(2016) 10 BOM CK 0052

In the Bombay High Court

Case No : Second Appeal No. 46 of 2016

Sheshrao s/o Pandhari Ghule — APPELLANT

Vs

Yadav s/o Jyotiba Bhosale — RESPONDENT

Date of Decision : 05-10-2016

Acts Referred:
Specific Relief Act, 1963 — Section 20

Citation : (2016) 6 AIRBomR 670

Hon'ble Judges : Sunil P. Deshmukh, J.

Bench : Single Bench

Advocate : Mr. C. R. Deshpande, Advocate, for the Respondent; Mr. V. D. Salunke h/f Mr. S. Y. Patil, Advocates, for the Appellant

Final Decision : Dismissed

Judgement

Sunil P. Deshmukh, J. (Oral)—Defendant comes up before this court challenging two concurrent decisions rendered hitherto, one by extra joint civil judge, senior division, Latur in special civil suit No. 158 of 2006 dated 30th November, 2011 and the other by District Judge-4, Latur in Regular Civil Appeal No. 400 of 2012 dated 19th September, 2015.

2. Parties hereto would be referred to by their original status in the suit, such as, respondent as "plaintiff" and appellant as "defendant".

3. There is no dispute about the fact that the defendant had owned and possessed agricultural land admeasuring 1 Hectare, 53 Are from gut No. 13 situated at village Ganjur, Taluka and District-Latur, which forms subject matter of litigation between the plaintiff and the defendant.

4. It is the case of the plaintiff that agreement to sell between the defendant and him had been executed on 15th February, 2005, wherein aforesaid property had been agreed to be sold to the plaintiff by the defendant for a consideration of Rs. 4,63,000/- and that about Rs. 4,00,000/- had been parted with by him and paid to the defendant at the time of execution of agreement to sell. A stamped receipt

acknowledging the payment had also been executed by the defendant on the very day. Rest of the amount of Rs. 63,000/- was agreed to be paid at the time of execution of sale deed after obtaining requisite permission, since the land had been falling in command area of Manjara Project and as such, permission had been necessitated and further that the defendant had agreed to obtain such a permission and thereafter to execute sale deed.

5. It is further case of the plaintiff that pursuant to the agreement, since the defendant did not apply for permission immediately, he went on persuading him for making application for permission for quite some time and ultimately, the defendant had filed application on 5th April, 2006 with the Collector, Latur for permission and accordingly, permission had been granted on 3rd August, 2006. After the requisite permission had been granted, the plaintiff had requested the defendant to execute sale deed by accepting balance of consideration amount. However, the defendant avoided to execute sale deed, entailing issuance of notice dated 5th August, 2006 through advocate. Said notice, though had been served and received by the defendant, had not been responded to nor compliance sought under the same had been made. As such, the suit ensued.

6. The defendant resisted the suit and claimed that suit land belongs to him. He denied execution of agreement to sell, receipt of amount and that any consideration in respect of the transaction had been agreed upon. It is denied that he had ever represented that permission from District Rehabilitation Officer would be required for sale of suit land and had applied for permission on 5th April, 2006. Defendant''s case is that one Vilas More, who was holding a high post and enjoying clout, had influenced obtaining permission for plaintiff. The defendant denied that the plaintiff had been willing to purchase suit land. The defendant further denied issuance of notice by the plaintiff.

7. Defendant''s case is that aforesaid Vilas More, son in law of the plaintiff, who also happens to be his relative, was at the relevant time, Deputy Engineer in Public Works Department is the real culprit. Vilas More was assisting the defendant. Vilas More in the year 2005, at the time of Gudi Padwa, agreed to pay defendant hand loan of Rs.2,00,000/- demanding signatures on blank stamp paper of Rs.100/- and a blank paper affixed with stamp. It is contended by the defendant that the amount was agreed to be advanced with interest @ 5% p.a. and accordingly, aforesaid two blank signed documents were handed over to said Vilas More. The blank documents were obtained under active confidence of the defendant and those might have been used by the plaintiff for filing present suit. It is contended that Vilas More and his father - Haridas More are engaged in activity of getting sale deeds of immovable property from others and as such, the documents appear to have been used in collusion with plaintiff, who is father in law of Vilas More, fabricating false documents with a view to grab suit land. It was contended that the suit land is the only source of livelihood for the defendant.

