

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

**SECOND APPEAL NO. 134 OF 2012
WITH
CA/2068/2012 IN SA/134/2012**

NANA BHIMRAO MUNDHE (DIED) THROUGH L.RS
BHAGIRATHIBAI W/O NANA MUNDHE AND OTHERS
VERSUS
PRABHU LAXMAN KALE

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Advocate for Appellant : Mr. S.V. Chandole h/f Sontakke
Patil B.R.

Advocate for Respondents : Mr Sanket S. Kulkarni

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CORAM : V.K. JADHAV, J.
Dated: March 01, 2018

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PER COURT :-

1. Heard finally with consent at admission stage.
2. The Respondent/plaintiff has instituted a Regular Civil Suit No.466/2000 for specific performance of the contract against the appellant/original defendant in respect of the agreement of sale dated 2.4.1994 pertaining to the suit land Sy.No.148/8 admeasuring 35-R at southern side and S.No.148/9 ad measuring 43-R and share in the water of the well, electric motor situated at village Pawarwadi, Tq. & District

Osmanabad. According to the plaintiff, defendant is the owner of the aforesaid land. The appellant/defendant was in need of money and, therefore, he approached the plaintiff and informed his desire to sell his land for satisfaction of his debts and needs. Even, the respondent/plaintiff had agreed to purchase the said land for a consideration of Rs.35,000/-. As per the terms of the agreement, respondent/plaintiff paid rupees 30,000/- to the defendant on 2.4.1993 and, accordingly, the appellant/defendant had executed an agreement of sale with respect to the aforesaid lands and possession was also handed over to the respondent/plaintiff. On 1.4.1996, the plaintiff had requested the defendant to accept remaining consideration of Rs.5,000/- and execute sale deed of suit land in his favour, however, the defendant has avoided to execute the sale deed. Even, the plaintiff has filed an application to the Talathi to record his name in the 7/12 extract on the basis of agreement for sale with due notice to the appellant/defendant. Though, the appellant/defendant preferred an appeal against the

said order to Sub Divisional Officer, Osmanabad, however, said appeal came to be dismissed and, accordingly, entry pertains to the agreement of sale was recorded in other rights column of the 7/12 extract.

b] The petitioner/defendant has strongly resisted the suit by filing his written statement at exh.17. The petitioner/defendant has denied all allegations except that he is the owner of the suit property. It is the contention of the petitioner/defendant that he obtained a loan of Rs.10,000/- with interest from the respondent/plaintiff. Since, the defendant was unable to repay the amount, so he requested the respondent/plaintiff that he will repay the amount on or before 1.4.1996, but the respondent/plaintiff insisted for interest on the aforesaid amount. The appellant/defendant has executed an agreement of sale for the total amount of Rs.30,000/- inclusive of Rs.15,000/- as principal and Rs.15,000/- as interest. The appellant/defendant never handed over the possession of the suit property to the plaintiff. On the

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contrary, he is in actual possession of the suit land. It is also the case of the appellant/defendant that he has repaid the loan amount alongwith interest on 1.4.1996, however, respondent/plaintiff has not given receipt for the said amount. Appellant/defendant contends that entry in the revenue record does not confer any title in favour of the plaintiff. The suit was not filed within limitation.

c] On the basis of the rival pleadings of the parties to the suit, trial court has framed issues at exh.18. Both the parties lead their oral and documentary evidence in support of their rival contentions. The learned Jt. Civil Judge J.D. Osmanabad by judgment and decree dated 12.08.2005 in R.C.S. No.466/2000 decreed the suit in terms of the reliefs claimed by the respondent/plaintiff. Being aggrieved by the same, the appellant/defendant has preferred Regular Civil Appeal No.98/2005 before the District Court, Osmanabad and the learned District Judge-3, Osmanabad by judgment and order dated 27.7.2011 dismissed the said appeal. Hence, this second

appeal.

