

Santosh and Another Vs. Namdeo and Others

Santosh and Another Vs. Namdeo and Others

SooperKanoon Citation : sooperkanoon.com/1184808

Court : Mumbai Nagpur

Decided On : Apr-04-2016

Judge : A.B. Chaudhari

Appeal No. : Second Appeal No. 60 of 2007

Appellant : Santosh and Another

Respondent : Namdeo and Others

Advocate for Def. : Mr. Narnaware

Advocate for Pet/Ap. : Mr. Gandhi

Judgement :

1. Being aggrieved by judgment and decree dated 02.01.2007 in Regular Civil Appeal No.300/2001 passed by Ad hoc District Judge 10, Nagpur by which the judgment and decree dated 13.02.2001 in Regular Civil Suit No.214/1989 dismissing the suit filed by respondents-plaintiffs was set aside and the decree for specific performance of contract etc. was made, the present second appeal was filed by the unsuccessful defendants.

FACTS

2. The respondents-plaintiffs, through their power of attorney holder by name Dhairyasheel, instituted Special Civil Suit No.214/1989 for specific performance of

contract against the defendant no.1-Santosh Vaidya. Defendant no.2-Kailash Lute was in fact the proposed vendee in the agreement who was joined as defendant because of his absence. The case of respondents-plaintiffs was that defendant no.1-Santosh Vaidya was the owner of field survey No.32, 1.57 HR at mouza Hudkeshwar and he entered into an agreement on 07.04.1986 in favour of the plaintiff and defendant no.2 for the sale thereof at the rate of Rs.40,500/-per Acre and all the proposed vendees paid an amount of Rs.10,000/- as earnest amount to him. It was also agreed that defendant no.1 will execute the sale deed within 1-1/2 years from the date of the agreement and remaining consideration would be paid accordingly at the time of registration of the sale deed. It was agreed that in case there was any legal impediment in getting the sale deed registered, further time of 1-1/2 years would be extended. It was then stated in the plaint that the defendant no.2 thereafter paid additional amount of Rs.10,000/- to defendant no.1 Vendor on the tenth day from the date of agreement. Thereafter, they were insisting on the defendant no.1 to execute and register the sale deed by completing all the legal formalities namely; to obtain necessary no objections from the Urban Land Ceiling authorities, town planning and other competent authorities which are required to be placed before the Registrar for registration. But the defendant no.1 did not respond and for want of no objection from those authorities, it was not possible to register the sale deed.

The plaintiff and defendant no.2 were throughout ready and willing to get the sale deed registered and pay the remaining consideration to defendant no.1. But it could not be done due to lapse on the part of defendant no.1 and he was careless and negligent in getting the no objections from the Government authorities for preparation of necessary documents. The defendant no.1 having not complied with the obtaining of permissions and no objections from the authorities, was not entitled to cancel the agreement nor could do so since the agreement itself provided for extension by another 1-1/2 year. The plaintiffs and defendant no.2 again informed defendant no.1 that they were ready and willing to get the sale deed registered and then defendant no.1 also realised his mistake of not obtaining the necessary documents of no objections etc and agreed to make compliance. However, defendant no.1 still did not produce no objections from the competent authority or clearance from Urban Land Ceiling authorities, town planning

authorities and, therefore, the registered notice dated 03.03.1989 was issued to him to attend Sub Registrar's office on 13.03.1989 but he did not turn up and, therefore, had no alternative but to file suit for specific performance of contract thereafter. Accordingly, suit was filed for decree of specific performance of contract and in the alternative for refund of money on 27.03.1989. The suit was dismissed for want of prosecution on 21.01.1994 and was again restored by detailed order on 19.11.1997. thereafter, it was set down for trial.

The power of attorney holder of respondent-plaintiff PW1-Dhairyasheel (PW1) was examined on their behalf while the appellants-defendants examined PW1-Santosh and defendant no.3 PW2-Suresh the subsequent purchaser who purchased the suit property on 14.09.1989 and 31.01.1994 i.e. after the suit was lodged in the Court. The trial Judge thereafter dismissed the suit. The respondents filed appeal before the District Judge who, as stated earlier, allowed appeal and decreed the suit. Hence, this appeal.