8. Issues, upon aforesaid pleadings came to be framed by the trial court viz;

whether the plaintiff proves that the defendant had executed agreement to sell, whether the plaintiff proves that he was ready and willing to perform his part of the contract, whether the defendant proves that the transaction is a money lending transaction and whether the plaintiff was entitled for specific performance. Further, it appears that there were some additional issues that have been framed viz; whether the defendant proves that he had signed blank stamp paper of Rs.100 and a blank paper with stamp with active confidence in Vilas More and those documents were used for fabricating agreement to sell and receipt and that said documents are false and forged documents and whether the suit is maintainable, being based on unregistered documents.

9. The trial court found, the plaintiff proved that the defendant had executed agreement to sell and that the plaintiff was ready and willing to perform his part of the contract and that the defendant could not prove that it was a money lending transaction or for that matter the agreement to sell and the receipt of amount is false and forged documents executed under active confidence of defendant in Vilas More and further held the suit to be maintainable.

10. Decision rendered by the trial court had been taken in appeal referred to above, by the defendant contending, the trial court did not appreciate that the transaction was a loan transaction and blank stamp paper and blank paper taken from the defendant by Vilas More have been misused and further that the trial court had not considered that the plaintiff had failed to prove the documents by independent witnesses and that it ought to have been appreciated that the plaintiff has failed to prove that he was ready and willing to perform his part of the contract or for that matter the plaintiff has failed to place on record the source of income for making payment of Rs.4,00,000/- and its actual payment.

11. The appellate court had framed points for consideration with respect to proof of suit transaction being genuine and bona fide, as to whether the defendant proved that transaction in fact was a hand loan transaction and that the agreement of sell and the receipt are sham and bogus and about readiness and willingness of the plaintiff to perform his part of the contract, holding that the transaction being genuine and bona fide and further that the defendant having not proved the documents being sham and bogus and for that matter it was a loan transaction and that the plaintiff was ready and willing to perform his part of the contract.

12. Mr. V. D. Salunke, learned advocate appearing for the defendant contends, it has emerged on record that the documents being relied on for seeking specific performance cannot be said to be effectively proved as is required. He contends that the position being so, the subsequent consideration about shifting of onus has been rendered redundant. He further contends that perusal of the appellate court''s judgment would show that it has been overwhelmed with the aspects which do not form part of pleadings of either party. He, therefore, submits that the judgments and decrees of the trial as well as appellate courts would not be tenable on facts and in law, having regard to aforesaid aspects not receiving their

due while deciding the proceedings.

13. According to learned advocate for the defendant, the plaintiff''s case shows that the agreement had been stated to have been executed on 15th February, 2006 and further that before the agreement to sell had been entered into, a piece of land abutting western side of the suit land had been purchased by the plaintiff from the defendant. The documents had been executed, written by a scribe in the office of Sub-Registrar, Latur attested by two witnesses, one of whom happens to be real brother of Vilas More. In order to prove documents, although purportedly Sanjay More, brother of Vilas More has been examined, he being a close relative, his testimony is doubtful and ought not to have been relied on. Save plaintiff and said Sanjay More, no other person has been examined, much less the scribe. He contends that the plaintiff has claimed ignorance about name of the scribe or any acquaintance with him, however, his evidence has been sought to be improved through testimony of attesting witness, Sanjay More. Mr. Salunke, refers to the judgment of the trial court wherein mere narration that the plaintiff in his oral evidence and that of attesting witness at Exhibit-36 and Exhibit-37 has admitted signatures of the defendant would not tantamount to discharge of burden of proving contents of the documents. He submits that there is similar discussion with regard to proof of contents of said documents given by the appellate court. He, under the circumstances, contends that it cannot be said that the primary burden has been effectively discharged by the plaintiff, since mere reference to admission of signature of the defendant does not take within its fold proof of contents of the documents and since said burden has not been discharged, further burden about document being forged and fabricated or for that matter sham and bogus would not be incurred by the defendant to be proved.

