

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

SECOND APPEAL NO. 375 OF 1991

Sambhaji S/o Govinda Dukre,
Died through his L.Rs:

1. Devidas S/o Sambhaji Dukre,
Age:42 years, Occu: Agriculture,
R/o. Chinchgavan, Tq. Hadgaon,
District Nanded.
2. Prakash S/o Sambhaji Dukre,
Age: 30 years, Occu: Agril,
R/o. as above.
3. Panchafullabai W/o Ramrao Shirphale,
Age: 39 years, Occu: Household,
R/o. Kamari, Tq. Hadgaon,
District Nanded.
4. Chandrakalabai W/o Ramrao Kale,
Age: 30 years, Occu; Household,
R/o. Ada, Tq. Kalamnuri,
District Hingoli.
5. Sindhubai W/o Uttamrao Sase,
Aged: 33 years, Occu; Household,
R/o. Malegaon, Tq. Kalamnuri,
District Hingoli.
6. Rukhminbai W/o Sambhaji Dikre
@ Dongare, Age: 65 years,
Occu: Household, R/o. Chinchgavan,
Tq. Hadgaon, District Nanded.

....Appellants.

(L.Rs. Of Orig: Deft.No.3)

Versus

1. Kausalyabai W/o Tukaram Suryawanshi,
Aged: 55 years, Occu: Agriulture,
R/o. Boregaon, Tq. Hadgaon,

District Nanded.

2. Godawari W/o Bapurao Shinde,
Age : 23 years, Occu. Agriculture,
R/o Chalgani, Tq. Pusad,
At present r/o. Shewala, Taluka
Kalamnuri, District Hingoli.
3. Sakhubai W/o Datta Durwe,
Age : 40 years, Occu : Agril.,
R/o. Chinchgavan, Tq. Hadgaon,
District Nanded.
4. Anusayabai W/o Datta Durwe,
Died through L.Rs.
- 4/1 Pranita W/o Santosh Jogdant
R/o Chinchgavhan, Tal. Hadgaon
District Nanded.
5. Sunderabai W/o Ghansham,
Died per L.Rs:
 - (i) Pundlik S/o Ghanshyam
Aged: 53 years, Occu: Agriculture,
R/o. Chinchgavhan, Tq. Hadgaon,
Dist. Nanded.
 - (ii) Suryabhan S/o Ghanshyam,
Aged: 30 years, Occu: Agri,
R/o. as above.
 - (iii) Gangabai W/o Dadarao,
Aged: 45 years, Occu: Household,
R/o. Talang, Tq. Hadgaon.
District Nanded.
 - (iv) Jijabai W/o Narayan,
Aged: 40 years, Occu: Household,
R/o. as above.

....Respondents.

(NO. 1 & 2 Orig: Plaintiffs,
Nos.3, 4 & 5 Ori. Deft.
Nos. 1, 2 & 4 respt.)

Mr. M.D. Narwadkar h/f Mr. M.V. Deshpande, Advocate for

appellants.

Mr. A.S. Kulkarni h/f Mr. N.S. Kadam, Advocate for respondent Nos. 1 and 2

Mrs. S.G. Chincholkar, h/f Mr. G.N. Chincholkar Advocate for respondent No. 4/1

Mr. N.S. Choudhari, Advocate for respondent Nos. 5(i) to 5(iv).

CORAM : T.V. NALAWADE, J.

DATED : 12th August, 2016.

JUDGMENT :

1) The appeal is filed against judgment and decree of Regular Civil Suit No. 36/1971, which was pending in the Court of Civil Judge, Junior Division, Hadgaon, District Nanded. It is also against judgment and decree of Regular Civil Appeal No. 151/1980, which was pending in the Court of 2nd Additional District Judge, Nanded. The suit filed by present respondents - Kausalyabai and Godavaribai for relief of partition and possession was partly decreed by the Trial Court. As the suit was dismissed in respect of one property purchased by present appellant viz. land Survey No. 77/B, the decision was challenged by plaintiffs by filing Appeal No. 151/1980. This appeal was allowed by the District Court and decree is given in respect of this property against the appellants. The other appeal filed by original defendant No. 2 bearing No. 85/1980 is dismissed by the District Court. The said decision is not challenged further by

original defendant Nos. 1 and 2 and so, in the present matter, only the dispute with regard to the agricultural land bearing Survey No. 77/B needs to be considered. Both the sides are heard.

