

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.458 OF 2015.

Sukhlala s/o Motiram Bari,
Age 54 years, Occupation Agriculture,
R/o Shendurni Tq. Jamner,
Dist. Jalgaon.

...Appellant.

VERSUS

Ganesh s/o Daulat Gujar,
Age 62 years, Occupation Agriculture,
R/o Shendurni Tq. Jamner,
Dist. Jalgaon.

...Respondent.

....
Advocate for Appellant : Mr. S. B. Yawalkar.
Advocate for Respondent : Mr. L. V. Sangeet.
....

CORAM : SMT.VIBHA KANKANWADI, J.

**Date Of Reserving The Order :
04-02-2019.**

**Date of Pronouncing The Order :
03-06-2019.**

ORDER :

1. Present appeal has been filed by the original plaintiff. He had filed Special Civil Suit No.193 of 2004 against the present respondent for specific performance of the contract.
2. It is not in dispute that, agricultural land bearing Gut No.882 admeasuring 1 H 80 R situated at village Shendurni is owned by defendant. There was an agreement to sell between defendant and

the plaintiff on 02-03-2003 to sell 50 R land out of said Gut No.882 for a consideration of Rs.1,65,000/-. It is also not in dispute that the defendant received amount of Rs.1,00,000/- on that day.

3. The plaintiff had come with a case that, by way of said agreement to sell when defendant agreed to sell 50 R land and accepted the amount of Rs.1,00,000/- as earnest amount, defendant had agreed to execute the sale deed till 31-05-2003 by accepting remaining amount of consideration. Thereafter, in May 2003 defendant asked amount of Rs.10,000/- towards the price of the land from plaintiff and at that time the said agreement to sell dated 02-03-2003 was cancelled and a new agreement was entered into between them. As per the said new agreement, defendant had agreed to sell 40 R land out of said agricultural land for a consideration of Rs.1,35,000/-. Plaintiff paid amount of Rs.10,000/- and 'Sauda Pavti' was executed mentioning that amount of Rs.1,10,000/- in all, has been received by the defendant. It is stated that, plaintiff was put in possession of the suit land by the defendant and since then he is possessing the same. When the time to execute the sale deed was approaching, plaintiff issued notice to defendant on 27-03-2004 asking him to execute the sale deed by the end of 31-03-2004 or to return the amount of Rs.1,10,000/-. Defendant neither returned the amount nor executed the sale deed but replied the notice on 31-03-2004. Plaintiff was ready and willing

to perform his part of the contract as per agreement dated 13-03-2003. However, when it was refused, he filed the suit for specific performance, possession of the land from the defendant. In the alternative plaintiff had asked that the defendant should return amount of Rs.1,35,000/- together with interest @ 12 % per annum.

4. Defendant resisted the claim of the plaintiff by filing written statement. It has been denied by the defendant that, he had in fact agreed to sell 50 R land out of gut No.882 on 02-03-2003 and accepted amount of Rs.1,00,000/- as earnest amount. According to him the said transaction between him and the plaintiff was money-lending transaction. He never put plaintiff in possession of the property. It has been stated that, when he demanded hand loan of Rs.1,00,000/-, a condition was put by the plaintiff that, he should execute agreement to sell. Since he was in hand of money, he executed that document but the real transaction was of money-lending. It is stated that, he repaid amount of Rs.50,000/- to plaintiff on 13-05-2003 and asked the plaintiff to cancel the previous agreement dated 02-03-2003, and to execute new agreement for the remaining amount. Accordingly agreement dated 02-03-2003 came to be cancelled and new "Sauda Pavti" was executed. It was also the document which was not to be acted upon, but it was executed by way of security. He has denied that, on that day he had received amount of Rs.1,10,000/- from plaintiff as earnest amount.

When plaintiff tried to get his name mutated to the revenue record, he had resisted and filed appeal. He has been held to be in possession of the suit land by the revenue authorities. When the transaction was a loan transaction it is stated that the plaintiff has no right to get specific performance of the contract.

5. Taking into consideration the rival contentions, issues came to be framed. Parties have led oral as well as documentary evidence on record. The learned 2nd Joint Civil Judge, Senior Division, Jalgaon has decreed the suit on 10-07-2006 and the defendant was directed to execute the sale deed in respect of the suit land in favour of the plaintiff.

6. Original defendant challenged the said Judgment and decree passed by the learned Trial Court by filing Regular Civil Appeal No.219 of 2006 before District court, Jalgaon. The said appeal was heard by learned District Judge -3, Jalgaon and after hearing both the sides, the appeal came to be allowed partly, on 17-04-2015. The Judgment and decree passed by the learned Trial Court has been set aside. The suit came to be partly decreed. Defendant was directed to pay amount of Rs.1,10,000/- to the plaintiff along with interest @ 12 % per annum from 13-05-2003 till its actual realisation. It is stated that, if the amount is not paid within the period of three months from the date of the decree then the plaintiff

would be entitled to enforce agreement of specific performance on payment of the remaining balance of Rs.25,000/-. Hence, the original plaintiff has filed this second appeal.

