

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

...

SECOND APPEAL NO. 426/2022

Ramesh s/o Anaji Gaoli

..Appellant

versus

Sandesh s/o Sureshchandra Sureka

..Respondent

.....
Mr. P.D.Meghe, Advocate for the appellant

Mrs. R.S.Sirpurkar, Advocate for the respondent
.....

CORAM: ANIL L. PANSARE, J.

DATED : 19th June, 2023.

PC:

Heard Mr P.D.Meghe, the learned counsel for the appellant and Mrs.(Dr)R.S.Sirpurkar, learned counsel for the respondent, at length.

2. The appellant is the original defendant; whereas the respondent is the original plaintiff. Henceforth, the parties will be referred to by their nomenclature before the trial Court, for the sake of convenience.

3. The plaintiff had filed a suit bearing Special Civil Suit No. 159/2010 for mandatory injunction, specific performance of contract and possession. The defendant-Ramesh Annaji Gaoali was suited through his next friend, namely, Ramesh Ranuji Chaudhary. The subject-matter of the suit is/was an immovable property situated at Mauze Malkaur, Tq. & District : Akola, bearing field Survey No. 69 admeasuring 5H 56R. The defendant is said to be the owner of 1H. 83R. and out of the said portion of land, he agreed to sell the land admeasuring 0.61R. The agreement to sell was executed on 10th November, 2009. The defendant agreed to sell

the suit property to the plaintiff at the rate of Rs. 17,31,000 per acre. The plaintiff had paid an amount of Rs. 6,25,000/- to the defendant. The balance amount was agreed to be paid at the time of execution of the sale-deed which was to be executed on or before 30th April, 2010. It was also agreed that the defendant shall measure the land through the Government agency and the copy of measurement will be supplied to the plaintiff. The balance amount was to be paid in terms of the actual measurement of the land.

4. The plaintiff filed the suit *inter alia*, on the ground that he was always ready and willing to perform his part of the contract, but the defendant failed to get the land measured through Government agency and, thus, failed to perform his part of the contract.

5. The defendant through next friend, contested the Suit. He denied the execution of the agreement to sell. He pleaded that the defendant was addicted to bad vices and was suffering from mental illness. The defendant was in need of money. The plaintiff assured him to extend financial help for Rs. 3,25,000/-, but with a condition that defendant will have to sign a document showing receipt of Rs.6,25,000/-. Accordingly, the plaintiff is said to have obtained signature of the defendant and his wife on the document. Thus, the defendant averred that though the agreement was executed, the real purpose of the agreement was not to sell the property but was to execute a document towards security of the amount. The defendant has also pleaded that the suit property is ancestral agricultural land and, therefore, he alone is not entitled to execute the agreement to sell. It is further pleaded that the land admeasuring 0.61R. would amount to

fragmentation and that therefore it cannot be sold in view of the provisions of the Maharashtra Prevention of Fragmentation and Consolidation of Holdings Act, 1947.

6. On the basis of rival pleadings, the trial Court had framed the following issues and answered the same in the following manner :-

Sr.	Issues	Findings
No		
1.	Whether the defendant is suffering from mental illness?	No
2.	Whether the defendant proves that, the agreement for sale dated 10.11.2009 was executed for the security of amount of Rs.3,25,000/- borrowed from the plaintiff?	No
3.	Does plaintiff prove that, he was and is ready and willing to perform his part of contract?	Yes
3A	Whether the suit property is ancestral joint property of plaintiff?	No
4.	Whether the plaintiff is entitled to claim relief asw prayed for?	Yes
5.	What order and decree?	Suit is decreed with costs.

The Suit was accordingly decreed in favour of the plaintiff vide judgment and order dated 17th February, 2022.

7. The defendant assailed the judgment and decree before the District Judge-4, Akola, vide Regular Civil Appeal No.39/2022. The lower appellate Court, after having heard the contentions of the parties, framed

the following points for determination and answered the same in the following manner :-

“(1) Whether on 10.11.2009 the defendant Ramesh was of unsound mind, so as to render the agreement (receipt Exh.60) void?
.. No.

(2) Has there been an agreement between the parties, for sale of the suit property to the plaintiff Sandesh?
.. Yes.

(3) Whether intention of the parties, behind execution of the agreement (Exh.60) was not to sale the suit property but something else?
..Yes.

(4) Whether the plaintiff Sandesh has been ready and willing to perform his part of the contract?
.. Yes.

(5) Whether the defendant Ramesh has breached the contract?
..Yes

(6) Whether the transaction is hit by Sec.8 of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947?
.. No.

(7) Whether the defendant Ramesh deserves an opportunity to adduce documentary evidence in the form of the extract of the register of the consolidation scheme 1982 , under O.41 R.27?
.. No.

