



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

SECOND APPEAL NO. 478 OF 2022

Mrs. Charushila Devidas Doifode,
Aged about 70 years, Occu. : Service,
R/o. Plot No.196, Chhatrapati Nagar,
Ring Road, Nagpur.

.... **APPELLANT**

// VERSUS //

Mr. Suresh Daulatrao Virulkar,
Aged about 68 years, Occu. : Retired,
R/o. Gajanan Krupa, Plot No.282,
Sector 19, Khoparkhairni,
Opp. Jimmy Towers, New Mumbai.

.... **RESPONDENT**

Mr. Anup S. Dhore, Advocate for Appellant.
Mr. Vilas U. Waghmare, Advocate for Respondent.

CORAM : SANJAY A. DESHMUKH, J.

DATE OF RESERVING THE JUDGMENT : 29.08.2024.

DATE OF PRONOUNCING THE JUDGMENT : 25.10.2024.

JUDGMENT.

1. This appeal is preferred against the Judgment and decree passed by the District Judge-18, Nagpur in Regular Civil Appeal No.157 of 2021, dated 22.07.2022, which was preferred against the Judgment and decree passed by the 19th Joint Civil Judge, Senior Division, Nagpur in Regular Civil Suit No.1301 of 2012 (old Spl.C.S. No.988/2007), dated 03.01.2019.

2. PLAINTIFF'S CLAIM :

(i) The defendant, along with Ganesh Bodkhe and Ashok Munje, jointly purchased the land bearing Khasra No.46, admeasuring 1.84 HR., situated at Mouza Sonoli, Tahsil and District Nagpur which is suit property. They each held a 1/3rd share in the suit property. The defendant, was in need of money therefore, he agreed to sell his 1/3rd share of the suit property to the plaintiff for a consideration of Rs.5,00,000/-. Accordingly, on 16.12.2006, an agreement to sale was executed between them. The plaintiff paid an amount of Rs.2,50,000/- to the defendant. It was agreed that the balance consideration amount of Rs.2,50,000/- would be paid within four months from the date of execution of agreement to sale. The defendant agreed to handover possession of the suit property to the plaintiff on the day of registration of the sale-deed. Thereafter, the plaintiff paid Rs.2,00,000/- by Demand Draft to the defendant. The defendant assured that he would execute the sale-deed as early as possible, but he failed to do so. He also failed to obtain the necessary documents required for the registration of the sale-deed. Consequently, the plaintiff issued a notice dated 07.07.2007 to the defendant through her Advocate and called upon him to execute the sale-deed. The defendant did not reply that notice in spite of receipt of notice. The plaintiff, therefore, made phone calls and sent

telephonic messages to the defendant for execution of sale-deed, but it went in vain. The plaintiff was, and is ready to perform his part of contract, but the defendant was not ready to perform his part of the contract to execute the sale-deed. Therefore, the plaintiff filed a suit for specific performance of the contract as per Section 10 of the Specific Relief Act, 1963 (for short the “S.R. Act”).

(ii) The defendant denied the material contentions raised by the plaintiff in the plaint. He admitted that the plaintiff had only paid an amount of Rs.2,00,000/- by Demand Draft but denied that it constituted a contract of sale. The defendant further contended that the price of the suit property is more than Rs.10,00,000/- per acre. He was in need of money. He, therefore, requested help from his friend and the other co-owners of suit property. His friend Shri Ganesh Bodkhe arranged that amount and gave it to him. However, as security for the loan Ganesh Bodkhe insisted that the defendant shall execute a contract of sale. It was agreed that upon repayment of the amount, the contract of sale would be cancelled. On the assurance from Shri Bodkhe, the defendant signed that contract of sale. The defendant confirms that only hand loan of Rs.2,00,000/- was provided to him by the plaintiff for a period of 12 months. The defendant is and was willing to refund that amount. The defendant lastly prayed that the suit be dismissed.

3. The learned trial Court held that the plaintiff had successfully proved the existence of contract of sale of the suit property. The plaintiff had also proved that she paid Rs.2,50,000/- as well as Rs.2,00,000/- towards consideration amount for purchase of the suit property. The plaintiff proved her readiness and willingness to perform her part of the contract. The defendant failed to prove that it was loan transaction and the contract of sale was executed as security for the loan. Consequently, the suit was decreed.