3. The learned counsel for the appellant/original defendant submits that, though, the appellant/defendant has specifically pleaded about the real transaction between the parties as loan transaction, the trial court has not framed a specific issue in this regard and, even, the first appellate court has not discussed the said point while disposing of the appeal. Learned counsel submits that, the appellant/defendant lead oral and documentary evidence to substantiate his contentions about loan transaction, however, the Courts below have not considered the same. Learned counsel submits that, though the appellant/defendant has raised a specific point in the pleadings that the suit is not within limitation, however, the Courts below have not recorded the findings on the point of limitation by framing the issue. Learned counsel submits that, it is the case of the respondent/plaintiff himself that, earlier to the institution of the present suit, he had instituted R.C.S. No.262/1998 for perpetual injunction as against

the appellant/defendant in respect of the said suit property on the strength of the aforesaid agreement of sale. Learned counsel submits that, in view of the same, the bar under Order II Rule 2 (3) clearly attracts. Previous suit was based on the same cause of action and even though, respondent/plaintiff was entitled to more than one relief, without obtaining leave of the Court omitted to sue for the relief for which the second suit has been filed. Learned counsel submits that, the Courts below have not considered this material aspect of the case. All these are the substantial questions of law required to be considered by this Court by admitting this appeal.

4. Learned counsel for the appellant/defendant, in order to substantiate his case, placed reliance on following judgments :-

- I. Mohd. Laiquiddin and another Vs. Kamala Devi Misra (dead) by Lrs. and others reported in 2010 (2) ALL MR 490.
- II. Achintya Kumar Saha Vs. Nanee Printers and others. Reported in (2004) 12 Supreme Curt Cases 368.

III. Bachhaj Nahar Vs. Nilima Mandal and others.
Reported in AIR 2009 Supreme Court 1103.

5. Learned counsel for respondent/original plaintiff submits that, the suit was for specific performance of contract. Issues which are required to be framed, were framed by the trial Court, and, the lower appellate court has also framed the points and considered the same. Learned counsel submits that, so far as the pleadings pertaining to the loan transaction is concerned, the appellant/defendant led oral and documentary evidence and the lower appellate Court has discussed the same at length and disbelieved the story put forth by the appellant/defendant in that regard. Learned counsel submits that, though, issue was not specifically framed to that effect, the appellant/defendant knowing his case well and being conscious of the facts pleaded by him, lead the evidence and the same has been considered by both the Courts below. The appellant/defendant never objected for the issues as framed by the Trial Court and, even never bothered to file any application for re-casting the issues. Learned counsel submits that, so far as

issue of limitation is concerned, the same was not substantially raised before the Court below, however, in terms of Section 3 of the Limitation Act, it is the duty of the Court to consider the same. It appears from the evidence and the submissions made on behalf of the appellant/defendant before the Courts below that the appellant/defendant has not seriously raised the point of limitation. Learned counsel submits that, on the other hand, even if the date of agreement of sale is considered and in the light of the Article 54, the suit is well within limitation. Learned counsel for respondent submits that, the petitioner/defendant has not specifically pleaded about the bar of Order II Rule 2(3) of the Code of Civil Procedure. Even if, same is considered in this second appeal for the first time, the Supreme Court in a case of **Rathnavathi Vs. Kavita Ghanashamdas** reported in **2015 (1) ABR 60**, in the identical facts held that bar contained in Order II Rule 2 of the Civil Procedure Code was not at all attracted because of distinction in cause of action for filing two suits. The Apex Court in the facts of that case observed

that, so far as cause of action to file suit for permanent injunction was concerned, it was based on threats given to plaintiff by defendants to dispossess her from suit house and so far as cause of action to file suit for specific performance of agreement was concerned, same was based on non-performance of the agreement by second defendant in plaintiff's favour despite giving legal notice to second defendant to perform her part. The Supreme Court held that both the suits were, therefore, founded on different causes of action and hence can be filed simultaneously. Learned counsel submits that, no substantial question of law is involved in this matter. Both the Courts below have correctly decreed the suit of the plaintiff. There are concurrent findings. No interference is required. Second appeal is liable to be dismissed.

6. On careful perusal of the judgment and order passed by the Courts below and on perusal of the evidence lead by the parties in support of their rival contentions, I do not find any substantial question of

law involved in this appeal. So far as pleadings of the appellant/defendant in respect of the real transaction as a loan transaction is concerned, even though, there is no specific issue framed in this regard by the trial court, the lower appellate court has discussed the said point at length in paragraph nos.12, 13 and 14 of the judgment and held that, said transaction between the parties is not a loan transaction, but it is a absolute sale transaction. It is the part of the record that, the appellant/defendant never objected for framing of the issues at any point of time and, being conscious of the above facts, lead evidence in support of his pleadings and the same has been considered at length by the Courts below. The lower appellate Court has discussed at length the evidence adduced by the appellant/defendant to substantiate his contentions about loan transaction. Lower Appellate Court has discussed the evidence of two witnesses on this point. First witness on this point has admitted in his cross-examination that he has no idea as to what was the transaction between the parties. The same is the case

