



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

SECOND APPEAL NO. 521 OF 2023

Prabhu s/o Gangaram Gade
Age: 65 years, Occu. Agri.,
R/o. Gandhi Nagar, Biloli, Tq. Biloli,
Dist. Nanded

... APPELLANT
(Orig. Defendant)

VERSUS

Kadaji s/o Vishwanath Tutturwad
Age: 43 years, Occu. Agri.,
R/o. Singarwadi, Tq. Bhokar,
Dist. Nanded

... RESPONDENT
(Orig. Plaintiff)

....
Mr. Yogesh P. Deshmukh, Advocate for appellant
Mr. Avinash R. Borulkar, Advocate for respondent
....

CORAM : Y. G. KHOBRAGADE, J.

RESERVED ON : 10th APRIL 2024

PRONOUNCED ON : 19th APRIL 2024

ORDER :-

1. By present appeal under Section 100 of the Code of Civil Procedure, the Appellant is challenging the judgment and decree dated 17.07.2023, passed by the learned first appellate Court in first appeal bearing R. C. A. No. 24 of 2018, thereby

confirmed the Judgment and Decree dated 18.08.2018, passed by the learned Joint Civil Judge, J. D., Bhokar in Suit bearing R.C.S. No.18 of 2012 (Old R.C.S. No. 3 of 2011) and thereby dismissed Exh.16 counter claim of the appellant/defendant for perpetual injunction over the suit land.

Facts of the case in hand is summarized as under -

2. The present Appellant is the original Defendant and the Respondent is the original plaintiff.

3. The plaintiff filed a suit thereby praying specific performance of agreement to sell and perpetual injunction. The plaintiff contended that the defendant was indebted and he was in need of money. Therefore, the defendant approached him at his house at Shringarwadi, Tq. Bhokar and gave proposal to sell his agricultural land bearing Gat No. 98/2 admeasuring 3H. 09R situated at Somthana (Patti Bhokar), Tq. Bhokar, Dist. Nanded (hereinafter to be referred as suit property). According to plaintiff, the defendant had agreed to sell suit land for consideration of Rs.3,90,000/-. Accordingly, he paid Rs.2,00,000/- as earnest money in presence of one Shri Rameshwar Budhane, R/o Raikhod. Defendant is the

maternal uncle of plaintiff. Plaintiff was cultivating suit land for the year 2003 and 2005 on the basis of registered contract. Subsequently, on 17.06.2010, an agreement to Sell was executed between him and defendant at Shingarwadi, Taluka Bhokar, District Nanded, in presence of witnesses namely Shri Uttam Mahadu Mane, Narsinga Maroti Karewad and Laxman Maroti Aralwad and Nagnath Maroti Karalwad.

4. Plaintiff pleaded that in the year 2009, he already paid Rs. 2,00,000/- as earnest money on oral request of the defendant and at the time of execution of agreement to sell, he again paid Rs.1,40,000/- to the defendant. The plaintiff agreed to pay remaining consideration amount of Rs. 50,000/- at the time of execution of Registration of sale-deed after receiving necessary documents including non-encumbrance certificate from the concerned authorities, till 2010. In the month of November 2010, the plaintiff make telephonic call to the defendant for execution of sale-deed and offered to receive balance consideration amount of Rs.50,000/-, but the defendant deliberately avoided to execute registered sale-deed of the property in his favour.

5. The plaintiff further alleged that, on 25.12.2010, the defendant had been at his house and meeting was arranged in which Shri Maroti Gyanoba Konke r/o Kakandi, Nagnath Maroti Karalwad r/o Raikhod, Balaji Govind Bankawad r/o Kandhar, Poshatti Piraji Urudwad r/o Ballal and Rameshwar Budhme r/o Raikhod with Uttam Mahadu Mane, Narsinga Maroti Karewad and Laxman Maroti Aralwad r/o Shingarwadi, were present. However, the defendant refused to execute registered sale-deed in favour of the plaintiff. Thereafter, on 31.12.2010, the plaintiff has issued a legal notice and called upon the defendant to execute sale-deed in his favour by accepting balance consideration amount, but the same returned unserved with endorsement 'defendant was not found' at the given address.

6. The plaintiff further alleged that he is ready and willing to perform his part of agreement and ready to pay balance consideration amount of Rs.50,000/-, but the defendant denied to perform his part of agreement. He is in possession of the suit property since 2003, which has been certified by the Talathi, Somthana, who prepared panchanama. The plaintiff apprehended

that the defendant will not perform his part of agreement and is intending to alienate the property, hence, prayed for perpetual injunction restraining defendant from alienating the suit property and dispossessing him from the suit property.

7. The defendant filed written statement at Exh.12 and denied plaintiff's claim. The defendant admitted relation with plaintiff. The defendant contended that he the is owner and in possession of the suit property. The defendant denied about execution of agreement to sell on 17.06.2010 and accepting of amount in the year 2009. The defendant further denied about acceptance of earnest money. He further denied reducing of agreement in writing on stamp paper in presence of witnesses and holding of meeting on 15.12.2010. He also denied about service of legal notice.