(8) Whether the plaintiff Sandesh is entitled to a decree of specific performance of the contract?
.. Yes

(9) Whether the learned Civil Judge has erred in deciding the case?
.. No.”

The Appeal is accordingly dismissed vide judgment and decree dated 16th July 2022.

8. The defendant being aggrieved by the findings rendered by both the Courts below has challenged the same by means of this Appeal, which will have to be tested on the touchstone of what is provided under Section 100 of the Code of Civil Procedure, 1908.

9. Mr. Meghe, learned counsel for the defendant/ appellant would submit that the competent authority, like the Controller of Stamps and Director General of Registration, has issued a circular dated 12th July 2021 thereby prohibiting the transfer of agricultural lands admeasuring less than 2.5 acres and that therefore, the trial Court ought not to have decreed the suit.

10. In response, the learned counsel for the plaintiff/ respondent has invited my attention to the order dated 11th April, 2023 passed by this Court, which indicates that the respondent has referred to the judgment of the Division Bench (Aurangabad Bench), in the case of Govind Ramling Solpure and others vs. State of Maharashtra and others reported in 2022 Vol.5 Mh.L.J.661, wherein the Circular dated 12th July 2021 has been quashed and set aside. The learned counsel for the appellant sought time to ascertain the position. However, Mr. Meghe could not point out anything to the contrary.

11. Mr. Meghe, learned counsel for the appellant has then put forth arguments, which is twofold. Firstly, he contends that the plaintiff failed to prove his readiness and willingness to perform the contract by not proving that he had financial capacity to execute the sale-deed, as agreed. Secondly, the defendant was not competent to enter into contract because of unsoundness of his mind.

12. Both the contentions were, however, found to be without any merit.

13. The first contention is that the plaintiff failed to prove readiness and willingness to perform his part of the contract. The Courts below have relied upon the testimony of one Suresh Bhala, the Bank Officer (PW 3). He has deposed that company, namely, Sureka Udyog has mortgaged the land and machinery to obtain loan of Rs. 90 lakhs. The defendant's contentions were that the plaintiff was a partner in the said firm and that therefore the loan, if any, sanctioned in favour of partnership firm, cannot be taken aid of to prove that the said loan was for the purpose of purchasing a property by a partner in individual capacity and that therefore the evidence of the Bank witness is of no help to prove the financial capacity of the plaintiff. Accordingly, it is argued that the plaintiff was not ready and willing to perform his part of the contract.

14. The learned trial Court has elaborately dealt with the issue of financial capability. The plaintiff had relied upon the judgment in the case of Sughar Singh vs. Hari Singh (Dead) through LRs and others reported in 2022 (Vol.I) CCC 116 (SC). The trial Court, after going through the judgment, has taken a view and correctly so, that it is not necessary for the plaintiff in the cases of specific performance of contract to produce ready money to show his readiness and willingness to perform the contract but has to prove that he had means to generate the consideration amount.

15. Further, the trial Court has observed that the amount of Rs. 3,25,000/- paid to the defendant as earnest money was paid by the plaintiff *via* cheque from the firm's account, which obtained loan of Rs. 90 lakhs. Thus, the partner i.e. the plaintiff could have utilised said amount to pay balance consideration amount. The Court opined, considering the statement of the account of the Bank, that the plaintiff was in position to pay the balance consideration amount.

16. At this stage, Mrs.Sirpurkar, learned counsel for the respondent has invited my attention to the judgment of the Hon'ble Apex court in the case Gaddipati Divija and another vs. Pathuri Samrajyam & others, reported in 2023 SCC Online SC 442. In the said case one of the obligations of the vendor was to get the land measured and demarcated within three months. The Apex Court observed that the performance of the purchaser's obligation to pay the balance sale consideration within three months is dependent upon the fulfillment of the vendor's obligation to get the land measured and demarcated within three months. It is further held that unless the vendor gets the subject-matter land measured and demarcated within three months, it would be impossible for the purchaser to get the sale deed executed and, as such, the question of paying the balance sale consideration does not arise. Accordingly, she correctly argued that in the present case also, the defendant was under an obligation to get the land measured which the defendant failed and that therefore, the question of payment of balance consideration amount does not arise.

17. Nonetheless, the issue of financial capability of plaintiff has been answered in his favour by both the Courts below, after having

considered the evidence led by both the parties. The said finding is neither perverse nor has been rendered by ignoring the evidence or by incorrectly applying the principles of law. The concurrent finding on this point, therefore, does not require any further discussion.

