

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

925. SECOND APPEAL NO. 579 OF 2018

KANTABAI VINAYAK KHOPADE THR.
POA VINAYAKRAO MANIKRAO KHOPADE
VERSUS
BHIMABAI KHANDU SHEWATKAR & ORS.

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Mr. P.M.Shah, Senior Counsel i/b
Mr. Mukul Kulkarni, Advocate for appellant.
Mr. V.D.Salunke a/w Mr. S.S.Patil,
Advocates for R – 1, 4 & 7.
Mr. S.P.Brahme, Advocate for R – 6,8,9,
11 to 19, 21 to 23.

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CORAM: V.L.ACHLIYA, J.

DATE : 14/08/2018

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ORAL ORDER :

1. Being aggrieved and dis-satisfied with the concurrent decisions rendered by Courts below, the appellant – original plaintiff has preferred this Second Appeal.
2. Heard the learned counsel representing appellant and respondents. Perused the impugned Judgments and orders.
3. Learned Senior Counsel appearing on behalf of appellant – original plaintiff submits that except the finding to issue No. 9, the trial Court has answered the findings in favour of appellant. By referring the agreement of sale the learned

counsel submits that the said agreement itself reflect that time was not made the essence of contract. By referring the evidence on record, learned Senior Counsel submits that trial Court as well as first appellate Court have erred in overlooking the pleadings made by the plaintiff as to payment made to defendants in terms of agreement. It is contended that the plaintiff has specifically pleaded in para nos. 4 and 5 as to the payment made before and after the execution of agreement of sale. The plaintiffs have specifically pleaded that cheque bearing No. 630295 dated 24/09/1986 issued by plaintiff was realized by defendants. So also, specifically pleaded that after the execution of agreement of sale, as per demand of defendants of gave another cheque bearing No. 630296 dated 24/10/1986 of Rs. 50,000/- was given to defendants, but same appears to be not presented for realization by the defendants. It is submitted that though plaintiff has made specific pleadings and there is no specific denial made on the part of defendants as to issuance of second cheque by plaintiff towards part performance of contract. The denial made in the Written Statement filed by defendants is evasive denial. It is contended that in absence of specific denial, trial Court ought to have held that plaintiff has performed his part of contract. For non presentation of cheque for realization on the part of defendants, no fault can be attributed to plaintiff. It is further contended that trial Court has given much emphasis as to admission brought through cross examination of plaintiff that no amount was lying in the credit of defendants' bank account to honour the cheque dated 24/10/1986. It is submitted that defendants have nowhere pleaded and proved that cheque was presented but could not be realized for want of funds in the account of

plaintiff. In this back-ground, learned counsel submits that the appeal filed by appellant raises following substantial question of law.

" Whether in absence of specific pleadings and specific denial, trial Court was justified in answering issue No. 9 in negative ? "

4. In support of submissions that in absence of specific pleadings in the Written Statement, defendant is not entitled to lead evidence on such issue. Learned counsel has relied upon decision of Apex Court in the case of ***Gian Chand and brothers and another V/s Rattan Lal @ Rattan Singh reported in (2013) 2 Supreme Court Cases 606.***

5. Learned counsel for respondents supported the Judgments and orders passed by the Courts. By referring the pleadings made in the Written Statement submit that by no stretch of imagination it can be stated that there is no specific denial on the part of defendants as to facts pleaded in plaint. It is pointed out that in the plaint itself (para No. 6), the plaintiff has pleaded that cheque of Rs. 50,000/- dated 24/10/1986 seems to be not realized. It is pointed out that it is nowhere the case of plaintiff that amount of Rs. 50,000/- was subsequently paid to defendants. On the contrary the evidence brought through cross examination of plaintiff itself proved that the plaintiff had no amount lying credited to his account to honour alleged cheque.

6. By referring the pleadings made in the Written Statement, it is pointed out that the defendants have

specifically denied the issuance and receipt of such cheque by the plaintiff to defendants. It is specifically pleaded that all such averments made by plaintiff are false and inconsistent with his own pleadings. It is contended that the pleadings made in Written Statement are to be read in its totality. The defendants have specifically pleaded that plaintiff had no ability to pay such amount and averments made about issuance of cheque as well as non realization of cheque are false, concocted and made with ulterior motive to claim decree for specific performance of contract. It is submitted that it is the cardinal principle of law that only material facts are to be pleaded. It is contended that plaintiff has failed to prove that he was always ready and willing to perform his part of contract and performed part of his contract. In the cross examination, plaintiff has admitted that he had no sufficient funds on the date of issuance of cheque dated 24/10/1986 and onwards to honour said cheque. It is also brought on record through cross examination of plaintiff as well as entries recorded in the bank account of plaintiff, that on 24/10/1986 amount of Rs. 599.70 only lying to credit in his account. It is further proved that till the month of June, 1989 no deposit made in said account. The last entry made in pass book shows that amount of Rs. 720.80 only lying to his credit. In this back-ground, learned counsel submit that trial Court has recorded the finding to issue No. 9 in negative.

7. On due consideration of submissions advanced in the light of reasons and findings recorded by Courts below and more particularly to issue No. 9, I have no hesitation to hold that there is absolutely no perversity in the reasons and

findings recorded by Courts below. There is no force in the submission of learned counsel for appellant that denial on the part of defendants was evasive. The pleadings made in the Written Statement spell out that denial made by defendants can not be termed as evasive. Through the testimony of plaintiff itself, defendants have proved that at no point of time the plaintiff has arranged funds to honour the cheque. For the period of three years, same balance shown to be lying in the account of plaintiff. It is difficult to accept the case of plaintiff that though the cheque of Rs. 50,000/- dated 24/10/1986 issued by plaintiff on demand of defendants, they have failed to encash the same. In fact, it is the case of plaintiff that defendants were in extreme need of money and time to time plaintiff has given them small amount like Rs. 5,000/-, Rs. 20,000/-, Rs. 14,000/- in the month of September, 1986 and Rs. 10,000/- on 04/10/1986.

8. On careful consideration of the Judgment and Order passed by trial Court and confirmed in appeal by the appellate Court, I am of the view the appeal raises no substantial question of law. There are concurrent findings on facts recorded by the Courts below. There is absolutely no perversity in any of the reasons and findings recorded by Courts below. On the contrary, the Courts below have analyzed the pleadings and evidence in minute detail while recording the finding to issue No. 9 as against the plaintiff.

9. It is pertinent to note that Suit seeking decree for specific performance of contract came to be filed after period of 9 – 10 years after the alleged agreement of sale. It is brought on record that at the time of alleged execution of

agreement of sale, the plaintiffs were fully aware about the dispute pending against the suit property and pendency of R.C.S. No. 177/1989 against the defendants.

10. In absence of any perversity in any of the reasons and findings recorded by the Courts below, the appeal filed by the appellant is devoid of substance and merit therein. I am, therefore, not inclined to entertain the appeal.

11. In the result, the Appeal is dismissed. In view of dismissal of Second Appeal, C.A. No. 8919 of 2018 stands disposed of.

[V.L.ACHLIYA]
JUDGE

KNP/S.A. 579.2018