IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.5 OF 2016

Annasa s/o Wamansa Kashetriya (Died)
Through LRs. Prabhavatibai and others

… **Versus** …

Kailas s/o Ramdas Patil

…

Mr. B.R. Kedar, Advocate for the appellants

Mr. Alok Sharma, Advocate for the respondent

…

CORAM : SMT. VIBHA KANKANWADI, J.

RESERVED ON : 08th MARCH, 2019

PRONOUNCED ON : 02nd MAY, 2019

ORDER :

1 Present appeal has been filed by the legal representatives of original defendant challenging the concurrent findings, Judgment and Decree passed in Special Civil Suit No.54/2004 by Civil Judge Senior Division, Amalner, Dist. Jalgaon dated 27.11.2006 and Regular Civil Appeal No.33/2012 by learned Adhoc District Judge-1, Amalner, Dist. Jalgaon dated 30.09.2015, whereby the suit filed by the present respondent for specific

performance of the contract came to be decreed and in appeal it was confirmed.

2 What is not in dispute is that original defendant was the owner and possessor of house property bearing CTS No.5492/2 admeasuring 684 sq.mtrs.. Out of it, portion of two storied building admeasuring 228 sq.mtrs. including open space and as per the boundaries specified in para No.1 of the plaint situated at village Parola, Tq. Parola, Dist. Jalgaon.

3 Plaintiff had come with the case that defendant had agreed to sell the suit house by executing document on 09.12.2003 for a consideration of Rs.10,00,000/-. Plaintiff had paid earnest amount in all Rs.5,00,000/- (Rs.4,40,000/- in cash and two cheques of Rs.30,000/- each drawn on Dhule District Central Co-operative Bank, Dhule.) The written agreement to sell was signed by three witnesses Bhikan Patil, Dilip Patil and Gajanan Patil and it was scribed by one Sanjay Kashinath. It was also agreed that the plaintiff would pay the balance amount of Rs.5,00,000/- on or before 09.06.2004 and after receiving the amount the defendant would execute the sale deed and prior to that he would clear the encumbrance of Co-operative Society against the suit house. However, the defendant did not clear the encumbrance and

did not execute the sale deed on 09.06.2004. However, on the request of defendant a reviwal of the earlier agreement to sell was made by way of another written agreement to sell executing a document on 14.06.2004 in presence of same witnesses. It is stated that thereby the defendant got the time to execute the sale deed extended till 14.09.2004. Thereafter, plaintiff was insisting the defendant in the month of August that he should execute the sale deed, however, defendant was avoiding on one or the other pretext and also by saying that he has not cleared the dues of Co-operative Society. He requested the plaintiff to give amount of Rs.2,00,000/- to clear the loan borrowed from the Society and accordingly the plaintiff extended the said amount to defendant in cash in his shop in presence of witness Bhikan. It was assured by the defendant that he would execute the registered sale deed within 8 days. However, when the fact did not happen, plaintiff was contacting the defendant, he went to the house of the defendant and found that he had ran away. After he got knowledge that defendant has returned home on 22.09.2004, he met defendant along with witnesses and asked him to execute the sale deed by taking balance amount of Rs.3,00,000/-. Defendant and his wife asked plaintiff to wait for 10 days, but thereafter defendant refused. Hence, plaintiff issued notice to defendant on 14.10.2004. It is alleged that defendant had issued a false notice to plaintiff on 06.10.2004. It was replied by plaintiff on 17.10.2004. It was learnt that the defendant is trying to sale out the property, therefore, plaintiff gave public notice in daily newspaper. False reply was given by the defendant in daily newspaper and therefore, it amounted to refusal to execute the sale deed. Plaintiff was ready and willing to perform his part of the contract and therefore, the suit for specific performance was filed. Alternatively, the plaintiff has claimed that amount of Rs.7,00,000/- be repaid to him with interest @ 18% per annum.

4 The defendant resisted the claim of the plaintiff by filing written statement. He denied to have executed any such document on 09.12.2003 as well as on 14.06.2004. He has denied that he has received in all amount of Rs.5,00,000/- as an earnest amount on 09.12.2003 and thereafter Rs.2,00,000/- in his shop. It was contended that defendant has cloth shop and plaintiff used to visit his cloth shop oftenly and therefore, there was a domestic relations between them. Plaintiff had gone to defendant's shop about 5 years prior to the suit and told him that he has sufficient money and therefore, want to lend it to people. Defendant himself was in need of money in the year 1999 therefore, he took loan from plaintiff to the extent of Rs.2,80,000/- from 26.11.1999 to 15.02.2000. It is stated that, that amount

