

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

Second Appeal No. 0411 of 2017

District : Dhule

1. Nitin Vithal Chaudhary,
Age 52 years,
Occupation Agriculture &
Business.

2. Sau. Anita w/o. Nitin Chaudhary,
Age 46 years,
Occupation Agriculture &
Business.

Both residing at Near Kumbhar
Khunt, Dhule, Dist. Dhule.

.. Appellants
(Original
plaintiffs)

versus

Valji Naval Pati, Deceased
through L.Rs.:

1. Madhav @ Rajendra Valji Patil,
Age 36 years,
Occupation Agriculture.
2. Sunil Valji Patil,
Age 34 years,
Occupation Agriculture.
3. Sandeep Valji Patil,
Age 32 years,
Occupation Agriculture.
4. Pramila Valji Patil,
Age 28 years,
Occupation Household.

5. Smt. Vimalbai Valji Patil,
Age 56 years.

All R/o. Avdhan,
Taluka & Dist. Dhule.

.. Respondents
(Original
defendants)

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Mr. Kishor C. Sant, Advocate, for the appellants.

*Mr. Amol S. Sawant, Advocate, for respondents
no.01 to 05.*

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 03RD JULY 2019

ORAL ORDER :

01. Present appeal has been filed by the original plaintiffs challenging the judgment and decree passed by the learned District Judge-1, Dhule, in Regular Civil Appeal No. 155 of 2012, dated 17-09-2016, whereby the judgment and decree passed in Special Civil Suit No. 51 of 2004, by Joint Civil Judge (Senior Division), Dhule, dated 05-04-2008, was set aside. *[Parties are referred as per their nomenclature before trial Court, hereafter.]*

02. The present appellants - original plaintiffs had filed the said suit for specific performance of the contract. They had come with a case, that the original defendant, who was the owner of the suit property, had entered into agreement to sell with them on 19-08-2002. It is stated that it was agreed

that the plaintiff would purchase the property at the rate of Rs. 1,35,000/- per acre. The defendant had agreed to measure the land before the sale deed and the sale deed was to be executed within a period of 11 months. It is stated that on the date of the agreement, plaintiffs gave amount of Rs. 50,000/- as earnest amount in cash and a cheque dated 10-09-2002. The remaining amount was agreed to be given on the date of the sale deed. Plaintiffs contend that they were ready and willing to perform their part of the contract; however, the defendant did not get the suit land measured. Under the said circumstance, they issued notice to the defendant on 21-08-2003 and called upon the defendant to execute the sale deed by accepting the remaining amount. The defendant received the notice, however, he did not execute the sale deed and, therefore, the suit was filed.

03. Original defendant had filed written statement, however, thereafter he expired. His legal representatives were brought on record and by filing Pursis, they have accepted the written statement that was filed by their predecessor. It was their contention, that the defendant was knowing plaintiff no.01. The defendant was in need of amount of Rs. 50,000/- and, therefore, the plaintiff extended it by way of cash. At that time, signatures of the defendants were taken on blank stamp paper. Thus, they contended that the transaction was a loan

transaction and not of agreement to sell. They have denied execution of any such document styled as agreement to sell. It was also stated that the said document is suspicious. They have already returned the amount of Rs.50,000/- and, therefore, the suit was not maintainable.

04. Taking into consideration the rival contentions, issues came to be framed. Both the parties have led oral as well as documentary evidence on record. Taking into consideration the evidence and hearing both sides, learned trial Court has come to the conclusion that the plaintiffs have proved that the defendant had agreed to sell the suit land to them. They were always ready and willing to perform their part of the contract. The defendant failed to prove that the said document is hollow and the real transaction was a loan transaction. Learned trial Court has decreed the suit and directed the defendants to execute the sale deed in respect of the suit property in favour of plaintiffs.

05. As aforesaid, the defendants had challenged the said judgment and decree in Regular Civil Appeal No.155 of 2012 and the said appeal came to be allowed on 17-09-2016 by the learned Ad hoc District Judge-1, Dhule, thereby rejecting the relief of specific performance and damage. However, the defendants were directed to repay / refund the amount of Rs. 50,000/-

to the plaintiff together with interest at the rate of 9 % from the date of execution of the agreement i.e. 19-08-2002 till realization. Hence, this second appeal by original plaintiffs.

06. Heard learned Advocate Mr. K.C. Sant for the appellants and learned Advocate Mr. A.S. Sawant for respondents no.01 to 05.

07. It has been vehemently submitted on behalf of the appellants, that the learned first appellate Court has not considered the evidence and the law points involved in proper perspective when, in fact, the learned trial Court had appreciated the evidence properly. As regards proof of agreement to sell is concerned, though the plaintiffs had not examined the attesting witness, yet, they had examined the scribe. Since that document was not compulsorily attestable document, it was not necessary for the plaintiffs to examine the attesting witness. The explanation for change in the handwriting in the document has been given by the scribe. Under such circumstance, while re-appreciating the evidence, the learned first appellate Court ought not to have drawn any different inference than it was recorded by the trial Court. When the agreement was proved, it ought to have been held that the plaintiffs had paid amount of Rs. 50,000/- in cash and the cheque of Rs. 50,000/- towards earnest amount thereby proving execution of

the document and, therefore, by drawing presumption under Section 10 of the Specific Relief Act, learned first appellate Court ought to have come to the conclusion that the specific performance was required to be granted. Learned first appellate Court erred in considering the transaction as that of loan transaction and, therefore, substantial questions of law are arising in this case.

