

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

**SECOND APPEAL NO.3 OF 2022
WITH
CIVIL APPLICATION NO. 91 OF 2022
IN SA/3/2022**

Vijay S/o Chunilal Shikhare	]	
Age : 44 Years, Occ. : Business,	]	
R/o. NS-1/LIG/14/D/98/01,	]	
Shivaji Nagar, Aurangabad.	]	... Appellant (Orig. Plaintiff.)

Versus

1.	Babulal Deoman Shikhare	]	
	Age : 65 Years, Occ. : Retired,	]	
	R/o Kasliwal Tarangan Road, Disuza Colony,	]	
	Padegaon, Tq. & Dist. Aurangabad.	]	
2.	The Administrator	]	
	CIDCO, Aurangabad	]	... Respondents (Orig. Defendants)

...
Mr. Pramod F. Patni, Advocate for Appellant
Mr. V. B. Patil, Advocate for Respondent No.1.
...

CORAM : MANGESH S. PATIL, J.

DATED : 08 APRIL 2022.

ORDER :

1. Heard the learned advocate Mr. Patni for the appellant and learned advocate Mr. Vijay Patil for the respondent no.1, on the point of admission.

2. The appellant is the original plaintiff who has failed to obtain a decree for specific performance of an agreement to sell the suit property dated 29 April 2008 allegedly executed by the respondent no.1 in his favour in presence of Kailas Wagh (PW-2) by accepting earnest money of Rs.1,60,000/- with a stipulation that the remaining amount was to be paid at the time of execution of the sale deed after obtaining no objection certificate from the respondent no.2 – CIDCO as per its Rules and Regulations.

3. Respondent no.1 contested the suit by filing a written statement. He denied execution of the agreement styled as 'Sauda Pawati' and disputed his signature thereon. He contended that the appellant was already in possession of the suit property as his tenant being his nephew. A false and bogus agreement has been brought into existence. He had not received any earnest money. He further contended that even the notary before whom the agreement is stated to have been notarized himself is involved in many misdeeds and prayed to dismiss the suit.

4. By framing necessary issues and allowing the parties to lead evidence, the trial court dismissed the suit in entirety, *inter alia*, holding that the agreement was not proved to be executed by the respondent no.1 and that the appellant was not ready and willing to perform his part of the agreement.

5. The appellant's appeal before the District Court has been

dismissed by the judgment and order under challenge in this second appeal. Even that court concurred with all the findings of the trial court.

6. The learned advocate Mr. Patni for the appellant would vehemently submit that substantial questions of law arise in this second appeal in view of the peculiar facts and circumstances. The courts below have not appreciated the evidence in the proper perspective which has resulted in miscarriage of justice. Though there was a direct proof regarding execution of the agreement by the respondent no.1 in the form of testimonies of the appellant (PW-1) and Kailas Wagh (PW-2) who was an attesting witness, the lower courts committed gross error in referring to and relying upon evidence of a private handwriting expert Mr. Nandkumar Parikh (DW-2) through whom the respondent no.1 got the signature on the agreement examined with his admitted signatures. The learned advocate would submit that the courts below even overlooked the fact that these witness had based his interference on the basis of comparison of the signature of the respondent no.1 with a photocopy of the agreement and the signature appearing thereon. In support of his submission he would place reliance on the decision in the matter of **Bheri Nageswara Rao Vs. Mavuri Veerabhadra Rao and Ors., AIR 2006 Andhra Pradesh 314**. He would further submit that even this witness was a private examiner of documents and was not appointed by the court. There was every possibility of he having formed opinion subjectively since he was appointed by

the respondent no.1. Still, the courts below have given undesirable importance to his testimony to arrive at a conclusion holding that the signature on the agreement is not that of the defendant no.1. Payment of part of the consideration itself was sufficient to prove existence of agreement of sale.

7. Mr. Patni would further submit that the courts below have also given unnecessary importance to the fact that the suit property is with the respondent no.1 on a long lease from the respondent no.2 – CIDCO. Even if, its previous permission for such a transfer of the suit property was necessary, the specific performance could have been granted conditionally, subject to obtaining permission of the CIDCO. The transfer was not expressly prohibited by any law or regulations of the CIDCO. In this respect he would rely upon the decisions in the case of **Nathulal Vs. Phoolchand; AIR 1970 SC 546** and **Balu Baburao Zarole and Ors. Vs. Shaikh Akbar Shaikh Bhikan; AIR 2001 Bom 364**.

8. Lastly, Mr. Patni would submit that not referring to the decisions cited at the bar on behalf of the appellant by the trial court is also an additional circumstance giving rise to a substantial question of law. He, therefore, prays that the second appeal be admitted.

9. The learned advocate for respondent no.1 would support the judgments of both the courts below. He would submit that this is a second

appeal. This court cannot indulge in further scrutiny of evidence to reach a different conclusion, when there are concurrent findings by the courts below. Assuming for the sake of arguments that some of the conclusions of the courts below are erroneous would in itself not sufficient for this court to undertake a fresh scrutiny. The courts below have referred to various circumstances to come to a concrete conclusion about failure of the appellant to prove genuineness of the transaction and the agreement. Even if the testimony of the Mr.Nandkumar Parikh (DW-2) is ignored, the opinion of a state examiner of documents was also solicited through the trial court, but even he gave inconclusive report. The testimony of Kailas Wagh (PW-2) was also rightly discarded by the courts below, he having failed to inspire confidence. Even if his testimony is to be independently scrutinized, it will not inspire confidence from the manner in which he has responded in the cross examination.

