



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

SECOND APPEAL NO. 468 OF 2016

APPELLANT : 1. Fattu s/o Vishvanath Gajabhe,
Aged about 51 years,
Occupation – Cultivation,
R/o Doctors Quarter,
Opp. Ajani Railway Station,
Nagpur, Tahsil & Distt. Nagpur

//VERSUS//

RESPONDENTS : 1. Mukund Shridharrao Thawkar, (Dead)
through LR's
~~Aged about 55 years,~~
~~Occupation – Business,~~
~~R/o Naik Road, Mahal, Nagpur, Tahsil &~~
~~Distt. Nagpur~~

Amended as per Hon'ble Court's order dt. 12.07.24.

i) ~~Malini Mukund Thawkar~~
Malti wd/o Mukund Thawkar,
Age- Major,
R/o Naik Road, Mahal, Nagpur

ii) Kapil s/o Mukund Thawkar

iii) Sandip s/o Mukund Thawkar,
All R/o Naik Road, Mahal, Nagpur

2. Sau. Rajashri Balkrushna Yedme,
Aged about Adult,
Occupation – Cultivation,

3. Balkrushna Laxman Yedme,
Aged about Adult,
Occupation - Cultivation

4. Lukesh Balkrushna Yedme,
Aged about Adult,
Occupation – Cultivation
No.2 to 4 R/o, Warora, Tq. Warora,
District Chandrapur

Mr. Apurv De, Advocate for the appellant.

Mr. C.B. Dharmadhikari, Advocate for respondent No.1 .

CORAM : G. A. SANAP, J.

DATED : 2nd 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 08.08.2016, passed by the learned District Judge-1 Warora, District Chandrapur, whereby the learned Judge dismissed the appeal filed by the appellant/original defendant No.1 and confirmed the judgment and decree dated 11.11.2014, passed by the learned Civil Judge, Senior Division, Warora, directing the appellant/defendant No.1 to refund the earnest money to respondent No.1.

3. In this appeal, the following substantial question of law

has been framed:

“In the light of the findings recorded that the plaintiff was not ready and willing to perform his part of the agreement and that even to some extent the defendant No.1 was at fault, whether the defendant No.1 was entitled to forfeit the amount of earnest?”

4. The facts, in brief, leading to the substantial question, are as follows:-

The appellant is the original defendant No.1. The respondent No.1 is the plaintiff. Respondent Nos.2, 3 and 4 are the defendants Nos.2 to 4 respectively. The plaintiff filed the suit for specific performance of the agreement for sale of the suit land on 27.12.2010. The plaintiff stated that the defendant No.1, pursuant to the agreement for sale of suit land for Rs.90,00,000/- (Rupees Ninety Lacs Only), accepted Rs.15,00,000/- (Rupees Fifteen Lacs Only) towards earnest money and agreed to execute the sale deed within six months after receiving the balance consideration of Rs.75,00,000/- (Rupees Seventy Five Lacs Only). The plaintiff, after execution of the agreement, paid Rs.13,75,000/- (Rupees Thirteen Lacs Seventy Five Thousand Only) to the

defendant No.1 from time to time. He paid a total amount of Rs.28,75,000/- (Rupees Twenty Eight Lacs Seventy Five Thousand Only) to the defendant No.1. It is stated that despite repeated requests the defendant No.1 did not execute the sale deed. The plaintiff, therefore, filed the suit for specific performance of the contract.

5. The defendant No.1 opposed the suit by filing a written statement. He denied the claim of the plaintiff in toto. He admitted the execution of the agreement. He also admitted the receipt of Rs.28,75,000/- (Rupees Twenty Eight Lacs Seventy Five Thousand Only) from the plaintiff till 22.08.2011. He contended that there was a failure on the part of the plaintiff to perform his part of the contract. He was ready to execute the sale deed, as agreed.

6. The defendant Nos.2 and 3, the erstwhile owners of the suit land, contended that they sold the suit land to the defendant No.1, after obtaining the permission from the Collector, *inasmuch* as the land was owned by the Tribal. As per the permission granted for sale, the defendant No.1 was under an obligation to use the land for non agricultural commercial purpose. They contended

that as per the agreement, the defendant No.1 had agreed to sell the suit land to the plaintiff for agricultural purpose and the same was in violation of the condition of the permission.