14. To support his propositions, he cites quite a few judgments, particularly the one in the case of "Manoramabai Amrutrao Deshmukh and Another v. Laxman Atmaram Kathale" reported in 2005 (2) Bom.C.R. 353, wherein the court has observed thus -

"10. One basis fact for consideration is whether Exh.29, sale deed in question, is proved by the appellants. Admittedly, as observed and as not disputed, no evidence was led to prove the said sale-deed. The executant of the said document or scribe of the attesting witness was not examined. The law is settled by our Court as declared in 1982 (1) Bom.C.R. 819 : 1982 Mh.L.J. 840 (Prakash Cotton Mils v. Municipal Commissioner, Bombay) and AIR 1968 Bombay, 112 (Syeed Mohammad Yousuf v. D. and Others), it is held that the contents of documents can only be proved by examining the scribe of the document and further that the contents in the documents is hearsay evidence, unless the writer thereof, is examined before the court. In view of this position of the law, in my view, there is no question of law involved in this matter, as this fact itself goes to the root of the case. If document itself is not proved then there is no question of construction of such document, even though styled as sale-deed. I see there is no reason for interfering n the concurrent findings given by the Court below."

15. He further refers to a decision of division bench of this court in the case of "Sir Mohammaed Yusuf and Another v. D and Another" reported in AIR 1968 Bombay 112 to submit that to prove signature or handwriting of author is one thing and to prove contents of document is quite another. He lays particular stress on paragraph No.42 from said judgment, which is reproduced herein below for ready reference-

"42. The reason on which the decision of Bhagwati, J. is based is not far to seek. The evidence of the contents contained in the document is hearsay evidence unless the writer thereof is examined before the Court. We, therefore, hold that the attempt to prove the contents of the document by proving the signature or the handwriting of the authority is to set at nought the well recognised rule that hearsay evidence cannot be admitted. This question has been discussed by Halsbury at paragraph 533 at p.294 (Halsbury''s Law of England, 3rd Edition, Vol.15) under the heading ''Hearsay'' Says Halsbury:

''..... Statements in documents may also be hearsay. So, if A had taken counsel''s opinion before acting, the contents of the opinion would be admissible for the same purpose, but not to prove the truth of any statement of fact therein". In paragraph (534) Halsbury has discussed the reasons for rejection of hearsay evidence and says:

''The reasons advanced for the rejection of hearsay are numerous, among them being the irresponsibility of the original declarant, the depreciation of truth in the process of repetition, the opportunities for fraud which its admission would offer, and the waste of time involved in listening to idle rumour.''

The two principal objections, however, appear to be the lack of an oath administered to the originator of the statement, and the absence of opportunity to cross-examine him"

The Advocate General drew our attention to a decision of House of Lords in Maria Sturla v. Filippo Freccia (1879) 5 A. C. 623. In that case, the report of a committee appointed by a public department in a foreign state was admitted in evidence as a public document. It was, however, held that it was not admissible as evidence of all the facts Stated therein. In that case the facts were : The document in question, a report of certain persons called the Ginunta di Marina at Genoa, was sought to be put in evidence for the purpose of proving that person who was formerly counsul for the Genoese Republic in London, and the succession to whose daughter, Mrs. Brwon, was in question, was a native of Quarto near Genoa and at the time that report was made, aged about forty five years. The document was tendered for that purpose and for that purpose only"

16. He further relies on a decision of Madras High Court in the case of "S.S. Mariappan v. V. Bharathidasan" in Second Appeal No.299 of 2006 dated 9th December, 2010 in which according to him the question has been considered as

to whether the courts were justified in proceeding on the footing as if burden of proof lies on defendant to prove falsity/fabrication of the document and whether courts were justified in not considering the fact that the scribe having not signed agreement and not adverting to the same in the judgment. According to him, said judgment exemplifies that unless the initial burden can be said to have been discharged, the onus of proving falsity of document would not shift on the defendant. According to him, in the matter before this court as well, it is nobody''s case that the scribe has been examined and that the considerations which have weighed with the courts below is about failure of the defendant to prove fabrication of the documents.

