

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

SECOND APPEAL NO. 80 OF 2022

Shri Dhanraj S/o Mahadeoji Larokar,
Aged about 58 years, Occ. Pvt. Service,
R/o 267/B, Machhisath Itwari,
Tin Nal Chowk, Nagpur.

... **APPELLANT**
(Original Plaintiff)

.. **Versus** ..

1) **Laxmichand S/o Amrutlal Ahuja,**
Aged about 55 years, Occ. Business,
R/o. Kasarpura, Tin Nal Chowk,
Itwari, Nagpur & M.I.G. 63, H.B.
Colony, Jaripatka, Nagpur.

2) **Pratap S/o Dayaram Dewani,**
Aged about : 55 years, Occ: Business,
R/o Opp. Hotel Pritam C/o Chanchal
Beer Bar, Fawara Chowk, Sat-Lok
Plaza Building, C.A. Road, Nagpur

...**RESPONDENTS**
(Original Defendant)

Shri D.B. Walthare, Advocate along with Adv Pranjali
Hukare, Advocate for appellant.
Shri Shyam Dewani, Advocate for respondent Nos. 1 & 2

CORAM : **SMT. M.S. JAWALKAR, J.**
RESERVED ON : **15/03/2023**
PRONOUNCED ON : **18/04/2023**

JUDGMENT

Heard finally at the stage of admission with the
consent of both the parties.

2. Being aggrieved by the impugned judgment and Decree dated 27/01/2020 passed in Regular Civil Appeal No. 419/2015 (Dhanraj V/s Laxmikant and one other) dismissing the appeal by the learned District Judge – 8, Nagpur confirming the Judgment and Decree dated 21/08/2015 passed in Spl. Civil Suit No. 152/2009 passed by learned 3rd Joint Civil Judge, Senior Division, Nagpur.

3. The claim of plaintiff/appellant in short is as under:

The suit house property bearing Municipal Corporation House No. 267/B, Ward No.44, Mouza Nagpur, C.S. No. 638, admeasuring 300 sq.ft. situated at Budhwari, near Matan Market Tahsil and District- Nagpur within the limit of Nagpur Municipal Corporation and Nagpur Improvement Trust, Nagpur. The said house property is still in actual and physical possession of the appellant. As per the negotiations between the appellant and the respondent No.1, the sale consideration of the house property was fixed for worth Rs.10,00,000/-. The respondent No.1 has paid the advance amount of Rs.5000/- in cash on 26/01/2007 to the appellant i.e. on the date of

negotiations. The respondent No.1 has paid the amount of Rs.1,25,000/- by Cheque No. 407916 dated 09/02/2007 to the appellant out of sale consideration of Rs.10,00,000/-. No written agreement was executed between the appellant and the respondents as alleged, but the respondents have filed the alleged agreement dated 10/02/2007 or 12/02/2007 which is not properly stamped document. The respondent No.2 has paid the amount of Rs.70,000/- by cheque No. 153566 dated 21/04/2007 out of Rs.10,00,000/- of sale consideration to the appellant. On 06/10/2007, Advocate D.R. Ramteke has issued the legal notice on behalf of Shri Wamanrao Mahadeo Larokar to the respondent No.2 calling upon him to demolish the construction erected on plot admeasuring 290.25 sq.ft. i.e. on suit plot. On 23/10/2007, the respondent No.2 sent his reply notice denying the allegation made in legal notice dated 06/10/2007. There is no reference or whisper about the execution of alleged written agreement on any date much less on 10/02/2007 or 12/02/2007.

4. On 18/02/2008, the respondent No.1 has paid

the amount in cash of Rs.5000/- and the respondent No.2 has paid Rs.20,000/- to the appellant on 11/02/2008. The respondent No.2 has paid amount of Rs.1,65,000/- by cheque and amount of Rs.10,000/- by cheque to the appellant in the month of March, 2008 promising that the balance amount of Rs.2,00,000/- will be paid at the time of execution of sale deed. It was orally requested by the respondents that the appellant should execute the sale deed showing the sale consideration of Rs.6,00,000/- only instead of Rs.10,00,000/- and they promised that the balance amount of Rs.4,00,000/- will be paid out and out to the appellant within a period of one month from the date of registration and execution of sale deed. Thereafter the respondents took the appellant before the Sub Registrar -II Nagpur City and compelled the appellant to sign on the sale deed dated 18/03/2008 showing the sale consideration of Rs.6,00,000/- only, instead of Rs.10,00,000/-. Though the sale deed was executed on 18/03/2008, the post dated cheque No. 175165 dated 15/04/2008 was issued by the respondents, for Rs.2,00,000/- was dishonored. The appellant approached

the respondents to pay the amount of Rs.2,00,000/- to the appellant but both of them declined to pay the same amount. Therefore the appellant has issued legal notice on both the respondents informing them that he is not ready and willing to sale the suit house property to the respondents as the respondents have deliberately failed to pay the amount of Rs.2,00,000/- towards bounced cheque as well as remaining amount of Rs.4,00,000/- to the appellant. It was further informed that the amount of Rs.4,00,000/- paid by the respondents is forfeited as the respondents have not performed their part of contract fully as promised by them.