8. The defendant filed cross objection (Exh.16) and claimed that, the plaintiff was looking after agricultural operation of the suit property and was drawing agricultural income. In the year 2010, he was sick, hence, he had asked the plaintiff to manage the suit property, but the plaintiff with ill intention to grab the suit property, issued legal notice and claimed about specific performance of

agreement dated 17.06.2010. According to the defendant, said alleged agreement is false and bogus and he was never in need of money, so also, he never proposed the plaintiff to purchase suit property, hence, prayed for dismissal of suit.

9. On the basis of rival pleadings of both the sides as well counter claim and it's Written Statement filed by the plaintiff, the learned trial Court framed the Issues at Exh.33.

10. In order to prove the issues, the plaintiff examined himself as PW-1 at Exh.50, PW-2 Nagnath s/o Maroti Karalwad at Exh.84, PW-3 Narsinga Maroti Karewad at Exh.88, PW-4 Kondiba Maroti Aralwad at Exh.96. The Plaintiff relied on documentary evidence i.e. 7/12 extract of suit land at Exh.53, Suit land Map at Exh.54, application of plaintiff to Talathi for taking entry in register 7-B at Exh.55, possession panchanama for the year 2010-11 prepared by Talathi at Exh.56, report of 7-B register entry sent by Talathi to Tahsildar, Bhokar at Exh.57, copy of register 7-B for the year 2010-2011 at Exh.58, copy of envelope of legal notice issued to defendant is at Exh.122, original agreement of sale dated 17.06.2010 is at Exh.89.

11. The defendant also filed his evidence affidavit at Exh.80 and examined DW2 Datta Ramjo Jangwad, who filed evidence affidavit at Exh.104. Both the witnesses have undergone cross-examination conducted on behalf of the plaintiff.

12. After conclusion of trial, on 18.08.2018, the learned trial Court passed the judgment and decree directing the plaintiff to deposit balance consideration amount of Rs.50,000/- within thirty days and further directed the defendant to execute registered sale-deed in favour of the plaintiff in respect of land Gat No.98/2 to the extent of 3 H. 09 R, situated at Somthana, Taluka Bhokar, District Nanded, within a period of sixty days. However, counter claim of the defendant came to be dismissed.

13. Being aggrieved by the same, the defendant filed an appeal bearing R.C.A. No. 24 of 2018. On 17.07.2023, the learned first appellate Court passed the impugned judgment and decree and thereby dismissed the appeal.

14. Heard both the sides at length.

15. The learned Counsel appearing for the appellant vehemently canvassed that the plaintiff's suit is based on unregistered agreement to sale. Therefore, suit of the plaintiff is hit by Section 17 of the Registration Act. Therefore, the learned trial Court as well as the learned first appellate Court ought to have dismissed the suit, however, both the Courts below failed to consider the legal provisions of law, hence, impugned judgment and decree liable to quash and set aside.

16. The learned Counsel for the appellant further canvassed that, the alleged agreement to sale was not proved by the testimony of witnesses, which leads not to enforce the contract as per Section 14 (c) of the Specific Relief Act, 1963, though, unregistered agreement can be used for collateral purpose. However, the learned Courts below failed to consider the provisions of Section 14 (c) of the Specific Relief Act, 1963.

17. The learned Counsel appearing for the appellant further canvassed that, the evidence of present respondent/ Ori. plaintiff and of witnesses are not consistent with the pleadings, so also, there is

variance in evidence of the plaintiff's witnesses about payment of earnest money. He further canvassed that the plaintiff failed to prove execution of Agreement. Therefore, both the Courts below ought to have refused to grant discretionary relief under Section 20 of the Specific Relief Act. Therefore, both the Courts below ought to have held that, the alleged agreement was not executed by the present appellant/ori. defendant. However, both the Courts below recorded illegal and perverse findings, hence, prayed for quashing and setting aside of same.

18. In support of these submissions, the learned Counsel appearing for the appellant placed reliance on the case of ***Ganesh Shet Vs. Dr. C. S. G. K. Shetty and others – (1998) 5 SCC 381.***

19. Per contra, Mr. Borulkar, learned Counsel appearing for the present respondent/ori. plaintiff supported the concurrent findings of both the Courts below. He submitted that, on 17.06.2010, an agreement to sale Exh.89 was executed in presence of panchas i.e. PW2, PW3 and the plaintiff paid Rs.1,40,000/- to the Defendant at the time of execution of agreement Exh.89, in which, previous payment of Rs.2,00,000/- as earnest money has not been described

and the Defendant signed said Agreement in presence of the above said witnesses.

