IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 01 OF 2025

Amin Khan Kabir Khan
Through GPA
Kabir Khan Habib Khan .. Appellant

Versus

Danish Khan Yunus Khan .. Respondent

Shri Mangesh G. Patil, Advocate for the Appellant.
Shri S. B. Yawalkar, Advocate for the Respondent.

CORAM : SHAILESH P. BRAHME, J.
DATE : 29TH JULY, 2025.

FINAL ORDER :

. Heard both sides. Appellant is aggrieved by the concurrent findings of facts recorded by the Courts below in granting decree of specific performance of contract against him.

2. The respondent had filed R.C.S. No. 104 of 2016 for specific performance of contract founded on three registered agreements to sale namely Exhibit 20 dated 25.01.2006, Exhibit 21 dated 27.09.2007 and Exhibit 22 dated 31.10.2008. Initial period for execution of sale deed was extended by subsequent agreement. It is contended by the respondent that appellant failed to execute sale deed, hence notice was issued on 27.05.2015. Neither it was responded, nor any steps were taken for execution of the sale deed, which is cause of action to file a suit for specific

performance of contract.

3. Appellant contested the claim by filing written statement on the ground that it was loan transaction and agreements were executed towards security. Various pleas i. e. limitation, non joinder of necessary party and under valuation of the suit are raised in the written statement.

4. Respondent examined four witnesses. Appellant examined two witnesses. Both the Courts below found favour with the respondent in decreeing the suit.

5. Learned counsel for the appellant submits that despite pleadings, no issue of limitation and non joinder of necessary party was framed by the Trial Court. Suit filed in the year 2016 is barred by limitation, considering the dates of performance of contract stipulated in the agreement. It is submitted that the valuation of the suit property is about Rs. 20 to 25 Lakhs and suit was grossly under valued. It is further contended that considering the averments of the agreement and the valuation of the suit property at the relevant time was about Rs. 20 to 25 Lakhs, only possible inference is that of a loan transaction and security. He would further submit that both the Courts below committed error of jurisdiction in overlooking that encumbrance over the suit property was worth Rs. 3,40,000/- and the agreed amount of consideration was Rs. 2,37,000/-. My attention is adverted to tax receipts which are at Exhibit 37 and 38. The

appellant when entered into transaction with the respondent was merely eighteen years of age. He was immature and disadvantage has been taken by the respondent. It is contended that encumbrance was within knowledge of the respondent.

6. Learned counsel Mr. Yawalkar for the respondent supports impugned judgments and decrees. He would submit that the last agreement at Exhibit 22 does not stipulate any date for execution of the sale deed, rather it binds appellant to repay the loan and after removal of encumbrance within eight days, sale deed was to be executed. It is contended that no intimation was given by the appellant for the removal of encumbrance, neither there was any reply to notice. He would submit that both the Courts below have concurrently recorded that the respondent is in possession of the written agreements. It is submitted that all the agreements are registered and proved. The theory of hand loan lacks material particulars in the written statement. There is no pleading and evidence to make out a case that valuation of the suit house is about Rs. 20 to 25 Lakhs. Lastly, it is submitted that stray admission in cross examination of the plaintiff is not sufficient to corroborate theory of grossly inadequate consideration.

7. I have considered rival submissions of the parties. Both the parties have led oral and documentary evidence before the Trial Court. The agreements executed between the parties which are marked Exhibit 20, 21 and 22 are proved by the respondent

by examining P.W. Nos. 2 and 3, who are the witnesses and P.W. No. 4, who is the scribe of Exhibit Nos. 21 and 22. There is no controversy about the contents of the agreements.

8. The appellant has raised issue of limitation, but no issue was framed by the trial Court. The lower Appellate Court has dealt with this aspect of the matter while answering point No. 3 Pertinently, agreement at Exhibit 20 stipulates a date for executing sale deed i. e. 01.10.2007. Agreement at Exhibit 21 stipulates such a date as 01.10.2008. Agreement at Exhibit 22, though does not stipulate a date, but stipulates time of eight days after removal of encumbrance. Suit is filed on 30.06.2016. Before filing suit notice was issued on 27.05.2015, which is neither replied, nor responded.

9. There is nothing on record to suggest that the appellant responded positively in pursuance of notice dated 27.05.2015. There is no pleading and evidence on record on the part of the appellant that encumbrances were removed and respondent was called upon to perform his part of contract. The appellant has committed breach of the terms and conditions stipulated in Exhibit 22. Under these circumstances, I find that suit is within limitation.

10. It is trite law that time cannot be essence of contract, if a property is immovable property and unless repercussions of non performance of contract are stipulated in the agreement in

writing. Though in first two agreements time was stipulated to execute sale deed, consciously the said time is not stipulated in the third agreement. Considering overall conduct of the appellant, the submissions regarding limitation cannot be accepted.

11. It is vehemently contended by the appellant that valuation of the property is more than Rs. 20 to 25 Lakhs. The written statement does not stipulate a specific figure denoting valuation of the property. It is tried to be shown from stray admission in the cross examination of the plaintiff. In the absence of pleadings and evidence the stray admission would not enure to the benefit of the appellant.

12. The written statement is silent regarding the encumbrance over the property. My attention is adverted to Exhibit Nos. 37 and 38 to point out that it was to the tune of Rs. 3,40,000/-. It is obligation on the appellant to plead and lead evidence that encumbrance was to a particular extent and despite that in the transaction the consideration was fixed of Rs. 2,37,000/-. There is nothing on record to indicate valuation of land. In the absence of material particulars, I find no substance in the submission that though the encumbrance was more than the consideration, still the agreements were executed, which is indicative of loan transaction.

13. The submission of the appellant regarding his tender age

and the agreements were being executed taking disadvantage of want of maturity holds no substance. The transactions between the parties are evidenced by registered documents. It is not open for the appellant to take any defence that there was lack of maturity and the property was shown to be sold for very meager amount. It is nobody's case that while executing the agreements the appellant was not competent to execute the contract.

14. Learned counsel for the appellant relies on the judgment of the Supreme Court in the matters of Nanjappan Vs. Ramasamy and another reported in ***2015 AIR SCW 1659*** and **Usha Devi and others Vs. Ram Kumar Singh and others in Civil Appeal No. 8446 of 2024 dated 05.08.2024**.

15. Considering the evidence on record and the findings recorded by the both the Courts below, I do not find any substantial question of law is involved in the second appeal. Second appeal is dismissed.

[SHAILESH P. BRAHME J.]

bsb/July 25