

FARAD CONTINUATION SHEET NO.
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD.

Office Memoranda of appearance, directions and Registrar's orders.	Notes, of Court's orders or	Office Coram, orders or	Court's or Judge's orders.
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SECOND APPEAL NO. 524 OF 2012
WITH CA/8836/2012 IN SA/524/2012

MEBAL RUBIN ROBERT DECEASED TH LRS ARUNA ARUN
HIWARE
VERSUS
SANGITA BHARAT VILHE AND ORS

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Advocate for Appellant : Mr. Patil Swapnil S.
Advocate for Respondent Nos.1 & 3: Mr. Katneshwarkar P. R.

CORAM: T. V. NALAWADE, J.
DATED: 28th MARCH, 2016.

PER COURT:

1. The appeal is filed against judgment and decree of Regular Civil Suit No.166 of 1999 which was pending in the Court of Civil Judge, Junior Division, Bhusawal and also against judgment and order of Regular Civil Appeal No.118 of 2005 which was pending in the Court of District Judge No.4, Jalgaon. The suit filed by present appellant for relief of declaration of ownership and injunction is dismissed. Both the sides are heard.

2. The suit was filed in respect of portion of property

bearing City Survey No.38/2/A situated at Bhusawal. The suit property is given number as Plot No.6A and its area is 149 sq.mtrs. There is some construction and remaining portion is open space.

3. The suit was filed by one Smt. Mebal Robert. It was her case that the suit property was purchased by her under registered sale deed dated 28th April, 1992 for the consideration of Rs. 62,000/- from one Baburao Kirange. It was contended that the plaintiff was old and due to ill health she was not in a position to read and write or even to sign. One Edleena is daughter of plaintiff but she was not living with plaintiff and she was living at Washi. At the relevant time, as per the case of plaintiff, Arjun Hirwe, the son of plaintiff's sister was living with the plaintiff.

4. It was the case of plaintiff that husband of defendant Sangita was working as a Clerk of one advocate and he established good relations with plaintiff. It was her case that she had expressed her desire to execute a will and the husband of defendant had promised to help her in that regard as he had experience of Court work. It was the case of plaintiff that husband of defendant had obtained signatures of

plaintiff and thumb impressions on some documents and plaintiff was taken to one office and there also her signature was obtained. It was the case of plaintiff that after few days of the execution of the said document when Edleena visited the house of plaintiff and there was discussion about the aforesaid document, they realised that no will deed was executed. It was contended that the defendant did not give satisfactory reply and then they came to know that by making false representation and by deceiving the plaintiff, a sale deed was got executed in favour of defendant by her husband. The sale deed was registered on 15th July, 1999 in the office of Sub Registrar and consideration was shown as Rs.30,000/-.

5. It was the case of plaintiff that she had not given possession of the suit property to the defendant till the date of the suit. It was her case that she was living there with daughter and aforesaid Arun. It was contended that no consideration was paid for execution of the aforesaid sale deed.

6. The defendant Smt. Sangita filed written statement and contested the suit. She denied the allegation that misrepresentation was made and plaintiff

was deceived and no consideration was paid for execution of sale deed. It is the case of defendant that one room of the house was initially given to the husband of defendant on monthly rent basis on 9th May, 1999 and since then defendant and her husband were in possession of this room. It is the case of defendant that nobody was living with the plaintiff, like Arun mentioned in the plaint. It is denied that plaintiff had attempted to make a will. It is contended that for valuable consideration the suit property was sold by plaintiff and possession was given to the defendant.

7. During the pendency of the suit, plaintiff died and two ladies like Edleena and Smt. Aruna Hirwe were brought on record as legal representatives of plaintiff. It was contended that a will was executed in favour of present Appellant Smt. Aruna Hirwe by the plaintiff and so she has right to prosecute the matter.

8. A copy of sale deed dated 15th July, 1999 is on the record as Exhibit-30. Much was argued by learned counsel for the Appellant on the circumstance that attesting witnesses were not examined to prove the execution. When the execution itself is not disputed and the sale deed was registered, there was no need of

examining the attesting witnesses. It appears that the original document was with the office of Sub Registrar as it was kept there as per the old procedure and certified copy was issued to the purchaser. After comparing original with the copy, the document is given exhibit.

