

THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.1161 OF 2017
WITH
CIVIL APPLICATION NO.3214 OF 2017 IN F.A.NO.1161 OF 2017

Ajay Avinash Solanki & Ors. ... Appellants/Applicants
Vs.
Mrs. Asha Umesh Yadav & Ors. ... Respondents

Mr. Navin Parekh i/b. Girin Pandit, Advocate for the Appellants/applicants.

Mr. Atit Shukla a/w. Mr. Dharmesh Pandya, Tejal Kurdukar i/b. Ashwin Pandya and Associates, Advocate for respondent nos. 1 to 3.

CORAM:MRS.MRIDULA BHATKAR, J.
DATE: DECEMBER 5, 2017

JUDGMENT:

1. Heard.
2. Admit. By consent of the parties, the appeal is called out forthwith and heard finally.
3. This First Appeal is directed against the judgment and order dated 21.7.2017 passed by the learned Judge of the City Civil Court, Greater Mumbai, by which Suit No.9933 of 1987 is decreed. The respondents/plaintiffs have filed a suit for specific performance of the agreement; for compensation of Rs.3 lakhs

alongwith interest @ 18% and alternatively for refund of earnest money. The appellants/defendants are the owners of a piece of land admeasuring 721 sq.yards with a building thereon situated at New CTS No.1600 having final plot No.258 (original building No.239) situated at Dixit Road, Vile Parle (East), Mumbai. The original plaintiff-deceased was a builder developer and he agreed to purchase the property of the defendant. In 1984, the plaintiff after negotiations with the defendants agreed to purchase the suit property for Rs.1,85,000/-. Inter alia, the original deceased defendant executed agreement dated 5.7.1984 in favour of the deceased plaintiff and accepted an amount of Rs.18,500/- towards earnest money. The plaintiff thereafter paid property tax of Rs.316.50ps for the year 1983-1984. Thereafter, the deceased plaintiff though pursued the deceased – defendant for the transfer of the suit plot and building in his name and insisted for the execution of the sale deed, the deceased defendant avoided the same. The deceased plaintiff was ready and willing to pay his remaining part of the consideration amount and accordingly, sent legal notice to the deceased-defendant. However, the deceased defendant failed to perform his part of

obligation and therefore, the plaintiff was constrained to file suit in the year 1987 for specific performance and the damages. The original defendant appeared after notice and contested the claim by filing written statement on the ground that the defendant never agreed to sell the plot and the building to the plaintiff but he has borrowed the amount of Rs.185,000/- from the original plaintiff, who assured him to advance the said loan and actually gave him a part of the loan of Rs.18,500/- on oral agreement. However, by way of security, the defendant agreed to prepare an agreement of sale of the suit property and thus, he signed the agreement dated 5.7.1984 in favour of the plaintiff. It is categorically contended by the deceased defendant that the said agreement was never intended for sale of the suit property but it was a surety offered against the loan amount of Rs.185,000/-. It was further contended that the defendant failed to make further payment of Rs.156,500/- on or before August, 1984 as agreed between the parties and, therefore, this contract is not binding on him. The trial Court framed issues. The plaintiff thereafter filed his affidavit in chief marked at exhibit 6 and the matter was adjourned and fixed for cross-examination on 8.1.2014.

However, in between unfortunately, the original plaintiff expired on 22.12.2013 and, therefore, the present respondents, being legal representatives of the deceased plaintiff, were brought on record as plaintiffs in his place. Thereafter, neither the plaintiffs nor the defendants led the evidence and the learned Judge of the trial Court decreed the suit. He directed the plaintiff to deposit the remaining amount of Rs.166,500/- in the Court within one month from the date of the order and the defendants were directed to execute the registered sale deed in respect of the suit property in favour of the plaintiffs within two months from the date of the order. Hence, this appeal.

4. After going through the record of the case and hearing submissions, the points for determination arose as follows:

- i) Whether the evidence of the deceased plaintiff who is not subjected to cross-examination, can be relied?
- ii) Whether the plaintiffs have proved the agreement and their readiness and willingness to perform their part of contract?
- iii) Whether the judgment and order of decreeing the suit

in favour of the plaintiffs passed by the learned Judge, is just and legal?

