

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

SECOND APPEAL NO. 661 OF 1992

Smt. Shantabai Kashinath
Jadhav, since deceased, through
her legal heirs:

Appellants

1. Sou.Asha Ramdas Gaikwad
and Ors

Vs

1.Gnyeshwar Nivrutti Dhighe
and Ors.

.. Respondents

Mr. Prafull B.Shah a/w Mr K.P.Shah, Advocate for Appellants.

Mr. P.N.Joshi a/w Mr Pratik B Rahade, Advocate for Respondents.

CORAM : R.G.KETKAR,J.
DATE : 19/03/2015

ORAL JUDGMENT:

1. Heard Mr. Prafull B. Shah, learned counsel for the appellants and Mr. P.N.Joshi, learned counsel for the respondents at length.

2. By this Appeal under Section 100 of the Code of Civil Procedure, 1908 (for short, "C.P.C."), the heirs of the original defendant-Shantabai Kashinath Jadhav, hereinafter referred to as 'defendant', have challenged the Judgment and decree dated 13.8.1992 passed by the learned 6th Addl. District Judge, Nashik in Civil Appeal No.215 of 1987. By that order, the learned District Judge allowed the Appeal preferred by the respondents, hereinafter referred to as 'plaintiffs' and quashed and set aside

the Judgment and decree dated 31.1.1987 passed by the learned Civil Judge, Junior Division, Niphad in Civil Suit No.84 of 1980. The learned District Judge decreed the suit and directed the defendant to execute the reconveyance deed of the suit land in favour of the plaintiffs, as more particularly described in paragraph 1 of Plaint. The learned District Judge further made it clear that in case the defendant failed to execute reconveyance deed in favour of the plaintiffs, the plaintiffs are entitled to get it executed through Court after depositing Rs.10,000/- in Court. The defendant was ordered to deliver the possession of the suit land to the plaintiffs. The plaintiffs were also permitted to file separate application for mesne profits under order XX, Rule 12 of C.P.C from the date of filing of the suit till delivery of possession of the suit land. The relevant and material facts for disposal of the present Second Appeal, briefly stated, are as under.

3. The plaintiffs instituted suit, inter alia, contending that they had executed a Sale Deed on 6.8.1970 (Exhibit 41) of the suit land in favour of the defendant for a consideration of Rs.10,000/-. According to him, he was in need of money. It is his case that on the same day, i.e. 6/8/1970 (Exhibit 44) he had obtained agreement or writing from the defendant for repurchasing the suit land upon payment of Rs.10000/- within 10 years. The plaintiff requested the defendant to execute the sale deed. The defendant refused to reconvey the property in his favour. Prior to

executing the sale deed on 6.8.1970 he had executed mortgage deed on 14.5.1969 (Exhibit 45) and obtained money. Since he required more money he executed sale deed on 6.8.1970. The plaintiff, therefore, instituted the suit for reconveyance of the deed.

4. The defendant resisted the suit by filing written statement Exh.25. She denied all the adverse allegations. She denied that the plaintiff had mortgaged the suit land on 14.5.1969. She denied that she had executed any agreement or document to reconvey the property in favour of the plaintiffs. She submitted that, in fact, of 14.5.1969 she had purchased the suit land for a total consideration of Rs.10000/-. At the instance of the plaintiff, the amount of total consideration was mentioned at Rs.5000/- instead of Rs.10000/- to avoid payment of stamp duty. Though the sale deeds were executed in her favour on 14.5.1969, the plaintiff obstructed cultivation and enjoyment of the suit land. She, therefore, purchased the suit land by sale deed dated 6.8.1970. According to her, she is in possession of the suit land from 1970. The transaction dated 6.8.1970 is an out and out sale transaction. She denied execution of the agreement dated 6.8.1970. In the alternate, she submitted that if at all such agreement is in existence, the same is obtained by the plaintiffs by playing fraud and forgery. It was also contended that the so-called agreement dated 6.8.1970 is not an registered instrument.

On these, among other contentions, she prayed for dismissal of the suit.