9. Plaintiff had come with a case that she was deceived by making false representation. The sale deed was executed on 15th July, 1999, the so called will made in favour of Smt. Aruna was executed on 11th August, 1999 and the original plaintiff died on 2nd September, 1999. The suit was filed on 16th August, 1999. The plaint does not show that Smt. Aruna Hirwe had personal knowledge regarding the incident dated 15th July, 1999. It was contended that husband of Aruna Hirwe was living in the suit house with the plaintiff but there was no specific contention that Smt. Aruna was also living there. Evidence is given by Smt. Aruna that plaintiff was living with her and she took care of the plaintiff during her last days. It appears that she tried to give evidence to show that she was present in the house on 15th July, 1999 and in her presence signature and thumb impressions of original plaintiff were obtained by husband of the defendant. Her evidence shows that she learnt that the

incident dated 15th July, 1999 was disclosed by original plaintiff to her daughter Edleena and to husband of Smt. Aruna. She has deposed that as they had suspicion, they got prepared will dated 11th August, 1999 and then they collected the record of sale created on 15th July, 1999.

10. There is nothing with Smt. Aruna to show that she was living with original plaintiff in the suit property. The nature of evidence given by Smt. Aruna shows that she has no personal knowledge about the incident dated 15th July, 1999 or the intention of plaintiff of executing a particular document on that day. By examining one attesting witness on will like Shaikh Arif, the will is proved as Exhibit-57 but in this document also there is no mention about the incident dated 15th July, 1999. In the will there is a mention about Edleena and it is mentioned that something was given to her as per her share but the record does not show that anything was given to Edleena. The submissions made show that for some time there was dispute between Edleena and Smt. Aruna after the death of original plaintiff. In any case, the will at Exhibit-57 can help Smt. Aruna only to prosecute the matter. For getting the reliefs in the suit

the proof of will was not sufficient but the proof of the contentions made in the plaint was necessary. When Smt. Aruna had no personal knowledge regarding the incident dated 15th July, 1999, on the basis of aforesaid vague pleading and the hearsay evidence of Smt. Aruna, it cannot be believed that plaintiff was deceived. The circumstance that the sale consideration was shown as Rs.30,000/- cannot itself lead to an inference that no consideration was paid or plaintiff was deceived by defendant or her husband. The stamp duty was paid on the value of Rs.50,000/-, the value as per the ready reckoner. For proof of fraud, particulars of the fraud ought to have been given in plaint and then the evidence on the pleading ought to have been given. Admittedly, the defendant is in possession of the suit property. Submission was made that the possession was forcibly obtained subsequently but this contention cannot help in proving anything. There is one circumstance like original sale deed was with Smt. Aruna. In view of the nature of relationship of Smt. Aruna with deceased, that circumstance cannot be given much weight. The record and circumstances have created a probability that Smt. Aruna came in picture

subsequently and the record like will was created to see that the property comes to Smt. Aruna. If Smt. Mebal, original plaintiff was really deceived, she would have made mention about it in the will. When the sale deed was executed and it was registered in the office of Sub Registrar, necessary importance needs to be given to the said record. The document of will was prepared by Advocates as per the version of Smt. Aruna and it was notorised.

11. There is not only the record like sale deed in favour of defendant of the year 1999, the record was given effect in the assessment record. The other record like rent receipts issued by original plaintiff in favour of husband of defendant are on record at Exhibits-67 and 68 and the tax receipts are also produced by defendant to show that the tax was paid in respect of this house in the year 1997 and 1998 though in the name of original plaintiff. In the assessment record also the mutation was made in favour of the defendant. Thus, the possession of the suit property was with defendant even on the date of the suit and these circumstances are consistent with the case of defendants.

12. The findings of the courts below are consistent

and they are on question of facts. Due to absence of evidence to prove the fraud, there was no other alternative before the Courts below than to dismiss the suit. No substantial question of law as such is involved.

13. In the result, the appeal stands dismissed.

14. In view of final disposal of the appeal itself nothing further survives in civil application for injunction and the same stand disposed of accordingly.

Dt.28/03/2016.
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(T. V. NALAWADE, J.)