

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

SECOND APPEAL NO.698 OF 2014

Smt.Jijabai w/o Tukaram Bhojne,
Age 60 years, Occu. Agriculture,
through her husband and special
power of attorney holder
Shri Tukaram s/o Asaram Bhojne,
Age 65 years, Occu.Agriculture,
R/o Kingaon, Taluka Ambad,
District Jalna

..Appellant
(Orig.Plaintiff)

Versus

1. Jagannath s/o Vishwanath
Chaudhary,
Age 55 years, Occu.Agri.,
2. Smt.Nilabai w/o Jagannath
Choudhary,
Age 47 years, Occu. Agri.,

Both r/o Kingaon, Taluka
Ambad, District Jalna

..Respondents
(Orig.Defendants)

Mr B.R.Kedar, Advocate for appellant
Respondents no.1 and 2 served

CORAM : N.W. SAMBRE, J.

DATE : 21st January 2015

PER COURT

1. This second appeal is by original plaintiff.
2. The appellant-plaintiff filed a suit for specific performance in relation to agricultural property admeasuring 1 hectare 20-R out of Gut No.406 situated at Mauje Kingaon, which was agreed to be purchased by the plaintiff for a total consideration of Rs.1,60,000/-. Out of which according to the plaintiff, on the date of the agreement, an amount of Rs.1,50,000/- was paid, however, the remaining amount of Rs.10,000/- was agreed to be paid at the time of execution of sale deed.

3. According to appellant-plaintiff, the defendant played mischief by transferring a part of land in favour of his wife on 11th June 2001 which has prompted the plaintiff to approach the respondents for execution of the sale-deed. It is further urged that the respondents attended the office of Sub Registrar on 22nd February 2002 for execution of sale-deed, however, in view of differences between the parties, the sale-deed did was executed, resulting into issuance notice on 26th March 2002 to the respondents.

4. The present appellant herein, having read the intention of the defendants – land owner, filed Special Civil Suit No.39 of 2003 which was decreed on 9th September 2005, however, in Regular Civil Appeal No.176 of 2005, an order of remand was made, as the defendant denied the signature on the alleged agreement of sale dated 25th April 2001. Upon report received from the handwriting expert under Order 26, Rule 9 of the Code of Civil Procedure, the learned trial Court decreed the suit of the present appellant by judgment and order dated 27th July 2010, operative part of which reads thus :

- “1. Suit is decreed with costs.
2. The plaintiff shall deposit balance consideration of Rs.10,000/- in this court within the period of one month from the date of this order.
3. On depositing the amount of Rs.10,000/- in the court by the plaintiff, defendant no.1 shall execute the registered sale deed in respect of the suit land bearing

Gat no.406, to the extent of 1.20 Hectors, situated at village Kingaon, Taluka Ambad, District Jalna, as described in claim clause no.1 of the plaint in favour of the plaintiff within three months from the date of this order.

4. Plaintiff shall bear the expenses of the registration of the sale deed.
 5. It is declared that the sale deed bearing no.4054 dated 11/06/2001, executed by defendant no.1 in favour of the defendant no.2 in respect of 11 R land out of suit land of Gat no.406 as described in claim clause no.2 of the plaint is sham, bogus and same is not binding upon the rights, title and interest of the plaintiff.
 6. In the event of failure of the defendant no.1 to execute the registered sale deed of the suit land in favour of the plaintiff within the aforesaid stipulated time, the plaintiff is entitled to get the sale deed executed through the Court.
 7. On plaintiff's failure to deposit the balance consideration of Rs.10,000/- within one month as directed the suit shall stand dismissed with costs.
 8. Decree be drawn accordingly.”
5. The issues which were framed for the purpose of consideration of the claim of the present appellant-plaintiff were raised and answered accordingly, as follows :

ISSUESFINDINGS

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| 1. Whether the plaintiff proves that the defendant no.1 agreed to sell the suit property to the extent of 1 H 20 R from the land Gat no.406 situated at village Kingaon, Taluka Ambad, for the consideration of Rs.1,60,000/- ? | In the affirmative |
| 2. Whether the plaintiff proves that on 25.4.2001, the defendant no.1 by receiving Rs.1,50,000/- towards the earnest money executed an agreement of sale in her favour ? | In the affirmative |
| 3. Whether the plaintiff proves that the defendant no.1 agreed to execute a registered sale deed of the suit property by accepting remaining consideration amount of Rs.10,000/- ? | In the affirmative |
| 4. Whether the plaintiff proves that the sale deed of the suit land to the extent of 11 R executed by defendant no.1 in favour of defendant no.2 is sham, bogus, illegal and void and not binding on her right ? | In the affirmative |
| 5. Whether the plaintiff proves that she was and is ready to perform her part of contract ? | In the affirmative |