5. On the basis of the pleadings of the parties, the learned trial Judge framed the necessary issues at Exh. 26. The parties led evidence. After considering the material on record, the learned trial Judge dismissed the suit on 31.1.1987. Aggrieved by that decision, the plaintiffs preferred Appeal before the learned District Judge. The Appeal was allowed on 13.8.1992. It is against this decision, the original defendant preferred the Appeal under Section 100 of C.P.C. By order dated 2.3.1993, the Appeal was admitted as the grounds A, C and D involved substantial questions of law. Grounds A, C and D read as under ;

A) The Lower Court gravely erred in misinterpreting the provision of Section 58(c) of the Transfer of Property Act and substantially erred in law in ignoring the provision of Section 48(c) which provided that no transactions shall be deemed to be a mortgage unless the condition (of reconveyance) is embodied in the document which effects or purports to effect the same.

C) The Lower Appellate Court substantially erred in law in holding that the unregistered and disputed document of reconveyance (Exh.44) was proved by the plaintiffs. The Appellate Court ought to have appreciated that the lower Court had appreciated that the lower Court had rightly held that the said document (Exh.44) had not been proved by the plaintiff. Having categorically held that the burden to prove the document was upon the plaintiff, the appellate court very gravely erred in law that though none of the signatories to the document had been examined, yet the document could be proved on the basis of comparison of signature with Exh.41.

D) The Lower Appellate Court ought to have appreciated that in the evidence mere proving of

signature could not amount to prove all contents of the so-called (Exh.44) and in the circumstances even if the signature was proved by comparison and even though the plaintiff had not bothered to lead any expert evidence, which he could have done regarding the signature on Exh.44 as in comparison with Exh.41, the Lower Appellate Court gravely erred in law in holding that the contents of Exh.44 were proved in law”.

6. In support of this Appeal, Mr. Shah submitted that the Sale Deed dated 6.8.1970 (Exh.41) clearly shows that it is an out and out sale. Perusal of the recitals in that sale deed shows that on 14.5.1969 (Exh.45), the plaintiff sold the suit land to the defendant. It was recited therein that though on 14.5.1969 the plaintiffs sold the suit land to the defendant, it was agreed between the parties to reconvey the suit land in favour of the plaintiff. However, as the plaintiffs required money for improving his agricultural land as also for payment of Government dues, they decided to sell the suit land and the price offered by the defendant was fair and proper. He submitted that out of total 10 Acres, the plaintiffs sold 8 Acres 1 Guntha (3 Hectors, 21 Ares). The sale deed also recited that the suit land was to be cultivated by the defendant as owner and after her demise, by her heirs and legal representatives. The defendant being full owner was also at liberty to mortgage, sale or gift the suit land to third party. The sale deed also recorded that it was an out and out sale and there was neither oral or written agreement for reconveying the suit land. He submitted that if the sale deed dated 6.8.1970

(Exh.41), is read as a whole, it clearly shows that the intention between the parties was to sell the suit land. The parties never intended that the plaintiff will get reconveyance of the suit land. He further submitted that the defendant did not sign first page of the sale deed dated 6.8.1970 (Exh.41). The father of the plaintiff, viz Damodar Kashiram Dighe who was examined as PW 1 Exh.42, was not present on 6.8.1970 when the transaction was entered into between the parties. He submitted that the defendant did not sign the purported agreement dated 6.8.1970 at Exh.44. The plaintiffs did not examine any witness to so-called agreement Exh.44. The plaintiffs also did not examine scribe or his relation. He further submitted that the purported agreement dated 6.8.1970 (Exh.44) is not at all proved. In any case, assuming that the said agreement is in existence, the plaintiff obtained the said document by playing fraud and forgery on the defendant. He submitted that the defendant had made improvements in the suit land by digging well. After making improvements in the suit land, she will never agree to reconvey the property for the same price. In support of his submissions he relied upon the decision of the Apex Court in the case of D.R.Rathna Murthy Vs. Ramappa, (2011) 1 SCC 158 and in particular paragraphs 20 to 22 thereof.

