IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 273 OF 2016

Kamalbai Namdeo Kisve,
Age 42 years, Occu : Business and
Household, R/o Munshi Plots, Omerga,
Tq. Omerga, District Osmanabad .. Appellant
(Orig. Plaintiff)

VERSUS

Rafika Suraj Sayyad,
Age 43 years, Occu : Household,
R/o Munsi Plots, Omerga, Dist. Osmanabad .. Respondents
(Orig. Defendant)

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Mr. N.L. Jadhav, Advocate for the appellant
Mr. A.A. Khan, Advocate for the respondent

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CORAM : ANIL S. KILOR, J.

RESERVED ON : 24-03-2021
PRONOUNCED ON : 28-04-2021

JUDGMENT :

1. The appellant, who is the original plaintiff, is challenging the Judgment and Decree dated 07-03-2015 passed in Regular Civil Appeal no. 17of 2012 by the District Judge-1, Omerga, allowing the Appeal and reversing the Judgment and Decree dated 30-08-2008 passed by the Joint Civil Judge Senior Division, Omerga in Special Civil Suit no. 15 of 2005, decreeing the suit for specific performance of contract.

2. I have heard the learned counsels for respective parties.

3. Brief facts of the present case are as follows (The parties are referred to as per their status before the trial Court).

4. It is the case of the plaintiff that the plaintiff and defendant are resident of village Omerga in the same vicinity and they have no relations with each others. The husband of defendant Suraj Sayyad had sustained losses in his truck business and he was indebted. The defendant therefore had decided to alienate her house property bearing no. 287, ward no. 18, Municipal House no. 481 admeasuring 50 feet X 40 feet. The defendant had approached to the plaintiff and shown her desire for sale of suit property for satisfaction of debt. The defendant agreed to sell the suit property for consideration of Rs.2,70,000/-. The said offer was accepted by the plaintiff on 01-04-2005. Accordingly, the agreement for sale of suit property was executed in favour of the plaintiff after acceptance of amount of Rs.2,50,000/-. Thereupon, the defendant handed over the possession of suit property to the plaintiff on the same date and agreed to perform remaining part of the contract within a span of two months from the date of agreement. It was also agreed that the defendant will accept the remaining amount at the time of execution of sale deed.

4.1 It is the further case of the plaintiff that the defendant has started obstruction to the peaceful possession and enjoyment of the plaintiff with an intention to get more amount from the plaintiff. Therefore, the suit for perpetual injunction bearing RCS no. 257 of 2005 was filed against the defendant. However, the same was withdrawn with condition to file a fresh suit.

4.2 It is the case of the plaintiff that the plaintiff requested the defendant on many occasions for execution of sale deed by accepting the remaining amount of Rs.20,000/- but it was in vein. The plaintiff therefore issued legal notice to the defendant on 16-04-2005 through her counsel and thereby called upon the defendant to perform the remaining part of the contract, however, the notice was replied on false ground. Thus, the suit for specific performance was filed.

4.3 The defendant appeared in the said proceedings, filed written statement and denied the claim of the plaintiff and came up with a case that husband of the defendant purchased a truck through finance company and there were two dues of installment to be paid. Therefore, the defendant requested for Rs. 60,000/- to the plaintiff, out of which the plaintiff paid Rs. 35,000/-.

4.4 The defendant further stated in her written statement that the plaintiff used to threaten and because of which she left Omerga and started residing at Kasari where the plaintiff along with others came and demanded Rs.2,70,000/- or asked her to execute sale deed of the house property. On 01-04-2005, the plaintiff forcibly took her in a Jeep and brought at Omerga under threat and had taken thumb impression on the stamp paper as well as on register. Therefore, it is the case of the defendant that the alleged document dated 01-04-2005 is forged and bogus document. A Police complaint was also lodged by the defendant against the plaintiff for the offences punishable under section 341, 342, 363, 384, 506 r/w. 34 of the Indian Penal Code and 33 of the Bombay Prohibition of Money Lending Act.

