

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO.99 OF 2022
WITH
INTERIM APPLICATION NO.549 OF 2022
IN
SECOND APPEAL NO.99 OF 2022**

Chhaya Sarjerao Andre
V/S

....Appellant/Applicant

Dr. Pyarelal L. Tiwari
deceased through Legal Heirs & Ors.

....Respondents

**WITH
INTERIM APPLICATION NO.8653 OF 2024
IN
SECOND APPEAL NO.99 OF 2022**

Dr. Pyarelal L. Tiwari
deceased through Legal Heirs & Ors.
IN THE MATTER BETWEEN

....Applicants

Chhaya Sarjerao Andre
V/S

....Appellant

Dr. Pyarelal L. Tiwari
deceased through Legal Heirs & Ors.

....Respondents

Mr. Sachin S. Punde *for the Appellants/Applicants in SA and IA 549 of 2022.*
Mr. Drupad Patil a/w Ms. Srushti S. Chalke *for Respondent Nos.1A to 1D in
SA and Applicants in IA 8653 of 2024.*

CORAM: SANDEEP V. MARNE, J.
DATE : 08 MAY 2024.

P.C.:

1 By this Appeal, Appellant challenges the judgment and order dated 22 March 2021 passed by the Principal District Judge, Pune dismissing Civil Appeal No.547 of 2016 and confirming the decree dated 28 September 2015 passed by Joint Civil Judge Junior Division, Vadgaon Maval in Regular Civil Suit No.296 of 2012 (Old Special Civil Suit No.88 of 2008).

2 Plaintiff filed suit for specific performance of agreement for sale dated 28 July 2002 contending that the entire amount of consideration for purchase of the suit property was already paid. Defendants were served with suit summons and appeared in the suit. However, they did not file their Written Statement. Accordingly, 'No WS' order was passed against all the Defendants. Plaintiff examined three witnesses and after considering the evidence on record, the Trial Court proceeded to decree the suit directing the Defendants to execute the sale deed in respect of the suit property.

3 It appears that the decree passed by the Trial Court came to be executed by execution of sale deed in favour of Plaintiff. After execution of the decree, Appellant, who is original Defendant No.4, filed Civil Appeal No.547 of 2016 before the District Court challenging the decree dated 28 September 2015. There appears to be some dispute as to whether original Defendant Nos.1, 2, 3 and 5 filed Appeal against the decree of the Trial Court. Mr. Punde, the learned counsel appearing for the Appellant would

submit that Defendant Nos.1 to 3 had also filed their Appeal, which came to be withdrawn subsequently. However, there is nothing on record to indicate so. Be that as it may, the First Appellate Court proceeded to dismiss Appeal filed by the Appellant on 22 March 2021. Aggrieved by the decrees passed by the Trial and First Appellate Court, the Appellant has filed present Second Appeal.

4 Mr. Punde would submit that the Trial Court has committed a gross error in relying on the Affidavits of evidence of PW1 and PW2, who had merely tendered their Affidavits of evidence. That admittedly PW1 and PW2 did not enter into witness box and that the procedure contemplated under Order 18, Rule 4 of the Code of Civil Procedure, 1908 (**Code**) is not followed and therefore their evidence required to be discarded. In support of his contention, Mr. Punde would rely on judgment of this Court in **FDC Ltd. vs. Federation of Medical Representatives Association India (FMRAI)**, AIR 2003 Bombay 371. He would submit that Defendants are denied right of cross-examination in respect of PW1 and PW2, who never entered the witness box. He would also contend that their Affidavits of evidence were erroneously taken on record by the Trial Court on unscheduled day of hearing. That the hearing of the suit was adjourned to 7 September 2014 and the Trial Court took the suit on board on 6 August 2014 behind the back of the Defendants and took the Affidavits of evidence of PW1 and PW2. He would submit that since the errors committed by the Trial Court in taking on record Affidavits of evidence of PW1 and PW2 go to the root of the matter, Appellant is entitled to raise the said issue in the present Second Appeal.

5 Mr. Punde would further submit that in absence of evidence by the Plaintiff, readiness and willingness to perform Plaintiff's part of contract has not been proved and therefore the suit ought to have been dismissed by the Trial Court. He would further submit that the agreement for sale was executed on 28 July 2002, whereas the suit was filed on 17 December 2008 and that therefore the suit was clearly barred by limitation.