6. Whether the plaintiff proves that defendant no.1 failed to perform his part of contract ? In the affirmative
7. Whether the plaintiff is entitled for a decree of specific performance of contract ? In the affirmative
8. Whether the plaintiff is entitled for the possession of suit property ? In the affirmative
9. Whether the plaintiff is entitled for a declaration that the sale deed bearing no.4054 dated 11.6.2001 executed by defendant no.1 in favour of defendant no.2 is sham, bogus, illegal and void and not binding upon her ? In the affirmative

6. The land owner preferred Regular Civil Appeal No.166 of 2010 to the Court of Ad hoc District Judge -1 at Jalna who has allowed the same by his judgment and order dated 16th August 2014, as such present second appeal.

7. Learned Counsel for the appellant-plaintiff Mr Kedar, while questioning the legality and validity of the judgment delivered by the Ad-hoc District-1 Jalna on 16th August 2014 in Regular Civil Appeal No.166/2010 has sought to urge that the trial Court, having regard to the claim put forth before it, has decreed the suit having held that the agreement of sale of the suit land was proved, including payment of earnest money of Rs.1,50,000/-. He further urged that the lower

appellate Court, after re-appreciating the evidence has reached to a different conclusion which according to him, is based on its own appreciation and the plausible view. According to him, the judgment delivered by the learned lower appellate Court calls for interference. He further urged that the learned lower appellate Court though has answered execution of document in favour of the present appellant, however, for the reasons stated in the judgment, upset the decree passed by learned trial Court. He further urged that the learned lower appellate Court has committed an error apparent on the face of record by discarding plaintiff's witness PW-1 Tukaram who was examined at Exh.41. He further urged that the lower appellate Court has wrongly applied the provisions of Order III, Rule 1 of the Code of Civil Procedure and has drawn adverse inference under Section 114 of the Evidence Act.

8. Though the respondents were served on notice, none appears.

9. After having considered the submissions made by the learned Counsel for the appellant Mr Kedar, it is required to be noted that the suit in respect of agricultural land narrated in the foregoing paras was instituted which was for specific performance of contract. Learned lower appellate Court, for the purpose of deciding the issues sought to be raised before it, framed points for its consideration and answered the same accordingly, which read thus :

<u>POINTS</u>	<u>FINDINGS</u>
1. Whether the testimony of power of attorney holder is sufficient to decree the suit ?	No

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| 2. | Whether plaintiff proved that she entered into an agreement of sale on 25.4.2001 for a total consideration of Rs.1,60,000/- paying earnest money of Rs.1,50,000/- to defendant no.1 ? | No |
| 3. | Whether defendant no.1 committed breach of contract by executing the sale deed in favour of his wife defendant no.2 on 11.6.2011 ? | No |
| 4. | Whether plaintiff proves that defendant no.1 committed breach of contract on 22.2.2002 by not executing the sale deed for whole the suit property ? | No |
| 5. | To whom the greater hardship would caused by allowing the performance of contract rather than refusing the same ? | Did not arise |
| 6. | Whether any alternatively relief could be ordered ? | No |

10. Learned lower appellate Court, after framing issues at Exh.21, noticed that the plaintiff had claimed to have executed special power of attorney in favour of her husband. The husband of the plaintiff namely P.W.-1-Tukaram was the main witness who has deposed in support of plaint verification and claim made therein at Exh.47 whereas Pandharinath PW-2 and Raibhan PW-3 were the attesting witnesses to the agreement of sale Exh.48. PW-4 Arun was the writer of the document in question.

The defendant no.1 - Jagannath examined himself as DW-1 and in addition examined DW-2 Raosaheb, DW-3 Manikrao and DW-4 Pandharinath who claimed to have witnessed the repayment of

amount of Rs.1,40,000/-, as the defendant has come out with a case of loan transaction. The learned lower appellate Court has also taken into account the view of the trial Court that the agreement of sale though was alleged to be an unregistered document, however, possession of the property in question was never delivered. According to learned lower appellate Court, contrary to the provisions of Section 49 of the Transfer of Property Act and Section 17 of the Registration Act, the trial Court has given the said finding that the document in question does not require registration.