was repaid by him to the plaintiff between 01.01.2000 to 08.02.2000 to the extent of Rs.2,89,000/- along with interest. At the time of extending said loan plaintiff had obtained signatures of defendant on blank stamp paper, so also on blank signed cheques were obtained. Thereafter, another money lending transaction took place between him and plaintiff between 05.09.2000 to 22.03.2001 and the amount which was received by the defendant was to the tune of Rs.2,37,000/-. He has repaid amount of Rs.3,52,810/-. Third transaction took place between 12.10.2002 to 11.12.2003 and at that time he had obtained loan of Rs.50,00,000/-. He has paid total amount of Rs.1,34,600/- towards the third transaction. It is stated that the blank cheques and blank stamp papers have been misused by the plaintiff. He has given the cheque numbers and the name of the bank which have been stated to be obtained by the plaintiff. It is further stated that in the month of July, 2004 plaintiff started demanding the money with interest and therefore, defendant asked the plaintiff for the accounts of all the transactions, at that time, plaintiff had opposed and threatened him to kill. It is stated that due to the acts of the plaintiff, defendant had left his house on 09.09.2004. Therefore, his wife and relatives had filed missing complaint No.13/2004 with Parola Police Station. Police had found him and brought him to his own house. Thereafter, he issued notice to plaintiff on 06.10.2004 and asked him to return the blank documents. A false reply has been given by the plaintiff on 23.10.2004. It is stated that the market value of the suit property was Rs.90,00,000/-, therefore, there was no question for selling that property for such a meager amount. It is stated that the nature of the transaction was never 'agreement to sell' and therefore, there is no question of granting specific performance of the same.

5 After issues were framed parties have led oral as well as documentary evidence. As aforesaid the learned Trial Court has decreed the suit and the appeal filed by the original defendant has been dismissed by the learned First Appellate Court. Hence, present Second Appeal.

6 Heard learned Advocate Mr. B.R. Kedar for the appellants and Mr. Alok Sharma for the respondent.

7 It has been vehemently submitted on behalf of the appellants that the learned Courts below have not considered the evidence as well as law points properly. The finding in respect of readiness and willingness has not been dealt with properly. The Courts below have failed to consider that the real nature of the transaction was money lending transaction and therefore, execution of such a document could not have been ordered. The

admissions given by the plaintiff as well as his witnesses in their cross-examination has not been considered by both the Courts below. Plaintiff had examined the attesting witnesses PW 2 Bhikan and PW 3 Sanjay, the scribe. However, Bhikan is definitely an interested witness as he had filed criminal complaint under Section 138 of the Negotiable Instruments Act against the defendant. It can be seen from the document dated 14.06.2004, that it does not say in any manner that the earlier document was cancelled. In fact, both these documents were blank when defendant had signed those documents. Learned Courts below have failed to consider that the transactions which were brought on record, made by respondent was of money lending. Agreement Exhs.67 and 68 were not duly proved by the plaintiff. Both the Courts below have failed to appreciate that the books of account of the shop maintained by the defendant during regular course of his business. DW 1, the wife of the original defendant No.1 and DW 4 servant working in the cloth shop were the natural witnesses, who were present when the entries in the books of account were taken by defendant. The entries in the books of account have been discarded on the ground that some more evidence was required and mere entries in the books of account cannot be relied. There was evidence adduced by the defendant to prove that there was no occasion for him to execute agreement to sell, but since he had obtained loan from plaintiff, he executed that document by way of security. It was never intended to be acted upon. The market value of the suit property was brought on record. The Courts below have held that plaintiff has failed to prove further payment of Rs.2,00,000/- to the defendant and consequently it ought to have been held that the real transaction between the plaintiff and defendant was of money lending. Therefore, substantial questions of law are arising in this matter.

8 Per contra, the learned Advocate appearing for respondent submitted that plaintiff has proved execution of document of agreement to sell, he in clear terms proved payment of amount of Rs.5,00,000/-. It was rather held that plaintiff has failed to prove that he has paid further part of the consideration to the tune of Rs.2,00,000/- in August, 2004. Plaintiff has shown his readiness and willingness to perform his part of the contract. It was not necessary that he ought to have deposited the balance amount in Court. He could have brought the readiness and willingness on record independently. Therefore, there is absolutely no necessity to interfere with the concurrent findings of the Courts below. No substantial question of law is arising in this matter.

9 Taking into consideration the pleadings it can be revealed that defendant was denying the execution of both the agreement to sell. Under the said circumstance plaintiff was duty bound to prove the execution of those documents. However, at the same time it can be expressed that alternative defence appears to have been taken by the defendant that the documents were executed towards security of loan. Defendant is entitled to take as many as alternative and contrary defences as he may, but then there would be the onus on the defendant to prove them. The plaintiff has examined himself and his witnesses PW 2 Bhikan and PW 3 Sanjay, who are the attesting witness and scribe respectively, who have deposed in respect of agreements to sell Exhs.67 and 68. There was consistency in the pleadings and evidence of three witnesses of the plaintiff. On the ground of execution of the document, they have denied the suggestion categorically that signature of the defendant was obtained on blank stamp paper. Thus, it can be seen that both the Courts below have not found any such admission or any such factor which will disbelieve the evidence led by the plaintiff. Naturally the onus shifted on the defendant to prove either that his signature was obtained on blank stamp paper or that he had executed that document as security towards loan. Further, it can also be seen that plaintiff and his witnesses have categorically stated that on the day of execution of first agreement to

