



Harish

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.292 OF 2017
WITH
CIVIL APPLICATION NO.1963 OF 2016

Mr. Pandharinath N. Katore

...Appellant/
Applicant

Versus

Mr. Balkrishna N. Kasar & Ors.

...Respondents

Ms. Gauri Jadhav for the Appellant/Applicant.

Ms. Chaitali Bhogle i/b Sagar Kasar for the Respondents.

CORAM : SHARMILA U. DESHMUKH, J.

DATE : JANUARY 10, 2024

P. C. :

1. Heard.

2. The Second Appeal has been preferred being dissatisfied with the judgment of the First Appellate Court dated 8th October, 2015, dismissing the Civil appeal thereby confirming the judgment of the Trial court.

3. Special Civil Suit No. 1288 of 2004 was filed by the Appellant seeking specific performance of contract of sale and in the alternative, refund of sum of Rs. 2,50,000/- with interest. The suit property is land Gat No. 3(933), admeasuring 35 R situated at Kadachiwadi. The

Respondent No. 1 to 3 are the owners of the suit land. The case of the Plaintiffs is that they had agreed to sell their 1/3rd share each in the suit land to the Appellant for a total consideration of Rs. 3,00,000/- and pursuant to an Agreement for Sale executed between the parties, the sum of Rs. 2,50,000/- was paid as earnest money and balance amount of Rs. 50,000/- was to be paid at the time of execution of Sale Deed which was to be executed within 9 months. It was pleaded that on 22nd July, 2004, the suit property was sold to the Defendant No. 4 and thereafter notice was issued to the Defendant Nos. 1 to 3 seeking specific performance of the contract. It appears that in the proceedings written statement was filed by the Defendant No. 1 denying the transaction in question and even denying the execution of the Agreement for sale. The case of the Defendant was that on the basis of Power of Attorney which was obtained executed by one Nutan Avate from the Defendant No. 1 the land was sold on 26th July, 2004 by the power of Attorney holder and that the Defendants had not entered into any transaction as the Power of Attorney was not executed by them and the signatures of the Defendant Nos. 1 to 3 were taken on blank papers.

4. The Defendant Nos. 1 to 3 did not participate in the proceedings and the suit proceeded ex-parte. The Plaintiff filed his affidavit of evidence and deposed to the facts of the case as per the plaint. As the suit

proceeded ex-parte, there was no cross-examination. The Trial Court in view of the pleadings of the parties framed the issue as to whether the Plaintiff proves that the Defendant had executed an Agreement of Sale with the Plaintiff for a sum of Rs. 3,00,000/-.

5. The Plaintiff led evidence of himself and one witness named Chandan Gaikwad. The Trial Court observed upon consideration of the Agreement for sale that the same is type written Agreement but the name of the purchaser, date of transaction and the consideration amount of transaction are hand written and that there is no explanation for the same. The Trial Court further observed that even though the typed document shows the date of 3rd February, 2004 there is no date below the signatures to indicate the date on which it has been executed. The Trial Court further held that the consideration of amount of Rs. 2,50,000/- which is shown in the agreement for sale has not been established to have been paid by the Plaintiff to the Defendants. On the basis of the documentary and oral evidence which had come on record, the Trial Court answered the issue as regards the execution of Agreement of sale in the negative and dismissed the suit.

6. In Appeal against the judgment of the Trial Court the Appellate Court upon consideration of "Exhibit 22" i.e. Agreement for sale noted the discrepancy about the part of the document being hand written and

some part of the same being typed. The Appellate Court also noted that the Agreement of sale of the last page indicates that the possession of the suit land has been delivered to the Plaintiff, but in the subsequent paragraph, it has been mentioned that the Agreement for sale is without possession of the suit land and there are no initials of the parties where the contents are hand written. The Appellate Court considered that the notice which was issued by the Plaintiff to Defendant No. 1 to 3 states that the Defendant No. 1 had executed the Agreement For Sale in his favour and Defendant Nos. 2 and 3 had given their consent to the said transaction and as such, different theories were sought to be put forward . On the basis of the scrutiny of the evidence, the First Appellate Court has confirmed the finding of the Trial Court.

7. Before this Court, the question of law which is sought to be argued is whether in the absence of any cross-examination, the Agreement for Sale ought to have been taken as proved. Even though, the evidence of the Plaintiff has gone unchallenged, in view of the specific issue framed by the Trial Court which placed the burden of proof on the Plaintiff to prove the execution of the Agreement for Sale, it was necessary for the Plaintiff to lead cogent evidence to establish and prove that the Agreement for Sale was executed between the parties. The suit is for specific performance of the Agreement for Sale and without the execution of Agreement for Sale

itself being proved, no relief can be granted by the Trial Court even if the proceedings are ex-parte. The ex-parte proceedings does not dilute the burden upon the Plaintiff to prove his case by leading cogent evidence. Pertinently, the relief of specific performance is an equitable relief. The Trial Court as well as the Appellate Court on the basis of the documentary evidence come on record has arrived at a categorically finding that the Plaintiff has failed to prove that Agreement for Sale has been executed between the parties has not been established.

8. Both the Courts have noted the reasons which are already discussed above. Even though the Defendant Nos. 1 to 3 have not participated in the proceeding and the Plaintiff has not been cross-examined, the burden could not be said to have been discharged, merely by stepping into witness box and producing the document without proving the same.

9. In light of the discussion above, considering the concurrent findings of the Trial Court and the Appellate Court, no substantial question of law is involved. Second Appeal stands dismissed.

10. In view of disposal of Second Appeal, Civil Application does not survives for consideration and the same is disposed of.

(SHARMILA U. DESHMUKH, J.)