6 *Per contra*, Mr. Patil, the learned counsel appearing for Respondent No.1-original Plaintiff would oppose the Appeal and support the decrees passed by the Trial Court and the First Appellate Court. He would submit that even if it is assumed that there is any procedural irregularity in taking into consideration the evidence of PW1 and PW2, it is undisputed that PW3 entered the witness box and gave evidence about execution of the agreement and payment of earnest money. That therefore once the execution of the agreement is proved, in absence of any defence by the Defendants, the Trial Court has rightly decreed the suit. Mr. Patil would also take me through the relevant statements/certificates issued by the Bank in support of his contention that various amounts paid by the Plaintiffs were received in the account of Gangaram Kondu Kondbhar. He would pray for dismissal of the Appeal.

7 After considering the submissions canvassed by the learned counsel appearing for parties, it is seen that only Defendant No.4 has filed the present Appeal. Perusal of the decree passed by the First Appellate Court would indicate that Civil Appeal No.547 of 2016 was also filed by the

Appellant alone. Though Mr. Punde has contended that the brothers (Defendant Nos.1 to 3) had also filed Appeal before the First Appellate Court, he submits that the said Appeal was withdrawn. This would clearly show that Defendant Nos.1 to 3 and 5 have accepted the decree. Only Defendant No.4 is agitating the issue of correctness of the decree passed by the Trial Court by filing the present Second Appeal. It is also required to be noted that Defendant No.4 did not file Written Statement opposing the suit. Though she has sought to question the procedure adopted by the Trial Court in taking Affidavits of evidence of PW1 and PW2 on record in absence of the said witnesses entering in the witness box, the record would indicate that PW3 Shri Santosh Tiwari had entered the witness box and his examination-in-chief is conducted on 10 March 2015. Defendant No.4/Appellant however did not bother to cross-examine PW3.

8 Though procedural irregularity is sought to be agitated in respect of taking the suit on board on 6 August 2014 and in taking on record the Affidavits of evidence of PW1 and PW2, it appears that the Appellant was present before the Court through her advocate on subsequent dates on 17 September 2014 and 29 October 2014, 28 November 2014 and 3 November 2015. She did not raise any objection to taking on record the Affidavits of evidence of PW1 and PW2 or about preponing the date of hearing of the suit to 6 August 2014.

9 Though Mr. Punde has strenuously sought to rely upon provisions of Order 18, Rule 4 of the Code for demonstrating the procedural requirement

of witness entering in the witness box, perusal of the grounds of Appeal raised before the First Appellate Court would indicate that these grounds were not raised before the First Appellate Court. Mr. Punde is quick enough to point out that since the issue is pure question of law, the same can always be agitated directly in the present Second Appeal. He would also rely upon provisions of section 105 of Code in support of his contention that every order passed during course of Trial can always be challenged in a substantive Appeal. He would also place on record additional grounds which according to him demonstrate clear error on the part of the Trial Court if not following the procedure under Order 18, Rule 4 and 5 of the Code. In my view considering the facts and circumstances of the present case, it is not necessary to give any importance to the alleged procedural lacuna in not getting PW1 and PW2 in the witness box and recording their examination-in-chief. Appellant/Defendant No.4 was without the Written Statement. Despite availability of opportunity, she did not cross-examine PW3. It is therefore highly doubtful whether she would cross-examine PW1 and PW2 as well. Execution of the agreement is proved. Payment of consideration is also proved by production of relevant bank certificates. In the light of these facts and circumstances of the case, Appellant cannot be permitted to frustrate the decree passed after prolonged litigation between the parties by raising technical objections. Therefore reliance of Mr. Punde on judgment of this Court in **FDC Ltd.** (supra) would not assist the case of the Appellant.

10 The decree of the Trial Court has already been executed and the sale deed is executed by the Court Commissioner. Considering the overall conspectus of the case, I am of the view that no substantial question of law is

involved in the present Appeal. There is no point in further prolonging the litigation which has already ensued for 16 long years between parties. Second Appeal is accordingly **rejected**.

11 With rejection of Appeal, both the Interim Applications do not survive. The same are also stand disposed of.

(SANDEEP V. MARNE, J.)

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