SUBMISSIONS:

3. Mr. Gandhi, learned counsel for the appellants assailed the impugned judgment and order passed by the lower appellate Court and submitted that the suit as filed by plaintiffs through power of attorney holder was not maintainable because initially with the suit photocopy of the power of attorney was filed and thereafter attested power of attorney Exh.-99 was filed but the photocopy was not attested though original Exh.-99 was attested at later point of time. The power of attorney who did not have any personal knowledge about Exh.39-agreement, was examined as the only witness for the plaintiffs and, therefore, his evidence was totally inadmissible and of no assistance to the plaintiffs as a result the same was liable to be ignored in entirety. Though the power of attorney exhibited, its contents were not proved and by mere exhibition, the document cannot be read in evidence. Defendant no.2-Kailash Lute was also the proposed vendee in the agreement Exh.-39, but he was added as defendant no.2. He did not turn up in the court and, therefore, it could easily be inferred that all the proposed vendees were not ready and willing to perform their part of contract. The evidence of power of attorney holder would be hearsay evidence, he having no knowledge about the

transaction.

4. The agreement of sale Exh.-39 was not the original document of agreement of sale and photocopy was exhibited upon which the objection was taken but it was overruled by the trial Judge, which is wrong. In the absence of original document of agreement, the Court could not have placed reliance thereon. The agreement was required to be registered as it was stated therein that the possession was delivered on the date of agreement and in the absence of document being registered or impounded, the agreement was not legal, valid and such suit based thereon was liable to be dismissed.

5. The appellant-defendant no.1 had, by notice dated 14.10.1989, cancelled the agreement and in the absence of any challenge to the cancellation, the suit was not maintainable and was liable to be dismissed. The attempt of the plaintiffs to show that they were ready and willing to perform their part of contract through documents Exh.95, 95A and 96 was wholly misconceived as from the conduct of the power of attorney holder it could be easily inferred that the plaintiffs were not ready and willing nor had they proved that they were ready and willing to perform their part of contract. The aforesaid letters were forged and fabricated in order to show that they were ready and willing to perform their part of contract and the appellate Court should have rejected those letters. The certificates Under Postal Certificate are also tampered. Looking at Exh.-97 and 98, there was reason to believe that the conduct of the plaintiffs was not clean and it is well settled that when the conduct of the plaintiffs is not clean, the Court should not exercise the discretion of granting specific performance of contract.

6. The suit was filed after 2-1/2 years. Therefore, the discretion to decree the suit could not have been exercised in favour of the plaintiffs. The appellant-defendant no.1 had executed the sale deed in respect of the suit property in entirety by two sale deeds dated 14.09.1989 and 31.01.1994 in favour of defendant no.3-Suresh, who had thereafter, sold the plots to the others and, therefore, for specific performance of contract on the basis of agreement in question the decree could not have been passed additionally because the suit was dismissed and was not in existence from 27.01.1994 till 19.11.1997. The legal effect should have been

considered by the trial Court in respect of the subsequent sale deeds in favour of defendant no.3-Suresh and consequently ought to have declined to grant the specific performance.

7. Inviting my attention to Civil Application No.271/2016 under Order XLI Rule 27 of the Code of Civil Procedure along with the documents therein, he contended that this additional evidence should be permitted to be taken on record as the sale deeds of the plots sold to various persons were not filed on record through inadvertence but the interest of justice should not suffer and, therefore, these sale deeds should be taken on record which would be necessary for adjudication. The learned counsel for the appellants cited following judgments and prayed for reversal of the judgment of the lower appellate Court.

- 1) Man Kaur vs. Hartar Singh; 2011 (1) SCC (SRJ) 197.
- 2) S. Kesari vs. Anjum Jehan; 2013 (3) ALL M.R. (SC) 916.
- 3) A.C. Narayan vs. State of Maharashtra and Anr.; 2013 ALL MR (Cri) 4048 (SC).
- 4) Janki Vashdeo Bhojwani and anr. vs. Indusind Bank Ltd. and ors; AIR 2005 SC 439.
- 5) Church of Christ vs. Ponniamman Educational Trust; (2012) 8 SCC 706.
- 6) Varsha Maheshwari vs. Bhushan; 2011 (3) Mh. L.J. 666.
- 7) Gajanan vs. Sakhubai; 2012 (4) Mh.L.J. 470.
- 8) S.R. Ahmad vs. Alima Begum; 2009 (6) ALL. MR 86
- 9) Omprakash vs. Laxminarayan; 2013 (6) ALL MR 941
- 10) Bhupendra vs. Leelabai; 2010 (5) Mh.L.J. 390.
- 11) Arjun vs. Rama; 2014 (2) Mh. L. J. 390.
- 12) Janak Dulari Devi vs. Kapil Deo; 2011 (6) SCC 555.

