

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.349 OF 1995

Sampat s/o. Ganpatrao Sable,
Age 50 years, Occu. Agril.,
R/o. Tidi-Pimpalgaon, Taluka Pathri,
District Parbhani

.. Appellant
(Original Plaintiff)

Versus

1. Kantabai w/o. Madanlal Shinde,
Age 40 years, Occu. Household,
R/o. Manoli, at present residing
at Jaithpur Wadi, Tq. Pathri,
District Parbhani

2. Madan s/o. Marotrao Shinde,
Age 50 years, Occu. Agril.,
R/o. Manoli, Taluka Pathri,
District Parbhani

.. Respondents
(Original Defendants)

Mr. V. D. Salunke, Advocate for Appellant;
Mr. P. F. Patni, Advocate for Respondents

CORAM : S. G. MEHARE, J.

DATE : 01-11-2023

ORAL JUDGMENT :-

1. Heard the learned counsel for the appellant and the learned counsel for the respondents.

2. The appellant is the plaintiff. He had filed a suit for specific performance of the contract against the respondents, who were husband and wife. Respondent No.1 was the owner of the land in dispute.

3. It was a case of the plaintiff that on 03.06.1982, defendant No.1 had executed an agreement to sell, and part consideration by way of earnest money was paid. However, she failed to execute the sale deed. Hence, the plaintiff had filed a suit for specific performance of the contract and claimed that on the date of the agreement, the suit land was handed over in his possession.

4. Respondents/defendants came with a case that she never executed any agreement to sell. There was no agreement and no concluded contract. The so-called earnest amount of Rs.8,000/- was never paid to her. The suit land described in the alleged agreement to sell is not there in the village Manoli mentioned in the agreement to sell document. Defendant No.1 had no landed property at village Manoli.

5. The plaintiff examined himself to prove the contract and the execution of the agreement to sell. He examined P.W.No.2 Bhujangrao and one witness, Laxman, on the point of possession. Defendants examined a scribe, Malakhant, who did not support the plaintiff.

6. The learned trial Court believed the plaintiff and decreed the suit. However, the learned first Appellate Court reversed the Judgment of the trial Court, holding that the agreement to sell was not proved. The issue of readiness and willingness was not framed. There was no agreement to sell, and the property shown in the

village Manoli was not the property of defendant No.1. Against the said Judgment, the appellant came before this Court.

7. This Court, by order dated 03.03.1997, formulated the following substantial questions of law :-

- “i) The learned appellate Court below failed to appreciate that the learned trial court is given cogent reasons and findings on all the issues involved in the matter and after appreciation of record and evidence in the matter, arrived at right conclusion by passing an appropriate decree which should have been maintained by the appellate Court.
- ii) The question of interpretation of document, i.e. agreement of sale (Exhibit-46), therefore, is a substantial question of law involved in the matter.
- iii) The learned Appellate Court failed to consider that respondent No.2, who is the husband of respondent No.1 himself, purchased the stamp for the execution of *Issar Pawti* and accordingly *Issar Pawti* was executed by the respondents, hence, it is binding on them.
- iv) The learned Appellate Court ought to have considered that the plaintiff has paid a huge amount of Rs.10,000/- which had been accepted by respondent No.1 as earnest money and put her thumb impression on *Issar Pawti* in the presence of witnesses.
- v) The learned Appellate Court ought to have held that the respondents subsequently changed their mind and

denied the claim of the plaintiff for the execution of the sale deed for which the plaintiff is entitled as per law.

- vi) The learned Appellate Court gave much stress on the point of which description in the *Issar Pawti*, on the contrary explanation is given by the plaintiff in his evidence, which is corroborated by the evidence of the witnesses.
- vii) The findings of the learned Appellate Court on the point of location of the property are totally wrong and cannot be accepted.

8. The above substantial questions were the grounds taken in the appeal memo. Hence, by consent of both learned counsels, those are reformulated as below:-

- (1) Whether the Judgment and order of the learned trial Court without framing the issue of readiness and willingness was bad in law?
- (2) Is the agreement to sell (Exhibit-46) read incorrectly and misinterpreted?
- (3) Whether purchasing the stamp for execution of the agreement to sell by husband/respondent No.2 and its contents binds defendant No.1?
- (4) Does defendant No.1 put her thumb impression on the agreement to sell, and that amount the execution of the agreement?
- (5) Whether defendant No.1 had deliberately changed her mind and denied the execution of the sale deed.

(6) Whether incorrect description, particularly the place of the suit property, disentitle the plaintiff from getting the relief of specific performance of the contract?

9. The learned counsel for the appellant would submit that the learned trial Court did not frame a specific issue of readiness and willingness; however, he has discussed all these points while discussing issue No.3. Alternatively, he would submit that if non-framing of the issue affects the right of the parties, the case be remitted to the trial Court for a fresh trial.

10. Per contra, the learned counsel for the respondents vehemently argued that readiness and willingness, as provided under Section 16(c) of the Specific Reliefs Act, is essential in a suit for the specific performance of the contract under the Specific Reliefs Act. It is a personal bar to the specific relief. The agreement is not executable unless the plaintiff pleads and proves the readiness and willingness to perform his part of the contract. There is nothing on record that after the execution of the agreement to sell, the plaintiff ever made an attempt to pay the remaining balance consideration. Barely deposing the readiness and willingness is not sufficient. It must be pleaded and proved. In the absence of an issue framed on that material aspect, the defendants had no occasion to confront the plaintiff. Therefore, the learned first Appellate Court has correctly recorded the finding that

the non-framing of the issue is bad in law.

