

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY****CIVIL APPELLATE JURISDICTION****SECOND APPEAL NO.766 OF 2019****WITH****IA/3575/2019 IN SA/766/2019****Shri. Abhijit Prabhakar****.... Appellant****Versus****Mrs. Janabai Eknath Pawar And Anr.****.... Respondents****....****Mr. Girish M. Joshi, for Appellant.****....****CORAM : SANDEEP V. MARNE, J.****DATED : 04 JANUARY 2024.****P.C. :**

By this Appeal, the Appellant challenges Judgment and Order dated 01 February passed by the 4<sup>th</sup> Jt. Civil Judge, Senior Division, Nashik in Special Civil Suit No.655 of 2011 which is confirmed by the District Court by rejecting Regular Civil Appeal No.336 of 2016 vide Judgment and Order dated 03 January 2019.

2. I have heard Mr. Joshi, the learned counsel appearing for Appellant. According to Mr. Joshi, though the Trial Court has arrived at a conclusion that the Defendant has committed breach of agreement, the Trial Court has erred in not granting specific performance in favour of the Appellant-Plaintiff. Inviting my attention to the Order passed by the lower

Appellate Court, he would submit that lower Appellate Court has taken into consideration extraneous factor of Defendant already selling part of the suit property and creating third party rights. According to Mr. Joshi, no concrete evidence is available on record in support of creation of any third party rights in respect of suit property by the Defendant. According to him, the suit property still continues to be in the ownership and possession of the Defendant and that the Appellant is ready and willing to purchase the same. He would submit that the alternate prayer for refund of earnest money alongwith interest can be considered only in case where the specific performance of the contract is impossible. According to him, in the present case since the suit property still in the ownership and possession of the Defendant, Trial Court and lower Appellate Court could have easily directed Defendant to execute sale deed of the suit property in favour of the Appellant Plaintiff.

3. I have gone through the Orders passed by the Trial Court and the lower Appellate Court. I have also gone through the Clause No.5 of the agreement for sale dated 02 September 2008. Under Clause No.5 parties specifically agreed that the final transaction of sale would be executed only after the Defendant gets the construction regularized from Nashik Municipal Corporation. This is the specific contingency agreed by the Applicant-Plaintiff as condition precedent for execution of the sale deed. The findings recorded by the Trial Court and lower Appellate Court would indicate that the Defendant has not got construction regularized from Nashik Municipal Corporation. There is no dispute about this finding of fact. In the light of this position the very condition for execution of the sale deed, agreed by the Appellant-Plaintiff, is admittedly not satisfied. Therefore, in absence of

regularization of construction on the suit property, transaction of sale cannot fructify in favour of Appellant-Plaintiff. In my view this was the adequate reason for the Trial Court and the lower Appellate Court to decline the relief of specific performance in favour of the Appellant-Plaintiff. True it is that the lower Appellate Court taken into consideration the aspect of creation of third party rights by the Defendant in the suit property. However even if the said aspect of creation of third party rights is to be ignored, in my view the specific condition of getting structure regularized is not yet fulfilled and therefore the transaction of sale cannot fructify in favour of the Appellant-Plaintiff. Considering the overall circumstances of the case, the Trial Court has directed Defendant to refund earnest money of Rs.4,55,000/- to the Plaintiff alongwith interest at the rate of 9% per annum from June 2009 till realization of the entire amount. In my view this provides adequate solace to the Appellant-Plaintiff. There is no substantial question of law involved in the present Appeal. The Appeal, being devoid of merits, is dismissed without any order as to costs. Since the Appeal is disposed of, nothing survives in the Interim Application and it is also disposed of.

**SANDEEP V. MARNE, J.**

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