17. Mr. Salunke, further refers to a judgment of this Court in the case of "Dattaray Narayan Aher v. Bhaskar Narayan Aher" in Second Appeal No.166 of 1998 dated 31st August, 2010, which according to him, follows principle that proof of signature of the author is one thing and proof of contents of document is another. He also refers to and relies on a judgment of Punjab and Haryana High Court in the case of "Rajesh Pratap Singh v. Smt. Chameli Ishwar and Others" in R.S.A. No.2212 of 2008 dated 14th October, 2009 contending that when there are specific allegations of fraud and forgery, the scribe ought to have been examined, as observed in the same and further that the attesting witness of the document being nearly related to the plaintiff, it was all the more necessary to examine the scribe.

18. Mr. Salunke, further refers to and relies on a decision of the Supreme Court in the case of "Thiruvengada Pillai v. Navaneerthammal and Another" reported in 2008 AIR (SC) 1541 : 2004 (4) SCC 530, particularly, its head note and paragraph No.17, which respectively read thus-

"Specific Performance - Execution of agreement - Burden of proof- Plaintiffs came to court alleging that the first defendant had executed an agreement of sale in favour- The first defendant having denied it, the burden was on the plaintiff to prove that the first defendant had executed the agreement and not on the first defendant to prove the negative- The issues also placed the burden on the plaintiff to prove the document to be true- No doubt, the plaintiff attempted to discharge his burden by examining himself as also scribe and one of the attesting witnesses - But the various circumstances enumerated by the trial Court and High Court referred to earlier, when taken together, rightly create a doubt about the genuineness of the agreement and dislodge the effect of the evidence of PW 1 to 3- Decision of the High Court, reversing the decision of the first appellate court, does not call for interference- Appeal dismissed."

"17. The trial court had analysed the evidence properly and had dismissed the suit by giving cogent reasons. The first appellate court reversed it by wrongly placing onus on the defendants. Its observation that when the execution of an unregistered document put forth by the plaintiff was denied by the defendants, it was for the defendants to establish that the document was forged or concocted, is not sought proposition. The first appellate court proceeded on the basis that it is for the party who asserts something to prove that thing; and as the defendants alleged that he agreement was forged, it was for them to prove it. But the first appellate court lost sight of the fact that the party who propounds the document will have to prove it. In this case plaintiffs came to court alleging that the first defendant had executed an agreement of sale in favour. The first defendant having denied it, the burden was on the plaintiff to prove that the first defendant had executed the agreement and not on the first defendant to prove the negative. The issues also placed the burden on the plaintiff to prove the document to be true. No doubt, the plaintiff attempted to discharge his burden by examining himself as also scribe and one of the attesting witnesses. But the various circumstances enumerated by the trial court and High Court referred to earlier, when taken together, rightly create a doubt about the genuineness of the agreement and dislodge the effect of the evidence of PW 1 to 3. We are, therefore, of the view that the decision of the High Court, reversing the decision of the first appellate court, does not call for interference."

19. He refers to another judgment of the Supreme Court in the case of "Subhra Mukherjee and Another v. Bharat Coking Coal Ltd and Others" reported in AIR 2000 SC 1203. For ready reference head note (B) along with corresponding paragraph No.13 relied upon on behalf of the defendant is reproduced herein below:

"(B) Evidence Act, 1872 Section 101 Burden of proof - Issue whether a transaction is bona fide and genuine one or is sham and bogus - Party alleging it to be sham need not take burden of proof until transaction is proved to be bona fide by opposite party. There can be no dispute that a person who attacks a transaction as sham, bogus and fictitious must prove the same. But where the issue raised discloses that it is in two parts, the first part says, ''whether the transaction, in question, is bona fide and genuine one'' and the second part says ''or is a sham, bogus and fictitious'' transaction, it is only when the first part has been proved that the party alleging to be sham has to dislodge it by proving that it is a sham and fictitious transaction. When circumstances of the case and the intrinsic evidence on record clearly point out that the transaction is not bona fide and genuine, it is unnecessary for the Court to find out whether the respondent has led any evidence to show that the transaction is sham, bogus or fictitious."

