

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
BENCH AT AURANGABAD.**

SECOND APPEAL NO. 132 OF 2015

1. Shakuntala W/o Yeshwant Bhujange,
Age : 75 yers, Occupation : Agriculture,
R/o. Sadar Bazar, Ambajogai,
District Beed.
2. Suryakant S/o Yeshwant Bhujange,
Age : 60 years, Occupation : Agriculture,
R/o Sadar Bazar, Ambajogai,
District Beed.
3. Nagnath s/o Yeshwant Bhujange,
Age : 50 years, Occupation : Agriculture,
R/o Sadar Bazar, Ambajogai,
District Beed.

... APPELLANTS

(Orig. Deft. Nos. 1/1, 1/2 and 1/4)

VERSUS

1. Chandrakant S/o Hiranman Bhujange,
Age : 60 years, Occupation : Agriculture,
R/o. Sadar Bazar, Ambajogai, District Beed.
2. Chhayabai w/o Bharat Gavte,
Age : 55 years, Occupation : Household,
R/o. Takkalas, Taluka and District Parbhani.
3. Vijayamala W/o. Honaji Bharaskal,
Age : 51 years, Occupation : Household,
R/o. Yelda Road, Ambajogai, District Beed.
4. Rukminbai W/o Arun Khairmod,
Age : 45 years, Occupation : Household,
R/o. Mochi Galli, Ambajogai, District Beed.
5. Surekha W/o Piraji Gavli,
Age : 42 years, Occupation : Household,
R/o. Tuljabhavani Nagar, Latur.

6. Parvatibai W/o Sunil Gunwante,
Age : 40 years, Occupation : Household,
R/o. Raviwar Peth, Ambajogai, District Beed.
7. Narsing s/o Yeshwant Bhujange,
Age : 46 years, Occupation : Agriculture,
R/o. Sadar Bazar, Ambajogai, District Beed. **..RESPONDENTS**

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Mr R. N. Dhorde, Sr. Counsel for the appellants
Mr T. G. Gaikwad, Advocate for respondent No. 1 – Caveator.

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CORAM : T. V. NALAWADE, J.
DATE : 30TH SEPTEMBER, 2015.

ORDER:

. The instant appeal is filed against the judgment and decree passed in RCS No. 120 of 2000, which was pending in the Court of Joint Civil Judge Junior Division, Ambajogai and also against the judgment and order in Reg. Civil Appeal No. 19 of 2014, which was pending in the Court of District Judge - 3, Ambajogai.

2. Heard learned Counsels appearing on behalf of the respective parties.

3. The suit was filed by respondent No. 1 - Chandrakant for relief of specific performance of contract of sale of agricultural land against the appellants, which was in respect of portion of three acres

land out of survey No. 290, situated at village Chanai. The defendant-Yashwant, who was alive on the date of the suit, was a brother of father of the plaintiff.

4. It is case of the plaintiff that, the defendant, under agreement dt. 26th February, 1997, had agreed to sale the suit property to the plaintiff for consideration of Rs. 60,000/-. It is contended that, on the date of the agreement, the amount of Rs. 59,000/- was given by plaintiff to defendant and the remaining amount was to be paid at the time of registration of sale deed. It is contended that, the sale deed was to be executed prior to 30th June, 1999 by the defendant under the agreement.

5. It is the case of the plaintiff that, after the date of agreement, he requested the defendant many a times to execute the sale deed but, the defendant avoided to do so under one or the other pretext. It is contended that, when the possession of the suit land was given to plaintiff under agreement of sale, the defendant and his wife made false contentions and filed suit for injunction against him in respect of the suit land, bearing No. 150 of 1999. On the date of the present suit, the said suit of injunction was pending. It is contended that, as the plaintiff was in possession of the land, entry in revenue record was

made accordingly but dispute was created by defendant in respect of the entry also. It is contended that, when defendant flatly refused to execute the sale deed on 14th June, 2000 and when defendant and his family members tried to interfere in the possession of the plaintiff over the suit land and they arranged to file a chapter case against the plaintiff, the plaintiff realized that there was no other alternative but to file the suit for specific performance of contract. The relief of permanent injunction was also claimed. It is the case of the plaintiff that, he was always ready and willing to perform his part of contract.

6. The defendant – Yeshwant contested the matter by filing written statement. He denied that, he had agreed to sell the suit property to the plaintiff and the written agreement was made on 26th February, 1997. The defendant denied that the possession of the land is with plaintiff. The defendant, however, admitted that the plaintiff had asked him to execute the sale deed and notice to that effect was also sent.

