



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

SECOND APPEAL NO.248 OF 2016

APPELLANT : Smt. Ashabai w/o Laxminarayan
(Ori. Plaintiff)
(On R. A.) Kaithwas,
Aged about 48 years, Occupation –
Household, R/o Ashok Nagar, Nagpur.

..VERSUS..

RESPONDENTS : 1 Vijay S/o Vasantrao Tarekar,
(Ori. Defendants)
(On R.A.) Aged – Major, Occ-Not Known
2 Smt. Sandhya W/o. Wamanrao Pinjarkar,
Aged -Major, Occ- Not Known

(Amendment carried out
as per order of this Hon'ble
Court dt.05.09.2017) Correct address of Respondent Nos.1 and 2
Both R/o. Plot No.257, Ashok Nagar, Near
House of Ashabai Kaithwas, Near Srinath Seva
Ashram Nagpur

Mr S. P. Kshirsagar, Advocate for Appellant.
Mr L. M. Deshmukh, Advocate for Respondent Nos.1 and 2.

CORAM : **M. W. CHANDWANI, J.**

DATE : **24th FEBRUARY, 2025.**

ORAL JUDGMENT

1. Heard.

2. This appeal takes an exception to the judgment and decree dated 04.11.2015 passed in Regular Civil Appeal No.83 of 2023 by the District Judge-9, Nagpur, thereby dismissing the appeal and concurring with the judgment and decree passed in

Regular Civil Suit No.2757 of 2001 (Old Special Civil Suit No.171 of 1997) by the 5th Joint Civil Judge Junior Division, Nagpur.

3. The suit filed by the appellant came to be partly decreed, wherein the prayer for specific performance of contract came to be refused and the respondents were directed to return the earnest amount of Rs.15,000/- to the plaintiff. An unsuccessful attempt was made before the District Judge, Nagpur, who confirmed the judgment and decree of the Trial Court. Hence, this appeal.

4. Vide order dated 14.06.2017, following substantial question of law was framed.

“In absence of any cross-examination of the plaintiff and further in absence of any evidence being led by the defendants, whether the Courts were justified in refusing the relief of specific performance ?”

5. Heard the learned counsel appearing on behalf of the appellant. He submitted that there is evidence on record that the appellant was ready and willing to perform her part of the contract. Whereas, the respondents did not enter in the witness box in spite of assertion of the appellant. The Trial Court as well as the First Appellate Court did not consider the aspect of willingness to

perform her part of the contract by the appellant and therefore, both the Courts below were not justified in non-suiting the appellant. According to him, the Trial Court failed to consider that the appellant made further payments to the respondents towards part of the sale consideration and erroneously held that the appellant was not ready to perform her part of contract.

6. Conversely, learned counsel appearing on behalf of the respondents supported the judgment of the Trial Court as well as the First Appellate Court and sought rejection of the appeal.

7. Having heard the learned counsels appearing on behalf of the respective parties and having having gone through the impugned judgments and material available on record, it transpires that the appellant is a tenant of the suit property, which was owned by the father of the respondents/defendants. After the death of the respondents' father, the mother of the respondents executed the agreement to sale of the suit property on 26.11.1988 for the valuable consideration of Rs.50,000/-. The mother of the respondents received earnest money of Rs.15,000/-, which is palpable from the agreement to sale at Exh-37. Further, the case of the appellant before the Trial Court was that she had paid an amount of

Rs.24,960/- towards part consideration from time to time. For this purpose, the learned counsel for appellant relied on the account statement prepared by him, which is at Article – A, which does not bear the signature either of the respondents or their parents. More particularly, the respondents denied the receipt of this amount. The Trial Court as well as the First Appellate Court discarded the statement of account at Article - A on the ground that the appellant failed to prove that the account was maintained in ordinary course of business. This finding has been confirmed by the Appellate Court. There are concurrent findings of the Courts below in this regard.

8. Be that as it may, even if it is presumed that the said document is proved, perusal of the entries in the document reveals that the amounts allegedly received by the respondents appear to be towards rent, as all three entries specify the period for which the said amounts by three entries were received by the respondents or mother of the respondents.

9. At this stage, learned counsel for the appellant seeks to rely on the case of *R. Kanthimathi and Anr. vs. Beatrice Xavier*, (2000) 9 SCC 339, wherein the Supreme Court, after interpreting

the agreement and relying on the terms of handing over the possession has held that by executing the agreement, the landlord entered into a new relationship and therefore, the possession given pursuant to the agreement was possession in the capacity of a purchaser. However, in this case, bare perusal of the agreement does not reveal any condition, whereby the respondents agreed to handover the possession to the appellant. Rather, the agreement goes to show that the possession will be handed over later on. Therefore, the case of R. Kanthimathi (*supra*) does not apply to the case in hand. Thus, there is no force in the argument of the counsel for the appellant that the amounts received by the mother of the respondents after the agreement is nothing but part of consideration.

10. So far as the case of Vidhyadhar vs. Mankikroa and another, AIR 1999 SC 1441 not entering in witness box is concerned, since the burden lies on the plaintiff to prove the defendant's willingness to perform the contract and the specific finding given by the lower Court that further part consideration was not paid by the appellant towards sale consideration, it is clear that the appellant was not ready and willing to perform her part of the

contract. Therefore, the fact that the respondents did not enter into the witness box or that the appellant was not cross examined is immaterial. It was for the appellant to prove that she paid further consideration apart from Rs.15,000/- even though she pleaded it but failed to prove the same. Hence, the decision in the case of Vidhyadhar (supra) will not be helpful to the appellant.

11. In the result, no substantial question of law arises in this appeal. Hence, the appeal is dismissed.

(M. W. CHANDWANI, J.)

Tambe