



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR.

SECOND APPEAL NO. 556 OF 2018

APPELLANT : 1. Govindrao s/o Mahadeorao Bhagwat,
Original plaintiff in R.C.S.
No.52 of 2012
&
Appellant in RCA No.61 of
2014 on RA

//VERSUS//

RESPONDENTS : 1. Narendra s/o Madhukar Gulhane,
Aged adult, Occ. NIL
Original Defendants in
R.C.S. No.52/2012
&
Non-Appellants in RCA
No.61/2014 on RA

2. Umesh s/o Madhukar Gulhane,
Aged adult, Occ. NIL

3. Ku. Suvarna Madhukar Gulhane,
Aged adult, Occ. NIL

4. Sau. Yogita w/o Rajendra Gulhane,
R/o House No.150-151 Hanuman Nagar,
KDK College Road, Hanuman Mandir,
Nandanvan, Kavelu Quarter,
Nagpur - 440009

5. Smt. Sunanda wd/o Madhukar Gulhane,
Aged adult, Occ. NIL.

6. Harihar Shankarlal Joshi,
Aged adult, Occ. NIL
(All the respondents are R/o Arvi, Tahsil
Arvi, District Wardha)

Mr. Nikhil Walesha, Adv. h/f Mr. Anand Parchure, Advocate for the appellant.
Mr. Tejas S. Deshpande, Advocate for respondent No.6.

CORAM : G. A. SANAP, J.
DATED : 15th FEBRUARY, 2024

ORAL JUDGMENT

1. Heard finally with the consent of learned advocate for the respective parties.

2. In this second appeal, the challenge is to the judgment and decree, dated 29.03.2018 passed by the learned Ad-hoc District Judge-1, Wardha whereby the appeal filed by the appellant against the judgment and decree, dated 22.01.2014 passed by the learned Joint Civil Judge, Junior Division, Arvi was dismissed and judgment and decree refusing the specific performance of contract was confirmed.

3. The notice was issued to the respondents on the following two substantial questions of law:-

“(i) Whether the both Courts below erred in appreciating plaintiffs evidence especially in absence of rebuttal evidence led by defendant No.1?

(ii) Whether the Courts below failed to consider the issue of readiness and willingness as per Section 16(c) of the Specific Relief Act?.”

4. Background facts:-

The appellant is the original plaintiff. Respondent Nos.1 to 5 are the legal representatives of the deceased defendant No.1. Respondent No.6 is the original defendant No.2. It is the case of the appellant that the appellant had purchased a land bearing survey No.7/6 (new survey No.19) area 1H.01R from the deceased-defendant No.1 in the year 1996. The deceased-defendant No.1 failed to disclose that a portion of the said land has been acquired for Canal of Upper Wardha Dam Project when the sale deed was executed. 0H.24 R land was acquired by the Government. The deceased-defendant No.1 had taken the compensation. As far as the present dispute is concerned, it is the case of the appellant that when he brought this fact to the notice of the deceased-defendant No.1, deceased-defendant No.1, in order to take care of the interest of the appellant, on 05.04.2003, agreed to sell land bearing survey No.7/6 (New Survey No.19) area 1H.01R at the rate of Rs.50,000/- (Rupees Fifty Thousand Only) per acre. The agreement was oral. On 05.04.2003, the appellant paid Rs.501/- (Rupees Five Hundred and One Only) to the deceased-defendant No.1 as earnest money. According to the appellant, defendant No.1 did not get the land measured for the purpose of execution of the sale deed. Deceased-

defendant No.1 instead of execution of the sale deed as agreed in favour of the appellant agreed to sell the said land to defendant No.2-respondent No.6. He executed a sale deed in favour of the defendant No.2-respondent No.6 on 08.06.2005. According to the appellant, there was a breach of contract by the deceased-defendant No.1. He was called upon to perform his part of the contract and execute the sale deed as agreed. On the failure of deceased-defendant No.1 to comply with the requisitions of notice, a suit was filed for specific performance of the contract.

5. The deceased-defendant No.1 filed the written statement and opposed the claim. The deceased-defendant No.1 denied the claim in toto. Deceased-defendant No.1 contended that there was no oral agreement as stated by the appellant. He had entered into an agreement of sale with defendant No.2-respondent No.6 and pursuant to the agreement, the sale deed was executed in his favour on 08.06.2005.

6. The original defendant No.2-respondent No.6 also filed a written statement. He adopted the material part of the written statement of the deceased-defendant No.1. According to him, there was no oral agreement of sale between the appellant and original

defendant No.1. He had purchased the suit land pursuant to a sale deed dated 08.06.2005 from the deceased-defendant No.1. He is a *bona fide* purchaser.

7. The appellant examined himself and two witnesses in support of his claim. Neither the deceased-defendant No.1 nor defendant No.2-respondent No.6 adduced the evidence. The learned Judge of the trial Court, on consideration of the evidence, dismissed the suit, holding that the plaintiff was not able to prove the oral contract/agreement of sale with the deceased-defendant No.1. The appellant filed the appeal against this judgment and decree. The Appellate Court, on consideration of the evidence confirmed, the judgment and decree passed by the trial Court and dismissed the appeal. The appellant is, therefore, before this Court. At the stage of the notice, the above substantial questions of law were framed.

