

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

Second Appeal No. 375 of 2014

Pralhad S/o Narhari Kulkarni.
Deceased through his legal
representatives.

.. Appellants.

Versus

Shivlingappa s/o Laxman Gulave
(died, abated)
And Others.

.. Respondents.

Shri. R.F. Totala, Advocate, for appellants.

Shri. Bhausahab B. Bhise, Advocate, holding for Shri. D.J.
Choudhary, Advocate, for respondents 4,5 and 6.

CORAM: T.V. NALAWADE, J.

DATE : 27 JUNE 2016

ORDER:

1) The appeal is filed to challenge the judgment and decree of Special Civil Suit No.38/1995 (Old) which was given new number as Regular Civil Suit No.154/2002 and which was pending in the Court of the Civil Judge, Junior Division, Kille Dharur and also to challenge the judgment and decree of Regular Civil Appeal No.74/2005

which was pending in the District Court, Majalgaon, District Beed. Heard both the sides.

2) The suit was filed by one Pralhad Kulkarni, who died during pendency of the suit, for relief of specific performance of contract and for possession. It was in respect of land Survey No.47/7 admeasuring 2 hectares 83 R and situated at village Dhunkawad, Tahsil Dharur. It was the case of the plaintiff that the suit property was his ancestral property and some money was raised by the plaintiff from defendant Nos.1 and 2 on this land. It is contended that initially three agreements of sale were executed in favour of defendant Nos.1 and 2 on 30-11-1988 for getting the loan amount and those documents were executed by way of security. It is contended that the plaintiff repaid this amount and so on 7-12-1991 all the three agreements were cancelled.

3) It is the case of the plaintiff that defendant No.1, who is the father of defendant No.2, deceived the plaintiff and got executed one sale deed in respect of the suit property on 7-12-1991. It is contended that the sale

deed was shown to be executed in favour of defendant No.2 for consideration of Rs.47,000/-. It is contended that it was also security transaction and no mutation was to be effected in favour of the defendant No.2 and the possession was to remain with the plaintiff. It is contended that behind the back of the plaintiff, defendant No.2 got mutated his name in the revenue record on 26-5-1993. It is contended that said mutation was challenged by filing proceeding under Maharashtra Land Revenue Code and the proceeding is still pending.

4) It is the case of the plaintiff that on the expiry of period of three years sale deed was to be executed by the defendants in favour of the plaintiff and there was such oral agreement made with the plaintiff on 7-12-1991 itself. It is contended that when after expiry of the period plaintiff asked the defendant No.1 to accept Rs.47,000 and execute reconveyance deed, the defendants refused to do so and so cause of action took place for the suit. The suit was filed on 29-3-1995. Many times amendments were made in the plaint and relief was claimed for direction against the defendants to execute sale deed of

reconveyance in favour of the plaintiff after accepting Rs.47,000/- as consideration. Another relief was claimed that the sale deeds executed in favour of other defendants by defendant No.2 are null and void and they are not binding on the plaintiff.

5) Defendant Nos.1 and 2 filed written statement and they denied that they are money lenders and the document dated 7-12-1991 was executed as security for loan taken by the plaintiff. They contended that there was agreement of sale and when the members of the joint family of defendant No.1 and his brothers decided to separate from each other, the suit property came to the share of family of defendant No.1 and so the property was purchased in the name of defendant No.2 when initially agreements were in favour of other members of the joint family. They denied that there was oral agreement and they had agreed to reconvey, to sell the property after 3 years. They denied that possession was not given under sale deed. They contended that mutation was effected on the basis of the sale deed. They contended that they sold some portions in favour of other defendants as they were

absolute owners. They prayed for dismissal of the suit. The other defendants, purchasers from defendant No.2 filed similar written statement.

6) On the basis of the aforesaid pleadings issues were framed by the trial Court. The issues were mainly on the nature of transaction and there was also one issue framed against the defendants and they were expected to prove that there was agreement of sale made on 30-11-1988 and in furtherance of that agreement, sale deed was executed in favour of defendant No.2. In view of nature of the pleadings in the plaint this issue was unwarranted. The trial Court held that there was no loan transaction and the sale deed made in favour of defendant No.2 was absolute sale. The first appellate Court has considered the relief claimed of specific performance of reconveyance of the property under so called oral agreement and it is held that plaintiff failed to prove said agreement.

