

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

SECOND APPEAL NO. 136 OF 2022

APPELLANT:

Org.Deft

Shivganga w/o Netaji Pinjarkar,
aged about 56 years, Occ. Nil
R/o. Near Railway Quarter,
Mahaveer Nagar, Amravati.

...VERSUS...

RESPONDENTS:

(Org. Pltff)

Sanjay Pralhadrao Kelkar
aged about 53 years, Occ. Service,
R/o. C/o. Shri Chourgade, Near Public
Health Center, Dharni, Tah. Dharni,
Dist. Amravati.

Shri M.P Kariya, Advocate for appellant
Shri A.M. Sudame, Advocate for respondent

CORAM : AVINASH G. GHAROTE, J.
DATE : 28/09/2022.

1. Heard Mr. Kariya, learned counsel for the appellant and Mr. Sudame, learned counsel for the respondent.
2. The appeal challenges the judgment and decree of the trial Court dated 9.10.2012, whereby the suit for specific performance filed by the plaintiff/respondent, has been decreed for specific performance. The learned

appellate Court by the judgment dated 13.1.2021 has dismissed the appeal.

3. Mr. Kariya, learned counsel for the appellant/defendant raises three grounds : (i) the agreement in question (Exh.27) was not proved in absence of the attesting witness being examined, (ii) the rejection of the application under Order 41 Rule 27 of the CPC by the appellate Court stood vitiated, and (iii) the obligation cast upon the learned appellant Court under Order 41 Rule 33 of the CPCP was violated. Mr. Akshay Sudame, learned counsel for the respondent submits that none of these grounds arise.

4. The agreement in question is dated 4.11.2009, for sale of immovable property. The total consideration was ₹.8,00,000/-, out of which an amount of ₹.2,00,000/- was acknowledged in the agreement itself to have been paid on the date of agreement itself. The balance consideration was agreed to be paid on 30.5.2010, on which date the sale deed was to be executed and registered. ₹.50,000 was paid on 3.2.2010 (Exh.28). On 3.2.2010 itself the respondent/plaintiff had applied to Vidarbha Premier Cooperative Housing Society for grant of a loan of ₹.3,00,000/-, which came to be sanctioned on 23.2.2010. On 2.4.2010 (Exh.29) a public notice was issued by the plaintiff seeking objections, in pursuance to which a notice was issued by the appellant/

defendant on 19.4.2010 (Exh.30), claiming that the transaction in question was a loan transaction and enclosing a cheque of ₹.2,00,000/- along with the same as refund of the loan. This was replied by the plaintiff on 24.4.2010 (Exh.31) making his stand clear that the transaction was of sale and not otherwise. On 13.4.2010, the plaintiff purchased stamps of ₹.48,000/- and so also obtained a demand draft in the name of the Sub Registrar for the purpose of execution and registration of the sale deed. On 29.5.2010, the plaintiff is claimed to have been present before the Sub Registrar with the balance consideration, however, the defendant did not turn up. On 1.6.2010, a notice was sent by the plaintiff to the defendant calling upon her to remain present in the office of the Sub Registrar, on 10.6.2010 for receipt of the balance consideration and execution and registration of the sale deed, to which the defendant did not respond, as a result of which the suit for specific performance came to be filed on 5.7.2010.

5. During the trial, the respondent/plaintiff examined himself as PW-1; Mr. Ashok Ramchandra Mundwaik, an employee of the Akola Janta Commercial Cooperative Bank Ltd as PW-2 below Exh.39 to prove the purchase of the franking of stamps of ₹.40,000/- required for sale deed by way of the application dated 13.4.2010 i.e. Exh.41; PW-3 Anant Bhaskarrao Bute from the Janta Sahakari Bank, Amravati, who had brought the original demand draft

bearing no.29171, dt 13.4.2010 of ₹.8,000/- drawn in favour of the Joint Sub Registrar, Amravati, which was the registration charges for the sale deed to be executed and registered, which was at Exh.45; PW-4 Bhauroo Champatrao Thakare, from the office of the Joint District Registrar, Collector Stamps, Amravati, to prove the application dated 17.6.2010 for cancellation of the franking stamps and refund Exh.49 and Chandrakant Krushnarao Mule the Branch Manager of Vidarbha Premier Co-operative Housing Society, Rajapeth Branch, Amravati, who deposed that on 3.2.2010 the plaintiff had applied for a loan (Exh.60) of ₹.3,00,000/-, which was sanctioned on 23.3.2010.

