

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

SECOND APPEAL NO.289 OF 2019

Vaibhabanand Gruh Nirman Sahakari Sanstha through its President Raju Tukaramji Pochare.
Vs.

Sheshrao s/o Motiramji Choudhary and others

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Mr A. M. Ghare, Advocate for appellant.

CORAM : AVINASH G. GHAROTE, J.

DATE : FEBRUARY 13, 2020.

Heard Mr. Ghare, learned counsel for the appellant.
By an order dated 7th of August, 2019 the record and proceedings was called to appreciate the contentions advanced, in a better way. The record and proceedings has been received. With the assistance of Mr. Ghare, learned counsel for the appellant, I have perused the record and proceedings and other documents on record.

2. It is an admitted position, that the defendants no.1 and 2 who were the owners of land bearing Survey No.63/1 and 64, admeasuring 2.67 Acres, Mouza Zingabai Takali, Nagpur, had executed a sale deed in respect of an area admeasuring 1.04 Acres in favour of the plaintiff on 20.01.1989 (Exh.66). It is contended that, in fact the entire land of Khasra No.63/1 and 64, was agreed to be sold, however in the measurement carried out by the City Survey it was found that the actual land on spot was 2.20 Acres out of which the sale deed dated 20.01.1989 came to be executed

and registered for land admeasuring 1.04 Acres. It is contended that on 20.01.1989 (Exh.67), an agreement of sale for the balance area was executed between the parties. It is further claimed that the possession was also handed over consequent to which a layout was demarcated and the plots, were sold by the plaintiff to its members. It is further submitted that the consideration of Rs.58,000/- in respect to the agreement dated 20.01.1989 stood paid to the defendants no.1 and 2 on 21.08.2000 (Exh.68). As the sale deed was not executed, a suit for specific performance came to be filed on 12.09.2002. On behalf of the plaintiff, PW-3 Vinod Chavan came to be examined, in support of the so called agreement dated 20.01.1989 (Exh.67) and the documents styled as possession letter Exh.68 dated 21.08.2000.

3. The learned Trial Court held that since PW-3 Vinod Chavan, was not a witness to the agreement, the same was not proved, in view of the denial by the defendants no.1 and 2. It further held that there was material contradiction in the evidence of Raju Pachore (PW-1) and Vinod Chavan (PW-3) in respect of the possession and therefore held that the contents of Exhs.67 and 68 in respect of possession were not proved. It further held that the documents dated 20.01.1989 and 21.08.2000 were marked as exhibit for the purpose of identification only, therefore, mere marking of a document as an exhibit would not mean that the contents are proved. It further held that the document dated 20.01.1989, could not

be said to be an agreement. It therefore dismissed the suit as filed by the plaintiff.

4. The Appellate Court, in confirming the findings of the Trial Court, adverted to the fact that the document at Exh.67, was not an agreement at all, but was an undertaking. It further held that PW-3 Vinod Chavan though claimed to be a scribe of the document at Exh.67, the same was not reflected from the perusal of the document. It therefore, held that since no attesting witness was examined, in light of the denial by defendants no.1 and 2, the document dated 20.01.1989 could not be held to have been proved, though the same was marked as an exhibit. It also held that the document at Exh. 67, did not depict any consideration in light of which it did not satisfy the test of being termed as an agreement of sale and thus dismissed the appeal also.

5. Mr. Ghare, learned counsel for the appellant contends that the evidence of PW-3 Vinod Chavan, could not have been discarded by the Courts below as he was a scribe to the document Exh.67 who was competent to prove the same. Merely because he had not signed the document Exh.67, as witness that would not mean that he was incompetent to prove the same. He further submits that Exhs.67 and 68, have to be read conjointly and when so done, would demonstrate that the consideration was received for the balance land by the defendants no.1 and 2. He therefore submits that the Courts

below have erred on both the counts due to which the present second appeal raised serious substantial questions of law in that regard.

6. It is trite that when a document is termed as an agreement of sale and is sought to be enforced, it should satisfy all the necessary ingredients as contemplated by law of being an agreement of sale. The document should be certain as to (a) identity of parties (b) identity of property (c) identity of consideration (d) identity of other terms and conditions. A document to be termed as an agreement of sale should also satisfy the requirement of Section 25 of the Indian Contract Act.

7. A perusal of Exh.67 dated 20.01.1989, demonstrates that it does not have any term as to consideration. Even if it is considered that Exh.67 can be termed as an agreement to sell, in absence of any consideration fixed therein, it should have satisfied the requirement of Section 25 of the Indian Contract Act, however, the document Exh.67 does not do so, since it is not registered as is required by law in absence of mention of any consideration therein. The contention of Mr. Ghare, learned counsel for the appellant that Exh.67, should be read in conjunction with Exh.68 and if so done, would demonstrate that the consideration was agreed upon and the same stood paid, is equally fallacious, for the reason that the document at

Exh.68, is dated 21.08.2000, which is more than 11 years after the execution of the document at Exh.67 which is dated 20.01.1989. If the document at Exh.67, is to be an agreement, the same independently, ought to satisfy the test of being an agreement as on 20.01.1989. However, the same does not do so as discussed above. The findings of the Courts below therefore, that Exh.67 could not be termed as an agreement cannot be faulted with.

8. In so far as the contention that Exh.67, stood duly proved by the evidence of PW-3 Vinod Chavan, it is to be noted that Exh.67, does not state that it was scribed by PW-3 Vinod Chavan, in absence of which, his evidence, clearly would be doubtful. It was open, for the plaintiff to have examined any of the witnesses to Exh.67 to satisfy the requirements of the Evidence Act, however, that was not done, in absence of which, it cannot be said that the contents of Exh.67 were proved by the evidence of PW-3 Vinod Chavan. No other points were raised.

9. In light of the above, I do not find that any question of law, much less a substantial one, is involved in the present second appeal. The second appeal therefore is without any merit and is accordingly dismissed. In the circumstances, there shall be no order as to costs.

JUDGE