- 13) A.C. Arulappan vs. Ahalya Naik; AIR 2001 SCC 2783.
- 14) Ramkumar vs. Thawar Das; (1999) 7 SCC 303.
- 15) Ajaib Singh vs. Tulsidevi; (2000) 6 SCC 566.
- 16) Lourdu Mari vs. Loui's; AIR 1996 SC 2814.
- 17) Union of India vs. Ibrahim Uddin; (2002) 8 SCC 148.
- 18) Citadel vs. Ramaniyam; (2011) 9 SCC 147.
- 19) I.S. Sikander vs. Ksubramani; (2013) 15 SCC 27.
- 20) K.S. Vidyanadam vs. Vairavan; 1997 (2) Mh.L.J.642.
- 21) Tejram vs. Patirambhau; AIR 1997 SC 2702.
- 22) Life Insurance Corporation vs. Rampal; (2010) 4 SCC 491.
- 23) Tukaram vs. Manikrao; (2010) 4 SCC 329.

8. Per contra, Mr. Narnaware, learned counsel for the respondents-plaintiffs, supported the judgment of the lower appellate Court and submitted that the lower appellate Court rightly granted the decree for specific performance of contract and at any rate, admittedly, the agreement in favour of the respondents made by defendant no.1 was never in dispute. The agreement was exhibited by the trial Judge on the basis of admission in the written statement as defendant no.1 categorically admitted the agreement in question. According to him, it is well settled legal position that admission is the best piece of evidence and admission in the written statement can be acted upon. Insofar as the objections about the power of attorney and his evidence is concerned, the learned counsel argued that all the points are raised by the learned counsel for the appellant before this Court for the first time and were never put to the power of attorney holder in the cross-examination nor pleaded in the written statement and, therefore, they cannot be considered. Inviting my attention to the proviso to Rule 14 of Order VI of the Code of Civil Procedure, the learned Counsel for the respondent contended that the

power of attorney holder is the person authorised by the plaintiffs, about which there is no dispute and none of the plaintiffs or defendant no.2 have at all disputed the authority given by them to the power of attorney holder and, therefore, it was not legal and proper for the appellants to dispute about giving of the authority to the person authorised namely power of attorney holder PW1-Dhairyasheel. Learned counsel for the respondent then contended that, it is admitted position that the agreement with the respondents is prior in point of time of later sale deeds in favour of defendant no.3. After the institution of the suit, the sale deeds were executed in favour of defendant no.3-Suresh. In reply to the application under Order XLI Rule 27, he contended that he has filed the reply to the application and obviously all those transactions shown in the sale deeds filed along with the application are hit by the doctrine of lis pendens. Finally, learned counsel for the respondents prayed for dismissal of the appeal as according to him, no question of law muchless substantial question of law arises in the present appeal.

CONSIDERATION:

9. I have heard learned counsel for the rival parties at length. I have also perused the entire record, documentary as well as oral. I have perused the reasons recorded by the Courts below. This Court had, at the time of admission on 27.02.2007, framed three substantial questions of law, which are as under with my answers:

(1) Whether the Power of Attorney holder for the proposed vendees could validly depose about the existence of readiness and willingness on the part of the plaintiff/proposed vendees to perform their part of the contract when this fact could have been within the special knowledge of the plaintiffs themselves? ...Yes.

(2) Whether the appellate Court was justified in reversing the judgment of the trial Court and granting a decree for specific performance in favour of the plaintiffs when one of the proposed vendees who had executed the agreement of sale was not joined as a party to the appeal and the aforesaid fact clearly reflected that he was not ready and willing to get the sale deed executed in his favour? ...Yes.

(3) Whether the agreement of sale could be specifically enforced in a case where the vendees were more than one and some of them were not ready and willing to get the agreement specifically enforced? ...Yes.