with the second witness. He has also specifically stated in the evidence that he has no knowledge about the loan transaction between the parties. Lower appellate court has observed that second witness has not supported the case of the appellant/defendant that transaction between the parties was loan transaction. In view of the same, I do not find any substance in the submissions made on behalf of the appellant/defendant that because of non-framing of the issue with regard to the contention raised by the appellant/defendant about the loan transaction, serious prejudice has been caused to the defence of the appellant/defendant.

7. So far as the point of limitation is concerned, there is no dispute that the suit has been instituted on 9.12.1998 and agreement of sale came to be executed on 1.4.1996. On perusal of the judgment and order passed by the Courts below, it appears that, appellant/defendant has also not seriously raised the point of limitation.

8. So far as the bar under Order II Rule 2 (3) of the Civil Procedure Code is concerned, the Supreme Court in the case **Rathnavathi Vs. Kavita Ganashamdas** (supra) relied upon by the learned counsel for respondent/plaintiff in identical facts of the case, in paragraph no.29 and 30 of the order has made following observations :-

“29. In the instant case when we apply the aforementioned principle, we find that bar contained in Order II Rule 2 is not attracted because of the distinction in the cause of action for filing the two suits. So far as the suit for permanent injunction is concerned, it was based on a threat given to the plaintiff by the defendants to dispossess her from the suit house on 2.1.2000 and 9.1.2000. This would be clear from reading Para 17 of the plaint. So far as cause of action to file suit for specific performance of agreement is concerned, the same was based on non performance of agreement dated 15.2.1989 by defendant no. 2 in plaintiff's favour despite giving legal notice dated 6.3.2000 to defendant no. 2 to perform her part.

30. In our considered opinion, both the suits were, therefore, founded on different causes of action and hence could be filed simultaneously. Indeed even the ingredients to file the suit for permanent injunction are different than that of the suit for specific performance of agreement.

9. In the instant matter, after execution of the agreement of sale and handing over the possession of the suit land, the respondent/plaintiff found the threats of his dispossession on the part of the

appellant/defendant and, in consequence thereof instituted the suit for decree of perpetual injunction. It is also a part of the record that said suit was not contested on merits and, it was dismissed in default. On the other hand, cause of action so far as institution of the present suit seeking a decree of specific performance of contract is concerned, cause of action is different since the appellant/defendant has refused to execute the sale deed as agreed, I do not find any substance in the submissions made on behalf of the appellant/defendant that the bar under Order II Rule 2(3) of the Civil Procedure Code attracts in this case.

10. In a case Achintya Kumar Saha Vs. Nanee Printers and others, reported in (2004) 12 Supreme Court Cases 368, relied upon by the learned counsel for the appellant, the Supreme Court held that non-examination of the Core issue would be a substantial question of law. The Supreme Court has observed that, when first appellate Court failed to adjudicate upon the core issue, a substantial question of law arises before

the High Court and, accordingly the High Court is justified in interfering section 103 and taking a decision on the said question.

11. In the instant case, no such contingency has arisen. The lower appellate Court has examined the point raised by the appellant/defendant in his pleadings. Other two cases relied upon by the learned counsel for the appellant/defendant are altogether on different points. In a case Bacchaj Nahar Vs. Nilima Mandal and others reported in 2009 Supreme Court 1103, the Supreme Court has observed that a case not specifically pleaded can be considered by the Court only where the pleadings in substance, though not in specific terms, contains the necessary averments to make out a particular case and, the issues framed also generally cover the question involved and the parties proceed on the basis that such case was at issue and had led evidence thereon. This case, on the other hand, supports the case of the respondent/plaintiff. The parties being conscious of the pleadings, lead the

evidence to substantiate the same, especially the appellant/defendant lead evidence about loan transaction and the lower appellate Court discussed the same at length.

12. In view of the above discussion, I do not find any substance in this second appeal. There is no substantial question of law involved in this second appeal. Hence, following order.

O R D E R

- I. Second Appeal is hereby dismissed with costs.
- II. Second appeal accordingly disposed of.
- III. Pending civil application/s, if any, also stands disposed of.

(V.K. JADHAV, J.)

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