5. The learned Counsel for the appellant has argued that in this suit, the order passed by the learned Judge is illegal, bad in law and is to be set aside. He argued that the learned Judge has erroneously relied on the evidence, i.e., affidavit in chief of the plaintiff and documents exhibited therein. He submitted that the deceased plaintiff died after filing of the affidavit of evidence and was not available for cross-examination to the defendants. Under such circumstances, the entire evidence of the plaintiff should have been discarded. The defendants though admitted the signature and the execution of agreement dated 5.7.1984, the contents therein and the truthfulness of the contents was denied by them. He submitted that it was not necessary for the defendants to step into the box and lead evidence that the document of sale was not executed with intention to sell the property; because the contents of the document were not proved by the plaintiffs. He further submitted that on the point of proof of the contents of the documents, the learned Counsel relied on

the ratio laid down in **Prakash Cotton Mills Ltd. vs. Municipal Corporation of Greater Bombay**¹. Moreover, he argued that the document dated 5.7.1984 was never admitted by the defendants. He further submitted that apart from the proof of the agreement, in the suit for specific performance, it is necessary for the plaintiff to show his readiness and willingness to perform his obligation in terms of contract. He submitted that the original plaintiff was dead when the recording of evidence was going on. The present plaintiffs i.e., the legal representatives entered into the shoes of the original deceased plaintiff and it was necessary for them to lead evidence showing their readiness and willingness to pay the amount of consideration towards performance of the contract.

6. The learned Mr. Shukla for respondent nos. 1 to 3 supported the judgment passed by the learned trial Court accepting the case of the plaintiffs. The learned counsel submitted that the original defendant Mithalal Makanji Solanki and original plaintiff Umesh Bhanjibhai Yadav have entered into an Agreement of Sale of suit land for consideration of Rs.1,85,000/- on 5th July, 1984

¹ AIR 1982 BOM 387

and out of which, Rs.18.500/- was paid by cheque of Hong Kong & Shanghai Banking Corporation, Vile Parle Branch, Mumbai. The defendants have not only accepted the payment of earnest money but they have also admitted the execution of document which is marked at Exhibit 20 by the trial Court. The learned counsel pointed out that in the written statement, the defendants admitted the execution of Agreement of Sale (Exhibit 20) and payment received inter alia. Pursuant to that, the plaintiffs gave public notice on 14th July, 1984 about the sale of the suit land and called the objections of the public. The said public notice is marked at Exhibit 21. Pursuant to this, one G.S. Bhatt who claimed to be a tenant in the said building at Room no. 1, has claimed his right, which is marked as Exhibit 22. On 23rd July, 1984 all other tenants in the suit building have raised objections and have replied to the public notice which is marked as Exhibit 23. The learned counsel further submitted that there was no response from the appellants' side, i.e., defendants/owner of the property and therefore, the respondents were constrained to give personal notice to Mithalal Solanki about the sale transactions between the parties. The learned

counsel submitted that the respondents thus were always ready and willing to pay the remaining consideration amount and have called upon the appellants to perform their obligation but they avoided continuously. The plaintiff has infact proved his case on the basis of its affidavit, pleadings and documents. On the point of admission of examination-in-chief of the plaintiff in the absence of cross-examination, the learned counsel submitted that though affidavit-in-chief is not considered by the trial Court, the trial Court has rightly relied on the documents, i.e., Exhibits 20 and 21 and further documents, as they were admitted by the defendants in their written statement. He pointed out the issues framed by the trial Court wherein the burden of proving that the suit agreement was sham or camouflage for a Deed of Mortgage and security for loan of Rs.1,85,000/- was on the defendants. It was necessary for the defendants to lead evidence and discharge the burden. The trial Court has rightly accepted that the execution of the documents and contents of the document Exhibit 20 were proved due to the admission given by the defendants in their written statement. He submitted that once the execution of the agreement is admitted, then the contents of

the documents automatically can be read in the evidence as admitted. Relying on Sections 91 and 92 of the Indian Evidence Act, he argued that the oral evidence is excluded and cannot be considered when a fact is proved by the documentary evidence unless contrary is proved. In the present case, the defendants did not step in the box and therefore, the trial Court rightly on admission and on the basis of the documents and pleadings before it, has decreed the suit. On the point of effect of admission in pleadings of execution of contract, the learned counsel relied on the judgment of **Burjorji Cursetji Panthaki vs. Muncherji Kuverji**, reported in **1980 5 Bom 143 Vol. III**.