The learned trial Judge had framed the following issues in the suit numbering 10.

1) Does the plaintiff prove that the defendant no.1 put plaintiffs and defendant no.2 in actual possession of suit property? ...No.

2) Do the plaintiffs prove that the plaintiffs and defendant no.2 were and are ready and willing to perform the part of contract as alleged? ...No.

3) Do they further prove that defendant No.1 has committed breach of contract? ...No.

4) Do they further prove that they are entitled to specific performance of contract as alleged? ...No.

5) Do the plaintiffs alternatively prove that they are entitled for refund of earnest money and charges to the extent of Rs.1,20,000/- as alleged? ...No.

6) Does the defendant no.1 and 2 prove that the time is essence of contract? ...Yes.

7) Is suit bad for misjoinder of the parties as alleged? ...Yes.

8) Is suit within limitation? .-

9) Does defendant no.3 prove that he is entitled to the compensatory cost of rs.5,000/- as alleged? ...No.

10) What order and decree? ...As per final order.

The learned lower appellate Court had framed the following points for determination numbering 9.

1) Whether the time was essence of contract? ...No.

- 2) Whether the appellants proved that they and respondent no.2 were put in physical possession of the suit field? ...Yes.
- 3) Whether they were ready and willing to perform their part of contract? ...Yes.
- 4) Whether the respondent no.1 committed breach of contract? ...Yes.
- 5) Whether the appellants are entitled to Specific performance of Contract? ...Yes.
- 6) In the alternative whether they are entitled to refund of earnest amount and damages? ...Does not survive.
- 7) Whether the suit was bad for misjoinder of parties? ...No.
- 8) Whether the judgment of the trial Court needs any interference? ...Yes.
- 9) Order? ...As per final order.
10. Taking up first the Civil Application No.277/2016 under Order XLI Rule 27 for additional evidence for decision, I find upon reading of the said application in entirety so also the reply that, the appellants want to bring on record the subsequent sale deeds in respect of the alleged plots sold by appellant no.2-defendant no.3 during the period from April-1994 to January 1995 and 7/12 extract in the name of appellant no.2 so also order of conversion dated 11.08.2015 passed by Sub Divisional Officer from agricultural to non agriculture purpose. In my opinion, all these documents of sale deeds executed by appellant no.2 are obviously during the pendency of the suit before the trial Judge and after filing of the suit and, therefore, alike the appellant no.2-defendant no.3, who purchased the suit property after filing of the suit these additional documents showing sales of plots by sale deeds are clearly governed by the principles of lis pendens. In other words, all the sale deeds placed on record by appellant no.2 as additional evidence are in the nature of extension of the sale deeds obtained by appellant no.2, which is also covered by the principles of lis pendens. All such documents of sale deeds covered by the lis pendens cannot become the additional evidence for the purpose of adjudicating the real dispute between the parties in relation to the suit. Needless to repeat that the principles of lis pendens would govern the issue.

Therefore, the application for additional evidence cannot be entertained. That apart, all these documents are registered sale deeds, which were very much available that too to the full knowledge of the appellant no.2 since he himself was the executent of the sale deeds and particularly when his evidence was recorded on 24.01.2001, he could have easily produced all the registered sale deeds. At any rate, the said additional evidence is of no consequence and does not help any party to the dispute in the light of law of the lis pendens. Civil Application No.277/2016 is, therefore, rejected.

Answer to Question No.1:

11. Now coming to the controversy in the suit and the submissions made before me, the argument made by the learned counsel for the appellant on the point of power of attorney holder and his evidence, it will have be necessary to have a look at Order VI Rule 14 of the Code of Civil Procedure which reads thus:

"Order VI: Pleadings generally:

14. Pleading to be signed.- Every pleading shall be signed by the party and his pleader (if any):

Provided that where a party pleading is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorized by him to sign the same or to sue or defend on his behalf."