7. It is the case of the defendant that, father of the plaintiff was Karta of joint Hindu family, of which defendant was a member. It is contended that, Gut No. 272 was purchased by defendant from his own income. He contended that, he is suffering from paralysis and is

bedridden. He contended that, he used to give his thumb impressions on the papers which the father of plaintiff used to bring to him as they had the joint Hindu family. He contended that, as he was bedridden, one Shaikh Farid was cultivating the suit land for him. He contended that, when the plaintiff attempted to interfere in the possession of the defendant over the suit land, a report was given to the police and chapter case was filed against the plaintiff. He admitted that, he had filed suit for injunction against the plaintiff in respect of the same land. He contended that, by joining hands with revenue authority, the plaintiff had managed to get his name entered in the revenue record. It is the case of the defendant that, as he is demanding his share in the joint family property, only in order to pressurize him and harass him, a false suit is filed against him.

8. The issues were framed in the trial Court on the basis of the aforesaid pleadings and both the sides adduced the evidence. Though some other contentions were made by the plaintiff to show that the property bearing Gut No. 272 was purchased in the name of defendant by father of plaintiff and the consideration was paid by the father of the plaintiff, this contention need not be considered in the suit filed for relief of specific performance of contract. Both the Courts below have held that the plaintiff has proved the execution of the document of

agreement dt. 26th February, 1997 and also the contentions that the consideration of Rs. 59,000/- was paid to the defendant and defendant had put the plaintiff in possession of the suit property. The point of readiness and willingness is also proved by the plaintiff.

9. The Id. Senior Counsel for the appellant submitted that, the substantial question of law needs to be formulated on the point of proof of the execution of so called document of agreement of sale. He submitted that, the evidence given by the witnesses of plaintiff is not consistent with regard to the place of execution and also as to the person who was involved in preparing the document and this inconsistency is not considered and, therefore, the findings of the Courts below on this point are perverse. He also submitted that, the substantial question of law needs to be formulated with regard to the findings given by the Courts below on the point of possession. The Id. Senior Counsel further submitted that, as the agreement of sale was not registered under Registration Act, this document could not have been used for any purpose and on that point also, the substantial question of law needs to be formulated.

10. The plaintiff has examined himself to adduce evidence on the agreement of sale. His evidence shows that, in his presence the

document was written, defendant put his thumb impression on the document and one receipt with regard to passing of consideration was also given by defendant. He has given evidence that, under this document, possession was given to him on the date of agreement. He has given evidence that as he was in possession and he had started cultivation of the land, after enquiry made by revenue authority, his name came to be entered in column 7-B of the 7/12 extract. He has given evidence on cause of action and on attempts made by him for getting the sale deed executed. Most part of consideration was paid under the agreement and the defendant admittedly refused to execute the sale deed in reply given to the notice and so there is no need to discuss more the evidence on the point of readiness and willingness.

11. Hiranman Bhujaage - father of plaintiff is examined by plaintiff as his witness and his evidence is similar to that of the plaintiff. His evidence shows that, they had gone to the premises of Court for executing the document and one Bhatlavande had scribed the document on the basis of the information supplied by the defendant. There is some inconsistency in the evidence of Hiranman as he has deposed that, Shri. Narare, who was their Advocate, had helped them in preparing the document though the same was scribed by

Mr Bhatlavande. However, the evidence is consistent as to the place where the the document was prepared.

12. Shivaji Hirve, one attesting witness, who has signed both the documents, agreement and receipt, has given evidence that these documents were prepared at the instance of defendant and one Advocate Shri. Narare had helped the parties to prepare those documents. The evidence of father of plaintiff and these witnesses show that the consideration was paid to the defendant through Advocate Narare. The learned Senior Counsel for appellant submitted that, plaintiff has given evidence that amount was given to the defendant directly and, therefore, there is some inconsistency. Ld. Senior Counsel submitted that the plaintiff ought to have examined Advocate Narare when the evidence of aforesaid nature was given by the plaintiff.

13. Bhatlavande, the scribe, has given evidence that he wrote contents of the agreement as also the receipt as per the instructions given by the defendant. He had signed on the two documents, as they were scribed by him. Though he has not taken the name of Advocate Shri. Narare, not much can be made out due to the circumstance as he scribed the documents and there are signatures of this witness on both

the documents.