7. The parties adduced evidence in support of their rival contentions. The learned Judge of the Trial Court rejected the prayer for specific performance of contract made by the plaintiff but decreed the suit for refund of the earnest money and the other amount paid by the plaintiff with interest. The plaintiff did not challenge this judgment and order. The defendant No.1, being aggrieved by the order directing the refund of earnest money with interest filed the appeal. Learned District Judge-1 Warora dismissed the appeal, as stated above. The defendant No.1-appellant has filed this appeal and contended that the substantial question of law, as above, arises and needs to be answered in his favour.

8. I have heard Mr. Apurv De, learned Advocate for the appellant and Mr. C.B.Dharmadhikari, learned Advocate for respondent No.1. The Advocate for respondent Nos.2, 3 and 4 was absent.

9. Learned Advocate for the defendant No.1-appellant submitted that the appellant was not at fault. Learned Advocate pointed out that the defendant No.1 - appellant had been ready and willing to perform the part of his contract and execute the sale deed in favour of the plaintiff-respondent No.1. Learned Advocate submitted that the trial Court has recorded a finding that the plaintiff-respondent No.1 had not been ready and willing to perform his part of the contract. Learned Advocate submitted that in view of this finding the plaintiff-respondent No.1 was not entitled to get the decree for refund of earnest money. Learned Advocate submitted that due to the default committed by the plaintiff-respondent No.1 the amount of earnest money stood forfeited. The learned Advocate in support of his submission has placed reliance on the decision in the case of *Hanuman Cotton Mills vs. Tata Air Craft Ltd* reported in *1969 LawSuit (SC) 442*. Learned Advocate submitted that the decree granted by the trial Court for refund of earnest money and confirmed by the learned Appellate Court cannot be sustained.

10. Learned Advocate for the plaintiff-respondent No.1 submitted that there was no forfeiture clause in the agreement for

sale. Learned Advocate submitted that the time was not the essence of the contract. Learned Advocate further submitted that the failure on the part of the plaintiff-respondent No.1 to prove his readiness and willingness to perform his part of contract could not be said to be a breach of the contract. Learned Advocate pointed out that after execution of the agreement, as agreed, the plaintiff-respondent No.1 paid Rs.13,75,000/- (Rupees Thirteen Lacs Seventy Five Thousand Only) towards the part consideration. Learned Advocate submitted that no specific notice was issued by the defendant No.1- appellant to intimate the plaintiff-respondent No.1. about the forfeiture of the amount of earnest money. Learned Advocate submitted that the contract was frustrated because the transfer of the land, sought to be made, was contrary to the permission for transfer granted by the Collector.

11. At the outset, it would be necessary to highlight certain undisputed facts. The amount of Rs.15,00,000/- (Rupees Fifteen Lacs Only) was paid on the date of execution of the agreement for sale on 27.12.2010. The possession of the land was not delivered to the plaintiff-respondent No.1. The plaintiff-respondent No.1 paid Rs.13,75,000/- (Rupees Thirteen Lacs Seventy Five Thousand Only) out of the balance consideration to the appellant from time

to time. The total amount paid, including earnest money, was Rs. 28,75,000/- (Rupees Twenty Eight Lacs Seventy Five Thousand Only) to the defendant No.1 - appellant. It is seen that before filing the suit, the notice was issued by the plaintiff to the defendant No.1 calling upon him to execute the sale deed, as agreed. The defendant No.1 replied to the said notice and raised various contentions. The defendant No.1 expressed his willingness to execute the sale deed. However, he raised certain contentions which, according to the plaintiff, were not consistent with the agreement. The stalemate on this issue between the parties continued for quite some time. Ultimately, the plaintiff filed the suit for specific performance of the contract. The defendant No.1 denied the claim in toto. The defendant No.1 also contended in his written statement that he was ready to execute the sale deed. It is evident on perusal of the written statement that the admission of a claim of the plaintiff was not unconditional. If the admission of a claim of the plaintiff by the defendant No.1 had been unconditional then the learned trial Court would have granted the decree on admission. It needs to be stated that in view of a specific defence of the defendant No.1 the plaintiff-respondent No.1, was required to lead the evidence and prove that he has been ready and willing to perform his part of the contract. Learned Judge of the

Trial Court recorded the finding that the plaintiff had not been ready and willing to perform his part of the contract and based on this finding denied the relief for specific performance of the contract. Learned Judge on analysis of the evidence, adduced by the plaintiff in support of his plea and by the defendant in support of his plea to oppose the claim, rejected the relief of specific performance of the contract. In my view, all these facts need to be borne in mind while addressing the substantial question of law framed in this appeal.

