

**THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

SECOND APPEAL NO.250 OF 2014

Maroti Dauji Yewale

..VS..

Akash Ganpatrao Gowarkar

Office Notes, Office Memoranda of
Coram, appearances, Court's orders
of directions and Registrar's orders

Court's or Judge's order

Shri A.S. Dhore, Counsel for the Appellant.

Shri M.P. Khajanchi, Counsel for the Respondent.

CORAM : A.P. BHANGALE, J.

DATE : SEPTEMBER 15, 2015.

Heard.

This second appeal is preferred under Section 100 of the Code of Civil Procedure on the ground that the substantial question of law in respect of title is involved.

According to learned counsel for the appellant/defendant, both the Courts below failed to address themselves to the substantial question of law regarding validity of the Gift Deed (Exhibit-42) in view of Section 90 of the Indian Evidence Act, 1872. According to learned counsel for the appellant/defendant, primary evidence was not led in respect of the Gift Deed and Agreement to Sell pleaded by the plaintiff who sued the defendant on the basis of title to the suit property for recovery of possession of the suit property. I do not agree with these contentions for the following reasons:-

.....1/-

The respondent/plaintiff had instituted the suit for recovery of possession of House No.3 situated in Ward No.4 at Village Adegaon, Taluka Zari, District Yavatmal comprising of two rooms of slab and Chhapari bounded on East by cattle shed of appellant/defendant, on West by a lane, on North by house of Vitthal Asutkar and on South by residential house of the appellant/defendant.

The appellant/defendant, against whom the suit is filed, is maternal uncle of the respondent/plaintiff. According to respondent/plaintiff, the appellant/defendant, under an Agreement dated 22.7.1997, had agreed to purchase suit house for sum of Rs.50,000/-. The appellant/defendant had agreed to pay the consideration by March, 1998 and to obtain possession upon execution of the Sale Deed. However, in January, 1998, the appellant/defendant had requested the respondent/plaintiff to hand over the possession of the suit house as appellant/defendant was in urgent need of residence and assured to pay the consideration as per Agreement to Sell dated 22.7.1997 between respondent/plaintiff and appellant/defendant. The respondent/plaintiff, being close relative of appellant/defendant, handed over the possession of the suit house to the appellant/defendant. Since the
.....2/-

appellant/defendant failed to pay consideration of Rs.50,000/- as agreed between them, the Sale Deed could not be executed. That being so, the appellant/defendant is stated as unauthorized possessor of the suit house. Therefore, the respondent/plaintiff instituted the suit for possession of the suit house along with *mesne profits* in respect of the occupation of the suit house by the appellant/defendant.

Learned Civil Judge Junior Division, Maregaon decreed the suit in favour of the respondent/plaintiff on the ground that the respondent/plaintiff is the owner of the suit house and that pursuant to the Agreement to Sell there was no execution of the Sale Deed for non-payment of Rs.50,000/- which the appellant/defendant had agreed to pay. Thus, considering the documentary as well as oral evidence led before the Trial Court, it was found that the appellant/defendant in written statement alleged that there was Gift Deed (Exhibit-42) and consent letter Exhibit-50. The appellant/defendant did not dispute the Gift Deed. That being so, the Trial Court found that the Gift Deed was a document of 30 years old carrying statutory presumption regarding its genuineness in respect of the signature of the Donor and its contents. Thus, *prima facie* the document was accepted as
.....3/-

admissible in evidence. Though the Trial Court stated that the document was attested, the attesting witness was not examined. It is observed that in view of the proviso to Section 68 of the Indian Evidence Act, 1872, it was not necessary for the respondent/plaintiff to call attesting witness in proof of the execution of any document not being the will which has been registered in accordance with the provisions of the Indian Registration Act, 1908 unless its execution by the person by whom it purports to have been executed is specifically denied. It was accepted as admissible particularly when the fact of execution was not denied by the appellant/defendant. This finding recorded by the Trial Court to pass decree for vacant possession of the suit house were also approved by learned Judge of the First Appellate Court on the ground that the story of the Gift Deed was brought-forward by the appellant/defendant himself. During cross examination facts revealed that one Gangubai and Nagabai are the two sisters of appellant/defendant and daughters of Dauji. Ganpat Gowarkar is the son of Gangubai. Dauji executed Gift Deed dated 28.2.1973 (Exhibit-42) in favour of Ganpat Gowarkar. It was proved that the suit house was gifted to Ganpat Gowarkar and possession of the same was handed over to him.

.....4/-

Thus, the respondent/plaintiff (son of Ganpat) was in possession of the suit house and having registered Gift Deed executed on 28.2.1973. In the facts and circumstances of the case, therefore, it is contended that portion of the property belonging to Dauji came in the hands of respondent/plaintiff as claiming through Ganpat (son of Gangubai and Gangubai was daughter of Dauji). That being so, the findings of facts were recorded in favour of the respondent/plaintiff that he was entitled to recover the possession on the basis of the Gift Deed executed in the year 1973 (30 years old document). The first appeal, therefore, came to be dismissed and the decree passed by the Trial Court was confirmed.

In Evidence Act Section 90 reads thus -. Presumption as to documents thirty years old.—Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested. Explanation.—Documents are said

.....5/-

to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable. This Explanation applies also to section 81. Illustrations

(a) A has been in possession of landed property for a long time. He produces from his custody deeds relating to the land showing his titles to it. The custody is proper.

(b) A produces deeds relating to landed property of which he is the mortgagee. The mortgagor is in possession. The custody is proper.

(c) A, a connection of B, produces deeds relating to lands in B's possession, which were deposited with him by B for safe custody. The custody is proper.

In this background, learned counsel for the appellant/defendant submits that the appellant/defendant had filed the written statement. The copy of the same is brought to the notice which indicated that the Gift Deed was referred to in respect of the suit property as registered Gift Deed from Dauji to Ganpat (father of the respondent/plaintiff).

Learned counsel for the
.....6/-

appellant/defendant has placed reliance in the case of Kaliya ..vs.. State of Madhya Pradesh reported at (2013) 10 SCC 758. Having gone through the ruling, I find that it is not attracted in the facts and circumstances of this case. Looking to the admitted fact and in view of the proviso to Section 68 of the Indian Evidence Act, 1872, when the Gift Deed was 30 year old document, it was not necessary for the Trial court to call the attesting witness to prove execution of the document unless it could be established that the attesting witness is living, physically and mentally fit and available to depose in the court.

In the case in hand, there were concurrent findings by both the Courts below and I am satisfied that no substantial question of law arose in this second appeal which may be required to be formulated since the cause of action in the suit is based upon the title of the respondent/plaintiff to the suit property. The suit was decreed in favour of the respondent/plaintiff by concurrent findings of facts. It is not necessary for the second appellate court to formulate any substantial question of law nor any such substantial question of law is arising in the facts and circumstances of the case.

Needless to state that, it is open for the appellant/defendant to file independent suit by
.....7/-

pleading and establishing better title than the respondent/plaintiff if he is so advised.

For the reasons, therefore, considering the restrictions under Section 100 of the Code of Civil Procedure do not allow second appeal except when the High Court is satisfied upon existence of substantial question of law involved in the case and having observed that no substantial question of law is arising considering the concurrent findings of facts recorded by the courts below, no interference is warranted in this second appeal . Hence, the appeal is dismissed with costs.

JUDGE

!! BRW !!