

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.620 OF 2019

VISHNUDAS S/O DNYANOBA PADILE (DIED) THR LRS NIVEDITA
VISHNUDAS PADILE AND ORS
VERSUS
BHANUDAS S/O NIVRUTTI GURAME

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Mr. S. S. Manale, Advocate for appellants.
Mr. A. S. Reddy, Advocate for the respondent.

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 07.09.2021

ORDER :-

. Present appeal has been filed by the original defendants challenging the concurrent judgment and decree. Present respondent – original plaintiff had filed Special Civil Suit No.48 of 2010 (Old No.33 of 2016) before the learned Joint Civil Judge Senior Division, Udgir for declaration and specific performance of the contract. The said suit came to be decreed. It was declared that the sale deed bearing Registration No.3248 of 2005 dated 29.08.2005 executed by defendant No.1 in favour of defendant Nos.2 and 3 to the extent of suit land, is nominal, bogus and inoperative. Defendant No.1 was directed to execute sale deed of the suit land in terms of agreement to sell (Exhibit-48) excluding the terms mentioned in pursis (Exhibit-102) in favour of the

plaintiff by taking remaining amount of consideration Rs.12,29,000/- and the consequential relief has been granted. The said decree was passed by the learned Trial Judge on 20.04.2016. The said judgment and decree was challenged by the present appellants by filing Regular Civil Appeal no.36 of 2016. It was heard by learned District Judge-1, Udgir and dismissed on 26.04.2019. Hence, this second appeal. During pendency of the second appeal, appellant No.1 expired and appellant Nos.2 to 4 are his legal representatives as well as his mother, who has been brought on record by order dated 21.08.2021 passed in Civil Application No.8483 of 2021.

2. Heard learned Advocate Mr. S. S. Manale for appellants and learned Advocate Mr. A. S. Reddy for the respondent. In order to cut short it can be said that both of them have made submissions in support of their respective contentions.

3. Present respondent – original plaintiff had come with the case that since defendant No.1 was indebted and was in financial need, there were negotiations and the plaintiff agreed to purchase 2 Acres of land from land bearing Survey No.308/2001 admeasuring 1 H 62 R situated at Shelal, Tq. Udgir, Dist. Latur for a consideration of Rs.17,79,000/-. That agreement was entered into on 02.03.2005 and on the same day,

the earnest amount of Rs.5,50,000/- was paid to defendant No.1. It was also stated that defendant No.1 had obtained loan from one Sau. Sukumar Satish Godbharle and Sau. Manjusha Vaijanath Matpathi and, therefore, he was in need of money. Original defendant No.4 i.e. the wife of defendant No.1 had also signed the said agreement as consenting party. Defendant No.1 did not comply with the terms and conditions of the agreement and executed a false, fictitious, nominal and bogus sale deed on 29.08.2005 in favour of defendant Nos.2 and 3, who are his own children by showing their grandmother as their guardian and, therefore, the plaintiff contends that the said sale deed is not binding on him. He was ready and willing to perform his part of the contract. He, therefore, prayed for the specific performance.

4. Defendants denied everything, even the execution of the agreement to sell. It was then contended that the wife of the plaintiff was Director of one Priyadarshini Mahila Co-operative Bank, Latur. Sau. Sukumar Godbharle and Sau. Manjusha Matpathi were also Directors of the bank and they used to serve in the bank. All of them had approached to defendant No.1 through his father-in-law and induced that they would give him employment in the bank. They had then demanded amount of Rs.1,00,000/- and obtained 2 to 3 signatures on blank stamp papers. Defendant No.1 was not given employment by

them, but when he demanded the stamp papers back, a bogus agreement to sell has been got prepared. It is also then contended that defendant No.1 consumes liquor and taking disadvantage of his mental condition, that documents have been prepared.

5. Parties have led oral as well as documentary evidence. Both the Courts below have considered the proof about execution of agreement to sell and it has been held that it has been proved. The attesting witness has been examined. It is also held that the earnest amount has been paid to defendant No.1 on the same day of agreement. It has also held that defendant No.1 failed to bring on record as to why the attesting witness would depose falsely against him. Therefore, when the agreement to sell has been proved so also the payment of earnest amount, then the only fact was to see as to whether plaintiff had shown readiness and willingness to perform his part of the contract. It has been vehemently submitted on behalf of appellants that the plaintiff has not produced any such evidence on record that he had the capacity to pay the earnest amount of consideration and the amount was ready with him. At the outset, the argument is not convincing at all for the simple reason that here, first of all, the facts are different. Here, there was a condition put that defendant No.1 would prepare a road in the suit land and would obtain N.A. permission by getting layout plan sanctioned by

