



IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 184 OF 2024

WITH CIVIL APPLICATION NO. 5273 OF 2024

Tukaram Chhabu Kotkar

Appellant

Versus

1. Chandrakant Pandurang Gattani
(deceased) through LRs

1-A. Sandhya Chandrakant Gattani

1-B. Rohan Chandrakant Gattani

Respondents

WITH

WITH REVIEW APPLICATION NO. 189 OF 2024

IN CIVIL APPLICATION NO. 5272 OF 2024

Chandrakant Pandurang Gattani
and another

Applicants

Versus

Tukaram Chhabu Kotkar

Respondent

...

Mr. Amol K. Gawali, Advocate for the appellant and for
respondent in Review Petition.

Mr. S.S. Bora, Advocate for respondent Nos.1-A and 1-B and
for petitioners in Review Petition.

...

CORAM : SANDIPKUMAR C. MORE, J.

Dated : 3 OCTOBER 2024.

ORDER :

1. Heard rival submissions on admission.

2. The appellant i.e. the original defendant in Special
Civil Suit No.170/2016 has challenged judgment and decree

dated 20.12.2019 passed in the said suit by the learned Civil Judge, Senior Division, Ahmednagar i.e. the learned trial Court. The appellant/defendant has also challenged the judgment and decree dated 06.03.2023 passed by the learned District Judge-1, Ahmednagar i.e. the learned first appellate Court in Regular Civil Appeal No. 120/2020 filed against the aforesaid judgment and decree of the learned trial Court. The learned trial Court under the impugned judgment and decree dated 20.12.2019, has granted specific performance in favour of the original respondent/plaintiff Chandrakant Pandurang Gattani on the basis of agreement of sale dated 01.06.2015 executed by the present appellant/defendant. The learned first appellate Court, by confirming the said decree, has dismissed Regular Civil Appeal filed thereon. As such, the present Second Appeal is against concurrent findings of both the Courts below.

3. Brief facts are as under :

According to the plaintiff, the appellant/defendant executed an agreement of sale in respect of the suit land i.e. Gut No.42/2/1 to the extent of 40 R area falling to his share situated at Nepti, Taluka and District Ahmednagar for the consideration of Rs. 7,00,000/- as he was in need of money,

on 01.06.2015. On the date of the said agreement to sale, the plaintiff paid amount of Rs. 60,000/- in cash and an amount of Rs. 65,000/- through three cheques to the appellant. The said cheques were encashed by the appellant and as such the appellant received the amount of Rs. 1,25,000/- as an earnest money towards the agreement of sale dated 01.06.2015 from the original plaintiff. The sale deed of the suit land was to be executed in the 11th month after execution of agreement of sale. However, since the appellant avoided to execute the sale deed, letter and notice were issued to him by the plaintiff. Despite receipt of the same, the appellant did not execute the sale deed. Hence, the aforesaid suit was filed.

4. The appellant/defendant resisted the suit on the ground that he did not execute any agreement to sale dated 01.06.2015 in favour of the plaintiff. One Nanda Zol was in need of amount of Rs. 25,000/- in the month of June 2015. She demanded the said amount from plaintiff who was Money Lender. But the plaintiff told her that the said transaction would require two witnesses and stamp paper. Therefore, the defendant stood witness to the said transaction as he was acquainted with Nanda. Thus, he claimed that he only signed the stamp paper as witness to the transaction between

plaintiff and Nanda Zol. According to defendant, the plaintiff misused that stamp paper and prepared concocted story of the alleged agreement of sale.

5. The learned trial Court, after conducting the trial, decreed the suit of specific performance filed by plaintiff and directed the appellant to execute the sale deed of the suit property by accepting remaining amount of consideration. The appellant had also challenged the said decree before the learned first appellate Court, but the learned first appellate Court dismissed the appeal and confirmed the decree passed by the learned trial Court. Hence, this Second Appeal.

6. Learned Counsel for the appellant / defendant submits that both the learned Courts below have definitely erred in granting specific performance in favour of the original plaintiff contrary to the evidence laid by the parties. He has raised the following substantial questions of law :

- (i) Plaintiff has failed to prove execution of alleged agreement to sale.
- (ii) There was no readiness and willingness on the part of the plaintiff to perform his part, but both the learned Courts held otherwise.

- (iii) Both the learned Courts below wrongly interpreted letter dated 20.08.2015 by reading it in evidence and that too in absence of pleading.
- (iv) The evidence on record did not show capacity of plaintiff to purchase the suit property.

Learned Counsel for the appellant / defendant also relied on the following judgments :

- (i) ***N.P. Thirugnanam vs Dr. R. Jagan Mohan Rao & ors (1995) 5 SCC 115***
- (ii) ***Jagjit Singh vs Amarjit Singh, (2018) 9 SCC 805***
- (iii) ***J.P. Builders & anr vs A. Ramadas Rao and anr (2011) 1 SCC 429***
- (iv) ***Vijay Kumar & ors vs Om Parkash, (2019) 17 SCC 429***

7. On the contrary, learned Counsel for the respondents/original plaintiff vehemently argued that both the learned Courts below have concurred in holding that the plaintiff established the case of execution of agreement to sale on the basis of cogent evidence and readiness and willingness of the plaintiff was very much there as he had sent letter as well as notice asking for performance of defendant as per the agreement of sale, which were refused by the defendant. He pointed out that defendant/appellant could not establish his defence by adducing reliable and satisfactory evidence. On the contrary, he gave vital admission in his cross-examination

suggesting that he had avoided his part to comply the conditions of agreement of sale which was executed by him. Further, it was submitted that even the witness Nanda Zol examined on behalf of the appellant/defendant, gave vital admission and thereby admitted that she had purchased stamp paper for drafting agreement of sale by the appellant / defendant. Thus, the learned Counsel for the plaintiff submits that the substantial questions of law raised by the appellant/defendant are already answered by both the learned Courts below on the basis of trustworthy evidence, and therefore, the Second Appeal needs to be dismissed at admission stage only.

