

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

SECOND APPEAL NO.254 OF 1993

Nagnath s/o Dashrath Kumbhar,
Age 67 yrs, Occu. Agril & Pot Maker,
R/o. Sindphal, Tq. Tuljapur,
(Deceased through his L.R's) ...(Orig. Plaintiff)

Rangnath s/o. Nagnath Kumbhar,
Age 35 yrs, Occu. Agril & Pot Maker,
R/o Sindphal, Tq. Tuljapur,
Dist. Osmanabad .. APPELLANT

VERSUS

Bhima s/o. Rama Ghatshile,
Age 60 years, Occu. Agril.,
(Deceased through his L.Rs.) ...[Orig. Defendant]

1. Mohan Bhimrao Ghatshile,
Age 55 years, Occu. Agril.,
2. Navnath Bhimrao Ghatshile,
Age 52 years, Occu. Agril.,
3. Limbabai Arun Dhakne,
Age 50 years, Occu. Household

All r/o Sindphal, Tq. Tuljapur,
Dist. Osmanabad

4. Sou. Ambubai Bibhishan Kawade,
Age 55 years, Occu. Agril.,
R/o Mangrul, Tal. Tuljapur,
Dist. Osmanabad .. RESPONDENTS

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Shri S.S. Choudhary, Advocate for the appellant.
Shri Prashant K. Deshmukh, Advocate for
Respondent Nos. 1 to 4

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CORAM : P. R. BORA, J.

Reserved on : 18.06.2018

Pronounced on : 31.07.2018

JUDGMENT :

1. The present appeal is filed against the Judgment and order passed by the learned Additional District Judge, Parbhani in Regular Civil Appeal No.204 of 1984 decided on 18.03.1993. During pendency of the present second appeal, the original appellant died and his son, who claims to be the sole legal representative of the deceased, has prosecuted the appeal further. The original defendant also died during pendency of the present appeal and his legal heirs are brought on record, who have defended the present appeal. For the sake of convenience the parties are referred to by their original status in the suit i.e. appellant is referred to as the plaintiff and the respondents are referred to as the defendant since, deceased Bhima was the sole defendant in the civil suit.

2. The plaintiff had filed Regular Civil Suit No.133 of 1978 in the Court of Civil Judge, Junior Division, Tuljapur for specific performance of agreement of sale dated 27.09.1977 allegedly executed by the defendant in his favour and for

perpetual injunction, and alternative prayer was also made by the defendant for refund of the earnest money, if for any reason the Court does not grant the decree of specific performance. As per the case of the plaintiff before the trial Court, agriculture land bearing Survey No.413/B admeasuring 1 acre, 20 gunthas situated at village Sindphal, Tal. Tuljapur, Dist. Osmanabad was agreed to be sold by the defendant in favour of the plaintiff for the consideration of Rs.500/-. Accordingly, the plaintiff had paid an amount of Rs.400/- to the defendant as earnest money and the defendant, therefore, executed an agreement of sale in favour of the plaintiff on 27.09.1977. On the same day, the defendant was alleged to have delivered the possession of the said land to the plaintiff. It was agreed that, the balance amount of Rs.100/- was to be paid at the time of the execution of the sale deed.

3. It was the further case of the plaintiff that, despite several requests and demands made by him, since the defendant did not execute the sale deed in his favour of the aforesaid agriculture land and in terms of the agreement of sale dated 27.09.1977, he was constrained to file the suit for specific

performance of the said agreement of sale against the defendant. As per the averments in the suit plaint, the plaintiff was all the while ready and willing to perform his part of contract, but the defendant refused to execute the sale deed in his favour. It was the further case of the plaintiff that, instead of executing the sale deed in his favour, the defendant on 14.10.1978 obstructed his possession over the suit land. As such, the plaintiff filed the suit against the defendant for specific performance of an agreement of sale and for perpetual injunction.

4. The suit was defended by the defendant by filing his written statement. It was the defence of the defendant that, the transaction between him and the plaintiff though was stated to be an agreement of sale of the agriculture land, in fact it was a money lending transaction and the agreement of sale allegedly executed by the defendant was only for the purposes of security and was not to be acted upon. According to the defendant, he had obtained an amount of Rs.200/- from the plaintiff in two installments of Rs.20/- and Rs.180/- and for security of the repayment of the said amount, the plaintiff had compelled him

to execute the agreement of sale in respect of the suit land and has wrongly shown in the said agreement that, he had paid the amount of Rs.400/- to the defendant.

5. It was the further contention of the defendant that, he had already repaid the said amount. It was also the contention of the defendant that, since the alleged transaction was not of sale, the plaintiff did not enter his name in the revenue record even after the execution of the agreement of sale. It was also the contention of the defendant that, he had purchased the suit land in the year 1971-72 for the consideration of Rs.800/- and was thus not likely to sell the said land after about 8 years at the lower price.