7. Heard learned advocate Mr. S. B. Yawalkar for appellant and Mr. L. V. Sangeet for respondent. It will not be out of place to mention here that, in view of order passed by this Court on 21-06-2016 as well as 24-10-2018, the matter has been heard finally at the stage of admission. Record and proceedings was called for that purpose. Both the learned advocates for the parties have gone through the same.

8. The learned advocate appearing for the appellant submitted that, as per the plaintiff, initial agreement was for area of 50 R from agricultural land bearing Gut No.882 which was executed on 02-03-2003. However, that agreement was cancelled on 13-05-2003 and on the same day i.e. on 13-05-2003 new agreement came to be executed. According to plaintiff, when earlier agreement was executed at that time itself the possession of the suit property was handed over to the plaintiff. However, the agreement to sell is not a registered one, and therefore though at one place it is stated by the plaintiff that he was put in possession; yet, in the ultimate prayer clause he is asking for the possession of the property from defendant at the time of sale deed. The defendant had come with a

case that, the transaction is a loan transaction and taking into consideration the contentions raised by the defendant, an application for amendment was filed before the First Appellate Court at Exhibit 40. It has been rejected, and therefore, that is also included in the ground for this second appeal. When in fact the defendant had admitted the transaction and execution of the document on 02-03-2003 then he is estopped by putting a defence that the real nature of the transaction was different. The burden was on the defendant to prove the same. In this case plaintiff has examined P.W.2 Dr. Sukhlal Kaduba Bari who had purchased the land belonging to plaintiff's wife and had given earnest amount just prior to the execution of the first agreement to sell i.e. on 02-03-2003. The defendant has admitted the receipt of the amount as well as the fact that he had purchased another land from one Laxman near about the same period when the agreement to sell was executed. That means, as per the terms in the agreement when the defendant has received the amount as earnest amount, he cannot come with a case that, the transaction was a loan transaction. It was not necessary for the plaintiff to prove that, he had amount with him on that day and explaining the source from where the said amount for earnest amount was brought by him. This would have been necessary if the transaction itself denied in total. The fact that earlier transaction dated 02-03-2003 was cancelled had no effect on the subsequent

transaction in a sense that both the parties agreed to vary the terms of the contract. In the earlier agreement 50 R land was agreed to be sold for a consideration of Rs.1,65,000/-, whereas; later on, they agreed that the transaction would be restricted to 40 R land and the amount of consideration was varied and brought down to Rs.1,35,000/-. In fact on that day plaintiff had given further amount of Rs.10,000/- and taking into consideration the Rs.1,00,000/- given in the earlier transaction plus the fresh amount given, in the agreement to sell that was executed on 13-05-2003, it was stated that the defendant has received amount of Rs.1,10,000/-. The learned First Appellate Court has unnecessarily placed reliance on one of the term or few sentences from the agreement to sell, wherein it was stated that, the defendant would return amount of Rs.1,10,000/- by the end of 31st March 2004 and in case of failure on his part, he would execute the sale deed. In fact the term had a different meaning and therefore under such circumstance the discretion under Section 20 of the Specific Relief Act has not been used by the learned First Appellate Court in proper perspective. Therefore, substantial questions of law are arising and it ought to have been held that the real transaction between the parties was that of agreement to sell and the Judgment and decree passed by the learned Trial Court is required to be restored.

9. Per contra, the learned advocate appearing for the respondent

supported the reasons given by the learned First Appellate court. It is stated that, the learned First Appellate Court has considered the evidence properly. It was clearly stated in the agreement to sell dated 02-03-2003 that, it was cancelled on 13-05-2003 by accepting the entire amount. The defendant has explained and led evidence under which circumstance the second document came to be executed on 13-05-2003. It was specifically stated in Exhibit 47, the second agreement to sell that, the defendant would return the amount of Rs.1,10,000/- on or before 31-03-2004, and in case of failure he would execute the sale deed. This clearly shows that, the parties had no intention, especially the defendant had no intention to sell the suit land to the plaintiff. Another point that is also required to be considered is that, the wording and sentences in suit notice Exhibit 20 are in the same line. The main demand of the plaintiff in the suit notice Exhibit 20 was, the refund of the money and in case of failure the sale deed was called upon. Under such circumstance the real nature of the transaction between the plaintiff and defendant was a loan transaction. At one place the plaintiff had come with a case that, he was put in possession of the property by virtue of the first agreement to sell but then in the plaint he is demanding the possession of the suit land from the defendant. Exhibit 47 agreement to sell was not duly stamped nor registered. Further when the mutation entry was tried to be effected by the