2) In short, the facts leading to the institution of the appeal, can be stated as follows :-

The suit was filed in respect of the agriculture land bearing Survey No. 77/B (admeasuring 4 Acres 5 Gunta), survey No. 87 (Admeasuring 15 Acres 1 Gunta), both lands situated at village Bamni, Survey Nos. 26/A and 13 (admeasuring 10 Acres 5 Gunta and 10 Acres 4 Gunta, respectively) situated at village Khamgavan and one house property situated at Chinchgavan.

3) Plaintiffs are real sisters inter-se and they are daughters of defendant No. 1 - Sakhubai. Defendant No. 1 and defendant No. 2 are widows of Datta Durawe, father of plaintiffs. Defendant No. 4 is sister of Datta. As property bearing Survey No. 77/B is with defendant No. 3, present appellant, he was made party defendant in the said suit.

4) It is the case of plaintiffs that the properties situated at Khamgavan were ancestral properties of Datta and other

properties were his self-acquired properties. Thus, it was contended that the property bearing Survey No. 77/B from Bamni was self-acquired property of Datta. It is the case of plaintiffs that the possession of this property was never given to defendant No. 3 by Datta under any document, but after the year 1965, defendant No. 3 obtained the possession of this land illegally.

5) Defendant Nos. 2 and 3 filed joint written statement. They admitted relationship of plaintiffs with defendant Nos. 1 and 2. They contended that all the suit properties were self-acquired properties of Datta.

6) In the joint written statement, defendant No. 3 took the defence that he got the possession of Survey No. 77/B from Datta under agreement of sale on 10.1.1960 and so, defendant No. 3 has right to protect his possession under provision of section 53-A of the Transfer of Property Act. It was contended that the consideration of Rs. 1,300/- was paid to Datta and possession was given by Datta to defendant No. 3. It was contended that even prior to 10.1.1960, defendant No. 3 was in possession of this property and this possession was as a tenant of Datta. It was contended that Datta avoided to execute the

sale deed under one or other pretext till his death though defendant No. 1 was ready and willing to perform his part of the contract.

7) Defendant No. 1 filed consent written statement and she admitted the claim of plaintiffs. Defendant No. 4, sister of Datta, contested the suit and she contended that all the suit properties were ancestral properties of Datta and she has share in all the properties.

8) Issues were framed on the basis of aforesaid pleadings. Both the plaintiffs and defendant No. 3 gave evidence. In view of the nature of contentions made by defendant No. 3, the burden of proof was on defendant No. 3.

9) Defendant No. 3 has given evidence that 2 to 3 years prior to the aforesaid agreement of 1960, he had come in possession of the property as tenant of Datta. He has given evidence that Datta then agreed to sell the property for consideration of Rs. 1,500/- as Datta was in need of money for performing marriages of his daughters, Defendant No. 3 has deposed that the agreement was written and it was scribed by one Samandar Yadav. He has given evidence that in the house of

Datta, he had paid the amount of Rs. 1,300/- as consideration out of agreed amount of Rs. 1,500/- in the presence of one Harisingh. He has given evidence that in his presence, first Datta signed on the agreement and then Harisingh, witness and the scribe signed. The document was given Exh. 114 by the Trial Court.

10) In the cross examination, defendant No. 3 admitted that his relations with Datta and even with defendants were good till the death of Datta. He has given evidence that only after 4 to 5 years of the death of Datta, the relations became strained. There is no substantive evidence from defendant No. 3 that during lifetime of Datta he had shown readiness and willingness to perform his part of the contract, though there is such pleading.

11) The cross examination of defendant No. 3 shows that after the gap of 2 to 3 years of the marriage of Kaushalyabai, the marriage of other daughter was performed. This circumstance and other evidence of defendant No. 3 shows that he had not much knowledge about the family affairs of Datta. Further, aforesaid pleading shows that Datta was having huge landed property.

12) Samandar Yadav, the scribe has given evidence for defendant No. 3 and he has supported the case of defendant No. 3. Harisingh, witness of defendant No. 3 has also supported his case.

13) The evidence of defendant No. 3 and of the scribe show that the document at Exh. 114 was purported to be agreement of sale. The contents of these documents are not such that inference is possible that it was only agreement of sale.