6. Based on the rival pleadings of the parties, total 9 issues were framed by the learned trial Court. In order to substantiate the contentions raised by him in the plaint, the plaintiff himself deposed before the Court and also examined one more witness by name Shrimant Kapse. The defendant also entered in the witness box and examined one witness. The learned trial Court after having assessed the oral and

documentary evidence brought on record before it decreed the suit and directed the defendant to execute the sale deed in favour of the plaintiff within one month after receiving the amount of Rs.100/- from the plaintiff. The plaintiff was directed to deposit the amount of Rs.100/- in the Court within one month from the date of the Judgment.

7. The defendant challenged the Judgment and decree passed in the civil suit before the District Court by filing Regular Civil Appeal No.204 of 1984. The learned II Additional District Judge, Osmanabad, after having heard the learned Counsel appearing for the parties and on perusal of the Judgment rendered by the trial Court and the evidence brought on record, allowed the appeal and set aside the Judgment and decree passed in Regular Civil Suit No.133 of 1978. The learned First Appellate Court held the plaintiff entitled to recover the amount of Rs.400/- from the defendant by way of refund of the earnest money. Aggrieved by, the original plaintiff has filed the present second appeal in this Court.

8. Shri S.S. Choudhary, the learned Counsel appearing

for the appellant assailed the Judgment delivered by the First Appellate Court on various grounds. The learned Counsel submitted that, the findings recorded by the First Appellate Court are perverse as they are not based on the documentary as well as oral evidence adduced by the parties. The learned Counsel further submitted that, the moot question involved in the present matter is 'whether oral evidence can be laid upon contrary to the written agreement of sale executed by the defendant in favour of the plaintiff'. Referring to Section 92 of the Indian Evidence Act, the learned Counsel submitted that, the oral evidence adduced by the defendant contrary to the documentary evidence has to be excluded and it was rightly excluded by the learned trial Judge.

9. The learned Counsel further submitted that, the finding recorded by the First Appellate Court that the plaintiff is not the agriculturist is contrary to the evidence on record. The learned Counsel submitted that, merely on an admission given by the plaintiff that he belongs to a pot makers family cannot be in any way interpreted to mean that, he is not an agriculturist. The learned Counsel submitted that, the learned First Appellate

Court has viewed the case of the plaintiff with some prejudice and the said approach has resulted in passing the impugned order, which has caused grave injustice to the plaintiff. The learned Counsel, therefore, prayed for setting aside the impugned Judgment and decree and to restore the Judgment and decree passed by the trial Court in Regular Civil Suit No.133 of 1978.

10. Shri P.K. Deshmukh, the learned Counsel appearing for the respondents supported the Judgment delivered by the First Appellate Court. The learned Counsel submitted that, the trial Court had failed in properly appreciating the evidence on record and the said mistake has been rectified by the learned First Appellate Court. The learned Counsel submitted that, from the evidence on record, it clearly reveals that, there was no intention of the defendant to sell the subject agriculture land to the plaintiff though he executed the agreement of sale in favour of the plaintiff. The learned Counsel submitted that, the oral evidence adduced by the defendant and the witness examined by the defendant was sufficient to gather the intention of the parties, on which, the document of agreement of sale was silent.

The learned Counsel submitted that, the First Appellate Court has correctly appreciated the import of Section 92 of the Indian Evidence Act and no interference is required in the finding so recorded by the First Appellate Court.

11. The learned Counsel further submitted that, the conduct of the plaintiff as is revealed from the evidence on record also clearly indicates that, the alleged transaction was not of sale or else the plaintiff would have certainly obtained the possession of the subject land and also would have promptly carried out the necessary entries in the revenue record. The learned Counsel further submitted that, it is unconscionable that, the defendant would sell the subject land in the year 1978 for the consideration of Rs.500/-, which he had purchased in the year 1971-72 for the value of Rs.800/-. The learned Counsel submitted that, the valuable admissions given by the plaintiff in his cross-examination were ignored by the trial Court and the First Appellate Court has rightly considered the said admissions and has reached to the correct conclusion that, the alleged transaction was not of sale, but was in the nature of money lending. The learned Counsel, therefore, prayed for dismissing

the appeal.

12. The present appeal was admitted by this Court (Coram : S.G. Mutalik, J.) on 13.07.1993 on the grounds no.3, 4, 5 and 8 raised in the memo of appeal.

13. Following is the substantial question of law involved in the present second appeal.

'When the trial Court has held the agreement dated 27.09.1977 to be a genuine transaction of agreement of sale, whether the finding recorded by the First Appellate Court that transaction recorded in the document was never intended to be acted upon by the parties and the said document was executed by the original defendant only by way of security for the repayment of the amount borrowed by him from the original plaintiff is sustainable?'