7. On this background, the developments took place on few dates before the trial, are to be considered. On 30th November, 2013, the Court dismissed the Notice of Motion. The issues were already framed and they were marked at Exhibit 5. The affidavit of evidence of deceased plaintiff – Umesh Bhanjibhai Yadav was taken on record and marked Exhibit 6, compilation of documents marked Exhibit 7 and documents which were admitted by the defendant are marked from Exhibit 8 to Exhibit 19. In the

roznama, the Judge has mentioned as follows:

“Considering the nature of documents and averments in affidavit documents at Sr. nos. 2, 4, 5, 6, 8, 9, 16 and 18 are marked exhibits”.

Thereafter those 8 documents were exhibited from 20 to 27 on the basis of in-chief of the plaintiff. The matter was adjourned to 8.1.2014 for cross-examination of the plaintiff. The noting dated 8.1.2014 shows that the Advocate for the plaintiff informing the Court that plaintiff had expired on 22nd December, 2013, so the matter was adjourned to take steps. The roznama dated 11th February, 2014 discloses that *“Advocate for plaintiff submitted that he would file evidence of legal heirs of plaintiff on the next date. The matter is adjourned to 3.3.2014”*. Thereafter the matter was adjourned on 2 to 3 dates for filing affidavit of evidence of the legal heirs of plaintiff or their witnesses. The roznama dated 17th April, 2014 discloses that *“Advocate for plaintiff states that plaintiff would not lead further evidence”*. Nearly for 10 months thereafter there was no progress in the suit, however, it appears that defendant moved an application for clarification in respect of plaintiff's evidence and the status of

the affidavit-in-chief of the deceased plaintiff. In the roznama dated 9th March, 2015 the trial Judge has recorded the following facts:

“Advocate of plaintiff submitted that even though the Court would not consider affidavit evidence of Umesh which is recorded on 09.07.2010 and 27.11.2013 the plaintiff do not want to adduce the evidence. The Advocate of defendant submitted that the documents are marked in the evidence of Umesh cannot be considered in this case unless there was opportunity of cross-examination of Umesh”.

Further, the Court passed the order -

“I observed that since Umesh is not available for cross-examination, the documents recorded in evidence are meaningless in the record in the evidence. Matter is fixed for evidence of defendant.”

8. On 02.12.2016, the learned trial Judge has recorded that -
“the defendants submitted that they do not want to lead any evidence but made the application, that the evidence adduced by plaintiffs be discarded and suit be

dismissed”.

The trial Judge in the roznama has mentioned -

“It is pertinent that when the parties have closed their evidence, it is not necessary to make such application. The points mentioned in the application can be raised and argued during the course of arguments.

Hence, the Application is filed and the parties shall advance their arguments.

Thereafter the arguments were heard and suit was decreed.

9. This is a suit for specific performance and thus, the initial burden is on the plaintiff to prove the Agreement between the parties and thereafter the plaintiff to show his/her readiness and willingness to perform the part of his Agreement. A suit for specific performance can be filed on oral agreement also. However, the burden is on the plaintiff to prove the existence of the Agreement between the parties. In the present case, no agreement is executed between the parties on stamp paper. The letter dated 5th July, 1984 signed by defendant no. 1 in the name of deceased plaintiff (Exhibit 20) is supposed to be a

contract to be performed. In this letter, defendant no. 1 has declared that he has sold the suit property to deceased plaintiff for Rs.1,85,000/- and on that day, he had received a token amount of Rs.18,500/- by cheque and the full payment would be made by the party latest by 15th August, 1984. In the plaint, all pleadings in respect of specific performance are based on this letter.

10. The defendant no. 1 in the written statement though has admitted his signature and execution of such document has denied the very object of the execution of this document. It is contended that defendant no. 1 has borrowed money from deceased plaintiff who agreed to give him loan of Rs.1,85,000/- and out of which, he actually paid him Rs.18,500/- on 5th July, 1984. It is further contended that a letter stating the sale of the suit property and acceptance of Rs.18,500/- towards the partial amount of consideration was never agreed and intended between the parties. It was towards the security against payment of business loan by the deceased original plaintiff to the son of defendant no. 1. Thus, though the execution of the

document is admitted, especially the truthfulness of the contents was denied by the defendant.