"13. There can be no dispute that a person who attacks a transaction as sham, bogus and fictitious must prove the same. But a plain reading of question No.1 discloses that ti is in two parts; the first part says, ''whether the transaction in question is bona fide and genuine one, which has to be proved by the appellants. It is only when this has been done that the respondent has to dislodge it by proving that it is a sham and fictitious transaction. When circumstances of the case and the intrinsic evidence on record clearly point out that the transaction is not bona fide and genuine, it is unnecessary for the court to find out whether the respondent has led any evidence to show that the transaction is sham, bogus or fictitious."

20. He also refers to a judgment of the Supreme Court in the case of "Ishwar Das Jain v. Sohan Lal" reported in AIR 2000 SC 426 contending that when material or relevant evidence is not considered or where finding has been arrived at by appellate court by placing reliance on inadmissible evidence, a substantial question of law would arise.

21. According to Mr. Salunke, aforesaid questions arise for consideration in the second appeal.

22. Contentions on behalf of the defendant are being countered by Mr. Deshpande, learned advocate for the plaintiff contending that all these submissions and arguments on behalf of the defendant would have been of some significance only if facts, record and the evidence would warrant the same. According to learned advocate for the plaintiff, it cannot be disputed that the defendant has not denied his signatures on the documents and those documents form part of record. He contends that taking into account chronology of events and corresponding evidence in respect of the same, there can hardly be any suspicion or doubt about genuineness or for that matter documents being not sham and bogus or for that matter contents of the documents have not been proved. He submits that the defendant has miserably failed to prove his side of the case, particularly that it was a loan transaction, a loan which is contended to have been advanced by son in law of the plaintiff - Vilas More to the defendant, who also happens to be relative of the defendant himself. He submits that apart from aforesaid, the defendant in pursuance of the contents of the agreement to sell has acted accordingly, which is established by evidence on record. He further contends that burden of proof and its discharge by the party concerned in accordance with the Evidence Act has been rightly considered by the courts. The two courts have concurrently found the transaction to have been proved by the plaintiff by appreciation of evidence and as such, said appreciation would hardly be amenable for examination by the court under second appeal. He submits that the trial court has taken into account documents i.e. agreement to sell Exhibit - 36 and receipt Exhibit-37, legal notice Exhibit-76, its acknowledgement Exhibit-75, opinion of handwriting expert Exhibit-16 in respect of document Exhibit-78 permission application. He submits that it has been taken into account that there is document dated 15th February, 2005 and the receipt of the even date. He further submits that the evidence as is adduced on behalf of the plaintiff and his witnesses would depict that all the relevant facts required have been testified proving contents of the documents and said testimony has not been foiled by cross-examination of those witnesses. In the circumstances, even if, for a moment, it is assumed for the sake of arguments that ostensibly, it may not refer to the proof of the contents of the documents, yet fact remains that evidence shows that the documents stand properly, legally and factually proved and said evidence has not at all been shaken in the cross-examination of the witnesses. The position being so, according to learned advocate, it was but incumbent and must that the burden cast on the defendant ought to have been discharged by him and he submits that he has not only failed but has miserably

failed to do the same. He, therefore, contends that the chain of events and the chronology shows that the conclusions and inferences drawn by the trial as well as appellate courts based on appreciation of evidence are hardly amenable to any further probe in the second appeal. It would not emerge at all that the findings recorded are without evidence and that they are so perverse as would require re-appreciation by this court at second appellate stage.

23. Mr. Deshpande purports to rely on decision of the Supreme Court in the case of "Standard Chartered Bank v. Andhra Bank Financial Services Ltd. and Others" reported in AIR 2006 SC 3626 to buttress his submission that while evidence has emerged on record, burden of proof would have no significance and the court will have to decide matter in accordance with evidence as is on record. He lays stress on paragraph No.83 of said judgment, which reads thus