14. The fact that, the agreement of sale was executed between the parties on 27.09.1977 is not at all in dispute. The defendant has not denied or disputed his signature over the said agreement. In this background, the learned trial Court declined

to take into account the oral evidence adduced by the defendant and his witness in relation to the transaction, which was part of the alleged agreement of sale in view of the provisions under Section 92 of the Indian Evidence Act. However, a factually incorrect finding has been recorded by the trial Court that the defendant in his written statement did not specifically plead that, he did not receive the amount of Rs.400/- as mentioned in the said agreement, but had received only Rs.200/- from the plaintiff. Perusal of the written statement reveals that, the defendant has very specifically averred that, he had received only Rs.200/- from the plaintiff.

15. The observations made and the conclusion recorded by the learned trial Court that, since the defendant at the time of scribing the contents of the alleged agreement of sale did not dispute the same and also did not raise any objection even after writing of the document that the contents were incorrectly or falsely written in the said agreement, was not entitled to adduce any oral evidence making out a case that, the agreement of sale was nominal and that it was executed by way of security of amount borrowed by the defendant, are unsustainable. The

Hon'ble Apex Court in **Smt. Gangabai V. Smt. Chhabubai**, reported in **AIR 1982 SC 20** has held that,

"The bar imposed by Sub-section (1) of Section 92 applies only when a party seeks to rely upon the document embodying the terms of the transaction. In that event, the law declares that the nature and intent of the transaction must be gathered from the terms of the document itself and no evidence of any oral agreement or statement can be admitted as between the parties to such document for the purpose of contradicting or modifying its terms. The sub-section is not attracted when the case of a party is that the transaction recorded in the document was never intended to be acted upon at all between the parties and that the document is a sham. Such a question arises when the party asserts that there was a different transaction altogether and what is recorded in the document was intended to be of no consequence whatever. For that purpose oral evidence is admissible to show that the document executed was never intended to operate as an agreement but that some other agreement altogether, not recorded in the document, was entered into between the parties."

16. The learned First Appellate Court did give more weightage to ascertain the intention of the parties behind execution of the said document and according to me, the approach of the First Appellate Court was right and justifiable in view of the facts and circumstances of the case. The learned First Appellate Court has discussed the circumstances, which have come on record leading to an inference that, the intention of the defendant behind executing the alleged agreement of sale was not to sell the said land nor it was the intention of the

plaintiff to purchase the said land. One of the crucial circumstances is that though in the agreement of sale it was specifically averred that, the possession of the subject land was delivered to the plaintiff on the date of execution of the said document, no possession was in fact delivered to the plaintiff and it remained with the defendant. The evidence which has come on record clearly demonstrates that, though the alleged agreement of sale was executed in the year 1977, till 1981-82 the plaintiff had not even made an attempt to get mutated his name in the 7/12 extract in the column of cultivation. The evidence on record also reveals that, the temporary injunction came to be passed in favour of the plaintiff only after some decision was given by the Tahsildar directing the mutation to be carried out for recording the name of the plaintiff in the column of cultivation of the subject land.

17. Secondly, as has come on record, the land which was the subject matter of agreement of sale was purchased by the defendant in the year 1971 for the consideration of Rs.800/- from one Baji Ghatshil and others. Plaintiff in his cross-examination has clearly admitted the said fact. The

plaintiff has also admitted in his cross-examination that, the prices of the agriculture lands were increasing at the relevant time. The plaintiff has also admitted in his cross-examination that, at the relevant time even the *jirayat* lands were being sold at the rate of Rs.3000/- to Rs.4000/- per acre. In the circumstances, it appears unconscionable that, the defendant would sell the subject land for the value of Rs.500/- in the year 1977, which he had purchased prior to about 6 years by paying the consideration of Rs.800/- and that too when prices of the agriculture lands were constantly increasing. No such circumstance is brought on record by the plaintiff, which could have justified the fact of the defendant entering into the distress sale of the subject land. As against it, the defendant has raised a specific plea that, as at the relevant time he was in urgent need of some money, he had borrowed the amount of Rs.200/- from the plaintiff and towards the security of the repayment of the said amount, the alleged agreement of sale was got executed from him by the plaintiff.

18. Before the First Appellate Court an argument was advanced on behalf of the plaintiff that, inadequacy of

consideration cannot be a ground to refuse the decree of specific performance. The Judgment of the **Hon'ble Rajasthan High Court** in **Jetharam & Others Vs. Hazarimal** reported in **AIR 1952 Rajasthan** page no.28 was relied upon. The First Appellate Court has rightly analyzed the import of the said Judgment in para 12 of its Judgment. In the cited Judgment, the Rajasthan High Court has held that,

“Inadequacy of the consideration is no ground for refusing specific performance of the contract of sell unless that fact taken with other circumstances make out a case for holding that the bargain was an unconscionable one.”