11. In the suit for specific performance, curiously, plaintiffs did not lead evidence though the defendants have denied the contents of the Agreement and have also disputed readiness and willingness of the plaintiffs to pay the amount of the consideration till 15th August, 2019.

12. Thus, by the order dated 9th March, 2015, the trial Judge has specifically mentioned that the documents recorded in evidence are meaningless, as the plaintiff was not available for cross-examination. On this background, the finding of the learned Judge are probed. The learned trial Judge has held that the defendants did not prove that the suit agreement was sham and a guise/camouflage for the Deed of Mortgage and a security against loan of Rs.1,85,000/-. The defendants did not succeed in proving the above issue. The issue that does the plaintiff prove that he is ready and willing to perform his part of the suit agreement; is held in affirmative. The learned Judge decreed

the suit. In paragraph 10 of the judgment, the learned Judge has mentioned that *“it is pertinent to note that the defendants failed to cross-examine the plaintiff and this evidence of plaintiff is remained un-rebutted.”* This finding of the learned Judge of the trial Court is not only erroneous but perverse, illegal and itself is a sufficient ground to allow the Appeal. When the trial Judge is fully aware that the plaintiff after submitting his affidavit-in-chief expired and therefore, was not available for cross-examination and the trial Court has held that not only his evidence but the documents which were exhibited during the examination-in-chief are meaningless, cannot give such blatantly false finding that the defendant failed to cross-examine the plaintiff. Further, inference drawn by the trial Judge that the evidence of the plaintiff remained unrebutted is an expression of wrong notions of the trial Judge. When witness is not subjected to cross-examination, then his examination-in-chief is valueless. The exception is carved out only under section 32 of the Evidence Act where without cross-examination, the statement made by a dead person can be used as a piece of evidence if found truthful and voluntary. In the absence of cross-examination the evidence

of such statement, popularly known as dying declaration, can be relied by the Court and the Criminal Court can give conviction on the basis of it. The statement admissible is related to the cause of death. It is such statement where the maker is not available for cross-examination and yet it can be used as evidence. But it is not the case of the examination-in-chief of the other dead witnesses who are not available for cross-examination.

13. The basis of this suit is an Agreement, i.e., a letter dated 5th July, 1984 (Exhibit 20) where the defendant has admitted the execution of the document in his written statement but has challenged the contents of the document. The learned Judge has erred in accepting the contents of the document as they are. The learned Judge has applied the provisions of Sections 91 and 92 of the Evidence Act, i.e., exclusion of the oral evidence when written evidence in the nature of document is produced. The trial Judge has wrongly interpreted Section 92 and placed the burden on the defendant to prove that there was oral transaction other than the written Agreement as said in Exhibit 20. At this stage, the order passed by the trial Court on 9th March, 2015 is

required to be looked into. The roznama discloses that on 7th February, 2015, the advocate of the plaintiff made statement that he did not want to lead evidence of the plaintiff and therefore, the advocate of the plaintiff asked clarification about the documents which were taken on record during the examination-in-chief of deceased plaintiff. Thereafter, the advocate of the plaintiff has stated that even the affidavit of evidence of deceased plaintiff is discarded, still the plaintiff did not want to adduce evidence and so further clarification was sought by the advocate of the defendant about the documents which are marked in the evidence of the plaintiff, on which the Judge has specifically mentioned that since deceased plaintiff -Umesh is not available for cross-examination, the documents related in evidence are meaningless in the record in evidence. This clearly shows that the learned trial Judge did not want to rely and believe the documents which were exhibited in examination-in-chief of the plaintiff. It is the settled position of law that facts admitted need not to be proved. Hence, the documents which were admitted was marked from Exhibits 8 to 18. Those documents very well can be taken into account and

relied by the learned trial Judge in absence of the plaintiff's evidence. However, the documents which were marked from Exhibits 20 to 27 were not admitted by the defendants when the defendants were called upon to admit and deny the documents, therefore, in the examination-in-chief of the plaintiff, these documents were produced and they were marked and exhibited. Under such circumstances, the learned trial Judge committed error of law in relying on Exhibit 20 and attracting the provisions of Sections 91 and 92 of the Evidence Act. If the document, i.e., Agreement would have been admitted by the defendants and would have been exhibited, in the absence of the plaintiff's evidence, then the learned trial Judge was correct in accepting the contents of the document and thereafter Sections 91 and 92 would have been attracted and burden to prove the oral Agreement other than the written Agreement would have cast on the defendant.