14. The aforesaid evidence shows that the plaintiff gave evidence to prove both the documents. Though the agreement was not registered, there is a separate evidence of agreement of sale and payment of consideration. For collateral purpose, these documents can be used.

15. During pendency of the suit, defendant died and his L.Rs. i.e. his widow and issues were brought on record. His wife has stated in the evidence that, as there was joint Hindu family, her deceased husband - defendant used to give thumb impressions on any documents which were being brought by father of plaintiff. Thus, she has not specifically denied that the two documents like the agreement of sale and receipt bear the thumb impressions of her deceased-husband.

16. Shakuntalabai has given evidence that her husband was sick in the year 2000 and at that time, there was obstruction to the possession and they were cultivating the land through one Shaikh Farid. She has given evidence about the events like giving of notice by plaintiff and giving of reply by her husband. In view of these

circumstances, not much can be made out from oral evidence of this lady that, from 1995, her husband was bedridden and he was suffering from paralysis. She admits that, even when her husband was sick, he used to give thumb impressions on any document which was brought by father of plaintiff.

17. It is not the case of the defendant that, plaintiff was not in a position to pay such consideration. On the contrary, it is admitted fact that, two acres portion of this land was already sold by defendant from the same land to the plaintiff. That sale deed was never challenged. It is not disputed that, revenue authority made enquiry and found that plaintiff was cultivating the suit land and accordingly entry was made of the name of the plaintiff in the revenue record. That entry is still there though the defendant's widow has tried to say that they had challenged the said entry by filing appropriate proceedings. On this point, there is evidence of Shri. Shaikh Naseer, but the record prepared by revenue authority has presumptive value. It appears that, unnecessarily the officers of revenue department are examined by the plaintiff to show that proper enquiry was made and then the name of plaintiff was entered in the revenue record. The possession of plaintiff over the suit property is a circumstance, which corroborates the case of the plaintiff that there was the agreement of sale between the

plaintiff and the defendant. It is also admitted that, defendant had filed a suit for relief of injunction but, the said suit was subsequently withdrawn as no relief even interim was given by the Court to the defendant in respect of the suit property.

18. The ld. Senior Counsel for appellant submitted that, the burden was on plaintiff to prove that the disputed documents were bearing thumb impression of deceased-defendant in view of the nature of defence taken in the W.S. The ld. Senior Counsel placed reliance on some observations made by Hon'ble Apex Court in the case of **Thiruvengada Pillai v. Navaneethammal & Anr.** reported in **AIR 2008 SC 1541**. In view of the facts of said reported case, the Apex Court observed that it was necessary for the party who was relying upon the document to show that the document was not forged. The Apex Court has also observed that, there was doubt about the genuineness of the agreement and it was necessary to dislodge the effect of evidence of some witnesses.

19. Ordinarily, the burden to prove forgery is on the party alleging forgery in view of provision of Section 102 of Evidence Act (illustration – b). In suit for specific performance of Contract, when there is no specific pleading about forgery, such defence need not be

considered by the Court (Order 6 Rule 4 of CPC). In the present case, there is a evidence of scribe and also of attesting witness. There is implied admission of the widow about giving of thumb impressions by her husband. In any case, she had no personal knowledge about the execution of the documents. Further, there was one more transaction made in the past by defendant in favour of plaintiff in respect of some portion of the same land and so there was no room to have doubt about the case of the plaintiff that he was in possession under the disputed agreement.

20. Ld. Senior Counsel argued that, point of hardship ought to have been considered by the Courts. This point was never raised by the defendant or his L.Rs. On this point, the ld. Counsel for the plaintiff/present respondent placed reliance upon the decision of the Apex Court in the case of **Prakash Chandra Versus Narayan** reported in (2012) 5 SCC 403. In this case, the Apex Court has laid down that there needs to be a specific contention about hardship and issue also needs to be framed on that point. In view of this position of law, this Court holds that, at this stage, such contention made by the defendant cannot be considered.

21. The findings given by the Courts below on the point of

agreement of sale made by defendant, on the passing of consideration, on the point of possession of the plaintiff and on the point of readiness and willingness of the plaintiff and also on the cause of action are findings on fact and there are concurrent findings of the Courts below. In view of these circumstances, this Court holds that there is nothing in the present appeal, on the basis of which substantial question of law can be formulated. Appeal stands dismissed.

22. Ld. Senior Counsel for the appellant requested for grant of four weeks' time and to continue the interim relief for such period as he wants to challenge the decision of this Court.

23. Interim relief is continued for a period of four weeks from today.

[T. V. NALAWADE, J.]

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