

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 327 OF 2022

Yeshudas Vishwanath Patole

Appellant

Versus

Kalpana Damodar Salve

Respondent

Mr. A. P. Ghule Patil, Advocate for the appellant.

Mr. N. S. Jaju, Advocate for the respondent.

CORAM : R. M. JOSHI, J.

DATE : 13th MARCH, 2023.

PER COURT :

1. This appeal takes exception to the judgment and decree dated 15th March, 2018 passed by the 7th Civil Judge Senior Division, Ahmednagar in Special Civil Suit No. 112/2012 and the judgment and decree dated 15th November, 2021 passed by the Adhoc District Judge -1, Ahmednagar in Regular Civil Appeal No. 181/2018.

2. Appellant is original defendant in Special Civil Suit No. 112/2012 filed by the respondent (original plaintiff) for decree of specific performance on the basis of agreement to sale dated 24th May, 2012 (Exhibit 54). The plaintiff therein has specifically pleaded about execution of the said agreement by the defendant and part

payment of consideration being made to the defendant. He has raised further plea of his readiness and willingness to perform his part of the contract.

3. Defendant has not disputed execution of agreement of sale nor receipt of amount from plaintiff is in dispute. For all practical purposes, the only defence raised by the defendant is execution of the said document by way of security against the loan advanced to him by the plaintiff. Except this, no other specific defence is taken by defendant.

4. Both the parties adduced evidence and on the basis of material evidence on record, the impugned judgments came to be passed by the Courts below.

5. Learned counsel for appellant/original defendant submits that apart from the fact that the document was obtained by the plaintiff by way of security, it is his contention that an undue advantage has been taken by the plaintiff while getting the said document in question executed from him. It is submitted that since the defendant was indebted he had no option but to execute the

document for the purpose of advancement of loan. He placed reliance on the decision in the case of Kanshi Ram vs. Om Prakash Jawal and others, **1996 AIR (SC) 2150**. Relying upon the said judgment, it is sought to be contended that since the suit property is the only house property of the defendant, prejudice and hardship would cause to him if the specific performance is granted and instead alternate relief as sought by the plaintiff can be awarded by refund of money with interest.

6. Learned counsel for the respondent/original plaintiff opposed the said contention and submitted that after admitting execution of sale and other relevant facts, since the only defence for defendant was that the document in question was obtained by way of security, the entire burden rests upon him to prove the said fact. It is pointed out that though there were other signatories to the document, none of them were examined before the trial Court. With regard to the contention of hardship, it is submitted that no such issue was raised either before the trial Court or before the first appellate Court and therefore, at this stage, such issue cannot be entertained. In support of his contention, he placed reliance on the case of Sughar Singh vs. Hari Singh, **AIR 2021 SC 5581** and

Shakuntala w/o Yeshwant Bhujange & others vs. Chandrakant s/o Hiranman Bhujange & others, 2016(2) ALL MR 342.

7. Before dealing with the rival contentions, it will be appropriate to consider scope of Section 100 and 103 of the Code of Civil Procedure. As per Section 100, an appeal shall lie, if the High Court is satisfied that case involves substantial question of law. Section 103 empowers the Court to determine issues of fact, which include determination of issues necessary for disposal of appeal, not been determined by Appellate Court or both Courts below.

8. While considering the scope of these two provisions, the Apex Court in Ramathal vs. Marutathal, AIR 2018 SC 340 wherein the Apex Court has observed thus :-

“15. A clear reading of section 100 and 103 of the CPC envisages that a burden is placed upon the appellant to state in the memorandum of grounds of appeal the substantial question of law that is involved in the appeal, then the high court being satisfied that such a substantial question of law arises for its consideration has to formulate the questions of law and decide the appeal. Hence a prerequisite for entertaining a Second appeal is a substantial

question of law involved in the case which has to be adjudicated by the high court. It is the intention of the Legislature to limit the scope of second appeal only when a substantial question of law is involved and the amendment made to section 100 makes the legislative intent more clear that it never wanted the High Court to be a fact finding court. However it is not an absolute rule that high court cannot interfere in a second appeal on a question of fact, Section 103 of the CPC enables the High Court to consider the evidence when the same has been wrongly determined by the courts below on which a substantial question of law arises as referred to in Section 100. When appreciation of evidence suffers from material irregularities and when there is perversity in the findings of the court which are not based on any material, court is empowered to interfere on a question of fact as well. Unless and until there is absolute perversity, it would not be appropriate for the high Courts to interfere in a question of fact just because two views are possible, in such circumstances the High Courts should restrain itself from exercising the jurisdiction on a question of fact.

9. It is thus well settled that in second appeal under Section 100 of the Civil Procedure Code, the Court has no jurisdiction to

interfere with finding of fact on the ground that the finding is erroneous. Interference is possible only if there is any perversity or illegality in the judgments of the Courts below or total absence in considering the evidence available on record or misreading of evidence on the part of the Courts below.

10. There is no dispute about the fact that an agreement of sale of the suit property was entered into between the plaintiff and the defendant on 24th May, 2012. Plaintiff had paid part consideration of Rs. 2,00,000/- initially and Rs. 1,45,000/- thereafter out of total consideration of Rs. 5,50,000/-. Plaintiff has not only pleaded about readiness and willingness but has also adduced evidence to that effect. It is a matter of record that the remaining amount of consideration has been deposited before the trial Court during the pendency of the suit. Plaintiff, therefore, has successfully discharged the initial burden upon her to prove execution of the agreement of sale, part payment of consideration and readiness and willingness to perform her part of contract to enable her to seek decree of specific performance.

11. The burden, therefore, shifted on the defendant to prove his contention that the said document was obtained by way of security. There is absolutely no evidence on record to hold that the document (Exhibit 54) was brought into effect for the purpose of securing the loan advanced by plaintiff to the defendant. There is a clear finding recorded by the learned Appellate Court that the parties were stranger to each other and advancement of loan of such tune is not digestible. Pertinently, though witnesses to the agreement were closely related to defendant but none of them was examined. Both the trial Court as well as the appellate Court have rightly taken into consideration the evidence on record and have recorded finding that there is no evidence to substantiate the contention of defendant about the agreement of sale being executed by way of security towards repayment of loan. Having considered the pleadings and the entire evidence on record, no perversity is found in the findings recorded by both the Courts below.

12. The Hon'ble Apex Court in the matter of Sughar Singh (supra) has dealt with said issue by referring to Section 20 of the Specific Relief Act and has observed that not to grant the decree of specific performance despite the execution of agreement to sell is

proved; part sale consideration is proved and plaintiff is always ready and willing to perform his part of contract, would encourage dishonesty. In such situation, balance should tilt in favour of plaintiff rather than defendant. In absence of any plea of hardship being raised by the defendant before the trial Court, it is not open for the defendant to raise such issue at this stage. For the purpose of deciding said issue, this Court would be required to record finding of fact which is not permissible in absence of specific pleading and evidence. In this regard reference can be made to judgment of Apex Court in case of Prakash Chandra vs. Narayan, (2012) 5 SCC 403, wherein it is held that there needs to be a specific contention about hardship and issue also needs to be framed on that point. Thus, in view of this, contentions raised by appellant regarding hardship for first time cannot be considered at this stage.

13. In view of the foregoing discussion, this Court finds no substantial question of law being involved in this appeal and in the result, the appeal stands dismissed with costs.

14. Learned counsel for the appellant, on instructions, gives oral undertaking to vacate the suit premises within a period of three months from today. Undertaking is accepted.

15. Pending application, if any, does not survive and stands disposed of.

(R. M. JOSHI)
Judge

dyb