

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.170 OF 2019

Mrs. Alka Uttamchand Lunkad and
Anr.

..Appellants

V/S.

Dattatray Sudam Fand and Ors.

..Respondents

...

Mr. Mahendra Jivraj Karnawat for the Appellants.

Mr. R.S. Panchudkar for Respondent No.10.

CORAM : SANDEEP V. MARNE, J.

Dated : 3 APRIL 2024.

P.C. :

1. By this appeal, the Appellants challenge the judgment and decree dated 14/12/2017 passed by Ad-hoc District Judge-1 dismissing Civil Appeal No.880 of 2012 and confirming the decree dated 03/05/2010 passed by the 5th Additional Judge, Small Causes Court/Joint Civil Judge, Senior Division, Pune in Special Civil Suit No.59 of 2000.

2. Plaintiff filed suit seeking specific performance of agreement for sale dated 28/09/1998. He succeeded before the Trial Court in proving the execution of agreement and payment of earnest money of Rs.51,000/-. As per the agreement, transaction of sale was to be

completed within a period of four months and time was made the essence of the contract. The Plaintiff was to pay the balance amount of consideration of Rs.2,00,000/- to Defendant Nos.1 to 5 on execution of sale deed. It appears that Plaintiff issued a public notice dated 19/12/1998, but received an objection, on account of which, the transaction could not be completed within the stipulated time. According to Plaintiff, without terminating the agreement, Defendant Nos.1 to 5 went ahead and sold the suit property to Defendant Nos.6 to 10 in May-1999. The Plaintiff accordingly instituted the Special Civil Suit No.59 of 2000 on 11/01/2000 not only for specific performance of agreement for sale dated 28/09/1998 but also seeking cancellation of sale deeds executed in favour of Defendant Nos.6 to 10.

3. The Trial Court rejected the prayer for specific performance by holding that the Plaintiff was neither ready nor willing to perform her part of the contract. The Trial Court therefore partly decreed the suit by directing refund of earnest money of Rs.51,000/- alongwith interest thereon @ 16% per annum from 28/09/1998. Before the Appellate Court, Plaintiff filed an application under Order XLI Rule 26 of the Civil Procedure Code for production of additional evidence in the form of sale deed executed by the Plaintiff's husband on 25/01/1999 and an entry in the bank account of Rs.3,80,000/-. It appears that the First Appellate Court did not permit the Appellant to lead additional evidence and has proceeded to dismiss the appeal by judgment and order dated 14/12/2017.

4. I have heard Mr. Karnawat, the learned counsel for the Appellant and Mr. Pachundkar, the learned counsel for Respondent No.1.

5. After going through the findings recorded by the Trial Court on the aspect of readiness and willingness of the Plaintiff to perform her part of the contract, it appears that the findings with regard to the expectation of the Trial Court about production of proof of availability of cash amount of Rs.2,00,000/- with the Plaintiff are not too inspiring. In fact, Mr. Karnawat is not entirely wrong in relying upon the judgments of the Apex Court in ***Basavaraj vs. Padmavathi and Anr., 2023 LiveLaw (SC) 17*** and ***A. Kanthamani vs. Nasreen Ahmed, 2017 (4) SCC 654*** wherein the Apex Court has reiterated the principle that unless the Plaintiff is called upon to produce the passbook either by the Defendant or by the Court, it is not necessary for the Plaintiff to prove before the Trial Court his readiness by producing the bank passbook showing availability of funds for payment of balance amount of consideration. It appears that the Plaintiff had sufficient funds in the joint account maintained by her with her husband on account of sale of some property by her husband on 25/01/1999. However, despite availability of such concrete evidence, Plaintiff failed to produce that evidence before the Trial Court despite the specific issue being framed as to whether she proved her readiness to perform her part of the contract. On this count, the belated attempt

made by Plaintiff to produce additional evidence is rejected by the first Appellate Court.

6. There is yet another factor, which clearly goes against the Plaintiff. The agreement in question was executed on 28/09/1998 and the transaction was to be completed within four months. It was specifically agreed between the parties that the time was essence of the contract. It is true that the Plaintiff received objection for public notice issued by him on 19/12/1998 however, immediately after completion of period of four months, the Plaintiff did not take steps for filing of the suit, which resulted in Defendants selling the suit property to third party in May-1999. Thus, by the time when the suit was instituted by the Plaintiff on 11/01/2000, the suit properties were already sold to Defendant Nos.6 to 10. Mr. Karnavat would contend that the sale transaction is ab initio void. It becomes void, only if Plaintiff is held entitled to specific performance. Otherwise, it is a valid transaction.

7. Relief of specific performance was discretionary at least when the suit was decided as per provisions of Specific Relief Act prior to amendments in 2018. Though the finding recorded by the Trial and the First Appellate Court with regard to readiness to perform her part of the contract by Plaintiff is not too inspiring, in my view, the order of the Trial Court declining the discretionary relief of specific performance of the contract is clearly sustainable in the light of the peculiar facts and circumstances of the present case where the property is already sold to

the third parties before the suit was filed. The Trial Court has directed to refund of earnest money of Rs.51,000/- with substantially higher rate of interest of 16%, which is not challenged by Defendant Nos.1 to 5. The Plaintiff would thus earn substantially higher rate of interest of 16% on earnest money of Rs.51,000/- from 28/09/1998 till the suit was decided on 03/05/2010. I am informed that Defendant Nos.1 to 5 have already deposited earnest amount of Rs.51,000/- alongwith the interest awarded by the Trial Court. In my view the grant of alternate relief by the Trial Court to the Plaintiff provides some solace to her. There is no reason for this Court to interfere in the orders passed by the Trial and the First Appellate Court. No substantial question of law is involved in the appeal.

8. The Second Appeal is accordingly rejected.

SANDEEP V. MARNE, J.

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