

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****SECOND APPEAL NO.85 OF 2024
WITH
INTERIM APPLICATION NO.1378 OF 2024
WITH
SECOND APPEAL NO.84 OF 2024****Smt. Madhu Vijay Kheria****...Appellant****Versus****Shri. Mayank Sharma & Ors.****...Respondents****....****Mr. R. D. Suryawanshi, a/w. Mr. Suraj N. Naik, for Appellant.****....****CORAM : SANDEEP V. MARNE, J.****DATED : 08 FEBRUARY 2024.****P. C. :**

These appeals are filed challenging two separate Judgment and Orders passed by the District Court, Thane in Regular Civil Appeal No.197 of 2019 and 196 of 2019 dismissing both the Appeals preferred by the Appellants and confirming the decrees passed by the Trial Court in Special Civil Suit No.365 of 2012 and Special Civil Suit No.548 of 2012.

2. Flat bearing No. 'A-1' admeasuring 520 sq. ft. equivalent to 48.31 sq. mtrs. (built up) on ground floor of the building Chandresh Regency Co-Operative Housing Society Ltd. at Jesal Park area, S. V. Road, Bhyander (East) District Thane is the subject matter of both the suits bearing Special

Civil Suit No.548 of 2012 and Special Civil Suit No.365 of 2012. It is the case of Appellants that the original owner of the suit flat viz. Mayank Sharma and Romila Sharma orally agreed to sale the suit flat to one of the Appellants Madhu Vijay Kheria for total consideration of Rs.5.61 Lakhs, out of which an amount of Rs.3.71 Lakhs was paid by Madhu Kheria to the vendors and that she was put in possession of the suit flat by the vendors. As against this, Mr. Manoj Solanki and Mr. Yogesh Solanki claim that the owners Mayank Sharma and Romila Sharma executed oral agreement with them in the year 2005-06 for sale of the same flat by accepting consideration of Rs.5.50 Lakhs out of agreed consideration of Rs.6 Lakhs. On 08 August 2011 the owners Mayank and Romila executed registered sale agreement in favour of Manoj Solanki and Yogesh Solanki. Appellant Madhu Kheria issued notice to the owners calling them upon to specifically perform the contract by executing sale deed.

3. The Appellants initially filed suit bearing Regular Civil Suit No.1520 of 2012 seeking injunction against the original owners. It appears that the said suit was withdrawn. Thereafter two counter suits are filed. Manoj Solanki and Yogesh Solanki instituted Special Civil Suit No.365 of 2012 seeking possession of the suit flat from Appellants as well as damages for illegal occupation of the flat. Appellant Madhu Kheria filed Special Civil Suit No.548 of 2012 seeking cancellation of sale agreement dated 08 August 2011 executed by the owners in favour of Solankis and for specific performance of oral agreement executed in their favour by the original owners. For the sake of convenience, the Appellants are referred as 'Kherias', flat purchasers in whose favour registered sale agreement is executed on 08 August 2011 are referred to as 'Solankis' and the original owners are referred to as 'Sharmas'.

4. The Trial Court decreed Spl. C. S. No.365 of 2012 filed by Solankis and directed Kherias to handover possession of the suit flat to Solankis. So far as Spl. C.S. No.548 of 2012 filed by Kherias is concerned, the same was dismissed, but Sharmas were directed to return the security deposit of Rs.3.50 Lakhs to Kherias. Aggrieved by the decrees separately passed on 16 October 2019 in Spl. C.S. No.365 of 2012 and 548 of 2012, Kherias filed Appeals before the First Appellate Court. In respect of decree passed in Spl. C. S. No.365 of 2012, Regular Civil Appeal No.196 of 2019 is filed, whereas the decree passed in Spl. C. S. No.548 of 2012 was challenged in Regular Civil Appeal No.197 of 2019. By separate Judgments delivered on same day i.e. on 12 January 2024, the District Court, Thane has dismissed both the Appeals filed by Kherias. Accordingly, Kherias have filed the present two Second Appeals challenging decisions of Trial Court as well as of the First Appellate Court.

5. I have heard Mr. Suryawanshi, the learned counsel appearing for Appellants-Kherias in both the Appeals. He would submit that agreement for sale dated 08 August 2011 executed by Sharmas in favour of Solankis is a void document as the same was executed with full understanding of the past dealing with Kherias. That the agreement recorded that possession of flat was with Kherias. That therefore agreement cannot have the effect of transferring of land to Solankis. That the Trial Court and First Appellate Court has not correctly appreciated this aspect. That they ought to have held the agreement dated 08 August 2011 to be null and void. I am unable to agree. It is well recognized principle that transfer of title without possession is permissible. Therefore, merely because Kherias remained in possession of suit flat as on the

date of execution of sale agreement dated 08 August 2011, the same would not render the said agreement void.

6. Mr. Suryawanshi would then submit that Trial Court erroneously accepted the theory of oral agreement between Sharmas and Solankis while disbelieving similar oral agreement executed between Sharmas and Kherias. In my view, it would not be necessary for Solankis to prove existence of oral agreement which allegedly took place in the year 2006. The sale transaction between Sharmas and Solankis is documented by registered sale agreement dated 08 August 2011. By that agreement, Sharmas conveyed their right, title and interest in the suit flat in favour of Solankis. The acquisition of title in the suit flat is thus premised not only on oral agreement, but on registered sale agreement dated 08 August 2011.

7. Considering overall conspectus of the case, it is difficult to hold that any right, title and interest is acquired by Kherias in the suit flat based on alleged oral agreement with Sharmas. On the contrary, sale agreement dated 08 August 2011 refers to permissive occupation granted by Sharmas to Kherias by accepting security deposit. If indeed Kherias were interested to purchase the suit flat and if the consideration of Rs.3.71 Lakhs was indeed paid towards purchase of the flat, Kherias ought to have ensured that the written agreement for purchase of the flat was executed with Sharmas. The theory of oral agreement is also belied by the fact that till execution of sale agreement dated 08 August 2011 with Solankis, no steps were taken by Kherias to get their own registered document executed with Sharmas. It is only on 30 September 2011 (after execution of sale agreement dated 08 August 2011) with Kherias that they issued Notice calling upon the Sharmas

to execute sale deed. During the period from 2005 to 2011, no communication has taken place between Kherias and Sharmas. It is difficult to believe that Kherias, who parted with 65% of consideration, would not contact Sharmas in any manner for getting document of sale executed in their favour. Kherias started pressing complaints before Society and Police Authorities only after getting wind of attempts made by Sharmas to sale the flat to Solankis. The conduct of Kherias is such that transaction of sale between Kherias and Sharmas is difficult to infer.

8. After considering the entire conspectus of the case, it is difficult to hold that any serious error can be traced in the orders passed by Trial Court and First Appellate Court. No substantial question of law is involved in both the Appeals. Both the Appeals are accordingly rejected.

9. After the Order is pronounced Mr. Suryawanshi, the learned counsel appearing for Appellants would pray for time to vacate the suit premises. It appears that the possession warrant was not executed during pendency of the Appeal before the First Appellate Court. Accordingly, time to vacate the suit flat is granted to the Appellants up to 30 April 2024.

SANDEEP V. MARNE, J.

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