plaintiff in place of the defendant, it was challenged by the defendant. It was held that the defendant possessed the suit land. The matter came up to this Court in Writ Petition No.5464 of 2008 and no relief has been granted to the plaintiff. Under such circumstance the defendant is in possession of the suit property which also supports his contention that, he had no intention to sell out the property. Plaintiff has not tried to explain the term which was relied upon by the First Appellate Court from Exhibit 47, when opportunity was available to him before the learned Trial Court. The subsequent attempt was made by way of filing amendment application before the First Appellate Court i.e. Exhibit 40. It has been rightly rejected. On the contrary, it is to be noted that, the First Appellate Court has not accepted the defence taken by the defendant that he had refunded amount of Rs.50,000/- to the plaintiff and under such circumstance the First Appellate Court has directed the defendant to pay entire amount as per Exhibit 47. Accordingly the defendant has deposited the said amount. Taking into consideration all these aspects it can be said that, the discretion under Section 20 of the Specific Relief Act has been properly exercised by the learned First Appellate Court. Plaintiff cannot be said to be entitled to get specific performance of the contract, and therefore, no substantial questions of law are arising in this case.

10. As regards execution of documents is concerned, there is no

dispute between the parties. The first document styled as agreement to sell was executed on 02-03-2003. It was stated in the said document that, defendant has agreed to sell 50 R land out of Gut No.882 to the plaintiff for a consideration of Rs.1,65,000/- and the defendant has accepted earnest amount of Rs.1,00,000/-. It is also stated in the document that the transaction would be completed on 31-05-2003. The execution of the second document is also not in dispute and so also the contents thereof. However, as per the plaintiff the transaction is that of agreement to sell only but defendant says that it is a loan transaction; but since the plaintiff insisted for some security, the document were executed but with a specific understanding that they are not to be acted upon. Definitely the defendant was required to prove the real transaction taking into consideration the fact that he had admitted the execution of the document. Plaintiff has examined himself and two more witnesses whereas the defendant has also examined himself and two more witnesses. Plaintiff in his cross-examination has admitted in specific words that, the agreement dated 02-03-2003 Exhibit 36 was cancelled on 13-05-2003 when the amount was given. The admission is in the form that it is written on Exhibit 36 that the said agreement is cancelled on 13-05-2003. Recitals to that effect can be seen on that document overleaf and it is specifically stated that, "he has received entire amount and nothing is remaining in respect

of Sauda Pavti.” That portion on Exhibit 36 has been signed by him. If that document was the real transaction of agreement to sell then he would not have written such contents on 13-05-2003 on Exhibit 36. He has not explained as to under which circumstance the said portion came to be written. He can not be allowed to rely on some portion of that document, which is favourable to him and reject, what is not in his favour.

11. Thereafter parties have executed another document on 13-05-2003, which is also styled as agreement to sell. But in that document the land which was agreed to be sold was shown as 40 R, for a consideration of Rs.1,35,000/-. It was stated that, defendant is acknowledging amount of Rs.1,00,000/- already paid by plaintiff and further amount of Rs.10,000/-, that means by that document he acknowledged the receipt of Rs.1,10,000/-. It is to be noted that on agreement Ex.36, it is written that plaintiff has received entire amount and there is no outstanding. If that is so, then how defendant would acknowledge receipt of Rs.1, 00,000/- from Ex.36 in agreement Ex. 47? In the said document Ex.47 itself further contents shows that, defendant would repay the amount by 31-03-2004, and if he fails to pay that amount, he would receive the remaining amount and execute sale deed. When this portion from Exhibit 47 was pointed out, the plaintiff has not put forward any explanation for the same as to what the parties intended to. He has

not disputed that, Exhibit 47 was written by the scribe as per the instructions given by the parties. Under such circumstance when plaintiff is not offering any explanation and there is no ambiguity in the said contents, then it will have to be held that the real transaction between the parties was different than the plaintiff intends to say. Plaintiff could not have been allowed to fill up the lacunae by way of amendment at the appellate stage. It would have amounted to taking away the accrued rights of the defendant. That application for amendment has been rightly rejected by the learned First Appellate Court. The said fact further stands corroborated from the contents of the notice Exhibit 20. In notice Exhibit 20 the first and the important prayer by the plaintiff was that, defendant should refund him the amount of Rs.1,10,000/-, and in case of failure he should execute the sale deed. Therefore, taking into consideration the contents of agreement Exhibit 47 coupled with contents of notice Exhibit 20, the defence that has been taken by the defendant is more probable.

