

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

SECOND APPEAL NO.346 OF 1995

Apparao S/o Narayan Jarange,
Age 51 years, Occu. Agriculture,
R/o Borwanti, Taluka Kallamb,
District Osmanabad.

... Appellant.

Versus

Reyaz Ahmed S/o Chand Saheb Pathan,
Age 47 years, Occu. Agriculture,
R/o Borwanti, Taluka Kallamb,
District Osmanabad.

... Respondent.

...

Advocate for Appellant : Ms. Rekha S. Choudhary h/f Mr. S. S.
Choudhary.

Advocate for Respondent : Mr. Prasad B. Kadam h/f Mr. K. B.
Bhise.

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CORAM : S. G. MEHARE, J.

DATE : 31.10.2023

ORAL JUDGMENT :-

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

2. The appellant/plaintiff had filed a suit for specific performance of contract. The defendant/respondent claimed that it was a money lending transaction and the agreement was never intended to be acted upon.

3. On the basis of the pleadings and evidence produced by the parties to the suit, the learned Trial Court dismissed the suit of the plaintiff holding that it was a money lending transaction and the suit of the plaintiff was barred by limitation. The First Appellate Court reversed the judgment of the Trial Court and held that it was an agreement to sell. However, the plaintiff is not entitled to specific performance of contract and the suit was well within limitation.

4. The following substantial questions of law were formulated, as per the order dated 11.09.1995.

- (i) The Courts below wrongly inferred that the transaction was not sale transaction and it was loan transaction, contrary to the documentary evidence produced by the plaintiff, in accordance with the provisions contained in Sections 91 and 92 of the Indian Evidence Act.
- (ii) The Courts below committed error in deciding that the suit filed for specific performance was time barred as the parties did not fix time for performance of contract.

5. The learned counsel for the appellant has vehemently argued that the Courts below erred in believing the oral evidence against the documentary evidence, though barred

under Sections 91 and 92 of the Evidence Act. The defendant ever not denied the execution of the document purporting it to be an agreement to sell. The terms of the agreement were clear and unambiguous. However, he led the evidence that it was a loan transaction. Except the earnest amount of Rs.5,000/-, he did not receive the consideration. However, the plaintiff had produced the receipts acknowledging the money from the plaintiff on various dates, thereby, the defendant has received Rs.14,500/-. In addition thereto, he also led the evidence that another Rs.1500/- was also paid to him.

6. Learned counsel for the appellant submits that both Courts did not consider the acknowledgment of the part payment of the amount, by which, the entire consideration of Rs.32,000/- was paid to the plaintiff, but he had avoided to execute the sale deed. Hence, notice dated 28.01.1976 was issued and noticed that the defendant denied to perform his part of contract.

7. Section 91 of the Indian Evidence Act speaks of the evidence of terms of contracts, grants and other dispositions of property reduced to the form of document. Where such matter is required by the law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such

contract, grant or other disposition of the property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions contained therein. The section purports the proof of terms of the contracts, grants and other dispositions of the property that requires to be reduced to the form of document. If any document as such is reduced to writing, no other evidence except such document is admissible. Production of the document is mandatory. If the original is missing, secondary evidence of such document may be produced to prove the terms of the contract.

8. In the present case, the plaintiff has produced the written agreement to sell and he led the evidence. However, whether the evidence contrary to such document is admissible is the question. Section 92 of the Indian Evidence Act speaks of the exclusion of evidence of oral agreement. Where the terms of the contract, grant or other disposition of property that required by law to be reduced to the form of document, have been proved no oral agreement or statement is admissible. In simple words, where law requires that the term of contract are to be reduced to writing, no oral evidence shall be admitted, as between the parties to any such instrument or

their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from its terms. The section binds the parties to the terms reduced to writing. No evidence contradicting, varying, adding, or subtracting its terms is admissible. However, the evidence of fraud or illegality may invalidate any document. The existence of any separate oral agreement as to any matter on which the matter is to be silent, and which is not inconsistent with its terms may be proved. In considering whether or not proviso (2) to Section 92 apply, the Court shall have regard to the degree of formality of the document. In a nutshell, the Section restricts the contradictory evidence against the terms of the agreement reduced to writing.

9. The defendant had no case that it was a document obtained fraudulently. However, he has a case that it was a nominal document executed for security for loan. The law is crystal clear that the documentary evidence prevails over the oral evidence. However, there was no evidence as such to disbelieve that the agreement to sell was not executed and the terms of settlement were not agreed. Hence, both Courts erred in recording the findings that it was a loan transaction and not an agreement to sell.

10. The next limb of the argument of the learned counsel for the appellant is that in an agreement to sell, the date for performance of contract was not fixed. Therefore, second part of Article 54 of the Limitation Act would attract. She has referred to the agreement to sell and submitted that it was agreed that the plaintiff would pay the balance consideration amount of Rs.2,000/- within two years and thereafter the sale deed would be executed. Its really strange that a person paying the entire consideration waits for the execution of sale deed. She has tried her level best to convince the Court that there was no date fixed for execution of the sale deed. The terms of the agreement to sell were silent about the date of execution of the sale deed. She would argue that in such a case, the notice of denial to perform the part of contract is the date begins to run the limitation and that is covered in the second part of Article 54.

11. Per contra, learned counsel for the respondent would submit that the First Appellate Court has erroneously held that issuance of the notice was the cause of action. He would submit that the terms of the agreement were very specific that the sale deed was to be executed within two years from the date of its execution on paying the balance consideration.

Therefore, the learned Trial Court has correctly applied the first part of Article 54 of the Limitation Act. However, the First Appellate Court incorrectly recorded the finding on the law point. Hence, he can raise oral objection though he did not file the counter appeal.

12. The terms of the agreement to sell are very specific that the plaintiff agreed to pay the balance consideration within two years and get the sale deed executed. The agreement to sell was executed on 14.06.1971. The plaintiff was to pay the balance consideration and get the sale deed executed on or before 14.06.1973. If the defendant failed to perform the part of contract, the limitation to file a suit for specific performance of contract begins to run from 14.06.1976. However, the plaintiff has filed the suit on 01.07.1976, which is apparently barred by limitation. After having gone through the terms of the agreement, it can unequivocally be interpreted that the date for the performance of contract was fixed on the document itself. Therefore, first part of Article 54 was applied. Hence, the First Appellate Court has illegally held that there was no date fixed for performance of the contract. He has misread the agreement to sell Exh.32. The learned Trial Court

was correct in applying first part of Article 54 of the Limitation Act.

13. Appreciating the facts of the case and believing the defence that it was a loan transaction, the First Appellate Court refused the relief of specific performance of the contract and ordered to refund the earnest amount, as the defendant, by way of reply had admitted to refund. The reasons recorded by the First Appellate Court are apparently illegal and unsustainable in law. Since the suit was barred by limitation, there was no question to pass a decree of refund of the earnest amount.

14. In view of the above discussion, the first substantial question of law is answered that both Courts erred in believing the oral evidence as against the documentary evidence. The second question of law is answered that the suit was barred by limitation.

15. Since the finding of the First Appellate Court as regards the limitation has been declared illegal, consequently, the judgment and decree of the First Appellate Court needs to be set aside. Hence, the following order :

ORDER

- (i) The second appeal stands dismissed.
- (ii) The judgments and orders of refund of the earnest amount of both Courts stand set aside.
- (iii) Rule stands discharged.
- (iv) No order as to costs.
- (v) R and P be returned to the learned Trial Court.

(S. G. MEHARE, J.)

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