11. Upon perusal of the judgment delivered by the lower appellate Court, it is noticed that the agreement is at Exh.48. The said agreement to sale Exh.48 was not proved by the evidence of PW-1 Tukaram being husband of plaintiff. Husband of the plaintiff deposed in support of plaint based on special power of attorney which was executed by plaintiff. The plaintiff has not entered into witness box to prove the said power of attorney and as such, said document was not exhibited before the Court below. It was never the case of the appellant that she has authorised her husband to enter into discussion, negotiation and transaction on her behalf. At least the plaintiff has not established the same by entering into witness box. She has not entered into the witness box to prove the execution of power of attorney in favour of her husband. It is also noticed that to the transaction in question, said Tukaram was neither a party nor an attesting witness. The lower appellate Court noticed that the attesting witness PW-2 Pandharinath testified about the discussion as regards transaction which took place at the house of defendant no.1,

however, the presence of PW-1 Tukaram at the said place was not established. PW-3 Raibhan has deposed in contradiction with the testimony of PW-2 Pandharinath that the discussion in question took place at Ambad. It is observed by learned lower appellate Court that having regard to the fact that the agreement in its original was not produced, the power of attorney was not proved. The lower appellate Court was alive of the fact that the presumption could be drawn in view of provisions of Section 85 of the Evidence Act that the said document i.e. power of attorney executed by the plaintiff in favour of PW-1 Tukaram was never exhibited during the trial. The lower appellate Court also took note of the fact that the plaintiff herself had not entered into witness box so as to prove the power of attorney executed in favour of her husband delegating powers to him. Even it was not pleaded that for the purpose of transaction in question, she had authorised her husband to negotiate and enter into the deal. The learned lower appellate Court has taken into account the provisions of Order III, Rule 1 and 2 of the Code of Civil Procedure and Section 2 of the Power of Attorney Act (7 of 1882) and based on the decision of judgment of this Court in the matter of **Janki Vashdeo Bhojwal and anr. Vs. Industrial Bank Ltd. And ors.**, reported in **2005 (1) Mh.L.J.1170**, after having considered the use of the word, “acts”, has formed an opinion that a power of attorney holder cannot depose for the principal in respect of a matter which only the principal can have personal knowledge. The learned lower appellate Court has also taken note of the requirement of establishing his case for specific performance such as (a) valid agreement of sale; (b) breach

committed by the defendant; and (c) readiness and willingness to perform his part of contract. The learned lower appellate Court noticed that as the plaintiff herself has not entered into witness box and has not given evidence in support of the above points and has not offered herself for cross-examination, the question of accepting the evidence of the power attorney holder will be hardly of any consequence. The lower appellate Court noticed that in case if the principal, at no point of time had personally handled or dealt with or participated in the transaction and has no knowledge of transaction and where the entire transaction has been by the attorney holder, in such circumstances, the evidence of the attorney holder can be taken into account as regards the transaction. However, in the present case, since it was not the case in view of the fact that even the power of attorney was not proved, the lower appellate Court was right in disbelieving the evidence of PW-1 Tukaram.

12. The learned lower appellate Court has also looked into the aspect of readiness and willingness and tested the same in the backdrop of the affairs being handled by an attorney holder who may happened to be in close relation of the party to the agreement. The same can be taken into account, however, in the present case, the lower appellate Court noticed that the plaintiff herself has come out with a case that she had done all the transactions since beginning through her husband. She has further stated that in view of provisions of Sections 60 and 61 of the Evidence Act, appropriate presumption as to the correctness of the document needs to be drawn in her favour. The said proposition was scrutinised having regard to the facts of the

case in hand and drawn conclusion that evidence of PW-1 Tukaram was not sufficient to adhere to the said principal and has proceeded to draw the adverse inference.

13. After considering the evidence of handwriting expert as signature on the document - agreement to sale was denied, the lower appellate Court, after having regard to the evidence of PW-1 Tukaram as regards entering into contract and payment of Rs.1,50,000/- to the defendant, evidence of PW-2 Pandharinath who in his cross-examination has stated that he was present at the time of talk, has reached to a conclusion that the document in question was very much executed.

