



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.640 OF 2015
WITH
CIVIL APPLICATION NO. 14502 OF 2015
IN SA/640/2015

Lilabai Subhash Gopal,
Age 40 years, Occu. Agri.,
R/o Bohardi, Tq. Bhusawal,
Dist. Jalgaon.

... **Appellant**
(Ori. Defendant)

Versus

Barsu Vithoba Varde (Deceased)
Through Legal Heirs,

- 1) Anand Barsu Varade,
Age: 40 years, Occu. Agri.,
- 2) Govinda Barsu Varade,
Age: 35 years, Occu. Agri.
- 3) Sindhubai Murlidhar Rane,
Age: 60 years, Occu. Household,
- 4) Anjanabai Murlidhar Talele,
Age: 55 years, Occu. Household,
- 5) Sakhubai Ramdas Kolhe,
Age: 52 years, Occu. Household,
- 6) Maltabai Rajendra Kinage,
Age: 50 years, Occu. Household,
- 7) Sarlabai Chandrakant Patil,
Age: 48 years, Occu. Household,
- 8) Shardabai Nivrutti Bhangale,
Age: 45 years, Occu. Household,
- 9) Sugandhabai Barsu Varade (Deceased)

All R/o Kahurkheda, Tal. Bhusawal,
Dist. Jalgaon.

... **Respondents**
(Ori. Plaintiff)

...
Advocate for Appellant : Mr. Bhapkar S. B.
Advocate for Respondent Nos.1 to 5 & 8 : Mr. Gholap Ajit M.
...

CORAM : SHAILESH P. BRAHME, J.

RESERVED ON : 03.10.2025

PRONOUNCED ON : 09.10.2025

JUDGMENT :

1. Heard both sides.
2. Learned counsel for the appellant has tendered on record a compilation of paper book and the relevant documents are part of record. I have gone through Exh.Nos.45, 46, 35 and the pleadings.
3. Appellant/original defendant is challenged concurrent findings of facts recorded by Courts below while decreeing the suit for specific performance of contract in favour of the respondent/plaintiff.
4. Land Gut No.373 measuring 2 H. 46 R. belonged to the appellant. Out of that, 1 Hecter was agreed to be sold vide agreement dated 01.06.1994, Exh.35, for Rs.60,000/-. Out of that, respondent paid Rs.40,000/- as earnest. The sale deed

was agreed to be executed on 10.01.1995. Respondent called upon appellant to execute the sale deed vide notice dated 07.01.1995. In these background, Regular Civil Suit No.87 of 2001 is filed by respondent for specific performance of contract.

5. Appellant contested the suit by filing written statement contending that it was a money lending transaction. The respondent was a money lender who advanced Rs.19,500/- to the appellant. He fraudulently got executed agreement by obtaining signature of the appellant on blank stamp paper. The notice dated 07.01.1995 was false, hence, no reply was given. The respondent gave notice to the appellant on 02.03.1993. There was no transaction of agreement to sale between the parties.

6. Respondent examined two witnesses to prove the agreement and the transaction between the parties. Appellant also adduced oral evidence of her husband who was Power of Attorney.

7. Trial Court decreed the suit on 02.05.2003. Being

aggrieved, Regular Civil Appeal No.259 of 2003 was filed which was dismissed vide judgment dated 09.04.2013.

8. Learned counsel for the appellant would press into service the substantial questions of law submitted along with compilation. It is submitted that both Courts below did not consider the notices Exh.45 and 46. The Lower Appellate Court failed to exercise the jurisdiction in totally overlooking the notices. It is submitted that the transaction between the parties has not been established. The agreement Exh.35 is sham and bogus shrouded by suspicious circumstances. It is submitted that the original blank stamp paper has not been brought on record. It is further submitted that the suit land is the only property with the appellant and the grave hardship will be caused if sale deed of the suit land is executed. It is submitted that respondent is not entitled to discretionary relief. The matter needs to be remanded for considering all aspects of the matter.