5. On receipt of legal notice from the appellant, the respondents have issued the false reply notice dated 26/05/2008 through their Counsel. In this reply notice, there is no reference or whisper about alleged agreement dated 10/02/2007 or 12/02/2007.

6. The respondents have also filed Spl. Civil Suit No. 1221/2008, against the appellant for restoration of

possession, Declaration and permanent injunction, which is now pending on the file of 13th Joint Civil Judge Senior Division, Nagpur. Therefore the appellant has filed the Spl. Civil Suit No. 152/2009, challenging the legality and validity of the alleged sale deed dated 18/03/2008 as the respondents have failed to perform their part of contract and the respondents have played mischief, fraud and cheating appellant by misrepresentation obtained the signature of the appellant on the alleged sale deed dated 18/03/2008 under undue influence.

7. The respondents have filed their written statement dated 30/09/2009. After considering the matter placed on record the learned 3rd Joint Civil Judge Senior Division, Nagpur has been pleased to dismiss the Spl.C.S. No. 152/2009 vide impugned judgment and decree dated 21/08/2015. Aggrieved thereby the appellant has filed Regular Civil Appeal No. 416/2018 before the Hon'ble District Judge – 8, Nagpur under Section 96 of Civil Procedure Code. The Hon'ble District Judge – 8, pleased to dismiss the said appeal RCA No. 419/2018 vide impugned

judgment and decree dated 27/01/2020. Therefore the appellant is constrained to file the present second appeal under Section 100 of the Civil Procedure Code against the impugned judgment and decree dated 27/01/2020 passed in RCA No. 419/2018.

8. It is the contention of the appellants that the impugned judgment is biased and perverse in holding in para No.23 of the impugned judgment that, “The plaintiff has produced document of agreement of sale (Exh.81) dated 12/02/2007, whereas sale deed in question dated 18/03/2008 is at Exh.33.”

9. It is further submitted that the alleged agreement of sale dated 12/02/2007 is not produced by the appellant. The said documents is false and forged document which is filed on record before the learned trial Court by the respondents only to support their pleadings in paragraph No.5 of written statement. However, the First Appellate Court committed a grave error in holding that the appellant has produced document of agreement of sale

dated 12/02/2007. The sale deed dated 18/03/2008 is already under challenge as the said document is prepared by the respondents by practicing mischief, cheating and fraud played by the respondents, and also by causing misrepresentation and undue influence on the appellant.

10. Learned Counsel for the appellants relied on following judgments :

- 1) Ganesh Shet Vs. Dr. C.S.G.K. Setty and others, reported in A.I.R. 1996 SC 2216*
- 2) Chandrakant Rambhau Chachane and others Vs. Nandlal Goverdhandas Chandak, reported in 2018(3) Mh.L.J. 165*
- 3) Nilkanth s/o Shridhar Thorbole and another Vs. Hanumant s/o Baburao Magar and others, reported in 2021 (5) Mh.L.J. 264*
- 4) Ghanshyam Deoram Gaikwad Vs. Samshon John Gaikwad and another, reported in 2020(2) Mh.L.J. 451*
- 5) Shri Lakhi Ram (dead) and others Vs. Shri Trikha Ram and others on 5th February, 1998*

11. The counsel for the respondent supported the judgment of both the courts below and stated that both the courts below have taken into consideration the facts, circumstances and evidence placed on record and passed an appropriate order, hence no need of interference and prayed for dismissal of appeal. It is submitted that there is concurrent finding of facts and no substantial question of law involved in the appeal.

12. Learned Counsel for the respondent relied on following judgments :

- 1) *M. Revanna Vs. Anjanamma (dead) by Legal representatives and others, reported in (2019) 4 SCC 332*
- 2) *Munilal Vs. Oriental Fire and General Insurance Co.Ltd. And another, reported in (1996) 1 SCC 90*
- 3) *The Liquidator, The Maratha Market People's Co-op Bank Ltd. Vs. Jeejaee Estate and Ors., reported in 2019(1) ALL MR 884*
- 4) *Vidhyadhar Vs. Manikrao and another, reported in (1999) 3 SCC 573*
- 5) *Dahiben Vs. Arvindbhai Kalyanji Bhanusali (dead)*

through L.Rs. and others, reported in (2020) 7 SCC 366.