14. The learned lower appellate Court, having regard to the provisions of Article 25 of the Bombay Stamp Act, Section 17 of the Registration Act and Section 54 of the Transfer of Property Act, though noticed that there is recital in the agreement as regards handing over the possession to the plaintiff, however, noticed an admission on record that the possession of the property remained with the defendant resulting into claiming of relief of specific performance. The lower appellate Court held that the document - agreement to sale Exh.48, as sought was not required to be registered, as the possession was not handed over, however, upon scrutiny of the evidence of PW-2, DW-1, PW-1 has reached to a finding that the agreement Exh.48 was not to be acted upon. The learned lower appellate Court has taken into account the defence set up by the defendant as regards loan transaction and having regard to the evidence on record as regards

repayment of Rs.1,40,000/-, the threats caused to the defendant by the husband of the plaintiff, has reached to a conclusion that no case for breach of the agreement was established. The lower appellate Court has also taken into account the entire evidence that of witnesses and scribe and having regard to the law cited before it, reached to a conclusion that no case for specific performance was established.

15. Having gone through the judgment of the learned lower appellate Court, in my opinion, the grounds which are sought to be raised by Mr Kedar, learned Counsel for the appellant cannot be given colour of the substantial question of law.

16. So far as the above referred observations are concerned, I am fortified in my view in the law laid down by the Apex Court in the matter of **Santosh Hazari Vs. Purushottam Tiwari (dead) by L.Rs.**, reported in **AIR 2001 SC 965**. The Apex Court, while dealing with the issue as regards what is substantial question of law and decree to which this Court should interfere in the second appellate jurisdiction has observed in paragraph 15 thus :

“15. A perusal of the judgment of the trial Court shows that it has extensively dealt with the oral and documentary evidence adduced by the parties for deciding the issues on which the parties went to trial. It also found that in support of his plea of adverse possession on the disputed land, the defendant did not produce any documentary evidence while the oral evidence adduced by the defendant was conflicting in nature and hence unworthy of reliance. The first appellate

Court has, in a very cryptic manner, reversed the finding on question of possession and dispossession as alleged by the plaintiff as also on the question of adverse possession as pleaded by the defendant. The appellate Court has jurisdiction to reverse or affirm the findings of the trial Court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate Court must, therefore, reflect its conscious application of mind, and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate Court. The task of an appellate Court affirming the findings of the trial Court is an easier one. The appellate Court agreeing with the view of the trial Court need not restate the effect of the evidence or reiterate the reasons given by the trial Court; expression of general agreement with reasons given by the Court, decision of which is under appeal, would ordinarily suffice (See Girijanandini Devi & Ors. Vs. Bijendra Narain Choudhary, AIR 1967 SC 1124). We would, however, like to sound a note of caution. Expression of general agreement with the findings recorded in the judgment under appeal should not be a device or camouflage adopted by the appellate Court for shirking the duty cast on it. While writing a judgment of reversal the appellate Court must remain conscious of two principles. Firstly, the findings of fact based on conflicting evidence arrived at by the trial Court must weigh with the appellate Court, more so when the findings are based on oral evidence recorded by the same presiding Judge who authors the judgment. This certainly does not mean that when an appeal lies on facts, the appellate Court is not competent to reverse a finding of fact arrived at by the trial Judge. As a matter of law if the appraisal of the evidence by the trial Court suffers from a material irregularity or is based on

inadmissible evidence or on conjectures and surmises, the appellate Court is entitled to interfere with the finding of fact (See Madhusudan Das Vs. Smt. Narayani Bai & Ors., AIR 1983 SC 114). The rule is - and it is nothing more than a rule of practice - that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lies, the appellate Court should not interfere with the finding of the trial Judge on a question of fact.(See Sarju Pershad Ramdeo Sahu Vs. Jwaleshwari Pratap Narain Singh., AIR 1951 SC 120). Secondly, while reversing a finding of fact the appellate Court must come into close quarters with the reasoning assigned by the trial Court and then assign its own reasons for arriving at a different finding. This would satisfy the Court hearing a further appeal that the first appellate Court had discharged the duty expected of it. We need only remind the first appellate Courts of the additional obligation cast on them by the scheme of the present Section 100 substituted in the Code. The first appellate Court continues, as before, to be a final Court of facts; pure findings of fact remain immune from challenge before the High Court in second appeal. Now the first appellate Court is also a final Court of law in the sense that its decision on a question of law even if erroneous may not be vulnerable before the High Court in second appeal because the jurisdiction of the High Court has now ceased to be available to correct the errors of law or the erroneous findings of the first appellate Court even on questions of law unless such question of law be a substantial one."

17. In the light of above, no case for interference is made out. As such, the second appeal which is devoid of merit, stands dismissed.

(N.W. SAMBRE, J.)

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