9. Per contra, learned counsel Mr. Gholap submits that notices Exh.45 and 46 were considered by the Trial Court. Exh.45 was not in respect of the present transaction but it was

addressed to appellant's husband Subhash. Notice Exh.46 is totally after thought and prepared when the cross-examination was under way. It is further submitted that plaintiff did not step into witness box and adverse inference needs to be drawn. It is contended that the submissions of the appellant have no foundation in appeal memo. It is further submitted that appellant did not make any complaint of alleged fraud. The concurrent findings of facts are required to be confirmed.

10. The grievance of the appellant that Gut No.373 is the only land and the hardship likely to be caused to the appellant dis-entitles the respondents for the discretionary reliefs. Out of 2 H. and 84 R. of Gut No.373, the agreement of sale was executed to the extent of 1 H. only. The balance land is still with the appellant. I do not approve the submission that the relief is unequitable causing grave hardship to the appellant.

11. The Trial Court dealt with notices Exh.45 and 46. The appeal memo of Regular Civil Appeal No.259 of 2003 does not spell out any ground in respect of notices Exh.45 and 46. If such ground was not pressed into service, obviously Appellate Court was not obliged to deal with it. I do not find any fault

for non-consideration of Exh.45 and 46 by Lower Appellate Court. Merely for that reason, matter cannot be remanded.

12. The notice at Exh.45 bears date 02.03.1993 issued to husband of the appellant Subhash referring to lending of money on 19.05.1989. The agreement Exh.35 is executed on 01.06.1994. It was between appellant and the respondent. Her husband Subhash was only witness, not executor. It cannot be said that the notice has any relevance to the transaction in question. It pertains to some previous transaction with Subhash.

13. Respondent filed suit on 14.12.1995. Appellant filed written statement in the year 1996. The plaintiff's witness was being cross-examined, that time notice dated 05.09.2002 Exh.46 was issued by appellant to the respondent. The theory that agreement was manipulated and false document, is after thought. The notice was issued to fill up the lacuna. It was not a notice issued prior to institution of the suit.

14. It is stated in the written statement by the appellant that she did not feel it necessary to reply the notice dated

07.01.1995. If this is the situation, then Exh.45 and 46 would not come to rescue the appellant. The money lending transaction cannot be proved. No case is made out to remand the matter. Both Courts below have concurrently recorded findings against the appellant.

15. Appellant did not step into witness box. Her husband who is power of attorney cannot depose on her behalf. When appellant comes up with a case that she was deceived and her signatures on blank stamp paper was misused for preparation of agreement to sell, she was under obligation to step into witness box. She failed to face the cross-examination and adverse inference needs to be drawn against her. Mr. Gholap, learned counsel for the respondent has rightly relied on the case of ***Janki Vashdeo Bhojwani and another Vs. Indusind Bank Ltd. and others ; 2005 (3) Bom. C. R. 846***. I rely on the paragraph Nos.13 to 16 of the judgment of the Apex Court as follows :

“13. Order 3, Rules 1 and 2 of CPC, empower the holder of power of attorney to "act" on behalf of the principal. In our view the word "acts" employed in Order 3, Rules 1 and 2 CPC, confines only in respect of "acts" done by the power of attorney holder in exercise of power granted by the

instrument. The term "acts" would not include deposing in place and instead of the principal. In other words, if the power of attorney holder has rendered some "acts" in pursuance to power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined.

14. *Having regard to the directions in the order of remand by which this Court placed the burden of proving on the appellants that they have a share in the property, it was obligatory on the part of the appellants to have entered the box and discharged the burden. Instead, they allowed Mr. Bhojwani to represent them and the Tribunal erred in allowing the power of attorney holder to enter the box and depose instead of the appellants. Thus, the appellants have failed to establish that they have any independent source of income and they had contributed for the purchase of the property from their own independent income. We accordingly hold that the Tribunal has erred in holding that they have a share and are co-owners of the property in question. The finding recorded by the Tribunal in this respect is set aside.*

15. *Apart from what has been stated, this Court in the case of Vidhyadhar Vs. Manikrao and Another, (1999) 3 SCC 573 observed that*

"where a party to the suit does not appear in the witness-box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct".

