



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 827 OF 2016

Vasant Ramdas Jadhav.

...Appellant.

Versus

Surendra Raghunath Shinde
and Others.

...Respondents.

Ms. Rukmini Khairnar i/b Mr. P. N. Joshi for the Appellant.

Ms. Sangeeta Salvi h/f Ms. Seema Sarnaik for Respondent No. 1A to 1C.

Coram : Sharmila U. Deshmukh, J.

Date : March 22, 2024.

P. C. :

1. Being dissatisfied by the judgment dated 12th October 2015 passed by the Appellate Court dismissing the appeal and confirming the findings of trial Court in Regular Civil Suit No.91 of 1999, the original plaintiff is before this Court.

2. Facts necessary to be exposted are that RCS No.91 of 1999 was filed by the plaintiff seeking specific performance of the agreement for sale dated 20th September 1994 and in the alternative refund of earnest amount of Rs.70,650/-. The plaintiffs came with the case that the defendant had entered into an agreement for sale dated 20th September 1994 in respect of a row house for which an amount of

Rs.25,000/- was paid in the year 1991-1992. It was contended that during the period from 1st September 1991 to 19th September 1994 a sum of Rs.70,650/- was paid by the plaintiff to the defendant. It was contended that subsequently the row house was sold to a third party. Notice came to be issued by the plaintiff on 28th September 1998 and the suit came to be filed. The suit against the Defendant initially proceeded ex parte. Subsequently the suit was dismissed for default and was restored on 22nd June 2009. In the meantime, the original defendant expired and his legal heirs, i.e., wife and 2 children, were brought on record as his legal heirs. Upon consideration of the evidence, the trial Court negated the issue as regards the readiness and willingness of the plaintiff to perform his part of contract. The trial Court also held that the suit was barred by limitation and declined to grant the relief of refund of earnest money and specific performance of contract. As against this Regular Civil Appeal No.106 of 2010 was preferred. The appellate Court reversed finding of the trial Court as regards the limitation, however, answered the issue against the appellant on the aspect of readiness and willingness and on the issue of proof of payment of Rs.70,650/- by the plaintiff to the defendant. The appellate Court refused to grant the specific performance of agreement for sale holding that plaintiff is not ready and willing to perform his part of contract and dismissed the appeal.

3. Heard learned counsel appearing for the respective parties.
4. Learned counsel appearing for the appellant would submit that the payment of Rs.70,650/- was proved by bringing on record the receipts which were marked as Exhibits-24 to 26. She would submit that in the agreement for sale, payment of amount of Rs.30,000/- was mentioned whereas other amounts were paid by way of separate receipts. She would submit that the substantial question of law which arises is whether the trial Court and appellate Court were right in declining the alternate relief of refund of earnest money while declining the relief of specific performance.
5. Considered the submissions and perused the record.
6. On the basis of evidence on record, the appellate Court has held that the receipt Exhibit-26 claiming to be a receipt for the payment made to the deceased defendant is signed by one Anil Shinde, however, the said receipt did not bear signature of the deceased defendant nor stated to have been issued on behalf of the defendant and there is no explanation as regards the capacity in which Anil Shinde had executed the said receipt. Upon consideration of the agreement for sale, the appellate Court noted that the agreement for sale has been executed by the deceased defendant on behalf of his

proprietary concern Om Shree Sai Builders whereas the receipts do not show the name of the said concern. It was further held that despite the amount of Rs.70,650/- being stated to have been paid to defendant no.1, the agreement for sale which was executed subsequent to the payment, showed only an amount of Rs.30,000/-. Considering the totality of the circumstances, the Appellate Court disbelieved the case of Plaintiff of payment of Rs.70,650/- and held that the Plaintiff has failed to prove that he is ready and willing to perform his part of contract.

7. For the purpose of showing the readiness and willingness to perform the obligation under the contract, it was necessary for the Plaintiff to firstly establish that he paid the entire consideration as agreed between the parties and nothing further remained to be complied with on his part and the Defendant is in breach of his obligation under the agreement. This could have been done by establishing that the entire amount of Rs.70,650/- was paid. In the present case, on the basis of evidence, the Appellate Court has rightly held that the receipts do not bear the signature of deceased Defendant and further when the entire payment is stated to have been paid prior to the execution of agreement on 20th September 1998, there is no explanation as to why only an amount of Rs.30,000/-

is mentioned in the agreement for sale. For the purpose of showing the readiness and willingness, it is necessary that the Plaintiff shows that he is ready to stand by the contract. The Plaintiff has not come with a case that he had paid an amount of Rs.30,000/- to the Defendant and has offered the balance amount for the purpose of completion of transaction however due to default on the part of Defendant, the sale deed has not been executed. That factual scenario being absent in the present case and not been demonstrated even from the notice which was issued calling upon the Defendant to execute the sale deed, the Appellate Court has rightly held that the conduct of the Plaintiff exhibits an intention to avoid his liability, disentitling him from claiming the equitable relief of specific performance.

8. As regards the alternative relief of refund of the amount paid, the Plaintiff has come with a case that sum of Rs.70,650/- was paid and sought refund of the said amount. As discussed above, the receipt of payment sought to be relied upon was not established to have been executed by the Defendant. As the Plaintiff had claimed that a sum of Rs.70,650/- was paid and agreement of sale mentioned amount of Rs.30,000/-, there was discrepancy which was not explained by the Plaintiff. The courts have therefore disbelieved the

claim of the Plaintiff that payments have been made and refused to grant alternative relief.

9. In the light of above, there is no substantial question of law arises as there is no perversity in appreciation of evidence by the Appellate Court. Second appeal is devoid of merits and is dismissed.

10. In view of the disposal of Second Appeal, Civil/Interim Application taken out in this Appeal, if any, does not survive and the same is disposed of.

[Sharmila U. Deshmukh, J.]