



MHSN040010192015
Presented on : 05/11/2015
Registered on : 07/11/2015
Decided on : 03/02/2021
Duration : 5 Y. 02 M. 26 D.

**IN THE COURT OF
ADHOC DIST. JUDGE-1, ISLAMPUR, AT : ISLAMPUR
Presided Over by Smt. PARDESHI JAYASHRI MOHANLAL**

Reg. Civil Appeal No. 116/2015

Exhibit No.:11

Balaso Pukhraj Porwal,
Age: 51, Occu. Business,
R/o. Islampur, Taluka
Walva, Dist. Sangli.

Appellant.

VERSUS

[1] Smt. Gita Sunil Shete,
Age 47, occu. Household
and agri., R/o. Indira
Colony, Shivnagar,
Islampur, Tal. Walva,
Dist. Sangli.

[2] Mahesh Vasantrao Mali,
Age 44, occu. Household
and agri., R/o. Rajasthan
Bhuvan, Lal Chowk,
Islampur, Tal. Walva,
Dist. Sangli.

Respondents.

Advocate for Appellant

:

Mr. R.V.Koparde

Respondents

:

Absent.

Appeal under Order 41 of C.P.C.

JUDGMENT

[Delivered on 03/02/2021]

Being aggrieved by the judgment and decree passed in
Special Civil Suit No. 6/2014, dated 5/1/2015, by Civil Judge S.D.,

Islampur, [hereinafter referred to as the Ld. Trial Court], dismissing the suit for specific performance of contract, the appellant/ original plaintiff has preferred this appeal to set aside the same. For convenience, the status of the parties in said suit is retained.

2. Brief facts of the plaintiff's case are as under -

The suit property is a flat situated on second floor, in RCC building bearing Municipal house No. 2297/13, consisting east facing hall, latrine, bathroom, two bed rooms, kitchen, total admeasuring 54 ft. 3 inch east-west, 51 ft. one inch on south side, 29 ft. 6 inch on south-north and 44 ft. 3 inch on west-side, situated at Islampur, Taluka Walva, Dist. Sangli, which is more particularly described in plaint para-1. It was originally owned by defendant No.1 and she is in possession of the same. Defendant No. 1 sold the suit property to defendant No. 2 on 11/5/2006 by notarized agreement of sale. Defendant No.1 had received the suit property by way of succession and by order of the Court after the death of her husband Sunil Shete.

3. It is contended by plaintiff that, defendant No. 2 was in need of money to repay the bank loan. So he decided to sell the suit property, to which defendant No.1 had given consent. Plaintiff agreed to purchase the suit property for Rs. 20,00,000/-. On 25/7/2012 plaintiff paid Rs. 12,00,000/- to defendant No. 2 in presence of witnesses. Defendant Nos. 1 and 2 executed a notarized agreement of sale. It was agreed that sale deed was to be executed after two months, after accepting balance consideration of Rs. 8,00,000/-, due to some technical difficulties. The expenses of sale deed was to be borne by plaintiff. However, defendants failed to execute the sale deed, nor they repaid earnest amount. So plaintiff issued notice to defendants. Despite receipt of notice, defendants failed to comply it, therefore, plaintiff filed this suit.

4. The suit notice was issued to the defendants. They failed to appear and file W.S. Hence, suit proceeded *ex parte* against them vide order below Exh. 1, dated 21/7/2014.

5. The plaintiff filed his affidavit of examination in chief at Exh.8 and affidavit of witness Ravindra Patil at Exh. 13. He also filed 7/12 extract of suit property at Exh. 6, agreement of sale at Exh. 9, notice at Exh.10 and its acknowledgements Exh. 11 and 12.