7. On the other hand, Mr. Joshi supported the impugned order. He submitted that the defendant was badly in need of money

and, therefore, he executed the mortgage by conditional sale on 14.5.1969 (Exh.45). He submitted that comparison of the recitals in the sale deed dated 14.5.1969 (Exh.45), and the sale deed dated 6.8.1970, (Exh.41), shows that even in the earlier transaction of 1969, similar recitals appeared. In other words, he submitted that the recitals that the defendant became full owner and that during her life time she will cultivate and after her death, her heirs will cultivate the suit land, were recited. He submitted that the agreement dated 6.8.1970 (Exh.41) is duly proved by PW1 Damodar Dighe. There is no cross examination as regards paragraph 2 of his examination in chief. He relied upon Section 67 of the Indian Evidence Act, 1872 (for short, 'Evidence Act') and submitted that one of the attesting witnesses to the agreement dated 6.8.1970 (Exh.44) viz. Baburao Bajare had expired. P.W. 1 deposed that scribe Tribankrao Joshi also expired. Apart from Baburao Bajare, one more person had signed that document as a witness. He could not identify the said witness. He submitted that in such circumstances, having regard to Section 67 of the Evidence Act, the learned District Judge rightly held that the agreement dated 6.8.1970 (Exh.44) is duly proved by the plaintiff. He submitted that comparison of signatures of defendant on first page of sale deed dated 6.8.1970 (Exh.41) and signatures appearing on agreement dated 6.8.1970 (Exh.44) clearly shows that the agreement is signed by the

defendant. Having regard to Section 73 of the Evidence Act, the learned District Judge was justified in comparing the signatures on these documents and in holding that the agreement Exh.44 is signed by the defendant. He further submitted that the said agreement is duly proved by the plaintiff. The defence that the plaintiff obtained agreement (Exh.44) by playing fraud, was not substantiated by the defendant. In support of his submissions he relied upon the decision of this Court in the case of Kishan Arjuna Khansole Vs. Ababuwa Baba Khansole, 2000 (40 Mh. L. J. 854 and in particular paragraph 8 thereof.

8. I have considered the rival submissions made by the learned counsel appearing for the parties. I have also perused the material on record as also the original record. As noted earlier, the plaintiff has instituted the suit for reconveyance of agreement dated 6.8.1970 (Exh.44). The defendant denied execution of agreement (Exh.44) and its existence. Alternatively, she contended that if at all such document is in existence, the same was obtained by the plaintiffs by playing fraud on the defendant as she is illiterate lady. She further contended that the agreement is not a registered instrument. It is, therefore, necessary to consider whether the plaintiff has proved execution of agreement dated 6.8.1970 at Exhibit -44.

9. It is not in dispute that on 6.8.1970, the plaintiffs executed the sale deed (Exh.41) in favour of the defendant. It is the case

of the plaintiffs that on the same day and at the same time, reconveyance deed (Exh.44) was also executed. With the assistance of the learned counsel appearing for the parties, I have perused the sale deed (Exh.41) as also reconveyance deed (Exh.44). Perusal of the sale deed (Exh.41) shows that it bears signatures of the plaintiff Nivrutti and two witnesses, viz Baburao Bajare and one more witness whose name does not appear but his signature appears. The reconveyance deed Exh.44 dated 6.8.1970 also bears signature of Baburao Krishnaji Bajare as also the same witness whose name does not appear and only his signature appears. Thus, the first circumstance is in favour of the plaintiff as the document is executed on the same day and at the same time and is attested by the same witnesses who attested the sale deed. Perusal of the sale deed and in particular page 1 shows that it is signed by the defendant. The re-conveyance deed (Exh.44) bears signature of the defendant on the first page as also the last page above the signatures of witnesses. The said document is also signed by the husband of the defendant. Perusal of evidence of the defendant and in particular her cross examination shows that she does not want to examine her husband as a witness in the case. She admitted that witness Baburao Bajare is dead. She could not state whether Tribakrao Joshi scribe was dead at the relevant time or not. It is undoubtedly true that she deposed that the signature on Exh.41

is not her signature. She further admitted that she has no evidence to show that she had spent Rs.25000/- for improvement of the suit land and that the plaintiff's father Damodar raised objection when she started digging well in the suit land. She also denied that she was served with injunction order some ten days after she began for digging well.

10. The learned District Judge has considered the defence raised by the defendant as also the recitals in the document Exh.44. The recitals in the document Exh.44 records that though the sale deed was executed for a consideration of Rs.10,000/- and though it was recited therein that there was no agreement either in writing or orally for re-conveying the suit land, having regard to close relations between the parties, the defendant agreed to reconvey the suit land to the plaintiff within 10 years. In paragraph 8, the learned district Judge recorded that in view of the contents of recitals of Exh.44, the condition stipulated in the sale deed (Exh.44) that there is no agreement between the parties either in writing or orally to reconvey the suit land, is washed away. The learned District Judge noted that the plaintiffs did not examine any attesting witness as the witness Baburao Krishnaji Bajare had expired. The reconveyance deed (Exh.44) bears signature of husband of defendant Shantabai and one more witness whose signature is illegible. For want of evidence from the scribe or witnesses to the document, it was necessary