12. The aforesaid proviso to Rule 14 categorically shows that a person authorised is entitled to file and prosecute the suit till its disposal. In the instant case, it is not in dispute that the plaintiffs had authorised Dhairyasheel (PW1) to act as their power of attorney holder for signing of various documents, prosecuting and contesting the litigations etc. It is not at all disputed by any of the plaintiffs or defendant no.2. None of he plaintiffs or defendant no.2 have stated that they have not authorised Dhairyasheel (PW1) the power of attorney holder. Insofar as the aspect of attestation at a later point of time after execution of the power of attorney is concerned, I do not think any significance can be given to it since none of the persons giving authority have disputed the authority of the power of attorney

holder either orally or in writing to plead and prosecute their lis. In the light of the above provision, therefore, it is not possible to accept the submissions about the incompetence of power of attorney. The counsel for the appellant then argued that the power of attorney holder had no personal knowledge about the execution of agreement and, therefore, his evidence is worthless and should not have been relied upon by the appellate Judge.

In this context, I have perused the pleadings as well as entire evidence of Dhairyasheel (PW1) and the cross-examination. In the examination-in-chief, the power of attorney holder deposed about the entire transaction in question, readiness and willingness, details about the agreement, payments made and so on and so forth, which clearly shows his personal knowledge about the transaction in question and the filing of the litigation i.e. the suit in question. If according to the appellants, he had no personal knowledge about the transaction, there ought to have been appropriate pleadings in the written statement and appropriate cross-examination to him to bring out from his mouth that he did not have any personal knowledge about the transaction. However, it is significant to note that not only that there is no cross-examination on that point but there is no even a single suggestion to him that he does not know anything about the transaction and that he was not a witness to depose on behalf of the plaintiffs or the proposed vendees. In the absence of appropriate pleadings and the cross-examination, it would be difficult to accept such a submission. Secondly, the submissions that his evidence was hearsay evidence, again will have to be rejected as he deposed about the whole transaction. There is further submission that the contents of the power of attorney were not proved by the power of attorney holder and the answer obviously would be that Dhairyasheel (PW1) deposed about details of the power of attorney in his favour which was also exhibited and there is no cross-examination that he was not authorised by the plaintiffs and defendant no.2 nor the plaintiffs and defendant no.2 disputed his authority to act on their behalf. As to his evidence before the Court, in this context the learned counsel for the appellants vehemently relied on some judgments about the evidence of power of attorney holder, numbering 1 to 7 is in the list of reliance.

I have carefully gone through all these decisions. The first decision was rendered in the case of Janki Bhojwani (supra). In that case, the apex Court specifically found on facts that the power of attorney holder did not have personal knowledge about the matters of the appellants and, therefore, he could not depose about his personal knowledge of the matter of the appellants and therefore he could neither depose on his personal knowledge nor could be cross-examined on those facts which were to the personal knowledge of the principal. As stated earlier, there is no even remote suggestion or pleading anywhere or admission in the evidence about want of personal knowledge. On the contrary, Dhairyasheel (PW1) deposed on his personal knowledge about each and every details of the transaction which was not challenged. Hence, such matters cannot be resolved by merely raising questions but there has to be foundation in pleadings as well as evidence which is absent in the present case. The existence of readiness and willingness on the part of the plaintiffs or the proposed vendees to perform their part of contract has, in fact, been deposed by Dhairyasheel (PW1) the power of attorney holder of the plaintiffs. It is significant to note that upon careful reading of the examination-in-chief and the cross-examination of this witness Dhairyasheel (PW1) for the plaintiffs, it is seen that he categorically deposed in paragraph 4 of his evidence as under:

"4. ...The plaintiffs repeatedly requested the defendant no.1 to execute the Sale Deed but as the defendant no.1 failed to obtain the necessary documents from the different authority, the Sale deed could not be executed. On 14.10.1987 the defendant no.1 issued the notice to plaintiffs and defendant no.2. By this notice the defendant no.1 alleged that the suit agreement was cancelled by him. The plaintiffs had duly replied to this notice. The office copy of the reply notice is placed on record vide Exhibit-94. The postal acknowledgment is at Exhibit-95. By this reply notice, the vendees had called upon to defendant no.1 to attend Sub Registrar's office on 13.3.1989 for execution of the Sale Deed. We waited for him up to 4.00 p.m. However, the defendant no.1 did not attend the Registrar's office on that day. Hence, the vendees were constrained to file the present suit. The defendant no.1 was many times requested both orally and in writing to execute the Sale Deed. The vendees were all the while and are still ready and willing to perform their part of contract and to get the Sale Deed executed. In the present

suit the plaintiffs have claimed the decree for specific Performance of contract."