"83. Rebutting these arguments, Mr. Jethmalani contends that Section 110 is contained in Chapter VII of the Indian Evidence Act, 1872, which deals with the burden of proof. As a matter of fact, Section 110 merely enunciates the burden of proof as to ownership. He rightly submits that any rule of burden of proof is irrelevant when the parties have actually led evidence and that evidence has to be considered. Reliance is placed by him on Sita Ram Bhau Patil v. Ramchandra Nago Patil and Anr. for the proposition that when the entire evidence is before the court, the burden of proof becomes immaterial. Even assuming that the rule of burden of proof in Section 110 is relevant, Mr. Jethmalani contended that Section 110 would be applicable only to a ''thing'', which is capable of being possessed. He rightly submits that a chose in action is not a ''thing'', as, by definition, it is not in the possession of someone, but that possession has to be acquired by some action which is why it is called a chose in action. He rightly distinguished the judgment of this Court in Chuharmal Takarmal (supra) as wholly inapplicable to a situation of a chose in action. In the said judgment, the possession was with respect to certain wrist watches, which were obviously not choses in action. According to him, Section 137 of the TP Act makes Section 132 inapplicable to debentures but the principles of common law and equity must surely govern even such transactions of transfer of debentures.

24. He relies on yet another judgment in the case of "R. V. E. Venkatachala Gounder v. Arulmigu Viswesaraswami and V. P. Temple and Another" reported in AIR 2003 SC 4548 and lays stress on Head Note (H) and paragraphs No.29 and 30 of said judgment in support of his contention that once the plaintiff is able to create high degree of probability to shift onus on defendant, it is for the defendant to discharge his onus.

"(H) Specific Relief Act, 1963 Section 34 - Suit for recovery of possession on basis of title - onus to prove title - once plaintiff is able to create high degree of probability to shift onus on defendant - It is for defendant to discharge his onus - In absence thereof, the burden of proof on plaintiff, would be discharged, which would amount to proof of plaintiff'' title - Finding of fact that plaintiff succeeded in shifting onus on defendant and thus burden of proof on plaintiff stood discharged - Interference with, by High Court on re-appreciation of evidence - not permissible."

"29. In a suit for recovery of possession based on title it is for the plaintiff to prove his title and satisfy the Court that he, in law, is entitled to dispossess the defendant from his possession over the suit property and for the possession to be restored with him. However, as held in A. Raghavamma & Anr. v. Chenchamma & Anr., AIR 1964 SC 136, there is an essential distinction between burden of proof and onus of proof: burden of proof lies upon a person who has to prove the fact and which never shifts. Onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence. In our opinion, in a suit for possession based on title once the plaintiff has been able to create a high degree of probability so as to shift the onus on the defendant it is for the defendant to discharge his onus and in the absence thereof the burden of proof lying on the plaintiff shall be held to have been discharged so as to amount to proof of the plaintiff''s title.

30. In the present case, the trial Court and the first appellate Court have noted that the plaintiff has not been able to produce any deed of title directly lending support to his claim for title and at the same time the defendant too has no proof of his title much less even an insignia of title. Being a civil case, the plaintiff cannot be expected to proof his title beyond any reasonable doubt; a high degree of probability lending assurance of the availability of title with him would be enough to shift the onus on the defendant and if the defendant does not succeed in shifting back the onus, the plaintiff''s burden of proof can safely be deemed to have been discharged. In the opinion of the two Courts below, the plaintiff had succeeded in shifting the onus on the defendant and, therefore, the burden of proof which lay on the plaintiff had stood discharged. The High Court, in exercise of its limited jurisdiction under Section 100 of CPC, ought not to have entered into the evaluation of evidence afresh. The High Court has interfered with a pure and simple finding of fact based on appreciation of oral and documentary evidence which the High Court ought not to have done."