4. The learned first appellate Court held that plaintiff failed to prove the execution of the contract of sale and the payment of Rs.4,50,000/- to the defendant. It also held that the defendant proved that the said contract of sale was executed by him as security for the loan of Rs.2,00,000/-. The appeal was allowed and the suit was dismissed.

5. The following substantial question of law is formed :

“A. Whether the learned first appellate Court was justified in reversing the decree passed by the trial Court, specifically by accepting the evidence which is contrary to the pleadings?”

6. Perused the impugned judgment and the judgment of the trial Court also. Perused the evidence adduced by both sides.

7. The learned Advocate for the plaintiff submitted that the execution of contract of sale was admitted by the defendant. However, he had not proved that it was executed for the security of the loan. The first appellate Court erred about burden of proof that lies on the plaintiff to prove that the contract was executed for security of loan amount. The defendant had taken a completely contrary stand, asserting that he was not acquainted with the plaintiff. It was believed by the first appellate Court. The learned Advocate for the appellant further submitted that there were no such pleadings indicating that the defendant was not acquainted with the plaintiff. Taking such contrary stand is not permissible. He therefore submitted to allow the appeal and set aside the impugned judgment and decree passed by the first appellate Court.

8. The learned Advocate for the plaintiff/appellant is relying upon the following precedential law :

(i) ***Jagdish Singh Vs. Madhuri Devi***, reported in ***(2008) 10 SCC 497***, in para 36 and 37 reads as follows :

“36. Three requisites should normally be present before an appellate court reverses a finding of the trial court;

- (i) it applies its mind to reasons given by the trial court;
- (ii) it has no advantage of seeing and hearing the witnesses; and

(iii) it records cogent and convincing reasons for disagreeing with the trial court.

(ii) ***Zarina Siddiqui Vs. A. Ramalingam Alias R. Amarnathan***, reported in ***(2015) 1 SCC 705***, wherein it was held that, “the equitable discretion to grant or not to grant a relief for specific performance also depends upon the conduct of the parties”.

(iii) ***Prakash Rattan Lal Vs. Mankey Ram***, reported in ***2010 SCC OnLine Del 184***, wherein it was held that, “no party can be taken by surprise and new facts cannot be brought through evidence which have not been stated by the defendant in the written statement. The law provides a procedure for amendment of the pleadings and if there are any new facts which the party wanted to bring on record, the party can amend pleadings, but without amendment of pleadings, a party cannot be allowed to lead evidence beyond pleadings”.

9. Learned Advocate for the respondent submitted that the reasons and findings of the first appellate Court are legal and correct. The Court rightly observed that the plaintiff had not seen the partition deed and 7/12 extract of the suit property and was unaware of the boundaries of the suit property. Furthermore, the consideration amount of Rs.2,00,000/- was not paid from the bank account of the

plaintiff. Price of the suit property is more than Rs.10,00,000/-. The plaintiff also failed to identify the defendant in the Court. The plaintiff has not deposed that the defendant was present in Nagpur at the time of execution of contract of sale. He further submitted that the impugned judgment and decree are legal and correct and no any interference is warranted in it.

10. Learned Advocate for the respondent has relied on the following precedential laws :

(i) ***Mohd. Amirullah Khan & Ors., Vs. Mohd. Hakumullah Khan & Ors.***, reported in ***(1999) 3 SCC 733***, wherein it was held that, “in second appeal High Court ought not to have reappreciated the evidence and reversed findings of fact arrived at by the first appellate Court”.

(ii) ***Thiagarajan & Ors. Vs. Sri Venugopalaswamy B. Koil & Ors.***, reported in ***AIR 2004 SC 1913***, in which it was held that, “it is the obligation of the Courts of law to further the clear intentment of the legislature and not frustrate it by excluding the same. This Court in a catena of decisions held that where findings of fact by the lower appellate Court are based on evidence, the High Court in second

appeal cannot substitute its own findings on reappreciation of evidence merely on the ground that another view was possible”.