to consider whether the said document is proved or not. The learned District Judge noted that the defendant admitted execution of the sale deed (Exh.41) but at the same time denied her signature on page 1 of that sale deed as also identical signature on the document (Ex.44). He observed that the defendant did not give any explanation as to why she had signed first page of Exh.41. The learned District Judge thereafter noted that only defendant Shantabai and her husband were alive. In order to prove the document, the only witnesses remained for the plaintiff or the defendant, were the defendant herself and her husband. In these circumstances, it cannot be expected from the plaintiff to examine the defendant's husband to prove the document as he is bound to support his wife and not the plaintiff. The learned District Judge, therefore considered Section 67 of the Evidence Act and observed that as the plaintiff is unable to adduce evidence for want of witnesses the only way he can prove the document is by relying upon signature of the defendant. After considering the document on record as also Section 67 of the Evidence Act, the learned District Judge held that the plaintiff had discharged onus to prove the contents of Exh.44.

11. The learned District Judge thereafter considered the defence of the defendant, namely the plaintiff obtaining document (Exh.44) by playing fraud upon her and observed that the defendant failed to establish the plea of fraud. After going

through the evidence of the defendant, I do not find that the learned District Judge committed any error in reaching that conclusion.

12. The learned District Judge also considered the defence of the defendant that the document (Exh.44) is not a registered instrument. The learned District Judge dealt with the submissions in paragraphs 12 and 13 and held that the document being an agreement does not require registration. The learned District Judge ultimately held that the document (Exh.44) is duly proved.

13. Mr. Joshi relied upon the decision of this Court in the case of Kishan Arjuna Khansole (*supra*) to contend that Section 67 of the Evidence Act deals with the proof of signature and handwriting of document and does not lay down any particular kind of proof for proving that a particular writing or signature is in the hand of a particular person. He submitted that it has been held by several authorities that the execution of a document is a question of fact and can be proved like any other fact by direct as well as circumstantial evidence. Finally, there are authorities for the proposition of law that any recognised mode of proof which is satisfactory to the Judge is sufficient.

14. After considering the material on record, I do not find that the learned District Judge committed any error in holding that the document (Exh.44) is duly proved by the plaintiff.

15. Mr.Shah relied upon the decision of the Apex Court in the case of D.R.Rathna Murthy (supra) and in particular paragraphs 20 to 22 thereof, In that case, the appellant-plaintiff had instituted suit for specific performance. The suit was dismissed by the trial Court. The First Appellate Court reversed the decree. The High Court of Karanataka reversed the Judgment of the First Appellate Court and restored the Judgment of the trial Court. The appellant had purchased the land in question by registered sale deed dated 23.4.1986 from one A.M.Venkatachalapathy Setty for a consideration of Rs.10,000/-. On the very next day, the appellant sold the said land vide registered sale deed dated 24.4.1986 to the respondent-defendant for consideration of Rs.10,000/- and delivered the possession to him. In pursuance thereof, the respondent-defendant was put in possession of the suit land. The appellant thereafter called upon the respondent in the year 1991-1992 demanding the reconveyance of the suit property on the ground that the registered sale deed executed in favour of the respondent dated 24.4.1986 was a conditional sale deed and the appellant had a right to repurchase the said land for the same consideration of Rs.10,000/- within a period of ten years from the date of execution of the sale deed.

16. After considering the material on record, the trial Court dismissed the suit on 15.11.1995. The First Appellate Court allowed the appeal on 10.3.1999. The First Appellate Court held

that it was a conditional sale deed and accordingly directed the respondent to execute the sale deed in favour of the appellant. The High Court allowed the Appeal on 2.4.2002 and restored the trial Court's Judgment. In paragraph 10, the Apex Court observed that the sale deed dated 24.4.1986 was admitted by the other side. Most of the contents were also admitted. However, it was disputed that the word "avadhi" and the last clause had been inserted subsequent to execution of the document.