In the instant case, as has come on record, the land in question was purchased by the defendant for the consideration of Rs.800/- in the year 1971. The prices of the agriculture lands were admittedly rising at the relevant time. As admitted by the plaintiff in his cross-examination, at the relevant time even *Jirayat* lands were being sold at the rate of Rs.3000/- to Rs.4000/- per acre. Having considered the facts as aforesaid, unhesitatingly, it can be said that, entering into an agreement by the defendant to sell the subject land to the plaintiff for the consideration of Rs.500/- was an unconscionable bargain. In the circumstances, it was well within the discretion of the First

Appellate Court to take a contrary view than taken by the learned trial Court and to refuse the decree of specific performance and instead to direct the refund of earnest money received to the defendant from the plaintiff.

19. It was sought to be contended by Shri S.S. Choudhary, the learned Counsel appearing for the appellant that, in the cross-examination the defendant as well as his witness both have admitted that, the contents of the agreement of sale were written on their instructions. In the circumstances, according to learned Counsel, the defendant was estopped from raising any contrary plea and to come out with a case that, the consideration as was fixed between the parties was inadequate and to oppose the prayer of specific performance on that ground. I am, however, unable to accept the argument so advanced by the learned Counsel. Though it is a fact that, the defendant executed the agreement of sale in favour of the plaintiff in relation to the subject land for the consideration of Rs.500/-, from the circumstances on record, there is reason to believe that, the consent for sale of the subject land and the subsequent execution of the agreement of sale in that regard

may not be with free consent of the defendant. In the circumstances, according to me, the oral evidence adduced by the defendant bringing on record the real intention behind execution of the alleged agreement assumes vital importance. For a moment, even if it is accepted that, at the relevant time, the defendant consented for such an agreement and as such the said agreement of sale cannot be held to be void on the ground that the consideration is inadequate, in view of the explanation to Section 25 of the Indian Contract Act, the inadequacy of the consideration can very well be taken into account by the Court in determining the question whether the consent of the promissory was freely given. In the instant matter, it is the plea raised by the defendant since beginning that, for some urgent need he had borrowed a sum of Rs.200/- from the plaintiff and towards the security of the repayment of the said amount, the alleged agreement of sale was got executed by the plaintiff from him and in the said agreement, the defendant was falsely shown to have received the amount of Rs.400/- by way of earnest money. From the circumstances on record, it can be reasonably inferred that, the alleged agreement of sale was not executed with the free consent of the defendant. It is unconscionable that,

the land which was purchased by the defendant for the consideration of Rs.800/- prior to about 6-7 years and when the prices of the agriculture land were constantly rising during the relevant period, the defendant would sell the said land for the consideration of Rs.500/-. In the circumstances, inadequacy of the consideration is a fact which the Court can very well take into account in considering whether the consent was given by the defendant freely or otherwise.

20. There are certain more circumstances, which the First Appellate Court has elaborately discussed, which also lead to an inference that, the alleged contract was not of agreement of sale, but was towards the security of the repayment of the amount borrowed by the defendant from the plaintiff. As has come on record, though in the agreement of sale it was averred that the defendant had handed over the possession of the subject land to the plaintiff on the date of execution of that document itself, the possession was not handed over to the plaintiff and the subject land continued to be in possession of the defendant till passing of the interim order by the Court in favour of the plaintiff.

21. Further, as has been observed by the First Appellate Court, had it been the real intention of the plaintiff to purchase the said land, he would have definitely fixed some time limit within which the said transaction was to be completed and absence of any such clause in the alleged agreement of sale supports the case of the defendant that, the document was executed only with an intention of security to the loan obtained.

22. As about the aspect of the readiness and willingness, the learned First Appellate Court has made a detailed discussion analyzing the evidence on record and has recorded a conclusion that, the plaintiff has failed to prove his readiness and willingness to perform his part of contract. I do not see any infirmity in the finding so recorded. If all the circumstances, which have come on record are cumulatively considered, lead to the only inference that, the intention of the defendant in executing the alleged agreement was not to sell the said land in favour of the plaintiff.

23. The First Appellate Court has rightly held that the

bargain entered into by the defendant with the plaintiff is unconscionable and that it was never the intention of the defendant behind executing the alleged agreement to sell the subject land to the plaintiff. As I have noted herein above, it was well within the discretion of the First Appellate Court to refuse decree of specific performance of contract on the aforesaid grounds, it does not appear to me that, by exercising such discretion the First Appellate Court has committed any error. I, therefore, do not see any reason to cause interference in the Judgment and order, impugned in the present second appeal. The appeal being devoid of any substance deserves to be dismissed and is accordingly dismissed with costs.

(P.R. Bora, J.)

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