

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.794 OF 2017
WITH
CIVIL APPLICATION NO. 12191 OF 2022
IN
WRIT PETITION NO. 794 OF 2017

Rajendra Ramdas Chaudhari & Anr. ...Petitioners

Versus

Smt. Zamabai Rajaram Patil & Others ...Respondents

Mr. Girish Wani, Advocate for the Petitioners.
Mr. Kuldeep Patil h/f. Mr. S.S. Choudhari, Advocate for
Respondent No. 6.

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[CORAM : NITIN B. SURYAWANSHI, J.]

RESERVED ON : 4th OCTOBER, 2022
PRONOUNCED ON: 9th NOVEMBER, 2022

ORDER :

1. This petition filed under Article 227 of Constitution of India, takes exception to the order passed by Civil Judge, Senior Division, Jalgaon, below Exhibit-62 in Special Civil Suit No. 141 of 2012.

2. The petitioners/plaintiffs filed suit for specific performance, declaration and permanent injunction in respect of suit property, contending that the defendants No. 1 to 5 and deceased Sanjay Rajaram Patil agreed to sale the suit land to the

plaintiffs, for that agreement to sale was executed by the defendants on 13.05.2003. Defendant No 6 is the person to whom defendants No. 1 to 5 have subsequently sold the suit property.

3. Defendants No. 1 to 4 resisted the suit by filing a written statement, specifically denying that they have executed alleged agreement to sale dated 13.05.2003. They claimed that said agreement for sale is forged and fabricated document and they have not put their signatures and thumb impression in front of witnesses on 13.05.2003. They also denied the document dated 16.09.2005, purported to be a Bharna Pavati. They have categorically stated that there was no agreement for sale at all. They also denied presence of witnesses whose names and signatures appear on the alleged agreement dated 13.05.2003. There is specific denial of earnest money received by them pursuant to the agreement.

They have further claimed that they were in need of Rs. 25,000/- for taking defendant No. 1 to Lilavati Hospital for routine checkup. Plaintiff No. 1 being councilor of ward, defendant No. 3 approached him for help. Plaintiff No. 1 agreed to help defendant No. 3 and advanced Rs. 25,000/- by way of

hand loan. He further asked a blank stamp paper to be signed by defendants by way of security. Accordingly, defendants No. 1, 3 and 5 put their thumb impression and signatures on some blank papers along with deceased Sanjay. However, defendants No. 2 and 4 were not present at that time. They claimed that agreement dated 13.05.2003 is forged and fabricated and was prepared by forging signatures of defendants No. 2 and 4 and also by using blank papers having thumb impression.

4. On the basis of rival pleadings, the Trial Court framed issues at Exhibit-55. The plaintiffs thereafter filed application Exhibit-62 under Order XIV Rule 5 of Code of Civil Procedure, for framing additional issues by proposing following issues:

- (i) Do defendants prove that document dated 13-5-2003 is forged and fabricated document and the defendant have never put their signatures and/or thumb impression on the said document?*
- (ii) Do the defendants further prove that the signatures appears on the agreement of sale dated 13-5-2003 as "Bhanudas Rajaram Patil" and "Ganesh Rajaram Patil" are forged signatures?*
- (iii) Do the defendants further prove that they were in need of monetary help to the extent of Rs. 25,000 and, thus, they have executed a document by way of securing only and signed on blank stamp paper along*

with defendants no. 1, 3, and 5?

- iv) Do the defendants further prove that they have never received any amount as earnest money as alleged by the plaintiffs in the plaint?*
- v) Does defendant no. 6 prove that he is bona fide purchaser for value without notice?*
- vi) What decree and order?*

5. The defendants opposed the said application by filing a detail say. They claimed that the proposed issues cast negative burden on the defendants and therefore they cannot be framed. A burden to prove agreement to sale is on the plaintiffs and negative burden cannot be casted on defendants. They gave no objection to frame issue No. 5.