08. Per contra, learned Advocate appearing for the respondents supports the reasons given by the first appellate Court.

09. At the outset, it can be seen that there is no concurrent finding of the Courts below in this case. However, that does not automatically gives any right in favour of the appellants or allows us to draw an inference that there is substantial question of law involved in the matter. In order to take cognizance of second appeal under Section 100 of the Code of Civil Procedure, 1908, showing substantial question of law is *sine qua non* and, therefore, it is required to be seen as to whether the present appellants have made out any such case to formulate substantial question of law.

10. The first appellate Court while dealing with the appeal under Section 96 of the Code of Civil Procedure, was justified in re-appreciating the

evidence. It was required for the first appellate Court to come to conclusion as to whether the document is proved or a transaction has been proved by the plaintiff, or not. In this case, when the plaintiffs have come with a case that there was an agreement to sell executed by original defendant no.01 on 19-08-2002 and the said fact was denied by the defendant, the burden was solely upon the plaintiffs to prove execution of the said document. In order to prove the said document, the plaintiffs have examined PW 01 Nitin Chaudhary and PW 02 Kailas Lohar, the scribe. The agreement to sell is not a compulsorily attestable document and, therefore, though the document was attested by two witnesses, it was not necessary for the plaintiffs to examine the attesting witness. In other words, it can be said that non-examination of the attesting witness was not fatal for the plaintiffs.

11. Taking into consideration the evidence of PW 01 Nitin Chaudhary as well as PW 02 Kailas Lohar, the document i.e. Exhibit 42 - agreement to sell, what emerges is that certain contents of the agreement to sell are stated to be in the handwriting of PW 02 Kailas Lohar and as per the testimony of the plaintiff, only last nine lines are in his handwriting. Yet, it can be seen that there is no explanation by them as to in whose handwriting, the boundaries, area and the duration when amount was to

be paid are written. PW 01 Nitin Chaudhary has not explained as to why PW 02 Kailas Lohar could not complete the document and PW 02 Kailas Lohar and PW 02 Kailas Lohar says that since the defendant was not having the details of boundaries of the land and he went outside to do the work with bank, he had left blanks in the agreement. The fact to be noted is that PW 02 Kailas Lohar is not scribe by profession. He was not serving with plaintiff in his office in 2002. Under such circumstance, plaintiffs ought to have explained as to why instead of going to a regular scribe who has habit of writing agreement to sell, it was decided by the plaintiff as well as defendant to get document scribed by PW 02 Kailas Lohar. Another fact which plaintiff has not explained that why blanks were left when, according to him, talks of settlement of agreement had taken place much prior to the date of alleged agreement to sell. If everything was settled, then parties would come with the preparation and then there is no scope for leaving blanks. The details of the cheque of Rs. 50,000/- have not been given. The plaintiff is not explaining as to why post-dated cheque was given as earnest at that time and if we consider his cross, he is unaware about the fact as to whether the said cheque was encashed, or not. That means, even till the date he entered the witness box, he had not made enquiry about the same. Yet, he wanted the Court to believe that the said amount under the cheque was

given towards the transaction. Learned first appellate Court has taken all these facts into consideration, so also, some other facts in respect of the nine lines which are in the handwriting of PW 01 Nitin Chaudhary. Those inferences are definitely proper inferences and it is proper appreciation of evidence that has been led. Learned first appellate Court has rightly come to the conclusion that the plaintiffs had failed to prove that the transaction was of agreement to sell.

12. One more fact is required to be considered, that in the agreement Exhibit 42, it is stated that possession of the property was handed over to the plaintiffs. However, PW 01 Nitin Chaudhary in his cross examination has admitted that he has not received the possession and the statement to that effect in Exhibit 42 is wrong. When he had knowledge about the fact that possession was not handed over to him, then why he felt it necessary that it should be written in the document itself, is a question and when it is not answered, it throws suspicion on genuineness of the document.

13. The defendants have come with a case, that the original defendant was in need of amount of Rs. 50,000/- and they admit that it was received on the same day of the alleged agreement to sell in cash. It is stated that signatures of original defendant

were taken on some blank document. Learned trial Court has observed that when defendant was educated, it is hard to believe that he would have signed blank document and did not agitate it or challenge it during his lifetime. The first and the foremost fact that is required to be borne in mind is that if at all the plaintiffs could be said to discharge their burden of proof, then only the onus would have shifted on the defendant to prove the contention what they had taken. Further, when the original defendant expired, his legal representatives might not be in a position to explain as to why he had made signatures on blank stamp paper. Under those circumstances, learned trial Court ought not to have drawn such inference. Perusal of the judgment of the trial Court would show that almost evidence of the plaintiff was accepted as it is, without much scrutiny by the trial Court and then observations are made in respect of what has not been proved by the defendant when the onus never shifted on the defendant.

14. When the defendants themselves are coming with a case that the loan was taken and they have not proved the repayment, the learned first appellate Court was justified in passing the order of refund of that amount to the plaintiffs.

15. Since the transaction itself has not been

proved by the plaintiff, that it was of agreement to sell, there is no question of going into the aspect as to whether the plaintiffs were ready and willing to perform their part of the contract; further question of raising presumption under Section 10 of the Specific Relief Act does not arise. Under those circumstances, when the learned trial Court had erred, the first appellate Court has re-appreciated the evidence and has come to a correct conclusion by taking into consideration the legal aspects in the same; no substantial questions of law are arising in this case, requiring admission of the second appeal.

16. In the light of above, the Second Appeal is hereby disposed of as '**not admitted**'.

(Smt. Vibha Kankanwadi)
JUDGE

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