6) Chander Kanta Bansal Vs. Rajinder Singh Anand, reported in (2008) 5 SCC 117

7) Rattan Singh and others Vs. Nirmal Gill and others, reported in 2020 SCC OnLine SC 936

13. I have heard both the parties at length. Perused the judgment and decree passed by both the Courts below. Considered citations relied on by the parties. The main contention of the appellant is that the amount of Rs.10,00,000/- was agreed between the parties, however, by fraud and misrepresentation the defendant got executed sale deed of the suit house in his favour. Though amount of Rs.10,00,000/- was agreed between the parties, the sale deed was executed for consideration of Rs.6,00,000/-, out of which only Rs.4,00,000/- was paid and remaining amount of Rs.2,00,000/-, which was paid by post dated cheque got dishonoured. As such, complete consideration is not paid by the defendants and therefore, sale deed executed is liable to be declared as null and void. The appellant also filed CA No. 230/2023, for grant of

permission to amend the plaint of Spl.C.S. No. 152/2009, however this application cannot be entertained as the proposed amendment in plaint is filed in 2023, whereas the judgment and decree passed in suit is of 21/08/2015. The suit is of the year 2009.

14. Learned Counsel for the respondent relied on **M.Revanna (*supra*), Munnial (*supra*), Maratha Market Peoples Cooperative Bank (*supra*)**, in support of his contention that burden is on person seeking amendment after commencement of trial to show “due diligence” on his part as contemplated under the proviso. Bonafides of prayer for amendment as also prejudice to other side should be taken into consideration. Neither can amendment be claimed as a matter of right nor has court absolute discretion to allow amendment in view of proviso. Belated application for amendment which if allowed would result in travesty of justice are liable to be rejected. It is clear from exclusive reading of Order 6, Rule 17 of Civil Procedure Code is that it confers jurisdiction to Court to allow either party to alter or amend his pleadings at any

stage of proceeding on such terms as may be just. Pre-trial amendments are to be allowed liberally than those which are sought to be made after commencement of trial.

15. The learned Counsel for the appellant relied on *Chandrakant (supra)*, wherein this Court held that all amendments which are necessary to bring out the real controversy between the parties to the suit are permissible. However, in the said judgment itself, it is made clear that the amendment proposed in that suit being prior to the introduction of proviso to Order 6, Rule 17 of the Civil Procedure Code, the amendment could not be allowed at any stage of the suit. In the present matter, suit itself is of 2009, and therefore amended provisions will apply. Moreover, the amendment sought cannot be said to be bonafide or it is necessary to grant permission for proper and effective adjudication of the case. By way of amendment, appellant want to add paragraph No.12-A pleading that agreement dated 12/02/2007 is not admissible as it is not registered. However, by this agreement no possession was handed over as such it

requires no registration. Moreover, this document is already exhibited as Exhibit 81. In view of registered sale deed, the said amendment is nothing but filed to protract litigation. The learned Counsel for appellant relied on ***Lakhi Ram (supra)***, however facts involved in the said matter are totally different and the citation is not at all relevant. It is in respect of the amendment in regard to the insertion of relevant averments under Section 16(c) of the Specific Relief Act held that does not change the cause of action. However, the judgment is prior to amendment in the Civil Procedure Code. As such, application is liable to be rejected.

16. The learned counsel relied on **Chanderkant Bansal (Supra)** in support of his contention that proviso 2 of Order 6, Rule 17, limits the power to allow amendment after the commencement of trial but grants discretion to the Court to allow amendment if it feels that the party could not have raised the matter before the commencement of trial in spite of due diligence. However as observed above, the said document is already exhibited as Exhibit 81

however, since then no steps taken to challenge the order exhibiting that document.

17. Learned Counsel for the appellant contended that both the Courts below erred in recording finding that the plaintiff failed to prove that sale deed got executed by the defendant by playing fraud. Learned Trial Court when recorded that suit is neither false nor vexatious is ought to have granted relief claimed by the plaintiff.

18. It was specifically observed by learned Trial Court that as per Sections 16, 17 and 18 of the Indian Contract Act, it is a liability of plaintiff to prove the ingredients as mentioned in above section based on fraud, misrepresentation and undue influences. The witness examined by the plaintiff has not said a word in respect of fraud, misrepresentation and undue influences. It was his case that the sale deed was drafted in English and therefore he did not understand the contents of the sale deed. However, in cross he admitted that he is educated upto 6th standard. He also admitted that his thumb impression and

photographs taken on the Sub- Registrar's Office at the time of registration of the sale deed below Exh.32 (Dasta Goshwara Part I).

