



sa-95-2021.odt

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.95 OF 2021

DASHRATH BAPURAO MOHITE
VERSUS
HARISHCHANDRA S/O BHIMAJI SANTRE

...
Mr. S. V. Adwant i/b Ms. Neha B. Kamble, Advocate for the appellant.
Mr. P F. Patni, Advocate for the respondent.
...

CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 29.07.2021

ORDER :-

1. Heard learned Advocate Mr. S. V. Adwant instructed by learned Advocate Ms. Neha Kamble for the appellant and learned Advocate Mr. P. F. Patni for the respondent.

2. Present appellant is the original plaintiff, who intends to challenge the concurrent judgment and decree. He had filed Special Civil Suit No.523 of 2007. The matter has been decided by learned 5th Joint Civil Judge Senior Division, Aurangabad and the suit has been dismissed on 30.12.2009. The suit was for specific performance of contract based on oral agreement to sell. Thereafter, the plaintiff challenged the said judgment and decree firstly before this Court by way of First Appeal No.1514 of 2010, however, in view of increase in pecuniary jurisdiction

of the District Court, the matter was transferred and it has been renumbered as Regular Civil Appeal No.284 of 2012. The said appeal came to be dismissed by the learned District Judge-2, Aurangabad on 18.03.2017. Hence, this second appeal.

2. Learned Advocate Mr. Adwant instructed by learned Advocate Ms. Neha Kamble vehemently submitted that both the Courts below ignored the requirement of the law. Even a concluded oral agreement can be specifically put to performance. The transaction between the parties was based on the definition of proposal, promise consideration, agreement and concluded contract as defined in Section 2 of the Indian Contract Act. The intention of the parties on the date of the agreement ought to have been considered. The receipt-cum-memorandum was produced at Exhibit-44 in which acknowledgment was given by the defendant in respect of acceptance of Rs.4,25,000/- as consideration for sale of the suit property. The said documentary evidence is not considered properly. The payment of consideration can be by way of direct cash or partly in cash, partly by bank transaction or even solely by bank transaction etc. The important thing is that the money in any form should reach to the person proposing to sale the immovable property. Plaintiff has proved that in pursuant to the oral agreement on the day itself, he had paid amount of Rs.25,000/- as an earnest amount and then

he had paid amount of Rs.2,00,000/- from the bank and for total amount, Exhibit-44 was executed. The circumstances also ought to have been considered by both the Courts below to come to the conclusion that as to whether by those preponderance of probabilities, the plaintiff has proved the oral agreement or not. In fact, both the Courts below have also not used the power to send the admitted signature for comparison of the signature on Exhibit-44, when the defendant tried to deny the said signature on Exhibit-44. Even the Courts themselves could have used the power under Section 73 of the Indian Evidence Act. A rent agreement was filed at Exhibit-50, which was an unregistered document. That document was required to be compulsorily registered as per Section 17 of the Indian Registration Act, but that has been received in evidence. It could not have been even considered for collateral piece of evidence under Section 49 of the Indian Registration Act. Both the Courts below have erred in considering the documentary as well as oral evidence and, therefore, substantial questions of law are arising in this case.

3. Per contra, the learned Advocate appearing for the respondent relied on the reasons given by both the Courts below and submitted that when plaintiff is coming with the case that he could get a receipt executed from the defendant, then if at all there was oral agreement,

there was no reason for the parties to enter into a written agreement. Plaintiff is not giving any reason for executing any such written document. Both the Courts below have rightly held that he has failed to prove that there was any such agreement. When the existence of the agreement itself is not proved, question of its performance will not arise.

4. Important point to be noted is that the plaintiff himself had come with the case that there was an oral agreement between him and defendant. On 19.05.2002, in respect of sale of the suit flat, the consideration was fixed at Rs.5,00,000/-. According to the plaintiff he paid amount of Rs.25,000/- in presence of his wife on 20.05.2002 to the defendant. Thereafter, the defendant was insisting that he should pay atleast Rs.4,00,000/- immediately and, therefore, according to the plaintiff an acknowledgment has been issued. According to the plaintiff he is having account in Development Credit Bank. He had withdrawn that amount from his account and then gave the amount to defendant. Further, it is his case that thereafter periodically he has given more amount and the total amount of Rs.4,82,000/- has been paid by him towards consideration. He was ready and willing to perform his part of contract, however, when defendant denied, he has filed the suit for specific performance of the contract. Alternatively, prayer has been made for refund of earnest amount with interest. Plaintiff has examined

himself and two more witnesses, however, it appears that he has not tried to give any reason as to why no written document was executed in respect of agreement to sell. No doubt, there can be an oral agreement to sell and immovable property also, however, merely because the plaintiff was knowing defendant, as they are residing in the same building, we cannot infer that there were good relations between them and the agreement would have taken place in the form plaintiff intends to say. Even if for the sake of arguments we accept that there was such agreement, yet, he has not proved that any amount was paid by him towards the transaction. Both the Courts below have assessed the evidence led by the plaintiff in respect of payment and have come to the conclusion that plaintiff has failed to prove that there was oral agreement to sell and payment of earnest amount or payment of amount to the tune of Rs.4,25,000/-, so also time to time further amount was given making that tally to Rs.4,82,000/-. Merely on the basis of Exhibit-44 plaintiff intends to connect the transaction as an agreement to sell. However, it is to be noted that the defendant is denying execution of that document. The alleged eye witness examined by the plaintiff has denied everything and, therefore, question of invoking powers under Section 73 of Indian Evidence Act for comparison of the signature will not arise. In fact, there was no hurdle for the plaintiff to

file an application before the Trial Court for sending the said document along with the admitted documents for the opinion of the handwriting expert. When plaintiff himself has not taken active part and steps, he cannot seek assistance of the Court under Section 73 of the Indian Evidence Act. No doubt, the Court has power to compare the signatures and form its opinion under Section 73 of the Indian Evidence Act, however, such powers is required to be used very sparingly.

5. Further important point to be noted is that plaintiff has also examined one PW.2 Shewalkar, who in his affidavit-in-chief has said that the amount of Rs.4,00,000/- was paid in his presence to the defendant and then the receipt was prepared, however, in the cross-examination, he has taken a somersault and made a candid statement that he has not witnessed plaintiff paying the said amount to the defendant and then defendant executing receipt Exhibit-44. PW.-3 Ashif Hamid Shaikh is the employee of the bank, who has said that amount of Rs.4,00,000/- was withdrawn by the plaintiff on 20.05.2002, but in the cross-examination, he has made specific statement that amount of Rs.4,00,000/- has been deposited on the same day in the bank of the plaintiff. Plaintiff is silent as to how and from whom he has received amount of Rs.4,00,000/-, which he has deposited. The withdrawal appears to be just to create a piece of evidence, which cannot be accepted when there is evidence to

show that the amount has been deposited in his account on the same day.

6. Both the Courts below have further properly considered that the receipt cannot be taken as proof of oral agreement, as details have not been mentioned about the property. Every opportunity was then available for the plaintiff; if he wants to rely upon his evidence, to state everything in that receipt, however, why reiteration of the oral agreement was not got done in writing, is a question. There was no reason to mention everything halfheartedly. Under such circumstance, both the Courts below have come to a proper conclusion based upon the assessment of the facts as well as the law involved in the matter. No substantial question of law, as contemplated under Section 100 of the Code of Civil Procedure, is arising in this case requiring admission of the second appeal. Second Appeal, therefore, stands dismissed.

[SMT. VIBHA KANKANWADI, J.]

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