IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

Second Appeal No.1698 of 2005

* Shriram s/o Ratanlal Thakur
Since deceased, through his
legal representatives :

1-A) Shanta w/o Shriram Thakur,
Age 48 years,
Occupation : Household.

1-B) Pravin Shriram Thakur,
Age 35 years,
Occupation : Service.

1-C) Vishal Shriram Thakur,
Age 31 years,
Occupation : Business.

All R/o House No.4-5-20/P
Kumbharwada, Aurangabad.

1-D) Archana w/o Balkishan Pardeshi,
Age 34 years,
Occupation: Housewife,
R/o Barshi, Taluka Barshi,
District Solapur.

1-E) Vandana w/o Amrutsingh Thakur,
Age 34 years
Occupation: Housewife,
R/o Barshi, Taluka Barshi,
District Solapur. **.. Appellants.**

Versus

* Rameshwar s/o Shaligram Chandak
Since deceased, through his
legal representatives :

i) Sharada w/o Rameshwar Chandak
Age 45 years,
Occupation : Household,
R/o Kumbharwada, Aurangabad.

ii) Subham s/o Rameshwar Chandak,
Age 17 years,
Occupation: Student,
minor under guardianship of
his mother
Sharada w/o Rameshwar Chandak,
R/o Kumbharwada,
Aurangabad. .. **Respondents.**

Shri. S.V. Adwant, Advocate, for appellants.

Shri. A.D. Kasliwal, Advocate, for respondents.

CORAM: T.V. NALAWADE, J.

DATE : 7th JUNE 2016.

JUDGMENT:

1) The appeal is filed against the judgment and decree of Special Civil Suit No.296/2002 which was pending in the Court of the Civil Judge, Senior Division, Aurangabad and also against the judgment and decree of Regular Civil Appeal No.197/2005 which was pending in District Court Aurangabad. Heard both sides.

2) The suit was filed by present respondent Rameshwar for possession of some portion of the house property viz first floor and it is part and parcel of CTS No.4474/1 situated at Aurangabad. In Municipal record to this property House number is given as 4-5-20/P. It is the case of the plaintiff that under registered sale deed dated 20-10-1994 he purchased portion of 10×27 ft. from this property from the defendant for consideration of Rs.1.5 lakh. It is contended that there was structure of building having ground floor and first floor and the structure was having roof of tin. It is contended that symbolic possession of the ground floor was given at that time as one tenant was occupying the premises and actual possession of remaining portion was given.

3) It is the case of the plaintiff that during his temporary absence the defendant illegally took possession of first floor by removing wall and removing the construction towards his remaining property from CTS No.4474/1. It is contended that the plaintiff got possession of the suit property after vacating the premises by the tenant in the year 1997 and then he realized that the

defendant had started occupying the first floor. It is the case of the plaintiff that he wanted to pull down the entire structure to make new construction and he requested the defendant to vacate the first floor. It is contended that under one or the other pretexts the defendant avoided to vacate the first floor and consumed time.

4) It is the case of the plaintiff that in the sale deed, the description of the construction is not properly mentioned though the construction sold is described as one room having tin roof in stead of describing the building as two storeyed building having tin sheets. With these contentions possession of the first floor of the structure was claimed.

5) The defendant filed written statement and contested the matter. He denied everything including the sale of the aforesaid property in favour of the plaintiff. It is the contention of the defendant that he had executed general power of attorney in favour of the plaintiff and the plaintiff was expected to help him in getting vacated the premises from the tenant. It is contended that there was

agreement to allow the plaintiff to use the ground floor for running business on payment of rent for the period of ten years. It is contended that by making misrepresentation to him his signatures were obtained in the office of the Sub Registrar on a document of sale by the plaintiff when he was under the influence of liquor. It is contended that there was no intention of sale and so the sale deed is not binding on him.

6) It is the case of the defendant that the possession of the first floor of the structure is with the plaintiff but it is permissive possession and he wants to get back that possession.

7) On the basis of the aforesaid pleadings issues were framed by the trial Court. The trial Court held that under the sale deed not only the land but the structure standing on it was sold to the plaintiff and the trial Court held that the plaintiff is entitled to get relief of possession and mesne profit. These findings are confirmed by the first appellate Court.

