

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

SECOND APPEAL No. 474/2008

Pramod s/o Laxmanrao Rai,
aged about 44 years, Occ. Service,
r/o Om Society, Wadgaon Road,
Tq. Dist. Yavatmal.

.....APPELLANT

...V E R S U S...

1. Abdul Gaffar s/o Abdul Ghafoor,
aged about 57 years, Occ. Service,
r/o Shindenagar, Yavatmal, Tq. Dist.
Yavatmal.
2. Usman Khan s/o Mohammad Khan
Pathan, aged about 56 years,
r/o Shinde Nagar Bhosa Road,
Yavatmal, Tq. Dist. Yavatmal.
3. Shanoorbi Sk. Mohd. Haneef,
aged 46 years, r/o Shinde Nagar,
Bhosa Road, Yavatmal, Tq. Dist.
Yavatmal.

...RESPONDENTS

Mr. A. V. Bhide, Advocate for appellant.
None for respondents though served.

CORAM:- ANIL L. PANSARE, J.
ARGUMENTS WERE HEARD ON :- 19.07.2023
JUDGMENT PRONOUNCED ON : 21.07.2023

JUDGMENT

The appellant-plaintiff (hereinafter referred to as “Plaintiff”) has filed the present appeal against the respondents-defendants (hereinafter referred to as “Defendant”), being

aggrieved by the judgment and decree dated 24.11.2004 passed by the learned 4th Ad hoc Additional District Judge, Yavatmal in Regular Civil Appeal No.3/2001, confirming the judgment and decree dated 31.08.2000 passed by learned Civil Judge Senior Division, Yavatmal in Special Civil Suit No. 99/1992.

2. The plaintiff and defendant on 10.10.1991, have allegedly entered into an agreement to sell the suit plot viz. plot no. 84 admeasuring 2582 Sq. Ft. situated at village Bhosa. The agreed consideration amount was Rs.38,730/-. The plaintiff has allegedly paid Rs.25,000/- (Rs.15,000/- + Rs.10,000/-). The plaintiff filed a suit for specific performance of contract or in the alternative claimed for refund of earnest amount with interest on the ground that the defendant refused to perform his part of contract.

3. The defendant resisted the claim by filing written statement. The defendant denied that he has ever entered into agreement to sell or receive any amount from the plaintiff. He averred that he had already sold the suit plot on 14.05.1991 to two persons namely; Usmankhan Pathan s/o Mohammadkhan Pathan and Shahnoorbi Sk. Mohammad Hanif and therefore was

not even the owner of the suit plot on 10.10.1991. The defendant has further stated that he has never seen the plaintiff prior to filing of the suit. Thus, he alleged that agreement to sell dated 10.10.1991 is false and fabricated document and is not binding upon him.

4. Both the Courts below have rendered concurrent findings against the plaintiff and dismissed the suit. Thus, not only specific performance of contract is refused but also alternate prayer of refund of earnest money.

5. This Court has admitted the appeal on 05.01.2009 on the following substantial question of law.

“Whether by refusing to compare the admitted signatures on record with signature on disputed documents, the Courts below have refused to exercise the jurisdiction available to them in the matter?”

6. Heard Mr. Bhide, learned counsel for the appellant. None appears for the respondent, though served.

7. The first appellate court has noted that the scribe of the document was one Balkrushna Khadse. The attesting witnesses were Surendra Jaiswal and Girish Deshpande. Considering the

nature of dispute, the Court opined that at least one out of these three persons ought to have been examined by the plaintiff to prove that the defendant has executed the agreement to sell. The argument put forth by the counsel for the plaintiff that these witnesses were not available was not accepted by the first appellate court, for the reasons recorded in paragraph nos.12 and 13 of its judgment, which I need not comment upon for the reasons to follow.

8. The first appellate Court has noted that in the plaintiff's evidence, there is no whisper that defendant Abdul Gaffar has signed the agreement to sell in his presence. This omission is significant, considering the defence of not meeting plaintiff at any time earlier. The plaintiff, thus, failed to prove that the signature on the agreement to sell was of the defendant.

9. Mr. Bhide, learned counsel for the appellant has argued that the Courts below ought to have taken aid of Section 73 of the Indian Evidence Act, 1872 (For short the "Act"), to verify the signature of the defendant. He submits that the signature of the defendant on Vakalatnama filed by counsel for the defendant is identical to that of the signature on the agreement to sell.

10. The first appellate Court has dealt with this argument as well. It has relied upon the judgment in the case of **Ramkrishna Ganpat Futane and Others Vs. Mohammed Kasam and Others**¹; in which this Court held thus:

“...though it is permissible for a Court under Section 73 of the Evidence Act to compare signature, a comparison of handwriting as a mode of proof is very hazardous and inconclusive, specially when it is made by one not conversant with the subject and without such guidance as might be derived from evidence of Expert. A Judge should not, therefore, decide the question whether the disputed signature agrees with the other signatures of a certain person merely on his own inspection without the assistance of expert evidence. By such a comparison of signatures, the document cannot be said to have been proved as required by Section 67 of the Evidence Act.”

11. Accordingly, the first appellate court has held that the learned trial Court has committed no error in refusing to exercise the powers under Section 73 of the Act. The first appellate court then held that the plaintiff was at liberty to move an application before the trial Court for obtaining specimen signature of defendant and to refer the same to the handwriting expert along with disputed signature of the defendant but he failed to take any steps in this regard.

1 1973 Mh.L.J.511

12. It appears that the agreement to sell was not exhibited on the aforesaid counts. The first appellate Court therefore noted that unexhibited document cannot be read in evidence. The Courts took note of the fact that the plaintiff has nowhere pleaded that the defendant was owner of the suit plot on 10.10.1991. Additionally, the first appellate Court took note of the fact that in the written statement, the defendant has come up with a categorical case that he was not owner of the suit plot on 10.10.1991. He had placed on record copies of Index-II (Exh.-90 and 39) to show that he had already sold the suit plot to defendant nos. 2 and 3 on 05.06.1986 and 14.05.1991. Thus, it is held that the defendant had no right to execute the agreement to sell in respect of the suit plot. It is held that even otherwise the agreement if executed would be illegal and void and therefore is not enforceable by law.

13. In the result, though Mr. Bhide has argued that both the courts below ought to have taken aid of Section 73 of the Act to compare the signature of defendant, the Courts below have recorded a sound reasoning for not taking aid of said section. There is absolutely no reason why should the plaintiff not take steps in this regard as observed by the first appellate Court. In fact

the plaintiff has amended the plaint and sought declaration of cancellation of sale deed executed by defendant no.1 in favour of defendant nos.2 and 3 on the ground that the defendant has made misrepresentation and practiced a fraud upon the plaintiff. The plaintiff, however, failed to prove these allegations. Both the Courts below have rendered a concurrent finding on the point of failure of plaintiff to prove agreement to sell. The learned counsel for appellant failed to show that this finding is not in tune with the evidence led before the trial Court. The courts below have also given sound reasoning for refusing to compare the signature in terms of Section 73 of the Evidence Act. It cannot be therefore said that the Courts below have refused to exercise the jurisdiction available to them. The substantial question of law is accordingly answered in the negative. Consequently, the appeal fails and stands dismissed with no order as to costs.

(Anil L. Pansare, J.)

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