgagee, which being one of the obligations upon the defendants. However, the trial Court could not have refused to grant the specific performance on this count. As stated earlier, the first appellate court has rightly corrected the erroneous view so taken by the trial Court.

There is no question of law, muchless, substantial question of law involved in the appeal. The appeal is, therefore, dismissed in limine.

(Anil L. Pansare, J.)

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