6. On behalf of the defendant/appellant, the defendant examined herself, alone.

7. In so far as the first ground is concerned, it is material to note that in the written statement itself filed by the appellant/defendant, the execution of the agreement dated 4.11.2009 stood admitted by the appellant/defendant (special pleadings). In para 6 of the written statement, the receipt of ₹.50,000/- on 3.2.2010 vide Exh.28 also stood admitted. A plea was raised that the document was executed not as an agreement of sale, but was a loan transaction for the purpose of security to the loan granted. Once the execution of the

agreement and its contents stood admitted, there was no reason whatsoever for the plaintiff to have examined the attesting witness on account of such admission. The burden on account of such admission to prove the plea raised in defence that this was a loan transaction clearly shifted upon the defendant, in proving which, the material on record would indicate that the defendant has miserably failed. I therefore do not find any substantial question of law arising on this ground.

8. In so far as the plea regarding the application under Order 41 Rule 27 of the CPC and its rejection is concerned, the judgment of the learned appellate Court categorically demonstrates the consideration of this plea in paras 20 to 22 in which it has been held that the provision of Order 41 Rule 27 of the CPC was not to be used for letting in the fresh evidence but for obtaining such evidence, which was necessary to enable it to pronounce judgment. Though Mr. Kariya, learned counsel for the appellant has relied upon **Sanjay Kumar Singh vrs. State of Jharkhand, (2022) 7 SCC 247**, the same does not assist him, as he is unable to point out that without the documents which were sought to be brought on record by the application under Order 41 Rule 27 of the CPC, the Court was not in a position to pronounce the judgment. Even otherwise, the documents which were sought to be brought on record by the

said application were a complaint filed by the plaintiff against the defendant claiming that the defendant had cheated him and the evidence laid therein. Those documents in my considered opinion even if considered, would not detract from the fact that the agreement already stood admitted and therefore, nothing turned upon such documents. Therefore, **Sanjay Kumar Singh** (supra) in my considered opinion is not attracted, and no substantial question of law is made out on this count.

9. The third plea is that the appellate Court did not appreciate the facts as was required under Order 41 Rule 31 of the CPC in refusing to re-examine the evidence regarding the execution of the agreement. A perusal of para 13 of the impugned judgment of the learned appellate Court would indicate that this statement has been made in a limited sense in respect of agreement dated 4.11.2009 (Exh.27) on account of the fact that the defendant had admitted the execution and contents of the agreement. The learned appellate Court in the same para has categorically stated the requirement to examine the stand taken by the defendant/appellant, as to whether the said agreement was executed as a security towards repayment of loan was correct or not, and thereafter has gone on to discuss this position. I therefore do not see any violation of the requirement of Order 41 Rule 31 of the CPC by the learned

appellate Court.

10. Another ground which is sought to be canvassed is that since the plaintiff in his cross examination had expressed certain unawareness regarding as to who had drafted the agreement, that would be suspicious circumstances in the execution of the agreement (Exh.27), for which reliance has been placed on **Mangat Singh vrs. Rakesh Kumar Gupta**, RSA No. 91/2010, decided by a learned Single Judge of the Punjab & Haryana High Court on 6.5.2014, which holds that if the agreement of sale is clouded with suspicious circumstances, the said document cannot be a ground for grant of discretionary relief of specific performance. In **Mangat Singh** (supra) the signature on the document itself was denied by the defendant no.1 and the plaintiff had failed in its burden to prove the signature, in light of which the above observations were made. However in the instant matter the defendant/appellant in the written statement itself as well in an affidavit in lieu of oral evidence at Exh. 73, had admitted the execution of agreement dated 4.11.2009 and a plea was raised that the same was by way of a security for the loan advanced to her husband, in light of which admission, there do not appear to be any `suspicious circumstance in the execution of the agreement by the defendant.

11. I do not find any substantial question of law being involved. The appeal is therefore dismissed. No costs.

(AVINASH G. GHAROTE, J.)

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