

(2014) 02 BOM CK 0097
In the Bombay High Court
Case No : Second Appeal No. 276 of 2013

Gajanan

APPELLANT

Vs

Govinda

RESPONDENT

Date of Decision : 25-02-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (2014) 4 ALLMR 219 : (2015) 1 BomCR 653 : (2014) 3 MhLj 482

Hon'ble Judges : A.P. Bhangale, J

Bench : Single Bench

Advocate : P.S. Wathore, Advocate for the Appellant; A.V. Bhide for Respondent No. 1, Advocate for the Respondent

Final Decision : Dismissed

Judgement

A.P. Bhangale, J.—The present appeal is directed, against judgment and order dated 6-8-2012, passed by the learned Ad hoc District Judge-I, Khamgaon, in Regular Civil Appeal No. 8 of 2008, which was dismissed, which arose from judgment and order dated 12-12-2007, passed by the learned Second Joint Civil Judge Junior Division, Khamgaon, in Regular Civil Suit No. 48 of 2003, whereby the suit for specific performance was decreed. Heard the learned counsel appearing for both the parties at bar.

2. Shri P.S. Wathore, learned counsel appearing for appellant Gajanan S/o. Namdeo Jumle (defendant No. 2), contends that there is substantial question of law on the ground that the Courts below could not have passed the decree directing the defendants to deliver the possession of the suit land to respondent No. 1 Govinda S/o. Namdeo Jumle (plaintiff) when sale deed dated 27-1-2003 obtained by the appellant was not challenged and sought to be cancelled.

3. The facts of the case in a nut shell, are thus:

The dispute relates to land bearing Gat No. 1120 admeasuring 38 Are, situated at Mouza Pimpalgaon Raja, Taluka Khamgaon, District Buldana. The said property

was subject of an agreement to sell executed between Govinda and respondent No. 2 Rama S/o. Bayaji Mali (Amale) (defendant No. 1). The agreement to sell was executed on 10-1-2003 whereby Rama had agreed to sell his suit property in favour of Govinda for consideration of Rs. 37,000/- out of which earnest money in the sum of Rs. 1,000/- was paid and sale deed was agreed to be executed by 30-3-2003.

4. It appears that plaintiff - Govinda had issued notice dated 4-2-2003 to defendant No. 1 Rama calling upon him to execute the sale deed pursuant to agreement to sell dated 10-1-2003 to which Rama gave reply dated 10-2-2003. It was revealed that there was utter disregard of existing agreement to sell dated 10-1-2003, on 27-1-2003 the sale deed was executed by Rama in favour of present appellant. Thus, on 26-2-2003 Regular Civil Suit No. 48 of 2003 was filed for specific performance of contract and in the alternative for refund of the earnest money if specific performance cannot be granted.

5. Written statement was filed on 21-6-2003. It is pertinent to note that the appellant, who appears beneficiary under the sale deed executed by respondent No. 2 on 27-1-2003, was also a party to the Regular Civil Suit which was decreed in favour of Govinda. The trial Court had decided the suit and found that Govinda proved the agreement to sell the suit land, executed by Rama for total consideration of Rs. 37,000/-, on 10-1-2003 pursuant to which Govinda had already paid earnest amount of Rs. 1,000/- on 10-1-2003. The trial Court also found that Govinda was ready and willing to perform his part of the contract and thus, on the basis of the evidence led by the parties, the decree for specific performance of suit was passed whereby the defendants were directed to execute the sale deed in respect of the suit property pursuant to agreement to sell dated 10-1-2003 after receiving balance consideration amount within a period of one month from the date of the decree and the defendants were required to obtain necessary permission under The Bombay Prevention of the Fragmentation and Consolidation of Holdings Act, 1947 from the competent authority concerned and in case the defendants failed to apply or to obtain permission, the plaintiff was given liberty to obtain such permission for execution of the sale deed by or on behalf of the defendants in his favour. The trial Court also negatived the defence that the agreement to sell was executed by way of security for money lending transaction as alleged. The defence that the present appellant is bona fide purchaser was also appeared to have been negatived by the trial Court. The present appellant who was party to the suit had challenged judgment and order dated 12-12-2007, passed by the trial Court, before the First Appellate Court in Regular Civil Appeal No. 8 of 2008. The learned First Appellate Judge, after considering the record and evidence led by the parties, found that the agreement to sell dated 10-1-2003 was executed in favour of the plaintiff and the plaintiff was ready and willing to perform his part of the contract while the defendants avoided liability to execute the sale deed in favour of the present appellant. The contention that the agreement to sell was nominal and executed by way of security of hand loan, was also negatived by the learned First

Appellate Judge. Thus, there was concurrent finding of facts, in favour of the plaintiff, in both the Courts below.

6. According to the learned Counsel for the appellant there is a substantial question of law on the ground that the specific performance is a discretionary relief in respect of contracts and when the sale deed was executed in favour of the appellant on 27-1-2003, it could have been refused by relegating plaintiff to damages for specific performance of contract.

7. Shri A.V. Bhide, learned counsel appearing for respondent No. 1, on the other hand disputes the existence of any substantial question of law and contends, that in utter disregard of the existing agreement to sell, the appellant dishonestly and prematurely entered into the transaction of sale deed on 27-1-2003 while Rama was bound to perform his part of the contract by executing sale deed in favour of Govinda by 30-3-2003. Thus, even before the time for execution of the sale deed pursuant to agreement to sell had arrived the original defendants colluded with each other to defeat the suit agreement to execute the sale deed. These facts were considered by both the Courts below so as to record the concurrent finding of facts. Learned counsel, therefore, submits that there is no substantial question of law involved in the present second appeal.

8. I have considered the judgments passed by the Courts below in the present case and the concurrent finding of facts recorded by them. The argument that there was no challenge to the sale deed executed by Rama, in favour of Gajanan (plaintiff), on 27-1-2003 or that the declaration was not sought by the plaintiff to set aside such sale deed executed by Rama in favour of Gajanan, is an argument which may look attractive at the first blush, but considering the fact the appellant was made party in the trial Court and he had opportunity to lead the evidence and argue his case, the argument goes in oblivion as redundant. Both the parties were given full opportunity to lead their evidence and upon evidence led by the parties, the trial Court as well as the First Appellate Court have recorded the concurrent finding of facts. I do not find any substantial question of law involved in the present appeal as pleaded in the memorandum of appeal as the present appellant who entered into the transaction of sale on 27-1-2003 was fully made aware of the agreement to sell dated 10-1-2003 and he participated in the suit. He had also availed of the remedy of the First Appeal. Both the Courts below by their detailed reasons in the judgments and orders which were concurrent arrived at conclusions which in view of section 100 of the CPC cannot be disturbed unless any substantial question of law is made out. In such cases, it is normal rule that the specific performance as prayed for in view of the agreement to sell executed in writing ought to be granted unless there are facts and circumstances warranting refusal of the specific relief for any just and proper reason. When the plaintiff was ready and willing to perform his part of the contract pursuant to agreement to sell and was ready and willing to pay the entire balance consideration agreed upon between the parties throughout there was no any reason why specific relief cannot be granted in such cases insisting

upon specific performance of the contract i.e. agreement to sale. Hence, considering concurrent finding of facts recorded by the Courts below by their judgments and orders and in the absence of any substantial question of law, the appeal do not deserve admission, hence, the second appeal needs to be dismissed. The Second Appeal is, therefore, dismissed.