12. No doubt it was not necessary for the plaintiff to prove as to from which source he got the amount which he paid to the defendant on the date of the agreement. But then he should have explained as to what was the real intention of the parties and the real nature of the transaction in specific words. From the defence that was raised in the written statement, plaintiff had the idea as to

what case he is required to make out, yet he did not offer any explanation regarding those stipulations about refund of amount and in case of failure what is to be done. Another fact that is also required to be considered is that in Exhibit 47 it is specifically mentioned that, if the defendant returns the amount by 31-03-2004 then it should be treated that the agreement is cancelled. If it was pure agreement to sell, then such kind of stipulation would not have been there.

13. Plaintiff had initially pleaded that, in view of the agreement he was put in possession of the property by the defendant. However, it appears that, the defendant objected to the mutation entry and the plaintiff then filed appeal which was also dismissed and the matter came up before this Court in writ petition and the said writ petition is also dismissed. That means, as regards possession over the suit property is concerned, the competent Courts have held that the defendant is in possession of the property. At one breath plaintiff was contending that, he was put in possession by the defendant and at another breath in the prayer clause he was seeking possession of the suit property from the defendant. When with such case the plaintiff had come before the Court, adduced evidence, then the Courts should consider and appreciate the evidence as to what was the real intention of the parties and then apply the judicial discretion that is required under Section 20 of the Specific Relief Act. Here the

learned First Appellate Court has rightly held by interpreting the document that the real nature of the transaction was a loan transaction, and therefore, when defendant could not prove that he has repaid the amount of loan then he has been rightly directed to repay that amount to the plaintiff.

14. Another aspect that is required to be considered as regards possession is concerned. Both the agreements that is Exhibit 36 as well as Exhibit 47 are not sufficiently stamped and they are unregistered documents. They have been executed after 2001 Amendment to Section 53-A of the Transfer of Property Act, which made it mandatory that such transaction should be a written document, registered and of course it should be sufficiently stamped. From that angle also it can be seen that the transaction was not intended to be an agreement to sell. If the plaintiff had given substantial part of consideration at the time of agreement to sell itself, (if we hold that the transaction is agreement to sell) then he would definitely ask the defendant to put him in possession. In that case it should be a legal possession for which the document ought to have been registered on sufficient stamp paper.

15. Therefore, taking into consideration all the above said aspects it can be held that, no substantial questions of law are arising in this case. The learned Trial Court had not considered and appreciated

the evidence as well as law points involved in the case, and therefore, the First Appellate Court has rightly exercised its powers under Section 96 read with Order 41 of the Code of Civil Procedure.

16. Since the matter has been finally heard at the stage of admission, and it has been held that no substantial question of law is arising, then it is not necessary in this case to frame a substantial question of law first and then answer it in negative. As per the law laid down by Supreme Court in catena of decisions, the jurisdiction of the High Court to entertain Second Appeal under Section 100 of Code of Civil Procedure, after the 1976 amendment, is confined only when the Second Appeal involves as a substantial question of law. The existence of 'a substantial question of law' is a *sine qua non* for the exercise of the jurisdiction under Section 100 of the Code of Civil Procedure.

17. Reliance can be placed on decision in, *Ishwar Dass Jain vs. Sohan Lal*, reported in (2000) 1 SCC 434, wherein it has been observed that -

"Under Section 100 CPC, after the 1976 amendment, it is essential for the High Court to formulate a substantial question of law and it is not permissible to reverse the judgment of the first appellate court without doing so. There are two situations in which interference with findings of fact is permissible. The first one is when material or relevant evidence is not considered which, if

considered, would have led to an opposite conclusion. The second situation in which interference with findings of fact is permissible is where a finding has been arrived at by the appellate court by placing reliance on inadmissible evidence which if it was omitted, an opposite conclusion was possible. In either of the above situations, a substantial question of law can arise."

Further note of the decision in, *Kondiba Dagadu Kadam vs. Savitribai Sopan Gujar* reported in (1999) 3 SCC 722 can be taken, wherein it has been held that,

"In a Second Appeal under Section 100 of CPC, the High Court cannot substitute its own opinion for that of the First Appellate Court, unless it finds that the conclusions drawn by the lower Court were erroneous being :

(i) Contrary to the mandatory provisions of the applicable law;

OR

(ii) Contrary to the law as pronounced by the Apex Court;

OR

(iii) Based on in-admissible evidence or no evidence."

Further, it is observed in the said case that,

"If First Appellate Court has exercised its discretion in a judicial manner, its decision cannot be recorded as suffering from an error either of law or of procedure requiring interference in Second Appeal."

18. Therefore, taking into consideration the reasons stated above, when no substantial question of law are arising, second appeal stands dismissed. No order as to costs.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.