4.5 The learned trial Court framed the issues. Thereupon, both the parties examined their respective witnesses. The learned trial Court whereupon decreed the suit in favour of the plaintiff, directing the defendant to execute the sale deed in favour of the plaintiff vide Judgment and Order dated 30-08-2008.

4.6 The defendant feeling aggrieved by said Judgment and Decree dated 30-08-2008, preferred an Appeal bearing RCA no. 17 of 2012 before the District Judge-1, Omerga. Said Appeal came to be allowed vide impugned Judgment and Decree dated 07-03-2015 which is impugned in the present Appeal.

5. This Court vide order dated 22-07-2019 framed the following substantial questions of law :

1. Whether the learned First Appellate Court erred in holding agreement to sell Exh. 46 being inadmissible evidence in ignorance of Section 35 of the Maharashtra Stamp Act ?

2. Whether the agreement to sell/contract can be said to be a legal contract in view of the defence taken that it was got executed by giving threats ?

3. Whether proper Court fee was paid by the plaintiff ?

4. Whether the learned First Appellate Court was justified in reversing the decree passed by the learned Trial Court ?

5. Whether plaintiff was entitled to get specific performance of the contract ?

6. Whether interference is necessary in the Judgment and Decree passed by the learned First Appellate Court ?

6. Shri Jadhav, learned counsel for the appellant submits that the impugned Judgment and Decree dated 07-03-2015 is perverse as the learned lower Appellate Court while reversing the Judgment and Decree of the trial Court dated 30-08-2008, failed to consider the oral as well as documentary evidence available on record.

6.1 He submits that the burden to prove that the agreement dated 01-04-2005 was executed by fraud and under coercion lies on the defendant who has asserted it.

6.2 It is submitted that the law does not require to prove that where from the the plaintiff brought the amount and paid to the defendant while entering into the transaction in respect of specific performance of the contract.

6.3 He has further submitted that while reversing the Judgment of the learned trial Court, the learned lower appellate Court exceeded its jurisdiction and went beyond the evidence available on record.

6.4 It is submitted that the FIR itself is not sufficient to establish that there was threat more particularly when the FIR was lodged after 20 days of the alleged incident.

6.5 He further submits that while holding that the agreement to sale – exhibit – 46 is inadmissible in evidence, learned lower appellate Court failed to consider the import of Section 35 of the Maharashtra Stamp Act.

6.6 He has placed reliance on a judgment of the Hon'ble Supreme Court of India in the case of ***Javer Chand Vs. Pukhraj Surana***[1] for the purpose that once the Court rightly or wrongly, decides to admit the document in evidence, so far as the parties are concerned, the matter is closed.

6.7 He has further placed reliance on the judgment of learned Single Judge of this Court in the case of ***Mahendra Mahadeo Deshbratar & Ors. Versus Kailash Bhauraoji Chandankhede***[2], wherein relying upon the above referred Judgment in the case of ***Javer Chand*** has held that once the document is exhibited, the objection to the same cannot be considered at any stage thereafter.

6.8 He has further placed reliance on the Judgment of the Hon'ble Supreme Court of India in the case of ***Santosh Hazari Vs. Purushottam Tiwari deceased by L.Rs.***[3] to show that what care the appellate Court shall take while reversing or affirming the findings of the trial Court.

1 1961 AIR (SC) 1655
2 2014 (4) Bom.C.R. 877
3 2001 (2) Mh.L.J. 786

7. Per contra, Mr. Khan, learned counsel appearing for the respondent supports the impugned Judgment and Decree and prays for dismissal of the present Appeal on the ground that no substantial question of law is involved in the present matter.

8. To consider the rival contentions of the parties, I have gone through the record and proceedings and also perused the Judgment and Decree of both the Courts below.