19. The learned Trial Court as well as Appellate Court rightly appreciated that on perusal of evidence placed on record, no case is made out of fraud, misrepresentation or undue influences. It is admitted fact that post dated cheque of Rs.2,00,000/- was bounced. However, as per defendant in the sale deed itself in clause - 4, plaintiff undertake and agreed that he shall not pressing the cheque for encashment till confirmation by the defendants. The postdated cheques were issued by them upon his assurance that the property is being transferred with clear title, free from encumbrance, charges claimed, objection etc. Learned Counsel for appellant relied on various judgments, however, they are not relevant in the present set of facts.

20. The learned Counsel for appellant relied on *Nilkanth Shridhar (supra)*, wherein it is a pre-emptory

requirement of admitting secondary evidence of instruments is that the instrument in original ought not to have taint of inadmissibility under any law. However in the present matter, the sale deed is registered one and there is no ground of challenge to any secondary evidence laid by the defendant.

21. Learned Counsel also relied on ***Ghanshyam Gaikwad (supra)***, wherein this Court held that when after execution of agreement to sale, by a set of document on the same day possession is stated to have been handed over to the defendant, it was mandatory to register the said document. The agreement to sale, wherein, possession has been handed over of the immovable property, if is registered then only the protection under Section 53-A of the Transfer of Property Act would be available to the person who intends to invoke the same. In the present matter, as per terms of sale deed possession was handed over on the same day.

22. The learned Counsel also relied on ***Ganesh***

Sheth (supra), however, facts involved in the matter in the case before Hon'ble Apex Court were totally different. The question therein was that whether there was any concluded contract between the parties and decree for specific performance could not be passed as the purchaser clearly stated that at their meeting with one brother that he is yet to consult his two brothers about the sale consideration. In view of that fact, the Court held that there was no concluded contract between the parties and decree for specific performance could not be passed.

23. Learned Counsel for the respondent vehemently argued that part consideration if unpaid will not make the sale deed null and void. He relied on *Vidyadhar (supra)*, wherein Hon'ble Apex Court held that even if the finding recorded by the High Court that the plaintiff had paid only Rs.500/- to defendant No.2 as sale consideration and the remaining amount of Rs.4,500/-, which was shown to have been paid before the execution of the sale deed, in fact, not paid, the sale deed would not, for that reason, become invalid on account of provisions

contained in Section 54 of the Transfer of Property Act, which provides as under:

"Section 54 : "Sale defined"

54. "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

Sale how made.

Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument."

Contract for sale.

A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any interest in or charge on such property."

24. Learned Counsel for respondent also relied on ***Dahiben (supra)***, wherein the plaintiff have made out a case of alleged non-payment of a part of the sale consideration in the plaint, and prayed for the relief of cancellation of sale deed on this ground. The Hon'ble Apex Court held that even if, the averment of appellant/plaintiff are taken to be true in present case, that the entire sale consideration had not in fact been paid, it is held that the same could not be a ground for cancellation of the sale

deed. The appellant/plaintiff may have other remedies in law for recovery of balance consideration but could not be granted the relief of cancellation of registered sale deed.

25. It is vehemently argued by learned Counsel for respondent that there is concurrent finding of fact recorded by both the Courts below, they are neither perverse nor illegal. Jurisdiction of the High Court under second appeal cannot be exercised for re-appreciation of evidence. The learned Counsel relied on *Rattansingh (supra)*, in support of his contention that once it is established that instrument is registered one except Will, there is no need to examine attesting witness. Plaintiff admitted his signature, thumb impression and photograph. Hon'ble Apex Court held that the record reveals that disputed documents are registered. We are therefore guided by the settled legal principle that the document is presumed to be genuine if the same is registered. It is held that there is presumption that the registered document is validly executed. A registered document, therefore, prima facie could be valid in law. The onus of proof, thus, would be on a person who leads

evidence to rebut the presumption. In the instant case, respondent No.1 has not been able to rebut the same.

Section 68 of Evidence Act reads as under :

“68. PROOF OF EXECUTION OF DOCUMENT REQUIRED BY LAW TO BE ATTESTED.

If a document is required by law to be attested it shall not be sued as evidence until one attesting witness at least has been called for the purpose of proving its execution if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specially denied.”

As such, non examination of attesting witness is not at all fatal or make the instrument null and void, specifically when it is registered one.

26. As such, there is concurrent finding recorded by both the Courts below that plaintiff failed to establish case of fraud, misrepresentation, or undue influence needs no interference in the appeal. So far as unpaid consideration is concerned, in view of judgment of Hon’ble Apex Court that cannot be the ground for cancellation of

registered sale deed. However, appellant is having remedy available to file a suit for recovery of amount. As such, no substantial question of law is made out by the appellant and appeal is liable to be dismissed. Accordingly, appeal is dismissed. Amendment application bearing civil application No.230/2023 stands rejected. Other civil applications, if any, shall stand dispose off. Decree be drawn up accordingly.

[SMT. M.S. JAWALKAR, J.]

Jayashree..