11. The Contract of sale Exhibit-24 was admittedly executed by the defendant. It is for the Court to examine and decide whether it was executed as security for the loan amount or not. Therefore, the burden lies upon the defendant to prove that the contract was executed for security of loan amount, as per illustration (b) of Section 102 of the Indian Evidence Act, 1872. The defendant has not clarified in his evidence that, according to the contract of sale (Exhibit-24), he received Rs.2,00,000/-. In his written statement, he did not take a defence that he was not present at the time of execution of contract of sale Exhibit-24 in Nagpur, but he was present in Mumbai. However, he adduced the evidence of log book and history at Exhibit-105 and 106 along with attendance certificate Exhibit-90, to prove that he was not present at Nagpur and was serving in the Chemical Company. The defendants examined Chandrashekhar Kukade (DW-2), an employee of the said Company in Mumbai and Vitthal Jadhav (DW-4), a Deputy Manager of RCF company. In his cross-examination, he admitted that the employees did not sign the register at Exhibit-105 and 106. The learned trial Court, while appreciating evidence of the witnesses, particularly Vitthal Jadhav (DW-4) in para

45, observed that as per Exhibit-90 attendance certificate, Exhibit-105 and 106 log book and history register, the defendant was present on duty on 16.11.2006 and 30.11.2003. The defendant was relieved from the duty at 04.50 pm. It is also observed that anyone can travel by airplane, as flights are available from Mumbai to Nagpur. Thus, one can reach Nagpur on the same day. The said reasons are plausible, because the signature on Exhibit-24 is admitted by the defendant, and he did not take such stand that at the time of notarizing of the said contract of sale, he was not present at Nagpur.

12. Thus, from the evidence of both sides and reasons recorded by the learned trial Court, it appears that it has exercised the judicial discretion while passing decree. The conduct of the defendant, as per Section 8 of the Indian Evidence Act, 1872 shows that he signed Exhibit-24 after receiving of Rs.2,50,000/- and thereafter received a Demand Draft of Rs.2,00,000/-. His conduct further shows that he did not respond to the notice dated 07.07.2007 which was sent to him by plaintiff requesting to perform the contract of sale. As per Section 58 of the Indian Evidence Act, 1872 “an admitted fact need not be proved”. The defendant has admitted the execution of contract of sale Exhibit-24. The defendant has not attempted to repay that amount. One cannot pay such huge amount

to an unknown person as hand loan and if it is so then it must have repaid. It is not necessary for the plaintiff to know boundaries of agricultural land. Therefore, even though the plaintiff admitted in her cross-examination that she did not see the suit property and 7/12 extract and other documents, these admissions does not go to the root of the suit, because this is not of test of the memory of plaintiff in the court. The Court must consider not only the evidence, but the entire material before it and most important is conduct, as per definitions of 'proved' and 'not proved' provided in Section 3 of the Indian Evidence Act, 1872, no illegality or perversity has been pointed out in the reasons and findings of the learned trial Court. The learned trial Court exercised its judicial discretion as per Section 20 of the S.R. Act. There is no any perversity in the said judgment and decree.

13. The plaintiff's evidence has not been disproved by the defendant, and therefore, there was no scope for the first appellate Court to interfere with the discretion exercised by the trial Court. For the reasons stated above, the judgment of ***Mohd. Amirullah Khan*** and ***Thiagarajan*** cited supra are not helpful to the respondent. Hence, those are not relied upon. It is well settled that judicial discretion is

exercised by the learned trial Court and it cannot be interfered unless the perversity or illegality is pointed out.

14. On perusal of the judgment of the trial Court, no perversity is evident. The evidence has been properly appreciated. The reasons are convincing. The learned first appellate Court ought not to have interfered in the judicial discretion as there is no perversity in the said judgment. On the contrary, the learned first appellate Court relied upon the evidence of defendant that was contrary to the pleadings and therefore, substantial question of law is answered in the negative that the learned first appellate Court was not justified in reversing the judgment and decree of the learned trial Court. Therefore, the appeal deserves to be allowed and the impugned judgment and decree deserves to be set aside.

15. For the reasons discussed above, the argument put forth by the learned Advocate for the respondent is not acceptable. The appeal deserves to be allowed. The appellant-plaintiff was compelled to file this appeal therefore, she is entitled to costs of Rs.15,000/-. Hence following order :

- (i) The appeal is **allowed**.

- (ii) The impugned Judgment and decree passed by District Judge-18, Nagpur in Regular Civil Appeal No.157 of 2021, dated 22.07.2022 is quashed and set aside. The Judgment and decree passed by 19th Joint Civil Judge, Senior Division, Nagpur in Regular Civil Suit No.1301 of 2012 (old Spl.C.S. No.988/2007), dated 03.01.2019 is upheld.
- (iii) The respondent is directed to pay costs of Rs.15,000/- (Rs. Fifteen thousand only) to the appellant within a period of three months. If the said costs is not paid within four months, the respondent to pay interest @ 9% per annum thereon, from the date of this judgment till its realization.

(SANJAY A. DESHMUKH, J.)