8) This Court, other Hon'ble Judge, admitted the appeal on 3-4-2008 by observing that substantial questions of law can be formulated on the basis of ground Nos.1,2,3,6 and 10 mentioned in the appeal memo. The grounds are as under :-

(1) Whether the learned court below erred in passing the decree in favour of the plaintiff when there is variance between pleading and proof as the property mentioned in the plaint was other than the one mentioned in the registered sale deed filed at Exh. 51 ?

(2) Whether the pleading in the plaint about the description of property i.e. first floor and room therein and oral evidence on behalf of plaintiff in support thereof can be considered in support of plaintiff’s case contrary to Sections 91 and 92 of Indian Evidence Act, when it is contrary to and not in consonance with the contents of the written document ?

(3) Have the learned courts below erred in granting the decree for possession of first floor of the suit property on the basis of alleged sale deed, filed at Exh-51, when the said sale deed did not refer to any first floor of the suit property ?

(6) Have the learned courts below not failed to consider the pleading of the plaintiff, wherein he has admitted that the description of suit property in the sale deed is ambiguous and there is no reference to first floor and ground floor in the said sale deed, filed at Exh-51 ?

(10) Whether the courts below can rely upon the claim affidavit filed by the original plaintiff at Exh-21, when it is without verification, as is mandated under Order 19 of CPC ?"

9) The main contention of the defendant-appellant is in respect of the construction of the document of sale deed. The execution of it is not disputed. The defence is taken that the defendant was deceived and his signatures were obtained in the office of the Sub Registrar when he was under influence of liquor and false representation was made to him that it was document of general power of attorney. In view of the defence taken, the burden was on the defendant to prove that there was no intention of sale and there was other understanding between the parties. The sale deed is at Exhibit 51 and in view of the nature of defence taken by the defendant, this document can be read as it is. Further, the document shows that the wife of

the defendant had signed as a witness and also as a person who was identifying the defendant before the Sub Registrar. In view of this circumstance, it was necessary for the defendant to examine himself and also examine his wife who had signed before the Sub Registrar as a witness and as a person who was identifying the executant. This was not done. Along with the sale deed, map of the structure which was sold under the sale deed was given in the office of the Sub Registrar and the property shown in the map is shown to be sold under the sale deed. In view of these circumstances and in view of the provisions of sections 91 and 92 of the Evidence Act, the burden was on the defendant to prove that it was not real transaction and the real transaction was different.

10) There is evidence of the plaintiff in support of the aforesaid pleadings and there are aforesaid circumstances. The record shows that the plaintiff was cross examined to some extent and after that adjournment was sought by the learned counsel of the defendant for plaintiff’s cross examination. Reasoned order was made by the trial Court and it was observed that the defendant

was not ready to conduct the matter and was protracting the decision of the suit and order of "no cross" was made. As no interest was shown to lead evidence, order of closure of evidence of the defendant was also made by the trial Court. Subsequently also reasoned orders were made when application was moved for giving permission to cross examine and to lead evidence. Specific observations were made that the defendant was trying to do everything to protract the decision of the suit. The tactics played by the defendant are mentioned in various orders made by the trial Court. Even defence was taken that evidence cannot be given on affidavit and reasoned order was made on that application also by the trial Court. The evidence of the plaintiff was closed in the month of April 2004 and the suit came to be decided on 13-6-2005. These circumstances are sufficient to infer that sufficient opportunity was given to the defendant to take steps but the defendant took steps only with one intention viz to protract the decision of the suit. He was in possession and so it can be said that he was trying to protract the things intentionally. These circumstances cannot be ignored in a suit of present nature.

11) In view of unrebutted evidence and the aforesaid discussion, this Court has no hesitation to hold that it was the sale transaction. Both the Courts below have given such finding and there is no scope to interfere in the finding given by the Courts below.

12) In respect of other contentions that the plaintiff was to use only ground floor and the first floor was never transferred to him it can be said that there was no specific pleading that the first floor was not transferred. The defence taken was altogether different which is already quoted. First time in the argument in this Court it was submitted that if the sale deed is read as it is, it cannot be inferred that the first floor of the building was also sold. This Court has carefully gone through Exhibit 51, the sale deed. In the sale deed it is specifically mentioned that the portion of aforesaid CTS number like 27×10 ft was sold and on this land there was construction of one room having tin sheet and the construction was around 100 years old. Boundaries of this property are mentioned as to the East – the remaining portion of property bearing CTS No.4474/1 belonging to the vendor, to the South the

remaining portion of the property of the vendor from the same house, to the West the house of one Ashok Zunzarkar and to the North public road having width of 30 ft. This portion is marked in red ink in the map annexed to the sale deed. The boundaries are also written on this map. Thus, the land admeasuring 27×10 ft. which was portion of aforesaid CTS number was sold along with the structure which was present on it though the structure is described as one room.