12. It is undisputed that in the agreement for sale dated 27.12.2010 there was no forfeiture clause. Similarly, as per the agreement, the sale deed was to be executed within six months on receipt of the balance consideration amount. It needs to be stated that in a contract for transfer of immovable property time is not an essence of a contract unless it is specifically stipulated in the agreement. It is evident that there was no forfeiture clause in the agreement. Similarly the defendant No.1 - appellant did not forfeit the earnest money by written communication to the plaintiff. The learned Trial Court has recorded a finding that the plaintiff had not been ready and willing to perform the part of his contract. In my view, on the basis of this finding, the plaintiff – respondent No.1

could not be said to be guilty of breach of a contract. It is further seen that defendant No.1- appellant was also at fault in this entire transaction. The conduct of the plaintiff-respondent No.1, as can be seen from the record, indicate that there was no breach of contract on his part. The payment of part consideration namely Rs.13,75,000/- (Rupees Thirteen Lacs Seventy Five Thousand Only), after execution of the agreement for sale, would reflect upon his conduct. In my view, in such a situation the existence of forfeiture clause in the agreement would have assumed significance and deserved due consideration.

13. Defendant No.1- appellant has categorically admitted that he had purchased the suit land from the respondent Nos.2 and 3, who are admittedly Tribals after obtaining the permission from the Collector. He has admitted that the permission was granted on the condition that land should be used for non agricultural commercial purpose. The agreement would show that the land was sold to the plaintiff-respondent No.1 for agricultural purpose. The defendant No.1-appellant, in his written statement, has categorically stated that there was no contract for the sale of non agricultural land between him and the plaintiff. He has categorically stated that he had agreed to sell the land for

agricultural purpose. It is seen that this was in violation of the condition of the permission, which is produced on record at Exh.65. The Courts below have taken all these aspects into consideration.

14. It needs to be stated that after the execution of the agreement, the possession of the land continued with the defendant No.1 - appellant. It is not the case of the defendant No.1 - appellant that due to non performance of contract, on the part of the plaintiff, any damage or loss has been caused to him. It is not his case that, in view of this transaction between him and the plaintiff, the value of the land was diminished or reduced. A judicial note can be taken of the fact that prices of the N. A. land or agricultural land always increase. It is further seen that there was no stipulation in the agreement for damages in case of the non fulfillment of the promise by the plaintiff-respondent no.1.

15. In the backdrop of above stated crystallization of the facts, the decision relied upon by the learned Advocate needs consideration. This decision was cited before the Appellate Court. In para No.18 of the impugned judgment and decree, the learned Judge has considered the same. In the case of *Hanuman Cotton*

Mills Vs. Tata Air Craft Ltd. (supra) the Hon'ble Apex Court has held as follows:-

“24 From a review of the decisions cited above, the following principles emerge regarding “earnest”:

(1) It must be given at the moment at which the contract is concluded.

(2) It represents a guarantee that the contract will be fulfilled or, in other words, “earnest” is given to bind the contract.

(3) It is part of the purchase price when the transaction is carried out.

(4) It is forfeited when the transaction falls through by reason of the default or failure of the purchaser.

(5) Unless there is anything to the contrary in the terms of the contract, on default committed by the buyer, the seller is entitled to forfeit the earnest.”

16. In the case before the Apex Court, the entire amount was paid as earnest money. There was no ambiguity regarding the nature of the payment of money as earnest and the right of the respondents to forfeit the same under the terms of the contract. The contract in the said case provided for forfeiture. In my view, in the facts and circumstances of the case, in the absence of a specific clause for forfeiture of earnest money this decision will be of no help to the case of the defendant No.1. Similarly, the defendant No.1- appellant was also at fault. The defendant No.1- appellant did not admit the claim in categorical terms and therefore, the decree on admission could not be passed. The finding on the issue

of readiness and willingness recorded against the plaintiff-respondent No.1 cannot be construed as a breach of contract on the part of the plaintiff. Accordingly, I conclude that the Courts below have not committed any illegality or error. There is no perversity in the findings. The findings are based on consideration of the entire evidence on record. As such, I answered the question in the negative. As a result of this, I conclude that this appeal fails. It is accordingly, dismissed. The amount deposited by the defendant No.1- appellant in this Court be paid over to the ~~plaintiff—respondent No.1.~~ Respondent Nos.1 (i) to 1(iii) are allowed to withdraw the amount with accrued interest.

Corrected as
per Court's
Order dated
12.07.2024

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

(G. A. SANAP, J.)

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