

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

SECOND APPEAL NO.117 OF 2022

DEELIP KESHAVRAO KADAM
VERSUS
PRALHAD NIRRTUTI CHILME

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Mr. M. L. Dharashive, Advocate for the Appellant.
Mr. R. R. Imale, Advocate for the Respondent.

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CORAM : R.M. JOSHI, J

DATE : MARCH 15, 2023

PER COURT :

1. By consent of both sides, Appeal is decided at the stage of admission finally.

2. This Second Appeal is preferred by original plaintiff being aggrieved by the judgement and decree passed by District Judge – 3, Latur in R.C.A. No. 65/2016 wherein the judgement and decree passed by the learned trial Court is reversed. Parties are refereed to by their nomenclature in the original proceedings.

3. Plaintiff has filed suit for specific performance of contract. According to him, defendant is the owner of Gut No. 75 admeasuring 1H 64R and out of which 54R land was agreed to be sold by the defendant to the plaintiff and agreement to sell dated 15.02.2012

came to be entered into. At that time, a sum of Rs. 1,50,000/- was paid and balance amount was to be paid at the time of execution of sale deed. Since the defendant failed to show his readiness to execute sale deed, the suit came to be filed after issuance of notice to the defendant.

4. Defendant filed his written statement and opposed the suit. There is no dispute about the fact that the document dated 15.02.2012 was executed by him. However, it is the defence of defendant that it was not agreement to sell but it was a nominal document essentially executed by way of security towards hand loan received by defendant from plaintiff. He further stated that the said amount of loan has already been returned by him to the plaintiff with interest.

5. There is no dispute made with regard to the fact that document titled agreement to sell dated 15.02.2012 was executed by the defendant. In view of denial of defendant of his intent to secure document in question, initial burden is on the plaintiff to show that this is an agreement to sell and that he was always ready and willing to perform his part of the

contract. He is also required to prove that defendant has denied the execution of the sale deed as agreed upon. The evidence led by the plaintiff sufficiently demonstrates execution of document and that he had initially paid part consideration to the defendant and was always ready and willing to pay balance consideration to the defendant. In fact, defendant does not take any serious exception to the said evidence led by the plaintiff.

6. It is the contention of the learned Counsel for the Plaintiff/Appellant that the learned trial Court after taking into consideration evidence on record and in particular receipt showing repayment of the loan amount by the defendant to the plaintiff, has dismissed the suit. It is his grievance that the first appellate Court has reversed the said finding by discarding evidence of repayment of loan amount by defendant to the plaintiff.

7. Once the plaintiff has successfully proved the execution, part payment of consideration coupled with his readiness and willingness to perform his part of the contract, burden shifts on the defendant to show

that the transaction in question was not for the purpose of sale of the suit property but it was by way of security. In this regard, there is no evidence on record led by the defendant except for the alleged receipt of the repayment of loan. It is pertinent to note that the said receipt is not proved before the trial Court nor was it even shown to the plaintiff. In fact there is nothing on record to indicate how the said receipt was proved. It seems that without formal proof thereof or in absence of admission of document by plaintiff it was exhibited.

8. In this regard, it is material to note that the learned trial Court only on comparison of the signature on the said document with admitted signature of the plaintiff has come to the conclusion that receipt sought to be relied upon by the defendant is issued by the plaintiff himself. As against this, learned first appellate Court relying upon the same receipt has observed that there is variance in the signature of plaintiff on the said document as compared to the admitted document.

9. No doubt, Section 73 of the Indian Evidence

Act permits the Court to compare signature and handwriting however, it is settled position of law that the Court should be slow in comparing the document in this manner for arriving at the conclusion about the execution of the document in question. The very fact that findings are recorded by two different Courts, after comparison of same signatures are contradictory with each other, shows that it is hazardous to rely upon comparison of the same to hold proof thereof. In fact, initial burden was on the defendant to prove the said receipt in accordance with law by leading independent evidence. Least, the document should have been referred to plaintiff. This Court finds no evidence led by defendant to prove the said receipt.

10. Once the defendant admits execution of document in question, it is necessary to consider the recitals thereof and attending circumstances. In absence contrary established the recitals and the terms of such documents are binding on executants of document. The defendant having failed to lead any evidence to show that the document was brought into effect by way of security for the repayment of loan,

learned trial Court ought not to have held so and proceeded to dismiss the suit.

11. As against this, learned first appellate Court has rightly taken into consideration the contention of the defendant in the written statement about the amount received by him and the interest agreed upon between the parties. By making mathematical calculations, it is observed that the receipt does not pertain to the transaction as claimed by the defendant. This finding recorded by the First Appellate Court is unimpeachable.

12. Learned Trial Court committed serious error of law in considering the receipt as document proved without its proof in accordance with law. Further, it was not open for the Court to hold such document proved on mere comparison of signatures. The said exercise done by trial Court was ultimately found erroneous with findings of First Appellate Court in respect of very same signature. In the result, the judgement passed by the Trial Court in dismissing the suit with finding that it was loan transaction and defendant has returned the loan amount with intent cannot sustain. This Court finds no perversity in the finding recorded by First

Appellate Court and ultimate reversal of judgement of Trial Court.

13. From the perusal of the entire material on record this Court does not find involvement of any substantial question of law in this Appeal and hence, Appeal deserves to be dismissed. The same is accordingly dismissed. No order as to costs.

(R.M. JOSHI, J.)