13) In view of nature of defence taken by the defendant it is desirable to see the relevant provisions of the Transfer of Property Act. In Section 54 of this Act, transfer of ownership of immovable property is defined as transfer by a person of his rights and interests which can be done under registered sale deed when the value of the property exceeds one hundred rupees. In this regard one more provision like section 8 of the Transfer of Property Act is relevant and it reads as under :-

> "**8. Operation of transfer**.-- Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the

interest which the transferor is then capable of passing in the property and in the legal incidents thereof.

Such incidents include, where the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer, and all things attached to the earth;
. . . . . "

14) These provisions show that the transfer of ownership of land involves transfer of full rights and interests of the vendor and there is characteristic of permanency to such transfer. The transfer takes place as soon as the document is registered. In view of the provision of section 8, quoted above, it can be said that not much importance can be given to the incorrect description of the structure standing on the land. Such incorrect description cannot vitiate the sale. If boundaries are given and they are definite, the land that is conveyed is the land situated within those specific boundaries along with structure standing on it. In view of the provision of section 8, quoted above, if the vendor had no intention to sell some portion of the property or some part of his rights, he needs to specifically mention about it in the sale

deed. In absence of such mention the title in the land along with title in the structure standing on the land, passes to the purchaser. In view of this position of law, nothing could have been achieved by the defendant even after making the pleadings in that regard and giving evidence.

15) One technical point was argued that the affidavit filed as evidence by the plaintiff was not having verification and so it cannot be used in view of the various provisions like Order 18 Rule 4, Order 19 Rule 3, Section 139(b) etc. of the Code of Civil Procedure. This Court has carefully gone through the said document. It shows that there was no verification but at least on two occasions oath was administered to the plaintiff and on first occasion the contents were verified by the Court. The affidavit was sworn before the officer of the Court who is empowered by the High Court to administer oath for this purpose.

16) The learned counsel for the appellant placed reliance on some reported cases in support of his

aforesaid contentions. In the case reported as **2005 (3) ALL MR 622** Bombay High Court **(Shamrao Vishnu Kunjir v. Suresh Vishnu Kunjir)** this Court has discussed the implications of the amendment made by the Act of 2000 to the Civil Procedure Code and the provision of Order 18 Rule 4 of the Code. Direction is given by this Court to see that affidavits are verified and the procedure is followed from 1-8-2005. The present affidavit was accepted prior to that date by the trial Court. This single circumstance is sufficient to reject the proposition made for the present appellant. Further it is such technical defect which can be cured with the permission of the Court. This point was not raised before the Courts below and it was raised first time in this Court. So there is no force in this contention also. Reliance was placed by the learned counsel for the appellant on some more cases reported as :-

(1) **(2000) 7 SCC 104 (S. Saktivel v. M. Venugopal Pillai).**

(2) **(2007) 6 SCC 484 (State of Karnataka v. K.K. Mohandas)**.

(3) **AIR 1938 All 364 (Govind Behari v. Shujaat-Mand Khan).**

(4) **Civil Suit:1963/1997 (Kuldip Mehta v. Jagdip Mehta) decided by High Court of Delhi on 3-1-2007.**

(5) **Second Appeal No.110 of 1951 (Makhanlal v. Lala Lakshi Chand) decided by High Court of Rajathan on 23-7-1953.**

The relevant facts of the present case are already discussed due to facts of the present case, observations made in the aforesaid cases are of no help to the present appellant.

17) The learned counsel for the respondent produced a copy of decision delivered in Special Civil Suit No.377/2006. This was the suit filed for relief of partition against the defendant by coparceners and the suit property was included in the said suit. The learned Civil Judge Senior Division, Aurangabad dismissed the suit in respect of the present suit property. It was held that the suit property was already sold to the present plaintiff. The plaintiff was party to the said suit. That decision has become final. This circumstance also can be used against the present appellant. Thus the present appeal is devoid of merits. The aforesaid substantial questions of law are answered against the appellant and the appeal is dismissed.

18) The learned counsel for the appellant requests for continuation of interim relief for some time as he wants to challenge the decision of this Court. In view of the conduct of the present appellant quoted above, this Court holds that such relief cannot be granted in his favour and so that relief is also refused.

Sd/-
(T.V. NALAWADE, J.)

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