

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO. 56 of 2015**

1. Shri Avdoot @ Mahadev Shet
Verekar, son of late Dattaram
Shet Verekar, aged 57 years,
Married, business.
(Since deceased through legal heirs)
a) Miss Deepa Avadoot D. Shet
Verenkar, aged 24 years, household,
daughter.
b) Miss Deepti Avadoot Shet
Verenkar, aged 19 years, Student,
daughter.
c) Miss Triputi Avadoot Shet
Verenkar, aged 10 years, minor
represented by her next friend and
natural guardian, her mother,
The appellant no.2 herein.
2. Smt. Sandhya Shet Verekar,
w/o. Avadoot Shet Verekar,
aged 45 years, housewife,
both residents of Chafebhat,
Savoiverem, Ponda Goa. ... Appellants

V/s

1. Shri Atmaram Jairam Pilankar,
s/o late Jairam Pilankar,
major in age, married, business,
2. Smt. Vishranti Atmaram Pilankar,
d/o Gajanan Falari, w/o Atmaram
Jairam Pilankar, major in age,
housewife,
Both resident of Kankaband, Mapusa
Goa. ... Respondents

Mr. J. P. Mulgaonkar, Advocate for the appellants.

Mr. S. D. Padiyar, Advocate for the respondents.

CORAM :- C. V. BHADANG, J.

Date : 26th August, 2015

ORAL ORDER :

Heard Shri Mulgaonkar, the learned Counsel for the appellants and Shri Padiyar, the learned Counsel for the respondents.

2. The appellants are challenging the concurrent finding of dismissal of their suit, which was filed for relief of declaration and mandatory injunction.

3. Brief facts are that the original plaintiff no.1 (since deceased) was carrying on business under the name and style as M/s. Shantadurga Cashew Industries at Savoiverem in two sheds, constructed on plot A, admeasuring 1153.50 square metres. The case made out in the plaint was that the sheds on the plot were valued at Rs.18,31,300/- while the plant and machinery was valued at Rs.2,50,000/-. The original plaintiff no.1 (since deceased) had obtained loan from State Bank of India, Ponda Branch and on account of some difficulties, the original plaintiff no.1 could not repay the loan and the Bank had obtained a decree for recovery of

Rs.11,71,223.48 with interest. It appears that the Bank had subsequently given a proposal for one time settlement and the plaintiff no.1 was asked to pay an amount of Rs.7,70,000/- towards the final settlement of the dues. In such circumstances, the original plaintiff no.1 had approached the defendant no.1 Atmaram Pilankar, who is the nephew of the original plaintiff no.1 and had proposed for running the cashew industries on partnership basis. Atmaram had accepted the proposal and had advanced Rs.4,60,000/- as his share, which was deposited in the loan account. The remaining amount of Rs.3,10,000/- (out of one time settlement amount) was arranged by the original plaintiff no.1. It appears that subsequently, Atmaram Pilankar showed his unwillingness to continue in the business. Further, according to the plaint allegations, the plaintiffs were requested to acknowledge receipt of Rs.4,60,000/- and accordingly, both the plaintiffs signed a stamp paper under the belief that it is an acknowledgment of receipt of Rs.4,60,000/-. The plaintiffs subsequently learnt that a document styled as agreement of sale in respect of the said property, was written on the stamp paper, in which it was shown that the plaintiffs had agreed to sell the property for a consideration of Rs.5,50,000/-. It was in these circumstances that the appellants filed a suit for declaration that the alleged agreement of sale dated 04/09/2001 is null and void

and without any legal effect. It was also prayed that the entry regarding agreement of sale in the notarial register of Shri M. P. Sawaikar, be cancelled.

4. The original defendants opposed the suit. It was denied that the signature of the plaintiffs were obtained and subsequently, an agreement of sale was got written and notarised.

5. The learned Trial Court framed as many as seven issues. The material issue no.3 as to whether the plaintiffs prove that the defendant no.1 had played fraud and got executed the agreement of sale, was answered in the negative. In that view of the matter, the suit came to be dismissed.

6. The appellants challenged the same in Regular Civil Appeal No.245/2010 *inter alia* on the ground that the alleged agreement of sale was unregistered. The First Appellate Court framed the following two points for determination :

- “(i) Whether the plaintiff has established that defendant no.1 accepted his proposal of entering into a partnership to run the cashew industry and, accordingly, defendant no.1 advanced Rs.4,60,000/- as his share towards the partnership business ?*
- (ii) Whether the plaintiff has established that*

defendant no.1 played a fraud on the plaintiffs and managed to get the said agreement executed before the Notary M. P. Sawikar ?”