6. Considering the evidence on record and after hearing Ld. Advocate for the plaintiff, the Ld. trial Court dismissed the suit with costs. Being aggrieved with the said judgment and decree, the plaintiff has filed the present appeal on following grounds :-

The impugned judgment and decree of Ld. Trial Court is against law, equity and natural justice. The Ld. Trial Court has not considered the evidence adduced by plaintiff on record. The Ld. Trial Court has not framed the proper issues and given incorrect findings on the same. The Ld. Trial Court had not considered that, on 25/7/2012 plaintiff paid Rs. 12,00,000/- to defendant No. 2 in presence of witnesses, with consent of defendant No. 1 and defendant No. 2 executed a notarized agreement of sale. Defendant No.1 had given suit property to defendant No. 2 under agreement to sell on 11/5/2006. Defendant No. 1 was owner of suit property. As the defendants failed to file W.S., the Ld. Trial Court ought to have drawn adverse inference against them. The plaintiff was and is ready to purchase the suit property. On these grounds, the appellant prayed to set aside the impugned judgment and decree of Ld. Trial Court by allowing this appeal. He alternatively prayed to remand the suit for fresh trial.

7. Heard Ld. Advocate for plaintiff. Perused the evidence on record. The points arise for my determination along with my findings and reasons thereon, are as under :-

<u>Points</u>	<u>Findings</u>
[1] Whether it is proved by plaintiff that, defendants agreed to sell the suit property for Rs. 20,00,000/- and executed agreement of sale dated 25/7/2012 in his favour ?	Yes.
[2] Whether plaintiff further proved that, the defendant No. 2 accepted earnest amount of Rs. 12,00,000/- from him ?	Yes.
[3] Whether plaintiff further proved that he was and is ready to perform his part of contract, but the defendants committed breach of the agreement of sale ?	Yes.
[4] Whether plaintiff is entitled for specific performance of contract ?	No.
[5] Whether plaintiff is alternatively entitled for refund of earnest amount ?	Yes, from defendant No. 2.
[6] Whether the impugned judgment and decree needs any interference by this Court ?	Partly yes, to the extent of refund of earnest money.
[7] What order ?	As per final order.

Reasons

As all the points are interlinked with each other, they are discussed and decided together to avoid repetition of evidence.

All points together -

8. The plaintiff and his witness have deposed as per the contentions made in the suit. The plaintiff has produced 7/12 extract of the suit property on record at Exh. 6, agreement of sale at Exh. 9, notice at Exh.10 and its acknowledgements Exh. 11 and 12. From perusal of 7/12 extract of suit property at Exh.6, it is clear that name of defendant No. 1 is recorded to the suit property. Therefore, it can be said that, defendant No. 1 was owner and in possession of the suit property.

9. Admittedly, plaintiff has not produced any document to show that defendant No. 1 agreed to sell the suit property to defendant No. 2, or executed any sale deed of the suit property in favour of defendant No. 2. Therefore, it can not be said that defendant No. 2 is having any right, title or interest in the suit property.

10. The agreement of sale Exh. 9 clearly shows that defendant Nos. 1 and 2 agreed to sell the suit property to plaintiff for Rs. 20,00,000/- and defendant No. 2 has accepted earnest amount of Rs. 12,00,000/- from the plaintiff. However, as defendant No. 2 is not having any right, title or interest in the suit property, he can not execute the sale deed in favour of plaintiff.

11. Even though plaintiff is ready and willing to perform his part of contract, the sale deed can not be executed due to above said technical reason. However, one fact is clear from evidence on record that defendant No. 2 had accepted earnest amount of Rs. 12,00,000/- from the plaintiff and therefore, he is liable to refund the same. From perusal of contents of agreement of sale, it is clear that, if the sale deed can not be executed due to any technical reason, defendant No. 2 is required to refund the earnest amount to the plaintiff. There is no clause of interest of earnest amount. However, as the

plaintiff has parted with earnest amount and sustained loss, he is entitled to recover Rs. 12,00,000/- with interest thereon @ 6% p.a. from the date of this order till realization of the whole amount.