17. The trial Court, after appreciating the evidence of the parties and their witnesses came to the conclusion that the word "avadhi" and the last part of the sale deed were inserted after the execution of the document making it a conditional sale deed from absolute sale deed. The First Appellate Court interfered with the trial Court's judgment and without realizing that there was contradiction in the oral testimony of two marginal witnesses, re-appreciated the entire evidence and reached the contrary conclusion. The High Court realising that the findings of facts recorded by the first appellate court were perverse came to the conclusion that the trial Court was right in holding that the word "avadhi" had been inserted at three places in the margin and the last part of the sale deed added subsequent to the execution of the sale deed. In paragraph 17, the Apex Court observed that such insertion had been made to convert absolute sale deed into a conditional sale deed. The Apex Court held that

the trial Court and the High Court rightly believed the testimony of the respondent and held that the appellant was not entitled to reconveyance of the property. It is in that context the Apex Court observed in paragraphs 20 to 22 as under:

“20. Had it been a case of conditional sale, the appellant could have asked the respondent to wait for mutation or raise the objection before the Revenue Authorities in spite of the fact that mutation is a revenue entry and does not refer to the title of the land. Had it been the case of conditional sale deed enabling the appellant to repurchase the land any time within ten years, the respondent could not have spent huge amount of his life savings for improving the land, nor would he have dug a Well in the suit land spending twenty thousand of rupees. The aforesaid circumstances make it clear that the respondent had never agreed for reconveyance.

21. The interlineations had been made at four places in the sale deed. Word "Avadhi" had been mentioned at three places in the margin of the sale deed. The appellant did not attest the said word by putting his signatures at the time of registration. Attestation testifies/certifies the genuineness of the document. Attestation and execution are different acts, one following the other. Execution includes delivery and signing of the document in the presence of the witnesses and also the whole series of acts or formalities which are necessary to render the document valid. Attestation of sale deed is imperative. In the instant case, we find that the animus to attestation remain totally absent. It is settled legal proposition that the document may be admissible but probative value of the entries contained therein may still be required to be examined in the fact and circumstances of a particular case. (Vide State of Bihar and Ors. v. Sri Radha Krishna Singh and Ors. ; and Bharatha Matha and Anr. (Supra).

22. The case is required to be examined from another angle also. The appellant had purchased the land for a consideration of Rs. 10,000/-. On 23rd April, 1986, he sold the land on the very next date for a sum of Rs. 10,000/- reserving his right to purchase the land for the same consideration within a period of ten years. In normal

circumstances, the vendor would not agree for reconveyance for the same consideration for the reason that the value of the land generally goes upwards and within a period of ten years it could have at least become double. (See *Sardar Jogender Singh v. State of U.P.* ; and *Satish and Ors. v. State of U.P. and Ors.*, (2009) 14 SCC 758)."

18. In the present case, the learned District Judge, after considering the evidence on record rightly held that the document of reconveyance dated 6.8.1970 (Exh.44) is duly proved by the plaintiff. I have also perused the original record and in particular the sale deed dated 6.8.1970 (Exh.41) and agreement dated 6.8.1970 (Exh.44). In my opinion, the learned District Judge was justified in comparing the signatures of the defendant appearing on the first page of the sale deed as also appearing on the first and last page of the agreement (Exh44). The learned District Judge rightly held that the agreement (Exh.44) was signed by the defendant. The defendant also failed to establish plea of fraud. The learned District Judge, after considering recitals in the sale deed to the effect that the parties did not agree either in writing or orally that there is no agreement of reconveyance, rightly held that the effect of that recital is washed away in view of the recitals in the agreement (Exh.44).

19. In view thereof, I do not find that the learned District Judge committed any error in allowing the appeal. The findings

recorded by the Appellate Court are based upon appreciation of evidence on record. It cannot be said that the findings are perverse being based on no evidence or that they are contrary to the evidence on record. Merely because another view is possible that itself is no ground for invoking powers under section 100 of C.P.C. The points formulated at the time of admission are answered accordingly. In the result, Appeal fails and the same is dismissed.

20. At this stage, Mr. Shah orally applies for stay of this order for a period of 12 weeks from today. He states that within four weeks from today, the appellant and all adult family members residing with her shall file undertaking in this Court incorporating therein :

- (i) that they are in possession and nobody else else is in possession;
- (ii) that they have neither created any third party interest nor parted with possession;
- (iii) that they will hereafter neither create third party interest nor part with possession;
- (vi) that in case they are unable to obtain suitable orders from higher Court within 8 weeks from today, they will hand over vacant and peaceful possession of the suit land to the plaintiffs.

Before filing the undertaking, the appellants shall serve copy of the undertaking on the other side and if the undertaking

in above terms is filed, the same shall stand accepted by this Court.

21. Subject to the appellants filing undertaking in the aforesaid terms within four weeks from today, this order shall remain stayed for a period of twelve weeks from today. Order accordingly.

(R.G.KETKAR, J.)