

**(2011) 01 BOM CK 0101**  
**In the Bombay High Court**  
**Case No : Second Appeal No. 37 of 1988**

Bhagirathibai Gajanan Jadhav

APPELLANT

Vs

Shivdas Pralhad Mane, Sitabai Nanasaheb Chavan and  
Latabai Madhukar Jawale (since deceased) represented  
through (Madhukar Jawale, Santosh Madhukar Jawale, Sachin  
Madhukar Jawale and Manisha Madhukar Jawale)

RESPONDENT

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**Date of Decision : 27-01-2011**

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27  
Evidence Act, 1872 — Section 80  
Specific Relief Act, 1963 — Section 20

**Citation :** (2011) 3 BomCR 68 : (2011) 2 MhLj 679

**Hon'ble Judges :** V.M. Kanade, J

**Bench :** Single Bench

**Advocate :** Surel Shah, for the Appellant; Sandeep Salunkhe, for the Respondent

**Final Decision :** Allowed

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## Judgement

V.M. Kanade, J.—Heard the learned Counsel appearing on behalf of the Appellant and the Respondents. The Appellant is original Defendant and the Respondent No. 1 is the original Plaintiff. This Second Appeal has been admitted and at the time of admission, following substantial questions of law have been framed by the Court -

Whether the document dated 8-8-1973 purported to be an agreement of sale is unconscionable transaction and the Court should not have exercised discretion u/s 20 of the Specific Relief Act in favour of the Plaintiff?

During the pendency of the appeal, the Appellant amended the grounds of appeal and added four additional grounds which read as under -

? Whether the learned first Appellate Court could have decreed the suit without arriving at the finding regarding readiness and willingness which is a sine qua non for granting decree for specific performance?

? Whether the learned first Appellate Court could have relied upon the alleged statements of Appellants made before the Tahsildar without the same being produced by making an application under Order 41 Rule 27 and further without the same being confronted to the applicants?

? Whether the first Appellate Court was justified in relying upon the alleged statement made before Tahsildar when before the trial Court despite the opportunity it were not produced nor was any justification/explanation offered for omission to produce the same?

? Whether the first Appellate Court was justified in relying upon the alleged agreement of sale when the same was not proved in eyes of law?

2. The brief facts are that the Respondent No. 1 filed the suit for specific performance and possession of the suit property. It is case of the Plaintiff that he had entered into an agreement of sale with the Defendant dated 8th August, 1973 for a total consideration of Rs. 3,500/-in respect of land Gat No. 182 of Shej-Babhulgaon. The said agreement was duly registered and the Defendant accepted Rs. 1,100/-as an earnest amount. According to the Plaintiff, as per the mutual agreement between the parties, the balance amount of Rs. 2,400/-was to be paid at the time of sale-deed. One of the terms of the contract was that Defendant should obtain necessary permission of the concerned authority. According to the Plaintiff, the Defendants obtained permission of the Commissioner on 5th June, 1975. However, permission from the Sub-Divisional Officer was not obtained on one pretext or the other and therefore, the Plaintiff sent notice dated 2nd February 1977 to the Defendant but no reply was given to the said notice by the Defendant, and therefore, Plaintiff filed the suit for specific performance. Defendant Nos. 1, 2 and 4 filed their written-statement. In the written-statement it was contended that they never agreed to sell the suit land to the Plaintiff and that the said transaction was in fact a loan transaction. It was contended that they were in need of Rs. 550/-for their day-to-day necessity and the amount of Rs. 1,100/-was the principal amount, plus interest in the form of Dam Duppat. It was contended that the said agreement was executed to secure the debt. The trial Court framed issues and both the parties adduced evidence. The trial Court, however, held that the Plaintiff had not proved the case for specific performance and directed the Defendants to pay Rs. 550/-to the Plaintiff. Against this order, the Plaintiff preferred an appeal in the District Court. The District Court, however, allowed the appeal and decreed the suit of the Plaintiff.

3. The learned Counsel appearing on behalf of the Appellant/ original Defendant submitted that the Appellate Court had relied on the documents in appeal which was not part of the record and on the basis of the said documents which were brought on record, reversed the finding recorded by the trial Court. He submitted that therefore, the finding recorded by the Appellate Court was perverse. It is submitted that the Appellate Court relied upon the alleged statement of the Appellant made before the Tahsildar, without the same being produced by making an application under Order 41, Rule 27 of the Code of Civil Procedure. It

is submitted that the trial Court had in fact observed in its order that the Plaintiff ought to have brought that evidence on record in the trial itself. It is, therefore, submitted that the Plaintiff had not filed any application under Order 41, Rule 27 of the Code and no order was passed by the Appellate Court, permitting the Plaintiff to produce additional documents nor were these documents proved, in accordance with the law and yet the Appellate Court had recorded the finding against the Appellants herein.

4. On the other hand, the learned Counsel appearing on behalf of the Respondent/original Plaintiff submitted that the documents which were produced before the Appellate Court were the statements recorded by the official authorities. He also submitted that in view of Section 80 of the Evidence Act, since there is a presumption about the said documents which were produced as record of evidence, the Court was duty bound to presume that the said documents are genuine.

5. There is much substance in the submission made by the learned Counsel for the Appellant. Perusal of the lower Appellate Court's judgment clearly shows that in paragraph 8 the Court has relied on an order passed by the Additional Commissioner. He has observed as under

A perusal of the order passed by the Additional Commissioner permitting division of the land shows that block No. 182 consists of 14 hectares and 13 areas.

Admittedly, the said document was not part of the record in the trial Court. Similarly in paragraph 9, the learned Judge has observed that the trial Court failed to note that in respect of two other persons with whom the Plaintiff has entered into similar agreements, a decree for specific performance was passed against one of them. It is rightly submitted by the learned Counsel appearing on behalf of the Appellant that this fact does not form part of the record in the trial Court. Thirdly, in paragraph 10, the lower Appellate Court has relied upon the certified copy of the statements recorded by the Tahsildar and also the statements of the parties to the suit. The lower Appellate Court has observed as under

The certified copies of the statements recorded by the Tahsildar was produced in appeal ...

6. It is evident, therefore, that firstly, no order was passed by the Appellate Court under Order 41, Rule 27 of the Code. The said documents were not proved in accordance with law. The trial Court in its judgment has observed that "the Plaintiff should have brought these statements on record". It is evident from the observations made by the trial Court in paragraph 11 which reads as under

It is suggested to the Defendant that their statements were recorded by the Tahsildar for division of Gats. This fact has been denied by the Defendants. Had it been the real fact, then the Plaintiff ought to have produced the copy of the said statements, which could have been the best available evidence to the Plaintiff.

7. The Appellate Court has further relied on a document which has been produced by the Plaintiff along with the pursis namely sale-deed executed by Respondent No. 2 Sitabai of her one-fourth share on 9th May 1983 for consideration of Rs. 875/-. It is an admitted position that the said document is not part of record of the trial Court and therefore, the Plaintiff in appeal could not have produced the said document by filing a pursis and the Appellate Court should not have relied on the said document. This being the position, in my view, the lower Appellate Court has recorded the finding against the Appellant herein though said documents were not part of the record and therefore, this Court is entitled to interfere with the order passed by the lower Appellate Court, on the basis of substantial question of law raised by the Appellant. The judgment and order passed by the District Court in Civil Appeal No. 553 of 1982 is, therefore, set aside and quashed. Second Appeal is accordingly allowed and disposed of.