18. The second contention raised by the defendant is that in the year 2009 the defendant was of unsound mind and thus could not have entered into contract. This issue has also been dealt with in detail by both the Courts below. The agreement to sell was executed on 10th November, 2009. The lower Appellate court has held that the defendant has executed power of attorney in favour of his next friend i.e. brother-in-law Ramesh Chaudhary in the year 2011. The written statement filed in the year 2011 has been signed on behalf of the defendant by his brother-in-law in the capacity of the power of attorney-holder. The *vakalatnama* (Exh.10) filed before the trial Court was signed by the defendant himself. Admittedly, the suit has been filed in the year 2010 and therefore, if the defendant has executed or signed above documents in the year 2011, the plea raised by his wife or the next friend that defendant was of unsound mind in the year 2009, can be said to be a futile exercise to get out of the clutches of the agreement entered into by the defendant and the law that requires him to fulfill his obligation.

19. The Appellate Court has also dealt with the medical evidence. The defendant has examined Dr. Pramod Thakre (DW 3), in support of the plea of unsoundness of mind. The Doctor's evidence though shows that the defendant was suffering from mental illness, it also reveals that the defendant was brought before the Doctor for the first time in the year 2013. The Courts below, therefore, found that there

is absolutely no evidence that defendant was mentally unfit in the year 2009. The wife of defendant has led the evidence in support of unsoundness of mind of the defendant. The Courts below, however, have noted that the agreement to sell has been also signed by the defendant's wife. The Courts below have considered other circumstances as well to render a finding that the relatives of the defendant failed to prove that defendant was of unsound mind in the year 2009. This concurrent finding also does not require any interference.

20. That apart, the Hon'ble Supreme Court, while considering the scope of Second Appeal u/s 100 of the Code of Civil Procedure 1908, has reiterated the settled position of law after taking into account the judgments of the Privy Council and the subsequent judgments, in the case of Gurdev Kaur and others vs. Kaki and Others, reported in (2007) Vol.1 SCC 546. The Hon'ble Supreme Court held in paragraph Nos. 69 to 74 as under :-

“69. The analysis of cases decided by the Privy Council and this Court prior to 1976 clearly indicated the scope of interference under Section 100 CPC by this Court. Even prior to amendment, the consistent position has been that the Courts should not interfere with the concurrent findings of facts.

70. Now, after the 1976 amendment, the scope of Section 100 has been drastically curtailed and narrowed down. The High Courts would have jurisdiction of interfering under Section 100 CPC only in a case where substantial question of law are involved and those questions have been clearly formulated in the memorandum of appeal. At the time of admission of the second appeal, it is the bounden duty and obligation of the High Court to formulate substantial questions of law and then only the High Court is permitted to proceed with the case to decide those questions of law. The language used in the amended section specifically incorporates the words as “substantial question of law” which is indicative of the

legislative intention. It must be clearly understood that the legislative intention was very clear that legislature never wanted second appeal to become “third trial on facts” or “one more dice in the gamble”. The effect of amendment mainly, according to the amended section, was :

(i) The High Court would be justified in admitting the second appeal only when a substantial question of law is involved;

(ii) The substantial question of law to precisely state such question;

(iii) A duty has been cast on the High Court to formulate substantial question of law before hearing the appeal;

(iv) Another part of the section is that the appeal shall be heard only on that question.

71. The fact that, in a series of cases, this Court was compelled to interfere was because the true legislative intent and scope of Section 100 CPC have neither been appreciated nor applied. A class of judges while administering law honestly believe that, if they are satisfied that, in any second appeal brought before them evidence has been grossly misappreciated either by the lower appellate court or by both the courts below, it is their duty to interfere, because they seem to feel that a decree following upon a gross misappreciation of evidence involves injustice and it is the duty of the High Court to redress such injustice. We would like to reiterate that the justice has to be administered in accordance with law.

72. When Section 100 CPC is critically examined then, according to the legislative mandate, the interference by the High Court is permissible only in cases involving substantial questions of law.

73. The Judicial Committee of the Privy Council as early as in 1890 stated that there is no jurisdiction to entertain

a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be, and they added a note of warning that no court in India has power to add to, or enlarge, the grounds specified in Section 100.

74. The High Court seriously erred in interfering with the findings of facts arrived at by the trial Court and affirmed by the first appellate Court.”

21. Thus, the Apex Court has held that there is no jurisdiction to entertain a Second Appeal on the ground of erroneous finding of fact. In the present case, the Courts below have not even rendered an erroneous finding of fact, but have rendered a concurrent finding which is in tune with the evidence led before the Court and that therefore, no interference is required at the hands of this Court, for there arises no question of law.

22. Thus, the appellant failed to show that any question of law, much less substantial question of law arises in the instant Appeal. There is absolutely no substance in the contentions raised by the appellant/defendant. The Appeal therefore is liable to be dismissed and is accordingly dismissed, at the stage of motion hearing itself. No costs.

23. In view of dismissal of the Appeal, Civil Application No.1201/2022 does not survive. The same is disposed of.

[ANIL L. PANSARE, J.]

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