

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
APPELLATE SIDE
NAGPUR BENCH, NAGPUR

SECOND APPEAL NO. 478 OF 2013

Mahadeo Haribhau Vaidya Vs. Sumanbai Namdeo Pande & Ors.

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

Court's or Judge's Order

Smt R. S. Sirpurkar Adv for appellant.
Shri R. R. Srivastava Adv for respondents.

CORAM: A. S. CHANDURKAR J.

DATED: 14 JANUARY, 2015.

Heard. Challenge in the present second appeal is to the judgment by the first appellate Court decreeing the suit filed by the present respondent no.1 for declaration that the document dated 02.06.2003 and sale deed dated 23.12.2003 and 04.07.2005 were null and void and hence liable to be cancelled.

It is the case of the respondent no.1-original plaintiff that she was in need of money for meeting expenses of her daughter's marriage. She had therefore borrowed an amount of Rs. 60,000/- from the defendant no.1. A document

dated 02.06.2003 was executed which according to plaintiff was a mortgage deed. However, in fact the same was a power of attorney granted in favour of defendant no.1. Subsequently, plaintiff found that on the basis of said power of attorney, the defendant no.1 had executed a sale deed of the suit property in favour of defendant no. 2. Defendant no. 2 thereafter sold said land to the appellant/defendant no.3 on 04.07.2005. Hence, aforesaid suit for declaration and cancellation of the power of attorney and the two sale deeds was filed.

According to the defendant no.1, while executing the document dated 02.06.2003 an amount of Rs. 1,20,000/- had been paid. The defendant no.2 had further paid Rs. 52,720/- towards loan amount that was outstanding in favour of the plaintiff. According to the defendant no. 3, he was the bonafide purchaser having purchased the suit property on 04.07.2005.

The trial Court held that the plaintiff had failed to prove that the defendant no. 1 was a money lender. It further held that an amount of Rs. 60,000/- had been obtained and

the general power of attorney was got executed by the plaintiff. The trial Court disbelieved the case of the plaintiff and dismissed the suit.

The first appellate Court after re-appreciating the evidence came to the conclusion that the plaintiff had intended to mortgage the suit property but instead the document of power of attorney was got executed. It therefore held that the said power of attorney and the subsequent sale deeds were null and void. It thus decreed the suit and granted the declaration as prayed.

Smt. R. S. Sirpurkar, the learned counsel appearing for the appellant submitted that first appellate Court was not justified in reversing the judgment of the trial Court. According to her, the plaintiff being an illiterate lady had executed the power of attorney in favour of defendant no.2 and hence had authorised said defendant to sell the suit property. It was further submitted that the plaintiff did not choose to examine herself but instead examined her husband by executing power of attorney in his favour. She further submitted that the first appellate Court merely on the basis of

surmises has reversed the judgment of the trial Court. She therefore submitted that these aspects give rise to various substantial questions of law.

Shri R. R. Srivastava, learned counsel appearing for respondent no.1 supported the impugned judgment. He submitted that document at Ex. 54 did not authorise the defendant no. 1 to sell the suit property. He further submitted that evidence on record had been rightly appreciated by the first appellate Court and on considering the entire material on record the first appellate Court had rightly decreed the suit. He further submitted that on 23.12.2003 when the sale deed came to be executed by defendant no.1 in favour of defendant no.2, the plaintiff was also present. Hence, there was no necessity of the sale deed being executed by the power of attorney holder. He relied upon the decisions of the Supreme Court in:

1] *S. Abdul Khader Vs. Abdul Wajid (Dead) by LRs. and others (2008) 9 Supreme Court Cases 522;*

2] *Suraj Land and Industries Private Limited (2) through Director Vs. State of Haryana and another (2012) 1 Supreme Court Cases 656; and*

3] Church of Christ Charitable Trust And Educational Charitable Society Represented by its Chairman Vs. Ponniamman Educational Trust represented by its Chairperson/Managing Trustee (2012) 8 Supreme Court Cases 706,

to urge that in absence of specific authority being granted by the executor of the power of attorney, the holder would not be entitled to alienate the property.

I have considered aforesaid submissions and I have also gone through the records of the case. Perusal of the document at Ex. 54 that has been executed by the plaintiffs indicates that authority was given to the defendant no. 1 to enter into agreements, receive earnest amount as well as the entire consideration thereafter and to submit documents for being registered before the competent authority. The first appellate Court while considering the said document was pleased to hold that the same was drafted in such a manner so that the executant may not understand the contents of the said documents. Said conclusion has been recorded in para 12 of the impugned judgment. On careful perusal of the said document it cannot be said that the conclusion as recorded is contrary to the contents of said document itself.

It is further to be noted that on 23.12.2003 when the sale deed at Ex. 55 came to be executed in favour of defendant no.2 by defendant no.1 who was his own brother, the plaintiff was very much present before the Sub Registrar. The first appellate Court therefore after considering the evidence in that regard has chosen to accept the case of the plaintiff that the sale deed could have been executed by her instead of power of attorney holder. Said conclusion being based on consideration of the material on record, the same cannot be said to be perverse.

As regards the stand of defendant no.1 regarding the incapacity of the plaintiff to execute various documents, there is no evidence led on behalf of the defendants that the plaintiff was unable to execute any documents and hence there was need to grant power of attorney to the defendant no.1. Though the trial Court has recorded the finding that the plaintiff had failed to prove that the defendant no. 1 doing money lending business, the first appellate Court has accepted the case of the plaintiff in view of the fact that she required some amounts on account of her daughter's marriage.

Considering the entire evidence on record it cannot be said that the view as taken by the first appellate Court is either contrary to law or on the basis of perverse recording of findings. The decisions relied upon by the learned counsel for the respondent no.1 relate to authority of power of attorney holder. In the present case as the document at Ex. 54 does not clearly empower the defendant no.1 to alienate the suit property, the ratio laid down in aforesaid judgments can be made applicable to the facts of the present case.

In view of aforesaid, the Second Appeal does not give rise to any substantial questions of law. Same is therefore dismissed with no order as to costs.

JUDGE

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