16. In civil dispute the conduct of the parties is material. The appellants have not approached the Court with clean hands. From the conduct of the parties it is apparent that it was a ploy to salvage the property from sale in the execution of Decree."

16. It is alleged that respondent was doing money lending business. It is further alleged that fraudulently agreement was got prepared. Appellant did not file any complaint with police. She did not approach the competent authority against money lender. Appellant has miserably failed to establish the defence. I find no error of jurisdiction in the findings recorded by Courts below.

17. Respondent examined two witnesses to prove the document. The execution was proved and it was exhibited as Exh.35. The non-examination of the scribe would not vitiate the document. Both Courts below have rightly appreciated evidence on record in decreeing the suit.

18. Learned counsel Mr. Bhapkar relies on the judgment of ***Rajendra Lalitkumar Agrawal Vs. Ratna Ashok Muranjan and another ; 2019 AIR (SC) 702.*** I have considered paragraph No.15 of the judgment.

“15. From the reading the impugned order, we find that, on one hand, the High Court went on interpreting the terms of the document after hearing the argument of both sides (see appearance of both parties through lawyers) and on the other hand, in conclusion, held that it does not involve any substantial question of law. It virtually, therefore, decided the second appeal bipartite like the first appeal without keeping in view the scope of its jurisdiction conferred by Section 100 (4) and (5) of the Code. In our view, the approach of the High Court while deciding the second appeal was not in conformity with the requirements of Section 100 of the Code.”

This Court has not interpreted any new document for the first time. The conduct of the appellant is commented. The concurrent findings of facts are held to be plausible. Hence, this judgment will not help appellant.

19. Further reliance is placed on the judgment of ***C. Venkata Swamy Vs. H. N. Shivanna (D) by L.Rs. and another ; 2017 AIR (SC) 5604.*** I have gone through paragraph Nos.10 to 13 of

the judgment, in which, inter alia reliance is placed on the previous judgments of Supreme Court and scope of jurisdiction of Appellate court is explained. The ratio cannot be disputed. In the case at hand, I find no error of jurisdiction in the judgment of Lower Appellate Court.

20. Mr. Bhapkar further relies on the judgment of *Gulabchand Fakirchand Gandhi (D) through his legal heirs Kiran and others Vs. Indubai Pundalik Jape (D) through her Legal heirs Shakuntala and others ; 2019 (2) AIR Bom. R. 9*. I have gone through paragraph No.8, which inter alia refers to couple of judgments. The parameters for interference by the High Court under Section 100 of CPC are laid down. But in the present case, appellant failed to make out any case.

21. Lastly, reliance is placed on the judgment of *Kamal Kumar Vs. Premlata Joshi and others ; 2019 AIR (SC) 459* to buttress that grant of relief of specific performance is discretionary. No case is made out by the appellant to show that the discretion exercised by Courts below is perverse or unequitable or causing undue hardship. These judgments will not help the appellant.

22. I find that no substantial question of law exists in the present case. The substantial questions pressed into service are meritless and ostensible.

- (i) Second appeal is dismissed.
- (ii) Needless to mention that interim relief granted earlier shall stand vacated.
- (iii) In view of disposal of second appeal, pending civil application does not survive. Civil application as such is disposed of.

(SHAILESH P. BRAHME, J.)

...

vmk/-

23. After pronouncement of the judgment, learned counsel for the appellant prays for continuation of interim relief which was in operation since long. The appellant is in possession of the suit land. Hence, it is submitted that the possession needs to be protected till the appellant approaches higher forum.

24. The request is opposed by the learned counsel for the respondents.

25. The appellant is in possession and his possession is protected by interim relief operating in the matter till this date. The interim relief granted earlier shall be continued for further period of six (6) weeks, which shall stand vacated after the above said period without reference to the Court.

(SHAILESH P. BRAHME, J.)

...

vmk/-