11. To bolster his argument, he relied on the case of ***Pemmada Prabhakar and others Versus Youngmen's Vyasya Association and others, (2015) 5 Supreme Court Cases 355.***

The facts of that case were altogether different from the case at hand. In the said case, there was an agreement to pay the instalments. The purchaser had failed to pay the instalment as agreed. Hence, the Court held that the purchaser/plaintiff was not ready and willing to perform his part of the contract; thus, he was not entitled to specific performance. The facts of the present case are that the plaintiff was the purchaser and ready to pay the remaining balance on the day of execution of the sale deed. Hence, the cited case is distinguishable from the facts.

12. Admittedly, the trial Court did not frame the issue of readiness and willingness. However, the learned trial Court had discussed on readiness and willingness while discussing issue No.3, framed for the entitlement of the plaintiff for relief of specific performance.

13. None of the parties ever objected that no issue was framed, but both parties proceeded ahead and led the evidence. The parties have put evidence on readiness and willingness. The defendants cross-examined the plaintiff. The cross-examination of the plaintiff indicates that he was confronted on his readiness and

willingness.

14. The Bombay High Court in the case of ***Sk Ibrahim s/o Sk Mohamood and others V Sk. Mehamood Sk Vazie, AIR 2003 Bombay 357***, has held When the parties are fully aware of their respective cases, lead all the necessary evidence not only in support of their case but in refutation of the claim of the other side, non-framing of the issues is not fatal, unless it results in mistrial which vitiates the proceedings.

15. As discussed above, both parties led the evidence on the issue of readiness and willingness to perform the contract and the objections were not raised during the trial. The Court is of the opinion that non-framing of the issue does not result in a mistrial and vitiate proceeding.

16. For the reasons mentioned above, point No.1 is answered that if the parties are aware of the facts, parties have led the evidence, and discussed in the Judgment, framing of the issues in such case is not fatal to the case.

17. The entire case revolves around the agreement to sell (Exhibit-46). The learned counsel for the appellant has vehemently argued that the terms of the agreement need to be interpreted. Admittedly, the location of the land in question was incorrectly mentioned at Manoli instead of village Tidi Pimpalgaon. That does

not mean respondent No. 1 never intended to sell the suit land. The plaintiff, in his evidence, has explained this mistake. The learned trial Court has correctly accepted his mistake. A bare mistake in writing the name of the village does not absolve the defendant from her liability, or she cannot deny that no agreement as such was executed.

18. Per contra, the learned counsel for the respondents would submit that bare explanation in the evidence, in the absence of pleadings, is inadmissible. He ought to have filed an application for rectification of the mistake. Unless it is pleaded, it would be difficult to find out whether it was a mutual or unilateral mistake or whether it is a mistake of fact in a peculiar defence that no agreement was executed at any time. The pleadings are essential to prove and disprove the facts.

19. The learned trial Court believed the evidence of the plaintiff explaining the mistake regarding the village; however, nothing has been suggested to defendant No.1 that she had no other land except the land she intended to transfer.

20. It is not disputed that one Mahalkmikant (D.W. 4) was the scribe of the agreement to sell. He unequivocally deposed that he reduced the agreement to writing as per the dictation of the plaintiff. The witnesses did not put their signatures in front of him, and the defendant was not with them in the Court at the time of

reducing the agreement to writing. This witness has destroyed the case of the plaintiff that there was an agreement to sell. The first appellate Court had correctly appreciated that evidence. Scribe, is the best witness. The evidence of the scribe was not shattered in cross-examination. It was a specific case of defendant No.1 that she never executed an agreement to sell. She also entered into the witness box. She denied the case of the plaintiff in her cross-examination. She denied the suggestion that after reducing an agreement to sell in writing, it was read over to her and then put her thumb impression. However, she was not confronted about the thumb impression bearing on the said agreement to sell. Evaluating the said evidence, the Court is of the view that the agreement to sell was not proved, though the opportunity was with the plaintiff to confront defendant No.1 about putting her thumb impression. Defendant No.1 had proved in her case that she never executed an agreement to sell.

21. As far as the terms of the agreement to sell (Exhibit-46) are concerned, there was no ambiguity. Hence, the Court is of the view that there is no question to interpret the agreement to sell (Exhibit-46).

22. Bare purchasing the stamp paper by the husband does not bind defendant No.1/wife. Since the plaintiff failed to prove the agreement to sell, there is no question of receiving the

consideration. Nothing on record proves that the defendants ever changed their minds and refused to perform their part of the contract. In the absence of pleadings, the explanation as regards the mistake in writing the name of the village where the alleged suit premises was located is also not admissible. The first Appellate Court has correctly recorded findings on the facts about the identification of the property, and accordingly, all the substantial questions of law framed above have been answered in the negative.

23. The prayer of the appellant that the matter may be remitted back cannot be accepted for the reason that all the necessary issues were framed, and the issue of readiness and willingness was not framed, but the parties proceeded ahead and led the evidence. Hence, it was fatal to either side. There is nothing on record to prove that the Court may exercise power under Order XLI, Rule 33 of the Code of Civil Procedure.

24. The above discussion leads this Court to arrive at the conclusion that no substantial questions of law are involved in this appeal, and the appeal deserves to be dismissed. Hence, the following order:-

ORDER

- i) The second appeal stands dismissed.
- ii) No order as to costs.

- iii) R & P be returned to the learned trial Court.
- (iv) Rule stands discharged.

(S. G. MEHARE)
JUDGE

rrd