8. I have heard learned Advocate for the appellant and learned Advocate for the respondent No.6. Respondent Nos.1 to 5 despite service of notice have failed to appear before this Court.

9. Learned Advocate for the appellant submitted that in the absence of the evidence in rebuttal by the defendants, the Courts

below ought to have accepted the evidence adduced by the plaintiff and as such, the case of the appellant. Learned Advocate submitted that the Courts below committed patent illegality in discarding the evidence adduced by the plaintiff in the absence of any evidence in rebuttal by the defendants. Learned Advocate further submitted that the Courts below were bound to decide the issue of the readiness and willingness of the appellant to perform the part of his contract. Learned Advocate pointed out that the decision rendered by the trial Court and confirmed in appeal by the First Appellate Court are contrary to the provisions of Section 16(c) of the Specific Relief Act, 1963. Learned Advocate submitted that on the basis of the evidence adduced by the plaintiff, which has gone unrebutted, the appellant is entitled to the decree of specific performance of the contract.

10. Learned Advocate for respondent No.6 submitted that the appellant is required to stand on his own legs. The appellant could not take the benefit of weakness of defence of defendants-respondents. Learned Advocate submitted that the evidence adduced by the plaintiff was found woefully insufficient to prove the oral agreement as alleged. Learned Advocate submitted that the material facts pleaded in the plaint are not sufficient to justify the claim for specific performance of contract. Learned Advocate

submitted that once the appellant has failed to prove the oral agreement, the issue of readiness and willingness would lose its shine and significance.

11. It is a settled position in law that the party who avers a particular fact is bound to prove the same. It is a settled position that the plaintiff has to stand on his own legs and prove the basic facts pleaded in the plaint. The plaintiff cannot take the advantage of the defence or weakness of the defence of the defendants. The initial burden in this case was on the appellant to prove the oral agreement. On proof of the oral agreement, by cogent evidence, the onus would have shifted on the defendants to rebut the same by adducing the evidence. Leading evidence, depending upon the factual scenario obtained on record, is the conscious decision of the party. A mere failure to lead the evidence by the defendants could not be said to be the ground under the law to accept the claim of the plaintiff. In such a situation, before granting the claim, the Court is required to record a finding that the evidence is cogent, reliable and as such, sufficient to prove the fact alleged by the plaintiff. In this case, in my view, therefore, mere failure on the part of the defendants to step into the witness box and lead the evidence could not be the ground to accept the claim of the plaintiff/appellant.

12. I have minutely perused the judgment and decree passed by the Courts below. The Courts below have recorded a concurrent finding of fact that the evidence adduced by the appellant is not sufficient to prove the oral agreement of sale as alleged by the plaintiff. The Courts below have taken into consideration not only the evidence of the plaintiff but also the attending circumstances and conduct of the appellant. The Courts below have made threadbare analysis of the evidence, the circumstances and undisputed facts. It needs to be stated that the first sale deed was executed by the deceased-defendant No.1 in respect of his land in favour of the appellant. According to the appellant, the deceased-defendant No.1 by suppressing the material facts, had deceived him. He did not disclose that the portion of the land sold to him in 1996 was acquired by the Government for the construction of a canal. It is his case that he realized this fact in 2003 and therefore, he went to deceased-defendant No.1 and asked him to take care of his interests. It is the case of the appellant that at that time the deceased-defendant No.1 agreed to sell suit land to him orally. He accepted Rs.501/- towards the consideration. The Courts below have observed that this conduct of the appellant is not consistent with the conduct of a man of ordinary prudence placed in a similar situation. The appellant

who was already deceived in 1996 would not have taken a risk to purchase the land on the basis of the oral agreement. Similarly, he was expected to insist for execution of the agreement. The agreement should have contained the necessary particulars with regard to the nature of the transactions and the date agreed for the sale deed. It is pertinent to note that a person of ordinary prudence placed in a position of the appellant would have insisted for execution of the sale deed of suit land in 2003 itself, unless there was some difficulty on his part. If he had any difficulty to get the sale deed of the suit land executed from the deceased-defendant No.1 in the year 2003 itself, it was expected on his part to mention that fact in the agreement for sale. The Courts below have taken the conduct of the appellant into consideration. The perusal of the plaint would show that it lacks material particulars to make out the case of the concluded contract and the date for the performance of the contract. The appellant did not do anything for two years from the alleged oral agreement. He issued a notice to the deceased-defendant No.1 when he came to know that the deceased-defendant No.1 had agreed to sell the suit land to the original-defendant No.2-respondent No.6. The sale deed was executed on 8.06.2005. In my view, the appellant was expected to plead the necessary relevant facts as to why he made wait for two years for calling upon the deceased-

defendant No.1 to execute the sale deed of the suit land in his favour. In my view, on the basis of the evidence, the Courts below have found that the appellant was not entitled to get the relief. In my view, simply because of the failure on the part of the defendants to lead oral evidence, the evidence adduced by the plaintiff cannot be accepted as a sufficient evidence to prove the fact. As such, I conclude that there is no substance in the appeal. The concurrent finding is based on a proper appreciation of the evidence. As such I answer the question Number 1 in the negative. As far, as the question No.2 is concerned, my answer is that the both the Courts below have appropriately answered this issue.

13. As a result of this, Second Appeal is dismissed.

14. Second Appeal stands disposed of. No order as to costs. Pending applications, if any, stand disposed of.

(G. A. SANAP, J.)