8. So far as first two substantial questions of law are concerned, both the learned Courts below have discussed the evidence on record in proper perspective and observed that plaintiff established execution of agreement of sale dated 01.06.2015. He also examined the employee of Ahmednagar Merchant Co-operative Bank to prove that the appellant / defendant had received part consideration of the suit land through cheques mentioned in the suit. Moreover, plaintiff has also brought on record letter (Exh.21) and notice (Article-A) asking for specific performance on contract as per the

agreement of sale (Exh.20). It is extremely important to note that the appellant/defendant in his cross-examination has clearly admitted that he did not reply either the letter or notice. Such admission clearly indicates that he was in receipt of letter (Exh.21) and notice (Article-A). It is also evident that the acknowledgment receipts at Exhs.22 and 23 indicated that the aforesaid letter as well as notice were received by the appellant/defendant and therefore, in the light of admission on the part of the appellant that he received the aforesaid documents, the execution of agreement of sale as well as readiness of plaintiff to perform his part, have been established since the defendant did not reply either the letter or notice.

9. So far as the exhibition of letter dated 20.08.2015 at Exh.21 is concerned, the learned Counsel for the appellant vehemently submitted that it was wrongly exhibited without any pleading to that effect. However, the reference of issuance of letter is already given in the plaint in para-5. Moreover, the appellant/defendant has also admitted that he received the letter as well as notice. On going through the cross – examination of defendant/appellant he could have answered that he did not receive the notice as well as letter, but he

plainly stated that he did not reply that letter or notice meaning thereby he had already received the same. Not only this, but it is extremely important to note that he in the cross-examination, had stated that he was ready to execute the sale deed as per the conditions mentioned in agreement of sale at Exh.20. Though the learned Counsel for the appellant argued that considering the entire cross-examination this admission can be treated as stray admission, but this is not the only admission on the part of the appellant/defendant.

10. It is important to note that the appellant/defendant could not establish his defence that he signed the agreement of sale (Exh.20) only as a witness to the transaction between plaintiff and Nanda Zol. Moreover, there are also material contradictions between the evidence of appellant/defendant and his witness Nanda Zol. According to the appellant, Nanda Zol was in need of an amount of Rs. 25,000/-, but at the same time Nanda Zol has stated that she obtained amount of Rs.20,000/- from the plaintiff. Further, it is extremely important to note that Nanda Zol i.e. the own witness of defendant has clearly admitted in her cross-examination that she had purchased stamp paper used in Exh.20 for executing the agreement by defendant only.

Therefore, considering all these aspects, it is clearly evident that the defendant has not come with clean hands and from his admissions in the cross-examination and in the light of the evidence adduced by original plaintiff, it appears that the defendant/appellant has suppressed material facts on record. This is also observed by the learned first appellate Court.

11. Lastly, the learned Counsel for the appellant / defendant submitted that both the learned Courts below have not uttered a single word in respect of financial capacity of the plaintiff to complete transaction and therefore, the willingness which includes the financial capacity of the plaintiff, could not be established. He has relied on the observation of the Hon'ble Apex Court in the aforesaid cases (supra). Sum and substance of the aforesaid judgments is that for readiness and willingness of the purchaser to perform his part of contract the Court has to examine the capacity of the purchaser to pay the amount of sell consideration. However, on going through the aforesaid judgments, it is clearly evident that the aforesaid observation had come on record when the plaintiff, despite direction of the Court, failed to deposit the money. In the present matter, no such order was there compelling the plaintiff to deposit the balance

amount of consideration from any of the Courts below. On the contrary, it has been brought on record that as soon as the direction for paying balance amount of consideration is issued to the plaintiff by the learned trial court, he deposited the same without any delay. Moreover, immediately he had also issued notice as well as letter mentioning that he was ready with his money. It is extremely important to note that despite receipt of said letter and notice, defendant did not reply the same to falsify the contention of plaintiff. Therefore, it cannot be said that there was no willingness on the part of the plaintiff as claimed by the appellant. Therefore, considering the facts of this matter, the aforesaid observation of the Hon'ble Apex Court, is not helpful to the appellant.

12. Thus, by considering the findings given by both the learned Courts below and the evidence on record, it has been established on the basis of reliable and trustworthy evidence that the defendant had executed agreement of sale in respect of the suit property by accepting part consideration. The plaintiff also proved his readiness and willingness to get the sale deed executed. The avoidance of defendant / appellant for execution of sale deed has also brought on record. Further, it is most important to note that

the defendant could not establish his defence by adducing reliable and trustworthy evidence. On the contrary, the defendant and his own witness Nanda gave some vital admissions in their cross-examination supporting the plaintiff's case. Therefore, all the aforesaid substantial questions of law appear to be answered successfully in favour of the plaintiff on the basis of cogent evidence. Therefore, no substance is found in the present appeal and the Second Appeal stands dismissed at admission stage alongwith pending Civil Application. The Review Application filed by the plaintiff/respondents for setting aside delay condonation order in filing the present appeal, also stands disposed of being infructuous.

(SANDIPKUMAR C. MORE, J.)