13. The cross-examination of this witness if carefully seen, shows that this evidence in paragraph 4 has not even been touched in the cross-examination muchless shattered. Not only that there is no even suggestion to this witness that the plaintiffs were not ready and willing or that the plaintiff and defendant no.2 were not ready and willing to perform their part of contract. Further, perusal of the evidence of two witnesses of the defendant namely; appellant Nos.1 and 2, does not even show a semblance of evidence that there was no readiness and willingness on the part of the plaintiffs and defendant no.2. It clearly appears from the entire record that power of attorney holder had full personal knowledge about the entire transaction and that plaintiffs and defendant no.2 were ready and willing to perform their part of contract. In the wake of the above factual position in this case, all the judgments on this point cited by learned counsel for the appellant from Serial No.1 to 4, which are on their facts are, not applicable in the present case.

The question no.1, therefore, will have to be answered in the affirmative that the power of attorney holder could validly depose about the readiness and willingness.

As to Question No.2:

14. Vide order dated 27.02.2007 on Civil Application No.1253/2007, the appellants themselves at their risk deleted respondent no.2 (one of the vendees) from the array of parties to this appeal. I find that in the absence of respondent no.2 (one of the vendees), the question cannot be raised by the appellants. Even otherwise, grant of decree for specific performance of contract in favour of five vendees together would not and cannot be affected, if one of the proposed vendees is not a party to the appeal before the District Judge. The rights of all the plaintiffs, but for one, to ask for specific performance of contract merely because one of the proposed vendees is not a party, cannot be denied. It is not in dispute that all the vendees were party to the suit. The other vendees would be entitled to execute the decree in their favour. That apart, the learned counsel for the appellants did not raise any arguments on question no.2 but since the question was framed, the same is being answered by me.

In view of above, the question no.2 will have to be answered in the affirmative.

As to Question No.3:

15. Learned counsel for the appellants then argued that respondent had failed to prove their readiness and willingness and that the documents Exh.-95, 95A etc. were forged and fabricated documents. It was also contended that the document of agreement dated 07.04.1986 Exh.-39 was not the original document brought on record. In this connection, it would be appropriate to quote following portion from the evidence of Dhairyasheel (PW1) :

"The deft.No.1 had agreed to obtain all necessary no objection certificates and permission. The sale deed was to be executed within 1-1/2 years after procuring all the documents. It was also agreed between the parties that if any legal impediment was there in the execution of sale deed, the period would be extended further by 1-1/2 years. The xerox copy of the agreement of sale is placed on record. (The learned counsel for the defts. Raised objection with regard to exhibiting the document and making it admissible in evidence. The learned counsel for the plffs. Drew my attention to the admission in respect of execution of document appearing in para 2 of the W.S. Exh.19. Thus in view of this admission appearing in the W.S. the objection is overruled). The xerox copy of agreement of sale is marked as Exh.93. (As admitted)."

16. It is clear from the above that the photocopy of the agreement of sale was exhibited with the clear admission in the written statement made by contesting defendant no.1. In view of the above admission, I do not think that the document Exh.39 could not be read in evidence as it is well settled legal position that the admission is the best piece of evidence and can be acted upon. The above order overruling the objection is legal, correct and proper.

17. Insofar as readiness and willingness is concerned, I have seen the pleadings in the plaint so also testimony of Dhairyasheel (PW1). There are clear pleadings about readiness and willingness by the proposed vendees to perform their part of the contract so also the evidence which can be seen from paragraph (4) of his deposition and as earlier stated there is absolutely no cross-examination on the

readiness and willingness of the plaintiffs. It is, therefore, wrong to say that the plaintiff had not discharged their burden to prove readiness and willingness since there is categorical pleading and evidence both. I have then perused the documents Exh.-95, 95A, 96, 97 and 98. Perusal of these documents, to my mind, takes one nowhere. The letter under postal certificate addressed to the defendants even if ignored, the case of the plaintiffs does not get anyway shattered since independently the plaintiffs proved their readiness and willingness by appropriate pleadings and evidence as held by me above and it went unchallenged before the trial Judge. It is then seen that defendant no.2-Kailash was added as party to the suit for which reasons were given in paragraph 10 of the suit namely that the defendant no.2 was not available at the time of filing of the suit and, therefore, he could not be joined as plaintiff to the suit but since he was necessary party to the suit, he was joined as defendant no.2 and liberty was reserved to apply for transposition, if necessary, in future.