the end of 30.06.2005. No evidence was adduced by defendant No.1 that he had taken any such kind of step. Secondly, he then sold out the property to his own children by showing his mother as their guardian on 29.08.2005. When both the parents are alive, why there was necessity to show the grandmother as guardian of defendant Nos.2 and 3 is the question, which has been left unanswered by defendants. Further, there was every opportunity for defendants to ask ennumber of questions to the plaintiff regarding readiness and willingness and the availability of funds with him. No such cross has been conducted. Another point to be noted is that defendant No.1 is admitting that he is addicted to vices. Though he has denied that he had taken any kind of loan from the two ladies, yet the fact has come on record. Another fact is that when those persons had allegedly taken his signatures on the blank papers, what estopped him from lodging any report with the police is not explained by him. The wife i.e. defendant No.4, in fact, admits her signatures on the agreement to sell as consenting party. Then it leaves no inference to be drawn that defendant No.1 had executed agreement to sell in favour of the plaintiff. Further coming back to the readiness and willingness of the plaintiff to perform his part of the contract, as per the fact which has been pleaded by defendants themselves that the wife of the plaintiff is a director in the bank, he could have even raised loan for purchase of the

property. The plaintiff was consistent enough in saying in his plaint as well as in his examination-in-chief that he was ready and willing to perform his part of the contract and that has been considered by both the Courts below as requirement of Section 16-C of the Specific Relief Act and that is a correct position of law. It is not necessary that the plaintiff should show, by producing bank account that in his bank account, he has sufficient balance on the day the performance sought.

6. During the course of argument it has been tried to be contended by learned Advocate for appellants that the suit property was the ancestral property and this fact has not been considered by the Courts below. In fact, this submission at the second appeal stage itself is surprising. Further, it is contrary to the record. If that was the ancestral property, in which, apart from defendant No.1, his mother would have had share, she cannot purchase the property of her ownership for and on behalf of children of whom, she has been shown to be the guardian. Therefore, such lame excuse now at the second appeal stage cannot be accepted as substantial question of law.

7. Learned Advocate for appellants has relied on the decision in ***C. S. Venkatesh Vs. A. S. C. Murthy (D) by Lrs. and others, [AIR 2020 (SC) 930]***, wherein Hon'ble Apex Court held that "if the plaintiff has failed to

prove that he was having sufficient amount/financial capacity, it cannot be said that he was ready and willing to perform his part of the contract.” The ratio in this case is not applicable here for the simple reason that on the basis of scanning of evidence, the Court had come to the conclusion that the plaintiff had no financial capacity, as he was left with no property, either movable or immovable. Due to heavy loss, he had suffered. Here, when the defendants were having every opportunity to bring the financial condition of the plaintiff on record through cross examination, that opportunity has not been utilized. Further, on similar lines there are decisions in *Ravi Setia Vs. Madan Lal and others*, [2019 (9) SCC 381], *Manjunath Anandappa Urf. Shivappa Hanasi Vs. Tammanasa*, [2003 AIR (SC)1391] and *Vijay Kumar and others Vs. Om Prakash*, [2018 AIR (SC) 5098]. The ratio in these authorities is not applicable here for the simple reason that though the ratio cannot be disputed, but it has been arrived at on the basis of facts of the case. At the cost of repetition, it can be said that the plaintiff in this case has proved the readiness and willingness and it has been properly appreciated by both the Courts below. Another point that has been tried to be raised is that the guardian was not appointed for defendant Nos.2 and 3 and therefore, in absence of adherence of Order XXXII Rule 3 of Code of Civil Procedure, the suit should be dismissed. He is relying on

the decision in ***K. P. Natarajan and Anr. Vs. Muthalammal and ors.***, Special Leave Petition (c) No.2492 of 2021 decided on 16.07.2021 by Hon'ble Supreme Court. Here, it is to be noted that the citation, definitely, states that both the minors are under guardian of their natural mother defendant No.4 and defendant No.4 in her independent capacity also is party to the proceedings. Further, defendant No.1, as aforesaid, is the father of defendant Nos.2 and 3. When both the parents, either in their individual capacity are on record so also it is specifically mentioned that the mother is the guardian, it was sufficient compliance and it appears that it was never raised either before the Trial Court or before the first Appellate Court. Neither defendant No.1, nor defendant No.4 have shown that they have any kind of adverse interest to the minors. Further, reliance has been placed on the decision in ***Narayan Sitaramji Badwaik (Dead) Through Lrs. Vs. Bisaram and others***, Civil Appeal No.6124 of 2011 decided by three judge Bench of the Hon'ble Supreme Court on 17.02.2021, wherein it has been held that, "it is a well settled position of law that a second appeal, under Section 100 of the Code of Civil Procedure, lies only on substantial a question of law. However, this does not mean that the High Court cannot, in any circumstance, decide findings of fact or interfere with those arrived at by the Courts below in a second appeal. In fact, Section 103 of the Code of Civil Procedure

explicitly provides for circumstances under which the High Court may do so.” Thereafter, taking into consideration the facts of the case, the High Court therein itself has observed in the impugned judgment that the first Appellate Court approached the matter incorrectly and, therefore, in that case, it was observed that the High Court ought to have either remanded the matter, or exercised its power under Section 103 of the Code of Civil Procedure and decided the issues of fact. No such situation is arising in this case and, therefore, these citations are not applicable.

7. Both the Courts below have considered the facts and law points properly. It requires no interference. No substantial question of law as contemplated under Section 100 of Code of Civil Procedure is arising in this case requiring admission of the second appeal. Second appeal, therefore, stands dismissed.

[SMT. VIBHA KANKANWADI, J.]

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