20. Though, the defendant has denied receipt of earnest money of Rs.2,00,000/- as well as of Rs.1,40,000/-, but the defendant failed to challenge the transaction, so also, merely the Agreement to sell is unregistered it does not loses its sanctity and it is admissible in evidence because, under Agreement to sell the title of suit property not been passed in favour of the plaintiff. Therefore, registration of Agreement To Sell is not compulsory. Both the Courts below have concurrently held that, the plaintiff proved execution of agreement to sell by examining the attesting witnesses and the plaintiff is entitled to get the sale-deed executed in his favour. Therefore, no substantial question of law is involved in present second appeal, hence, prayed for dismissal of appeal.

21. Having regard to the rival submissions of both the side, I have gone through the entire record. The case of the plaintiff is based on Exh.89 agreement to sell dated 17.06.2010. The PW1 plaintiff, PW2 Nagnath Karalwad and PW3 Narsinga Karewad, categorically deposed in their evidence that on 17.06.2010, an agreement to sell

Exh.89 was executed by the defendant in favour of the plaintiff in respect of the suit land. The evidence of PW2 and PW3 shows that they were present and they have put their signatures at the bottom of Exh. 89 agreement to sell, as a witness. The plaintiff has proved contents of Agreement Exh.89. These witnesses were cross examined, but nothing has been solicited to disprove contents of agreement and signature of the Defendant. Though, Defendant has denied the execution of Agreement Exh. 89 and disputed his signature, however, the defendant has not examined the Handwriting expert to disprove his signature. Per contra the P. W. 2 & 3 deposed putting of signature by the defendant in their presence. As per terms and conditions of Agreement to sell Exh.89, the Defendant agreed to sell the suit land bearing Gat No.98/2 admeasuring 3 H. 9 R. in consideration of Rs.3,90,000/-. The plaintiff paid Rs. 2,00,000/- in the year 2009 to the Defendant/vendor. On 17-08-2010, the Defendant accepted Rs. 1,40,000/- at the time of execution of Agreement Exh. 89, which is in corroboration with evidence of P. W. 2 & 3.

22. No doubt, as per the terms and conditions of Exh.89, the registered document sale-deed supposed to be executed in the month of November 2010 after accepting the remaining amount of

Rs.50,000/-. The recital of Exh. 89 itself proves that the defendant/vendor delivered possession of the suit property to the plaintiff. Merely, the plaintiff and witnesses have not given description of denominations of the currency paid to the defendant it does not mean that Agreement Exh. 89 was not executed.

23. Needless to say that, defendant has denied entering into an agreement with the plaintiff. Therefore, burden lies upon the defendant to prove his defence by leading substantial evidence. The evidence of the witnesses clearly shows that the defendant himself purchased stamp paper to reduce the Agreement in writing and he has visited to the plaintiff's house. The stamp paper on which an Agreement to Sell Exh. 89 was reduced itself proves that the defendant has himself purchased the stamp paper on 10.06.2010 and executed it on 17.06.2010. The signature of the defendant on Vakalatnama as well as on affidavit is compared by the learned trial Court and it was held that when the defendant denied about execution of agreement to sell and preparation of said agreement being false and bogus, in that event, the defendant could have taken criminal action against the plaintiff for forging his signature, but no

such legal action was initiated and no police complaint was lodged even after getting knowledge of the said agreement.

24. It is an admitted fact that, the Exh. 89 Agreement is not Registered as per the provisions of Registration Act. However, it is submitted that under the agreement to sale, title of property does not passes and unregistered document can be impounded as per Section 35 of the Stamp Act. Since, Agreement to Sell Exh. 89 does not convey title of the property hence, it is admissible in evidence to prove intention of the parties for execution of Agreement.

25. On perusal of the impugned judgment and decree of both the Courts below, it prima-facie appears that, both the Courts below considered oral as well as documentary evidence available on record and concurrently held that, as per the recital of agreement to sell Exh.89, the plaintiff paid Rs.2,00,000/- in the year 2009 to the defendant and again on 17.06.2010 plaintiff paid Rs.1,40,000/- to the defendant in presence of witnesses. The defendant agreed to execute sale-deed in favour of the plaintiff in the month of November 2010 after accepting outstanding balance amount of Rs.50,000/-. The pleadings as well as evidence led by the plaintiff proves that, he was

ready and willing to perform his part of agreement in the month of November 2010, but the defendant failed to perform his part of agreement. The plaintiff has shown his willingness to pay Rs.50,000/- at the time of execution of sale-deed, but the defendant did not perform his part of contract. Therefore, it was held that the plaintiff is entitled to the decree of specific performance of contract as well as perpetual injunction as he is already in possession of the suit property. Hence, the findings recorded by both the Courts below are based on the oral as well documentary evidence and no perversity or illegality is found in the same. No any substantial question of law is involved, hence, appeal is hereby dismissed.

26. In view of above, pending Civil Application No. 12637 of 2023 is also disposed off. No order as to cost.

[Y. G. KHOBRAGADE, J.]

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