

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**SECOND APPEAL NO.126 OF 2021
WITH
CIVIL APPLICATION NO.3163 OF 2021
IN SA/126/2021**

ANGAD S/O MANIKRAO KENDRE
VERSUS
NARAYAN NAMDEO SIRSAT

.....
Advocate for Appellant : Mr. B. R. Kendre
Advocate for Respondent : Mr. S. V. Munde
.....

CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 11-08-2021.

ORDER :

1. Present appeal has been filed by the original defendant to challenge the concurrent Judgment and decree passed by the lower Courts.
2. Present respondent is the original plaintiff who had filed Regular Civil Suit No.27 of 2012 (Old Special Civil Suit No.21 of 2010) before Joint Civil Judge, Junior Division, Renapur, District Latur for specific performance of the contract and damages for breach of contract. That suit came to be decreed on 19-12-2014 and even the counter claim of the defendant for injunction came to be allowed. Only the original

defendant filed appeal challenging the said Judgment and decree passed by the Trial Court by filing Regular Civil Appeal No.02 of 2015. The said appeal was heard by the learned Adhoc District Judge-2, Latur and it was dismissed on 28-11-2018. Hence, this second appeal.

3. Heard learned Advocate Mr. Mr. B. R. Kendre for appellant and learned Advocate Mr. S. V. Munde for respondent.

4. It has been vehemently submitted on behalf of the appellant that both the Courts below have not considered the evidence properly and gave perverse finding. It was the specific defence of the defendant that the agreement to sell has been prepared by forging it. Even the criminal case was filed by the defendant against the respondent and the attesting witnesses for the offence punishable under Section 467, 468, 471, 418, 420 read with 34 of the Indian Penal Code and the said Regular Criminal Case No.70 of 2010 is pending for trial. In fact, the defendant is in actual possession of the suit land but when he had sold 39 R land to one Pralhad Munde i.e. the real cousin brother of the plaintiff then at that time one extra bond of Rs.100/- appears to have been purchased in the name of the defendant and his signature has been

obtained on that blank document by keeping him in dark. It has come on record that said 39 R land was sold by the defendant in favour of said Pralhad Munde for a consideration of Rs.1,56,000/-. The plaintiff has come with a case that defendant agreed to sell 44 R land in his favour for a consideration of Rs.1,60,000/- and earnest amount of Rs.60,000/- was taken from him. If we consider the rate for the land, it can be seen that defendant would not have agreed to sell the land admeasuring 44 R for such a meager amount. Further, the present appellant/original defendant had laid evidence of the notary who has stated that defendant was not present when he notarized the document. Therefore, it appears that the agreement to sell was brought in existence in collusion. When agreement itself has not been proved to have been executed willingly, question of its specific performance should not have been granted. Further, in the suit for specific performance, the plaintiff had not prayed for possession and, therefore, when it was proved by the defendant that he is in possession, the specific relief ought not to have been granted and the discretion under Section 20 of the Specific Relief Act ought to have been exercised judiciously. Therefore, substantial questions of law are arising in this case requiring admission of the second appeal.

5. Per contra, the learned Advocate for respondent relied on the reasons given by both the Courts below and submitted that the substantial questions of law are not arising.

6. Here, it is to be noted that both the Courts below have concurrently held that the plaintiff has proved that the defendant had agreed to sell the suit land for a consideration of Rs.1,56,000/- and executed the agreement on 15-06-2009. It was also held that the defendant has failed to prove that plaintiff prepared forged document of agreement to sell dated 15-06-2009. Unless it is shown by the appellant that the said findings are perverse or the appreciation of the evidence is perverse, this Court may not disturb those findings. Plaintiff has examined himself to support his contention, also examined the attesting witness P.W.2 Rakhmaji Jogdand, and stamp vendor as P.W.3. P.W.2 who was the attesting witness to the admitted sale transaction executed by defendant in favour of Pralhad that was executed on the same day of agreement to sell and this attesting witness to the agreement of sale was also the attesting witness to the sale deed in favour of Pralhad. When the defendant is admitting one transaction where the same attesting witnesses signing that document, then it cannot be said that the

another document is got executed from him by fraud. Further, the scribe has also been examined by the plaintiff. No contradictory material is coming forward. No doubt it appears that the defendant had filed criminal case against the plaintiff and attesting witness but it appears that in respect of that matter "B" Summary was filed before the Criminal Court and further the opinion of the handwriting expert was called which supports the case of the plaintiff. It can also be seen that in strict sense the defendant is not disputing the signature on that agreement to sell but it is his contention that inadvertantly his signature was obtained on additional stamp paper purchased in his name without his consent. Except his own statement to that effect, there is nothing. The First Appellate Court has rightly scanned the evidence of D.W.3 notary who has deposed that the defendant was not present when he affixed his stamp and signature on agreement Exhibit 101. In fact, notarization of the document was not at all compulsory and, therefore, whether he was present or not before the notary makes no difference at all. It also appears that the sale deed was also scribed by the same person who had scribed the sale deed which document is admitted to the defendant. The evidence has been chronologically assessed by both the Courts below and then the conclusion has been drawn that the

agreement is proved. When the agreement to sell is proved and also the fact that it was proved that earnest amount of Rs.60,000/- was paid on the day of the agreement then the decree for specific performance was inevitable since it was the agreement to sell an immovable property. Further, both the Courts on the basis of documentary as well as oral evidence have held that the plaintiff was ready and willing to perform his part of the contract.

7. Much strenuous submissions have been made on the point that the agreement to sell contains recital of handing over of possession of suit property to the plaintiff, but it is not a registered instrument and, therefore, that recital has no force and cannot be accepted. When part of the document has been proved to be false then the specific performance ought not to have been granted. Important point to be noted is that though the said recitals are appearing, yet the document has not been registered. The benefit of that recital cannot be given to the plaintiff but that does not *ipso facto* negatives the execution of the document or raises any kind of doubt over the same. In fact, the learned Trial Judge, therefore, held that the possession would remain with the defendant till proper procedure is adopted. Now it has been tried to be contended that since prayer

for possession was not added to the suit, the discretion ought to have been used and the specific performance ought to have been refused. This cannot be the requirement of law whether the plaintiff will be able to get the possession of the said property would be decided in the appropriate proceedings but that does not estop the Court from granting specific performance of the contract. Further, it appears that no such point was raised before the First Appellate Court, therefore, taking into consideration all these aspects it can be said that no substantial questions of law are arising in this case requiring admission of the second appeal. Hence, the second appeal stands dismissed. Pending Civil Application stands disposed of.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-

GAWADE
VIRENDRA
J

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by GAWADE
VIRENDRA J
Date: 2021.09.24
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