14) The Trial Court had held that defendant No. 3 failed to prove that he was tenant of Datta, but the Trial Court held that defendant No. 3 proved that there was agreement between Datta and defendant No. 3 of sale of this land. There was no specific issue with regard to the readiness and willingness of defendant No. 3 in respect of this transaction, though the protection of provision of section 53-A of the Transfer of Property Act was claimed by defendant No. 3.

15) In view of the contents of the document and other circumstances, the District Court held that defendant No.3 failed

to prove that Datta had agreed to sell this property to defendant No. 3. The District Court further held that case of defendant No. 3 is not at all probable and the witnesses examined by him cannot be believed.

16) This Court (Other Hon'ble Judge) admitted the appeal on 4.10.1991, but no substantial questions of law were formulated. This Court asked both the sides to argue on following substantial questions of law.

(i) Whether the material available for proof of execution of agreement of sale by Datta is not considered by District Court ?

(ii) Whether the District Court has committed error in not given protection of provision of section 53-A of the Transfer of Property Act to defendant No. 3 ?

17) For getting the protection of provision of section 53-A of the Transfer of Property Act, the basic requirement was to prove the existence of the agreement. After proving of such agreement, the conditions which are required to be fulfilled for giving protection of provision of section 53-A of Transfer of Property Act need to be considered. Whether there was agreement of sale needs to be proved on the basis of

preponderance of probability and for that, not only oral evidence, but other circumstances are required to be considered.

18) The document at Exh. 114 was given exhibit by the Trial Court even when objection was taken by the learned counsel for plaintiffs in the Trial Court. Exh. 114, so called agreement is written on simple paper and not on requisite stamp paper. No stamp duty was paid. The wording of the document is to the effect that property was sold to defendant No. 3 and the contents are as under :-

“सर्वे नं 77 ची जमीन 4 एकर 5 गुंटे आकार ची जमीन संबा वलद गोर्वीदा यास वीक्री दिली त्याची किंमत रुपये 1300 अक्षरी तेराशे आज नगदी रुपये घेवुन पावलो”

Thus, the contents of the document show that attempt was made to show that the property was actually sold under this document though different title was given to the document. In this document, there is mention that possession was given. Thus, entire consideration mentioned in the document was shown to be given and possession was shown to be given. In view of these circumstances, necessary stamp duty ought to have been paid and the sale deed ought to have been registered as provided under the provisions of Transfer of Property Act and

Indian Registration Act. The counsel of the plaintiffs had rightly taken objection in the Trial Court for giving exhibit. The record shows that no readiness was shown by defendant No. 3 to pay the stamp duty or penalty even for reading this document for collateral purpose. In view of these circumstances, it can be said that the execution of document was not proved.

19) The aforesaid document was shown to be executed on 10.1.1960, but there is no record to show that this document was used for any purpose other than for the present suit by defendant No. 3. The suit was filed in the year 1971. In 7/12 extract of the suit land for the year 1964-65 first time pencil entry (Kachha entry) of the name of defendant No. 3 was made in crop cultivation column. When it is the case of defendant No. 3 that even prior to 1960 he was in possession as a tenant of Datta, there is no such record with him. It needs to be kept in mind that after the death of Datta, there were only female successors of Datta. In view of these circumstances, not much weight can be given to the circumstance that in crop cultivation column the name of defendant No. 3 was entered first time in the year 1964-65 and as it was pencil entry (Kacchi entry). Further on one hand, defendant no. 3 came with the case that agreed consideration was Rs. 1,500/- and on the other hand, the

document shows that the consideration for sale was Rs. 1,300/-. The aforesaid contentions of both the sides and the circumstance that Datta was having huge landed property show that it was not possible that Datta had agreed to sell the suit property to defendant No. 3 for meager consideration of Rs. 1,500/- and he had executed such document. In view of these circumstances, the District Court has rightly held that the case of the defendant No. 3 was not at all probable in nature. No fresh appreciation of these circumstances is possible in second appeal. It is already observed that when agreement itself is not proved, there was no question of giving protection of provision of section 53-A of the Transfer of Property Act. No substantive evidence is there from defendant No. 3 to show that he had taken steps to execute the sale deed during lifetime of Datta. The plaintiffs and other defendants are successors of Datta and they are owners of the property and so, there was no other alternative before the Courts below than to give decree of possession in respect of this property also. In the result, both the points are answered against the appellant, defendant No. 3 and appeal is dismissed.

[T.V. NALAWADE, J.]

ssc/