6. The Trial Court rejected the application holding that issues framed at Exhibit-55 are sufficient to decide controversy between the parties. Hence, the present petition.

7. Heard the learned advocate for the petitioners and learned advocate for respondent No. 6.

8. The learned advocate for the petitioners by relying on **Makhan Lal Bangal Vs. Manas Bhunia & Others** [AIR 2001 SC

490], and *Thiruvengada Pillai Vs. Navaneethammal & Others* [AIR 2008 SC 1541], submits that there is positive assertion on the part of defendants that alleged agreement dated 13.05.2005 is forged, fabricated and they have never put their signatures on the same. Therefore, proposed issues are required to be framed, so that they should prove their case. He further submits that while passing the impugned order the contentions of the petitioners are not considered in proper perspective. The impugned order, therefore is liable to be quashed and set aside and application Exhibit-62 deserves to be allowed.

9. The learned advocate for the respondents/defendants on the other hand supports the impugned order. He submits that negative burden cannot be casted on the defendants.

10. Heard the learned advocate for the petitioners and learned advocate for respondent No. 6 at length. Perused the grounds in the writ petition, annexures thereto and the impugned order.

11. In terms of Section 102 of Indian Evidence Act, 1872, burden to prove is on the person who would fail if no evidence is led. Thus, if no evidence is led the plaintiffs case will

fail. Therefore, the plaintiffs will have to discharge initial burden to prove that defendants have executed agreement dated 13.05.2003. After the plaintiffs discharge initial burden, onus will shift on the defendants to prove their case as per the averments made in the written statement that the agreement is forged, false and not executed by them or defendants No. 1, 3, and 5 have signed on blank paper and same was used to forge and fabricate the agreement dated 13.05.2003.

12. It is a settled legal position that the evidence is led to prove the pleadings of the parties. Therefore, there is no substance in the contention of the petitioners that in absence of specific issue, defendants will not be under obligation to lead evidence to prove their case as stated in the written statement.

13. In Kashinath Vs. Jaganath, (2003) 8 SCC 740, it is held that; *'where the evidence is not in line with the pleadings and is at variance with it, the said evidence cannot be looked into or relied upon.'*

14. In Syed and Co. v. State of J & K 1955 Supp (4) SCC 422, it is held; *'without specific pleadings in that regard, evidence could not be led in since it is a settled principle of law*

that no amount of evidence can be looked unless there is a pleading.'

15. In **Ram Sarup Gupta v. Bishun Narain Inter College**, (1987) 2 SCC 555, it is held as under:-

"6. ...in the absence of pleading, evidence, if any, produced by the parties cannot be considered. ... no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it."

16. In Thiruvengada Pillai (supra), the Apex Court held that *'in a suit for specific performance of agreement of sale, the plaintiffs alleged that first defendant executed agreement of sale in their favour. It was denied by the first defendant, therefore, burden to prove that first defendant had executed agreement would be on plaintiffs and not on first defendant to prove the negative.'*

In view of aforesaid ratio, the plaintiffs will have to discharge their initial burden of proving agreement to sale dated 13.05.2003 and then the onus will shift on the defendants to prove that the said agreement is forged, fabricated and it was not executed by them.

17. I am of the view that, issues framed by the Trial Court at Exhibit-55 are properly framed and there is no need to frame additional/proposed issues.

Taking into consideration the fact that the defendants have given no objection to frame Issue No. 5, same is required to be framed in the facts of the present case. The Trial Court has not considered framing of Issue No. 5 without assigning any reason.

18. In the result, writ petition is partly allowed.

19. The order passed by the learned Civil Judge, Senior Division, Jalgaon, below Exhibit-62 in Special Civil Suit No. 141 of 2012, is modified by directing the Trial Court to frame proposed Issue No. 5.

20. In view of disposal of writ petition, civil application stands disposed of.

[NITIN B. SURYAWANSHI, J.]