9. Before answering the first substantial question of law whether the learned First Appellate Court erred in holding agreement to sell Exh. 46 being inadmissible evidence in ignorance of Section 35 of the Maharashtra Stamp Act?, I would consider whether the alleged agreement was executed or made by free consent of the parties.

10. It is a settled that without consensus *ad-idem* there can be no contract. It is also settled law that there must be a valid and binding contract between the parties in respect of which the parties should be consensus *ad-idem.* Burden of proof is on the plaintiff seeking specific performance of the contract.

11. On the above referred touchstone, I revert back to the relevant facts of the present case which would throw light on the point whether there was free consent of the defendant. From the record, it is revealed that the alleged agreement was executed on 01-04-2005. In cross-examination, the plaintiff deposed that the discussion about transaction took place in the house

of defendant in the morning between 10.00 am to 10.30 am on 01-04-2005 and immediately thereafter, the amount of Rs.2,50,000/- was paid and the defendant was taken to Omerga for execution of the agreement in question.

11.1 It has also come on record that the husband of the plaintiff and defendant were not present at the time of execution of agreement or at the time of discussion regarding the sale transaction in question.

11.2 The oral evidence of plaintiff further shows that the amount of Rs.2,50,000/- was arranged by her from her brother who was also not present at the time of transaction and said amount was brought by her on 01-04-2005 even before any discussion as alleged to have held.

11.3 The attesting witness Bharat Patil states in his oral evidence that on 01-04-2005 he had been to the Court for obtaining certified copy in a criminal case and at that time, the plaintiff requested him to sign the said agreement as witness.

11.4 It is also not disputed that the FIR was lodged by defendant against the plaintiff inter-alia, alleging that the defendant was kidnapped by plaintiff from her village Kasari to Omerga in a jeep vehicle and her signature was obtained on the alleged agreement.

11.5 Moreover, it has also come on record that the husband of the defendant is in business of transportation and his truck was seized by the finance company because of default in payment of two installments and even after alleged payment of Rs.2,50,000/- by plaintiff towards part consideration, said truck was not released by making the payment of default installments.

11.6 Though it is the case of plaintiff that immediately after signing the agreeme0nt, the defendant handed over the possession of suit house, no documents namely electricity bill, water bill etc. produced on record by the plaintiff.

12. The above referred facts which are on record safely take to a conclusion that the execution of alleged agreement was not voluntary and with free consent. It is a settled law that any contract which is made without free consent, is not binding.

12.1 The undisputed facts and circumstances in this case creates doubt over the genuineness of the alleged transaction in absence of free consent of the defendant. The plaintiff substantially failed to remove the said doubt and make out a probable and possible case to hold that the contract in this matter is a valid contract and there is no fraud or coercion, particularly in a backdrop of criminal complaint lodged by the defendant against the plaintiff.

13. As regards the first substantial questions of law framed by this Court, in view of ***Javer Chand***'s case, it is settled law that "The Court has to judicially determine the matter as soon as the document is tendered in evidence and before it is marked as an exhibit in the case. Once a document

has been marked as an exhibit in the case and the trial has proceeded all along on the footing that the document was an exhibit in the case and has been used by the parties in examination and cross-examination of their witnesses, Section 36 of the Stamp Act comes into operation. Once a document has been admitted in evidence, as aforesaid, it is not open either to the Trial Court itself or to a Court of Appeal or revision to go behind that order. Such an order is not one of those judicial orders which are liable to be reviewed or revised by the same Court or a Court of superior jurisdiction."

14. However, having observed that the alleged agreement is not valid in absence of free consent and for the said reason it is not binding on the defendant, I have no hesitation to hold that there is no merit involved in the present Second Appeal.

15. Accordingly, I hold that the learned lower appellate Court was justified in reversing the decree passed by the trial Court and holding that the plaintiff is not entitled to get decree of specific performance of contract.

16. The Second Appeal is dismissed.

Sd/-
[ANIL S. KILOR]
JUDGE

arp/