The First Appellate Court concurred with the learned Trial Court in holding that the plaintiffs had failed to establish that the defendant no.1 had played a fraud and had managed to get the said agreement executed before the Notary Mr. M. P. Sawaikar. The First Appellate Court had answered both the points framed in the negative and had proceeded to dismiss the appeal.

7. In the present appeal, the appellants have set out the substantial questions of law, in paragraph 25 of the appeal memo as under :

“(i) Whether the agreement of sale dated 4/9/2001 is vitiated by the absence of consensus-ad-idem and want of free consent on the part of the plaintiff and is therefore unenforceable ?

(ii) Whether the Courts below have failed to appreciate that the agreement of sale dated 04/09/2001, being unregistered, understamped, without attesting witnesses is clearly vitiated by fraud and therefore is void and unenforceable?

(iii) Whether the agreement of sale dated 4/9/2001

is illegal and unenforceable as it is not registered in accordance with section 17 of the Registration Act ?

(iv) Whether in the absence of attesting witnesses, the agreement of sale dated 4/9/2001 was one without "animus attestendi" and therefore unenforceable?"

8. It is submitted by Shri Mulgaonkar, the learned Counsel for the appellants that the alleged agreement of sale being unregistered, was illegal and unenforceable, being against the provisions of Section 17 of the Registration Act. It is also submitted that the document is understamped. It is submitted that the alleged agreement of sale is also without any attesting witnesses. It is submitted that the Courts below erred in holding that the appellants had failed to establish fraud.

9. On the contrary, Shri Padiyar, the learned Counsel appearing for the respondents has supported the impugned judgment. It is submitted that the challenge to the agreement being understamped and without any attesting witnesses, was not raised before the Courts below and cannot be allowed to be raised for the first time in the Second Appeal. It is submitted that the First Appellate Court has considered the arguments based on

Section 17 of the Registration Act and has rightly come to the conclusion that the said document having been executed before the commencement of the Amendment Act, 2001, was not required to be compulsorily registered. He submitted that there are concurrent findings of facts recorded by the Courts below on the point of absence of any fraud as alleged.

10. I have considered the rival circumstances and the submissions made. With the assistance of the learned Counsel for the parties, I have perused the judgment passed by the Trial Court as also the First Appellate Court.

11. The Courts below have rightly come to the conclusion on facts that the plaintiffs had failed to establish any fraud. Admittedly, the amount of Rs.4,60,000/- was deposited by the original defendant no.1 in the loan account. This is as per the averments made in the plaint itself. Thus, it was not necessary for the defendants to obtain a separate acknowledgment of receipt of Rs.4,60,000/- as is claimed on behalf of the appellants. In either case, the said finding being a concurrent finding of fact, based on evidence, unless and until it is shown to be perverse, would not partake of the nature of a substantial question of law. In so far as the argument that the document is understamped and without any

attesting witnesses, it was not raised before any of the Courts below. In so far as the argument based on Section 17 of the Registration Act is concerned, the First Appellate Court has adverted to the same in paragraph 22 of the judgment and has held as under :

“22. It has also been argued by Ld. Advocate Shri Mulgaonkar that the agreement is invalid as it has not been registered in terms of section 17 of the Registration Act. It is, however, to be taken note of that no interest or charge is created in a property by virtue of an agreement for sale. It has been argued that as the defendant was put in possession of the property, registration of the said agreement was necessary. In this respect, it would be advantageous to take into consideration sub-section 1 A of Section 17 of the Registration Act which stipulates as follows:-
“The documents containing contracts to transfer for consideration, any immovable property for the purpose of Sec.53 A of the Transfer of Property Act, 1882 (4 of 1882), shall be registered if they have been executed on or after the commencement of the Registration and Other Related laws (Amendments) Act, 2001, and if such documents are not registered on or after such commencement, then, they shall have no effect for the purposes of the said section 53A.””

12. In such circumstances, I do not find that the appeal

involves any substantial questions of law. In the result, the appeal is hereby dismissed, with no order as to costs.

C. V. BHADANG, J.

SMA