25. He also refers to and relies on judgments of the Supreme Court in the case of "Ramji Dayawala and Sons (P) Ltd. v. Invest Import" reported in AIR 1981 SC 2085 and in the case of "Achuthan Pillai v. Marikar (Motors) Ltd,." reported in AIR 1983 Kerala 81, in order to support his contention that although it is being contended on behalf of the defendant that proof of handwriting would not be a proof of facts in the documents, yet it will have to be considered that in the present matter as considered in AIR 1981 SC 2085 paragraph No.16, that while it emerges in this case that facts as have been referred to in the body of the document have been deposed to by the attesting witness and the plaintiff, contents of the documents stand absolutely proved and as observed in paragraph No.16, truth or otherwise of the facts or contents stated will have to be considered to be proved and admissible in evidence as persons who can vouch safe for the truth of the facts in issue. Paragraph No.16 of judgment reported in

AIR 1981 SC 2085 is reproduced herein below-

"16. Incidentally it was urged by Mr. Majumdar that even if the court proceeds on the assumption that the letter and the cable were received, it is not open to this Court to look into the contents of the letter and the cable because the contents are not proved as the Managing Director of the appellant company who is supposed to have signed the letter and the cable has neither entered the witness box nor filed his affidavit proving the contents thereof. Reliance was placed on Judah v. Isolyne Bose. In that case a letter and two telegrams were tendered in evidence and it was observed that the contents of the letter and the telegram were not the evidence of the facts stated therein. The question in that case was whether the testatrix was so seriously ill as would result in impairment of her testamentary capacity. To substantiate the degree of illness, a letter and two telegrams written by a nurse were tendered in evidence. The question was whether in the absence of any independent evidence about the testamentary capacity of the testatrix the contents of the letter could be utilised to prove want of testamentary capacity. Obviously, in these circumstances the Privy Council observed that the fact that a letter and two telegrams were sent by itself would not prove the truth of the contents of the letter and, therefore, the contents of the letter bearing on the question of lack of testamentary capacity would not be substantive evidence. Undoubtedly, mere proof of the handwriting of a document would not tantamount to proof of all the contents or the facts stated in the document. If the truth of the facts stated in a document is in issue mere proof of the handwriting and execution of the document would not furnish evidence of the truth of the facts or contents of the document. The truth or otherwise of the facts or contents so stated would have to be proved by admissible evidence, i.e. by the evidence of those persons who can vouch safe for the truth of the facts in issue. But in this case Bhikhubhai Gourishankar Joshi who filed an affidavit on behalf of the appellant has referred to the averments in the letter and the cable. He is a principal officer an constituted attorney of the appellant company. Once the receipt of the letter and the cable are admitted or proved coupled with the fact that even after the dispute arose and before the suit was filed, in the correspondence that ensued between the parties, the respondent did not make any overt or covert reference to the arbitration agreement and utter failure of the respondent to reply to the letter and the cable controverting the averments made therein would unmistakably establish the truth of the averments made in the letter. What is the effect of averments is a different question altogether but the averments contained in the letter and the cable are satisfactorily proved."

26. He further refers to judgment of the Supreme Court in the case of "Narbada Devi Gupta v. Birendra Kumar Jaiswal" reported in AIR 2004 SC 175, which according him supports his case having regard to facts and circumstances it cannot be said that the contents of the documents having not been admitted by the defendant and/or the same can be denied by him.

27. Upon aforesaid submissions and the background, emerging situation is that

the plaintiff claims, the document - agreement to sell, has been executed on 15th February, 2005, as also receipt acknowledging payment of Rs.4,00,000/- had been executed by defendant, whereas case of the defendant is said documents are fabricated ones having been given in the custody of a third person, namely, Vilas More, who is stated to be son in law of the plaintiff. Signatures on the documents are not disowned, however, are contended to be for some other purpose.

28. It is vehemently contended on behalf of the appellant that the contents of the agreement to sell cannot be said to have been duly proved, as required, for want of examination of scribe, relying on the judgments referred to above and further that onus to prove the document to be sham and bogus would only shift if the transaction is bona fide and genuine.

29. In the present matter, it sufficiently bears out that the contents of the document have been given evidence about proving the same. Witnesses in respect of transaction, examined on behalf of the plaintiff, to quite a large extent have given evidence about contents of the documents. The attesting witness has been examined, who had been conversant with the events and has deposed about the contents of the document. Evidence by him could not be dispelled in the cross-examination. The attesting witness examined is not a witness which can be said to be related one as in the case of "Rajesh Pratap Singh v. Smt. Chameli Ishwar and Others" (supra). It would not be a case wherein it can be said that the contents have not at all been proved. While in the present case, the attesting witness has been examined, for want of examination of the scribe, it cannot be said that the contents are not at all proved. The document concerned appears to have been proved as per requirements of the provisions of the Indian Evidence Act. The two courts have appreciated that the documents to be duly proved. That apart, there are contemporaneous other attending circumstances, which corroborate contents of the documents.

