

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

SECOND APPEAL NO.363 OF 2016

Prabhakar s/o Laxman Lohkare
(since deceased Thr. His LRs.)
Sushilabai w/o Prabhakarrao Lohkare
and ors.

... Appellants

-vs-

Shamrao s/o Pandurang Sambre

... Respondent.

Shri Amol Mardikar, Advocate for appellants.
Shri D. T. Shinde, Advocate for respondent.

CORAM : A.S.CHANDURKAR, J.
DATE : June 20, 2018

P.C.

The appellants are the legal heirs of original plaintiff who have filed this second appeal being aggrieved by judgment of the trial Court dismissing the suit for specific performance which judgment has been affirmed by the appellate Court.

Facts in brief are that the suit property is land admeasuring 0.46R from Survey No.30/3. The suit property is said to be owned by the respondent and his brother Sheshrao. It is the case of the plaintiff that an agreement dated 29/06/2000 was entered into for purchasing the aforesaid property for a consideration of Rs.3,16,250/-. An earnest amount of Rs.50,000/- was paid and the

balance consideration was to be paid by 30/11/2001. According to the plaintiff he was placed in possession of the suit field. As the defendant avoided to complete the contract, notice dated 05/02/2000 came to be issued and thereafter the plaintiff filed suit for specific performance of the aforesaid agreement.

2. In the written statement it was denied that any such agreement was entered into. According to the defendant his signature was obtained on a blank stamp paper on the ground that his signature was required for correcting the revenue records. It was further pleaded that the defendant was not the absolute owner of the suit property and hence the suit was liable to be dismissed.

3. The parties led evidence before the trial Court which after considering that evidence held that the plaintiff had failed to prove any such agreement having been entered into. It was further held that the plaintiff was not in possession of the suit property and hence dismissed the suit. The appellate Court after re-appreciating the evidence concurred with the judgment of the trial Court. Being aggrieved the legal heirs of the original plaintiff have filed the present appeal.

4. Shri Amol Mardikar, learned counsel for the appellants submitted that both the Courts committed an error in holding that agreement dated 29/06/2000 was not duly proved. He referred to the deposition of the plaintiff and his witnesses to indicate that the defendant had infact entered into agreement and had received the amount of Rs.50,000/-. He referred to the deposition of PW-2 Arun Nagpure from whose deposition it was clear that agreement had been entered into and the earnest amount was paid. He further submitted that adjoining lands were also purchased by the plaintiff and other family members from the defendant and his brother and this indicated the genuineness of the present transaction. He also submitted that the presence of Sheshrao, brother of the defendant while entering into agreement has also been duly proved. It was thus urged that the suit was liable to be decreed. The appellate Court also erred in refusing to take into consideration the additional evidence that was sought to be brought on record by the original plaintiff.

5. Shri D. T. Shinde, learned counsel for the respondent supported the impugned judgment. According to him both the Courts rightly found that the execution of agreement dated 29/06/2000 had not been duly proved. He submitted that the plaintiff examined

witnesses who were interested and no independent witness was examined. The scribe or the defendant's brother who was said to be present had not been examined. After appreciating the evidence on record relief had been rightly denied to the plaintiff. Moreover, it was not proved that the plaintiff was in possession of the suit property as no evidence in that regard was placed on record. It was thus submitted that no interference was called for with the judgments of the Courts below.

6. I have heard the learned counsel for the parties at length and I have also gone through the evidence led by them. The execution of the agreement at Exhibit-16 has been held to have been not proved by the plaintiff. For proving said agreement the plaintiff examined himself at Exhibit-15. In the said agreement it was stated that possession of the suit property was delivered to the plaintiff on 29/06/2000. It has been found that there is no evidence whatsoever to indicate possession of the suit property being handed over to the plaintiff in terms of the agreement. The Scribe who had written down the agreement was not examined. The witness examined by the plaintiff (PW-3) below Exhibit-26 was related to the plaintiff and he deposed that one Prakash Bhoyar was present when the talks between the parties took place. Said Prakash Bhoyar has not been

examined by the plaintiff. According to the defendant his signatures were obtained by informing him that the same were required for being filed in the revenue proceedings. When a specific defence was raised by the defendant that his signatures were obtained in such a manner, the burden on the plaintiff to prove the execution of the agreement was much higher. Both the Courts have held that this burden was not discharged. It is found that this finding recorded by the trial Court and confirmed by the appellate Court is after considering the evidence on record. The appreciation of evidence in that regard is not perverse. As noted above the plaintiff has not been able to show that he was put in possession on the date of agreement and he continued to be in possession till December 2004. This is another factor which is against the plaintiff.

7. As regards the additional evidence that was sought to be placed on record by the appellant before the appellate Court, the same is not found to be very relevant inasmuch as a suit for partition has been filed subsequently. The appellate Court while not permitting the additional evidence to be brought on record had found that the same was not necessary for deciding the appeal. The provisions of Order-XLI Rule 27 of the Code of Civil Procedure, 1908 have been taken into consideration in the right perspective. I do not

find that the appellate Court committed an error in refusing to permit additional evidence being brought on record. The said proceedings related to a suit filed by the respondent herein against his brother and other family members for partition and separate possession. It is rightly observed that the appellant did not take the required steps for proving that the suit property could not have been the subject matter of the agreement at Exhibit-16.

8. It is thus found that both the Courts after considering the entire evidence on record rightly came to the conclusion that the agreement dated 29/06/2000 was not duly proved by the plaintiff and therefore refused to grant the relief of specific performance. The appreciation of evidence is not perverse. The Second Appeal does not give any rise to any substantial question of law. It is accordingly dismissed with no order as to costs.

JUDGE