14. In the suit for specific performance, the plaintiff has to prove his readiness and willingness to make the payment. There is admission on the part of the defendant that he has accepted

amount of Rs.18,500/-, however, it cannot be a substitute to proof of readiness and willingness. It was mandatory on the part of the plaintiff to show that he was always willing and ready to pay the remaining amount of Rs.1,66,500/-.

15. In the case of **Man Kaur (Dead) by LRs. vs. Hartar Singh Sangha**², the Supreme Court while dealing with the requirements of the proof of facts in the case filed under Specific Relief Act on the point of section 16(c) of the Specific Relief Act, held that the plaintiff should not only plead and prove the terms of the agreement but should also plead and prove his readiness and willingness to perform this obligations under the contract in terms of the contract and right from the date of the execution till the date of decree, he must prove that he is ready and has always been willing to perform his part of the contract. The evidence of his readiness and willingness of his performance of his part of contract can be gathered on the basis of the conduct of the party and the attending circumstances. However, these facts are required to be brought on record.

² (2010) 10 SCC 512

16. In the case of **Burjorji Cursetji Panthaki** (*supra*), the suit was filed for specific performance. In the written statement, the defendants admitted the execution of Agreement and also the acceptance of earnest money but pleaded that the said Agreement was not valid as it was executed by him in coercion and undue influence. In the said case, the defendant was examined. The learned Judge considered whether the document was sufficiently admitted by the defendant to make its production in evidence unnecessarily. There was also an issue of the requirement of registration under section 17 of the Registration Act. Thus, the question was whether the proof of the document is superseded by these admission in the pleading. The Court has to answer the questions where the parties are at issue and not those which are agreed. Therefore, the pleading in the written statement or admission will act as an estoppel to deny the Agreement. In the case of **Burjorji Cursetji Panthaki** (*supra*), it is not discussed whether the defendants have denied the documents at the time of admission under Order 12 of the Code of Civil Procedure. In the present case, though the execution is admitted, specifically sale of land is

denied and it was offered as surety for loan is also pleaded. The pleadings are to be considered as a whole. Thus, it cannot be said that it was unqualified admission by the defendants. Moreover, the admission of the contents of the documents were specifically denied and therefore, in the present case, the document Exhibit 20 was not exhibited as admitted but it was exhibited in the evidence-in-chief tendered by the plaintiff. Once the plaintiff is not available for cross-examination, then whatever in-chief on record which includes also the exhibition of the documents cannot be relied by the plaintiff. Any evidence which is tendered by one party should be open and available for the challenge by the other party. The other party may have some material to dislodge that evidence or create doubt about the existence of that evidence, hence opportunity cannot be denied by shutting down the door of the cross-examination.

17. Thus on both the counts, i.e., proof of the Agreement and proof of readiness and willingness, the plaintiff failed to discharge his burden. Under such circumstances, the learned trial Judge ought not to have decreed the suit. Hence, the said

judgment and order needs to be set aside.

18. The defendant has admitted that he has accepted an amount of Rs.18,500/- towards loan from the plaintiff. Therefore, the defendants are liable to refund the said amount of Rs.18,500/- with interest @ 18% p.a. from the date of the transaction, i.e.. 5th July, 1984 till realization of the amount. The judgment and order dated 21st July, 2017 passed by the learned Judge of the City Civil Court is hereby set aside. The Suit is dismissed. Parties to bear the costs. The defendants to refund the amount of Rs.18,500/- @ 18% p.a. to the plaintiff from the date of the transaction till realization of the amount within six weeks.

19. First Appeal is disposed of. Civil Application is also accordingly disposed of.

20. The learned counsel for the appellants orally prays to stay the operation of this judgment, as the appellants wants to challenge this judgment in the Hon'ble Supreme Court.

21. As the appellants wants to challenge this judgment before the Hon'ble Supreme Court, the operation of the judgment is stayed for a period of eight weeks.

(MRIDULA BHATKAR, J.)