30. In the process, onus/burden had been incurred by the defendant to be discharged upon his own contention that the documents had been handed over to Vilas More for security purpose in respect of a loan from him to the defendant.

31. The courts have appreciated that having regard to that the documents having been proved and the same depicts a genuine transaction, onus naturally had been shifted to prove the allegations of defendant in respect of said documents on the defendant.

32. The decisions relied upon on behalf of the defendant have been rendered in different factual backgrounds and the observations made therein have been in the background of contextual situations in those cases.

33. Both the courts have considered that existence of the signatures on the documents have not been disputed by the defendant and neither that the bond papers have been purchased by the defendant on 15th February, 2005 from one Mr. Mule, nor the place of purchase has been disputed. As a matter of fact,

defendant had made an attempt to prove his case, through witnesses. However, on scrutiny, the courts found that evidence of Uddhav Ghule Exhibit-79 and Ram Suryawanshi Exhibit-82 was a hearsay evidence and they had no knowledge about transaction and were not acquainted with the facts as are narrated in the affidavits.

34. Besides, the courts have also observed that it was contention of the defendant that Vilas More and his father were engaged in sale and purchase transactions of lands and in support of his defence, the defendant purported to examine some witnesses. The courts have particularly considered that the onus as had been incurred by the defendant has not been discharged by him by adducing any cogent material and evidence and a solitary document does not appear to be evidence sufficient to infer the same.

35. Onus while shifted, and having not been able to discharge said burden, it will not now be open for the defendant to fall back on so called lacunea in evidence of plaintiff. Evidence does not show any substance in the defence of the defendant.

36. The defendant although disputed purpose of documents and particularly alleging that the documents are fabricated, having been placed in custody of third person, yet, such a case does not get any support by any credible evidence. It appears to be defendant''s case that he had been reposing confidence in Vilas More who is related to him. No evidence in respect of loan being given to the defendant and placing documents in custody of Vilas More has been coming forth.

37. There is evidence neither about that loan had ever been given by said Vilas More nor about tendering of documents to Vilas More has been proved by any credible material and the courts below on appreciation of evidence have found said contention not worthy of credence.

38. It further emerges that the plaintiff has pleaded that he is owner of adjacent land to the suit property and that he was lecturer in a place quite close by, namely, Omerga indicating that he had been equipped with sufficient amount. It has emerged in the evidence that the document is of 15th February, 2005, permission for sale was sought on 5th April, 2006, thereafter, there was legal notice by the plaintiff and acknowledgement of its receipt by the defendant. It has been pointed out though the application for permission has been disputed, the matter had been referred to expert''s opinion. The evidence so coming forth has not been rebutted at all.

39. Apart from aforesaid one more fallacy in the case canvassed by defendant can be said to emerge, while defendant contends that it was around Gudi Padwa him and Vilas More had certain transaction, the document is purchased on 15th February, 2005. It is not the case of the defendant at all that document dated 15th February, had been purchased by him for the transaction which was entered into around Gudi Padwa, which was way subsequent to / after 15th February, 2005. It has come on record that bond paper has been purchased by the

defendant himself. It is not the case of the defendant that there was intention on 15th February, 2005, to enter into transaction around Gudi Padwa.

40. In the circumstances, facts, events and occurrences, the evidence given on behalf of the plaintiff not only lends credence to the case of the plaintiff, but also to a very large extent substantiates the same. Facts, events, occurrences and evidence show greater degree of probability in favour of the plaintiff. The defendant has not discharged his burden of proving the case to be otherwise by any cogent material and/or evidence. As such, findings by trial as well as appellate court would hardly be amenable to reopening in second appeal for appreciation.

41. Second appeal as such, fails and stands dismissed.

42. In view of dismissal of the second appeal, civil application No.866 of 2016 does not survive and stands disposed of.