

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

SECOND APPEAL NO.263 OF 2012

Shripati Bapu Shinde ... Appellant

V/s.

Shantabai Krishna Tilekar (Tilak)
@ Shantabai mother Geetabai Tilekar
(Since deceased through LRs)
1A.Suman Dattatraya Tilekar & Ors. ... Respondents

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Mr. Uday Warunjikar, Advocate for the Appellant.
Mr. Dilip Bodake, Advocate for the Respondents.

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CORAM : R.K. DESHPANDE, J.

DATED : JULY 28, 2015.

P.C.

The trial Court passed decree on 18th October, 2005 in Regular Civil Suit No.61 of 2003. The defendant is directed to hand over vacant possession of the suit property to the plaintiff. The counter-claim filed by the defendant for specific performance of contract is dismissed. The Appellate Court has concurred the finding of the facts recorded by the trial Court and dismissed the Regular Civil Suit No.523 of 2010 on 5th December, 2011. Hence, the original defendants are before this Court to pursue their

counter-claim which was for specific performance of contract, dismissed by both the Courts below.

2 The alleged agreement relied upon by the defendant is of 17th April, 1970, for sale of the suit property for total consideration of Rs.3,000/- and an amount of Rs.500/- was said to have been paid at the time of execution of the agreement. The counter - claim was filed on 5th February, 2001. The trial Court has held that the counter - claim was barred by limitation. The learned counsel for the appellant has relied upon Section 90 of the Indian Evidence Act, 1872, to urge that the document dated 17th April, 1970, which is the agreement to sale produced on record, was of 30 years old and hence the presumption about signature and every other part of the document which purports to be in the hand writing of a particular person has to be presumed, as it is in that person's hand writing and in the case of the documents executed or attested that, it was duly executed and attested by the persons whom it purports to be executed and attested. He has invited my attention to the evidence of the defendant who deposed about it and also the admission in the cross-examination of the plaintiff no. 1 B.

3 Undisputedly, the document is dated 17th April, 1970, and it is said that the original document was produced before the trial Court and a Photostat copy has been shown to me. The document is not at all legible. It is not possible either to read the contents of it or to know the signatures on it. None of the attesting witnesses were alive and hence they were not examined. The scribe of the document one Shri Khamkar was alive. He died on 25th November, 2004 and the defendant led his evidence on 15th September, 2004. The Courts have held that there is nothing on record to prove that the person described as Khamkar was unable to depose. Rule under Section 90 of the Evidence Act is founded on necessity and convenience and confers a discretion upon the Court. The defendant has failed to produce the best available evidence in support of his case. In view of this, no substantial question of law arises. Second Appeal is dismissed.

4 In view of the fact that the document is not legible the provisions of Section 90 of the Indian Evidence Act would not be attracted.

JUDGE