That apart, it is not the case of the appellants that the plaintiffs were never ready and willing to perform their part of his contract or that none of the plaintiffs had ready money to pay balance consideration for obtaining the same. There is no cross-examination, not even suggestion the plaintiffs did not have money to make payment of balance consideration or that they were not ready and willing. These are the aspects which are required to be pleaded and brought in the cross-examination but unfortunately as stated earlier, there is absolutely no cross-examination on this points and, therefore, it could not be said that merely because one vendee was added as defendant, the agreement of sale could not be enforced. It is not even the case of the appellants that some of the proposed vendees were not ready and willing to get the agreement specifically enforced for which there ought to have been some pleading and evidence, which is totally absent in the present case. Therefore, question no.3 will have to be answered in the affirmative.

18. The learned counsel for the appellants then submitted that the agreement was cancelled by Exh.-102 dated 14.01.1987 and the suit was, therefore, not maintainable. I have carefully seen the memos of appeal before the lower appellate Court as well as the Court. This ground has not been even remotely

raised. Counsel for the appellant has raised this ground for the first time that too during arguments. I think, the counsel cannot be allowed to raise this question. He relied on the decision in the case of I. S. Sikander. (supra) In this context, I have perused the entire pleadings of the appellants and I find that in the written statements, there is no objection raised that the suit was not maintainable because of the alleged cancellation. I have carefully gone through the issues framed and I do not find that a single issue about cancellation of agreement was framed in the suit by the trial Judge. I have also carefully seen the points of determination framed by the lower appellate Court and I find that no such point for determination was at all framed nor it was argued nor was decided by the lower appellate Court. The substantial questions of law framed by this Court also do not show any such question.

Be that as it may. Even otherwise, I find that recitals in the agreement Exh.-39 clearly show that it was for defendant no.1 to obtain all no objections for registration of the sale deed from various authorities and admittedly he had not obtained those even at the time of issuing Exh.-102. Admittedly the agreement Exh.-39 itself provided that in the eventuality of not obtaining document of no objections, the period would be extended by another 1-1/2 years. The suit was duly filed within the limitation of three years. Therefore, in the wake of clause for extension of time by 1-1/2 years in the agreement itself, the Court is bound to ignore the cancellation under Exh.-102 being ineffective and of no consequence. The judgment in the case of I.S. Sikander is, therefore, not applicable in view of the facts of the case and as per the discussion made above.

19. Learned counsel for the appellant then argued that the suit was instituted after 2-1/2 years and sales to defendant no.3 and in turn to various persons were already made and, therefore, the discretionary relief of specific performance should not have been granted. He cited decision on this point. However, I find that the right of the plaintiff to obtain specific performance of contract within the period of limitation cannot be defeated and at any rate sale deeds obtained by appellant no.2 were obtained after institution of the suit filed in the Court so also the sale deeds of the plots executed by him even without obtaining conversion order from the concerned Sub Divisional Officer as it was admittedly obtained in the year

2015 for the first time. The appellant no.2 thus committed all sorts of illegalities. The principles of lis pendens would, therefore, clearly take care of the situation. To deny the discretionary relief of specific performance of contract to the plaintiffs though they had approached the court within the prescribed time would work out injustice to the plaintiffs. The appellant no.2, in fact, misconducted himself by purchasing the suit property after filing of the suit and, thereafter, went on selling spree. The submission is, therefore, unacceptable.

The learned counsel for the appellants contended that the plaintiffs claimed to be in possession of the suit property and, therefore, the agreement Exh.-39 was inadmissible in evidence for want of registration thereof. Perusal of the record shows no such issue or point for determination was at all framed nor such objection was raised. That apart, there is a clear recital in Exh.-39 that after measurement by Patwari, the possession of the suit field will be given. Not only that, both the Courts have concurrently held that the possession was never delivered to the plaintiffs but appellants were in possession. Hence, no registration was necessary. The submission, therefore, will have to be rejected.

20. In the result, I find no merit in the appeal. Hence, I make the following order.

ORDER

(i) Second Appeal No.60/2007 is dismissed.

(ii) No order as to costs.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com