10. Lastly, the learned advocate Mr. Patil would submit that though the agreement is alleged to have been executed in April 2008 and according to its contents, the permission from the CIDCO was to be obtained and the sale deed was to be executed in May 2019, and that the specific performance can be granted in a given set of facts subject to obtaining such a permission the courts below have noted that since the date of execution of the agreement till filing of the suit the appellant had failed to take any step to get necessary permission from CIDCO and to get the sale deed executed. Even no notice at

any point of time was served to the respondent no.1 till filing of the suit. These circumstances have also weighed with the courts below in concluding that the appellant had failed to prove the requirement of section 16(c) of the Specific Relief Act, 1963. The view taken by the courts below being a plausible one may not be substituted. No substantial question of law arises and the appeal be dismissed.

11. I have carefully considered the rival submissions and perused the papers.

12. There cannot be dispute about the legal position that the specific performance cannot be refused, even if some permission of a competent authority is necessary for transfer of a property and the specific performance can be granted subject to such a condition as has been laid down in the matters of **Nathulal and Balu Baburao Zarole** (supra). It is pertinent to note that the courts below have not refused to grant specific performance for this reason and therefore no further discussion in this regard is necessary.

13. The courts below have concurrently held about the agreement having not been duly proved. Obviously, the burden was on the appellant to prove genuineness of this agreement. Even if one ignores the testimony of a private examiner of documents Mr. Nandkumar Parikh (DW-2), admittedly, the disputed signature on the agreement was also got compared with his admitted

signatures from the said examiner of document, CID, Maharashtra State (Exh.41), which report was inconclusive. Meaning thereby that even he was unable to confirm that the agreement bore respondent no.1's signature.

14. True it is that Kailas Wagh (PW-2) is an attesting witness and has stated about the document having been duly executed by the respondent. But both the courts below have refused to rely upon his testimony. True it is that both the courts below have not given concrete reasons for discarding his testimony. However as can be noticed, they have assessed and weighed his evidence by taking into consideration all the attending circumstance, to reach a concurrent finding of fact holding the agreement as having not been duly proved.

15. It is important to note that in the written statement itself the respondent no.1 had specifically questioned genuineness of the documents, *inter alia*, pointing out that the agreement is a notarized document, even though it purports to have been executed before a notary.

16. It is pointed out by the trial court that it would have been the best evidence for the appellant to have called the concerned notary along with the register maintained by him, when a serious doubt about its genuineness was an issue that had cropped up. In doing so, the trial court also noted that the stamp paper for this agreement was purchased in the name of Kailas Wagh

(PW-2). Though, not in so many words a passing reference to this circumstance was made, in all probability to discard his testimony. It also noticed that if really the agreement was executed and notarized on 29 April 2008, the appellant would not have waited for almost three years to lapse after execution of the agreement till filing of the suit on 18 December 2010, that too, without ever making any attempt to call upon the respondent no.1 to execute the sale deed or persuading him to obtain necessary permission from the CIDCO. Not even a notice was ever issued by him to the respondent no.1 to persuade him to do so before filing the suit.

17. Taking stock of all these circumstances and evidence courts below have reached a plausible conclusion about the appellant having failed to prove the agreement, though the judgments and the reasoning have not been happily articulated. The sum and substance of the reasoning given by them justifies the conclusion that the agreement was not proved and that the appellant had failed to prove that he was ever ready and willing to perform his part of the agreement. It is a plausible view, based on reasonable appreciation of the facts, circumstances and evidence on record. Though the trial court had not discussed each and every citation, albeit, the list of citations placed on the record on behalf of the appellant was reproduced, the lower appellate court has even referred to those and has demonstrated as to how those are not applicable to the facts and circumstances of the case.

18. There is one more circumstance, which is my considered view would be of some significance. Apart from the lack of sufficient evidence to prove the agreement, if actually earnest money mentioned in the agreement and the one pleaded in the plaint was paid, surprisingly, not only the plaint is silent about any prayer in the alternative for refund of the earnest money. No such request was made before the lower appellate court seeking amendment of the plaint and addition of the prayer taking aid of proviso to section 22 of the Specific Relief Act, 1963. Even before me, no such submission was advanced by the learned advocate for the appellant. Though this may not be a decisive factor, it is indicative of and at least gives a hint that perhaps the conclusion of the courts below holding that the transaction is not genuine, seems to be probable, else at least he would have insisted for refund of the earnest money.

19. Be that as it may, having found that the concurrent findings of the courts below are based on reasonable appreciation of evidence and they have taken a plausible view, the findings being concurrent, in my opinion it is not a fit case where any interference can be caused in the second appeal. No substantial question of law arises for determination by this court.

20. Pending civil application is disposed of.

(MANGESH S. PATIL, J.)