12. The Ld. Advocate for appellant has rightly relied on para 19 of the ruling reported in 2004[1] Mh.L.J., 138 [Kisanlal Maniklal Vs. Dinkar Yashwant Patil], in which ratio laid down by Privy Council in the case of **Gurbaksh Singh Vs. Gurdial Singh** regarding drawing adverse inference is discussed, which is reproduced here.

" It is the bounden duty of a party, personally knowing the whole circumstances of the case, to give evidence on his own behalf and to submit to cross examination. His non appearance as a witness would be the strongest possible circumstance going to discredit the truth of his case " .

In present case defendants failed to appear and file their W.S. Therefore, adverse inference can be drawn against the defendants and it can be said that, they agreed to sell the suit property to plaintiff for Rs. 20,00,000/-, defendant No. 2 accepted earnest amount of Rs. 12,00,000/- from plaintiff, however sale deed can not be executed due to want of right, title and interest of defendant No. 2 in the suit property and defendant No. 1 has not accepted the earnest money. Even though defendant No. 1 is having title and possession over suit property and she has given consent to the agreement to sell between defendant No. 2 and plaintiff, as she has not accepted any earnest amount from plaintiff, she alone can not be compelled or directed to execute the sale deed in favour of plaintiff, or to refund the earnest amount to the plaintiff.

13. Ld. Advocate for the appellant has argued that no issues were framed by the Ld. Trial Court. However, even if the issues are not framed, it has to be seen whether prejudice has been caused to the plaintiff for non framing of issues. However, it is admitted fact that defendants did not file the say, and therefore, case is decided exparte. It is not necessary to frame the

issues when plaint is not challenged by the other side. Thus, there is no force in argument advanced by Ld. Advocate for appellant that, no issues have been framed in the case.

14. On going through the judgment and decree of the lower Court, I find that, the lower court has rightly considered the evidence on record and come to the proper conclusion that the plaintiff is not entitled for specific performance of the contract, however Ld. Trial Court has failed to consider that plaintiff has paid huge earnest amount of Rs. 12,00,000/- to defendant No. 2 in presence of witness under notarized agreement. Said agreement is proved on record. The Ld. Trial Court had not given any plausible or sound reasons as to why prayer of plaintiff regarding refund of earnest money is refused, when the evidence of plaintiff has gone unchallenged on record. Considering the contents in the agreement, I hold that plaintiff is entitled for refund of earnest amount from defendant No. 2 and to this extent, the judgment and order passed by the trial Court is illegal, improper and requires to be set aside. Therefore, there is need to interfere with the judgment and order of the trial court to the extent of refund of earnest amount only. Hence, I answer the above point accordingly. Therefore, appeal deserves to be partly allowed.

15. In view of above discussion, I proceed to pass following order ;

ORDER

- [i] The appeal is partly allowed.
- [ii] The final order passed by Ld. Trial Court is modified as under.
 - [a] The suit is partly decreed.
 - [b] The suit for specific performance of contract with respect of suit property is dismissed.

- [c] The suit for refund of earnest amount is decreed and plaintiff is entitled to recover Rs. 12,00,000/- with interest thereon @ 6% p.a. from the date of this order till realization of the whole amount from defendant No. 2 only. Defendant No. 2 is directed to refund the earnest amount with above said interest to the plaintiff within 60 days from today.
- [iii] In the circumstances, there is no order as to costs of suit and appeal.
- [iv] Decree be drawn accordingly.
- [v] R. & P. be sent back to the Ld. Trial Court.

Islampur

Date : 03/02/2021

(Jayshri M.Pardeshi)

Adhoc District Judge- 1, Islampur.

Certificate

I affirm that, the contents of this P.D.F. file order are same, word to word, as per the original order.

Name of Stenographer : A.R.Jamadade [Grade-1]
Court : Adhoc-District Judge-1, Islampur
Date : 3/2/2021
Order signed by the
Presiding Officer : 5/2/2021
Order uploaded on : 5/2/2021