sell Exh.67 plaintiff had given cash of Rs.4,40,000/- and two cheques were given of Rs.30,000/- each. The numbers of the cheques have been reflected and therefore there is definitely a supporting documentary evidence to the agreement to sell Exh.67. As regards Exh.68 which was the subsequent agreement to sell, plaintiff as well as his witnesses have stated that since defendant could not repay the loan and remove the encumbrance within the time agreed the time to get the sale deed executed was extended by executing Exh.68. A question has been raised on behalf of the appellants on the second document, on the ground that whether by way of such document the period for specific performance could have been got extended or not. Here, both the parties had agreed and therefore, they had entered into a contract. There is proof about the execution of the agreements. Under such circumstance, unless such contract is not permissible under the law, the Courts would definitely honour the contracts. Exh.68 was also scribed by PW 3 Sanjay and it was signed by PW 2 Bhikan as an attesting witness. It was the wish of the party to have the same witness to the subsequent agreement also and therefore that circumstance cannot be taken as suspicious circumstance. It was not at all necessary to cancel the earlier agreement-to-sell, when second document was executed. Ultimately, it depended on the terms of the contract arrived at by both the parties. Further, merely because the first agreement was not cancelled, we can not infer that second agreement would not have been executed at all. There is reason given by plaintiff to support the fact, as to why second agreement was entered into. Defendant in his cross, has admitted that he had not cleared the loan of the society, when second agreement was entered into. This fact supports the pleading of the plaintiff. Another fact that is also required to be noted is that the defendant in his notice Exh.37 had admitted the fact of execution of agreement to sell. Therefore, it was for him to take any action if something contrary was going on that which was not in contemplation of real transaction. But except issuing notice it appears that he has not taken any other steps.

10 Defendant has relied mainly on the books of accounts maintained by him to prove his alternative defence, that he executed the documents as security. In his books of account he has shown that plaintiff has advanced him loan amounts during different period. Taking into consideration the provisions of Section 34 of the Indian Evidence Act, the appellants contend that those entries ought to have been considered by both the Courts below. Those entries were kept by defendant in the regular Courts of his business and therefore, they are important and the fact is also

supported by the testimony of DW 2 Sharad and DW 3 Pravin. Out of them, DW 2 Pravin is the servant who was serving with defendant, DW 4 Ramkrishna was also the servant serving with the defendant. They all have stated that the transaction was a money lending transaction. As regards repayment of the amount is concerned, except the alleged entries in the account books of the defendant there is nothing. The learned Trial Court after taking note of decision in Chandradhar Goswami vs. Gohatti Bank Ltd., AIR 1967 SC 1058 has rightly held that the merely on the basis of entries in the books of account any person cannot be charged with liability. Further evidence is required for payment of money. Now, though the supporting evidence can be said to be the oral testimony of DW 2, 3 and 4, but none of them have explained, especially the defendant himself as to why at any point of time the defendant had not obtained any receipt from the plaintiff regarding repayment. The learned Trial Court has also minutely considered the books of accounts and has stated that the defendant has used code words, which is not contemplated, when it is a regular books of account of a business. Therefore, both the Courts below have rightly discarded the defence that has been taken by the defendant that the transaction was money lending and Exhs.67 and 68 were executed towards security of the loan.

11 One more point, that was agitated before the Courts below was, that the price of the suit property at the time of execution of the document was around Rs.90,00,000/- and under that circumstance the defendant could not have agreed to sell the said property for a consideration of Rs.10,00,000/- only. Both the Courts have rightly held that there is no evidence led by the defendant to prove that on the date of the agreement the price of the suit property was Rs.90,00,000/-. Further, a transaction between defendant's wife in respect of sale of part of the property bearing CTS No.5492/B admeasuring 456 sq.mtrs. was sold for Rs.4,76,000/- only and the suit house, basically which is agreed to be sold, was to the extent of 228 sq.mtrs.. Still the price which was offered by the plaintiff was Rs.10,00,000/- and therefore, the said point was also discarded by both the Courts below. The facts have been appreciated by both the Courts below properly, especially the learned Trial Court.

12 As regards point of readiness and willingness also, it can be seen that as regards first agreement Exh.67 is concerned, sale deed remained to be executed because of the defendant's inaction to get the encumbrance cleared. Defendant has admitted that till the date of the next agreement to sell he had not cleared the encumbrance on the suit property. Therefore, there is

substance in the say of the plaintiff that because he could not clear the encumbrance before the time stipulated, the time was extended by executing agreement Exh.68. It was, therefore, held that plaintiff has shown readiness and willingness to purchase the suit property throughout the trial as well as before the First appellate Court also. Under such circumstance, the discretion under Section 20 of the Specific Relief Act has been exercised properly by both the Courts below. No substantial question of law is arising in this matter. Hence, the Second Appeal is disposed of as **"Not admitted"**.

(Smt. Vibha Kankanwadi, J.)

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