7) Learned counsel for the appellants submitted that the first appellate Court ought to have considered the issues framed by the trial Court which were to ascertain

the nature of the transaction between the plaintiff and defendant Nos.1 and 2 and as no such points were considered by the first appellate Court, the judgment and decree of the first appellate Court cannot sustain in law. Learned counsel was asked to clarify as to what was the exact case of the plaintiff and upon that learned counsel submitted that the suit was filed for relief of direction against the defendants to execute sale deed in favour of the plaintiff.

8) The claim made in the plaint was as follows :-

"Re-conveyance of the property by way of specific performance of the contract and possession."

9) In view of this nature of relief and the contention that on 7-12-1991 defendant Nos.1 and 2 had agreed to execute reconveyance deed in favour of the plaintiff, the suit could have been easily treated as the suit for specific performance of the contract. On one hand in plaint at para No.5 plaintiff had contended that plaintiff had repaid the amount which was taken under previous agreements which were of November 1988 and on the

other hand there was no specific pleading as to why the amount of Rs.47,000/- was mentioned in the sale deed, if the entire amount was returned by the plaintiff which was taken in the past from the defendant. On one hand, he contended that the defendant Nos.1 and 2 were money lenders and some document was executed in favour of them by way of security in respect of the loan taken and on the other hand relief of aforesaid nature was claimed. It can be said that it was open to the plaintiff to prove the real transaction but he has come with specific case that there was oral agreement of reconveyance and he was praying for relief of specific performance of that contract. In view of this circumstance, burden was heavy on him to prove that there was such oral agreement.

10) Plaintiff - Pralhad died during pendency of the suit and his son Subhash gave evidence. Admittedly Subhash was witness to the sale deed dated 7-12-1991. He has given evidence that they obtained loan from defendant Nos.1 and 2 which was to be repaid within three years and then the document of sale deed was executed in favour of defendant No.2. He has given evidence that at

that time amount of Rs.47,000/- was due against the plaintiff and so the document was executed. He has tried to say that they repaid the amount which was already taken and so the previous three agreements were cancelled. This case does not appear to be probable in nature. In the sale deed there is no mention that any amount was given to the plaintiff in the presence of Sub Registrar and the sale deed shows that the amount was already paid and it was taken by plaintiff for return of loan, for religious purpose and for development of other lands. Thus the contents of the sale deed and the oral evidence given by the son of the plaintiff are not consistent with each other.

11) The so called previous agreements are produced on the record and the execution of those documents is not disputed. They show that the document for cancellation of the previous agreement was prepared on 7-12-1991 itself and the reason was given that the land was sold on that date in favour of defendant No.2. Thus the other documents created by plaintiff are consistent with the contents of the sale deed.

12) Admittedly, on the date of the suit, defendant No.2 was in possession and there was such revenue record also. Mutation was also made in favour of the defendant No.2 on the basis of sale deed. It is contended that in the year 1993 the defendants got mutated the name behind the back of the plaintiff. This contention cannot be accepted as the revenue authority was bound to make mutation on the basis of aforesaid sale deed. Under the provisions of the Maharashtra Land Revenue Code every year crop inquiry is made and the names of persons are entered in the crop cultivation column of 7/12 extract. Name of the defendant No.2 is entered that way and so the case of the plaintiff in that regard also cannot be believed. Plaintiff had contended that only after making of the mutation the defendants illegally got possession. This case is not believable as the suit was filed in the year 1995 when the mutation was made in the year 1993.

13) One more circumstance was argued by the learned counsel for the appellant that in favour of one person like Munde defendant No.1 had executed a sale deed in respect of land which was previously owned by

said Munde. It is argued that the present transaction between plaintiff and defendant No.1 was also of the nature of loan transaction as the defendants 1 and 2 were money lenders. The said person was not examined by the plaintiff. On the basis of document of sale deed executed by defendant No.1 in favour of Munde inference is not possible that there was loan transaction between Munde and defendant no.1.

14) If there was agreement of sale dated 7-12-1991 the suit ought to have been filed within period of 3 years if the plaintiff was able to prove the agreement of sale as 3 years period was decided as per the case of the plaintiff. The plaintiff has not examined any independent witness to prove such oral agreement. At least person who had signed on the sale deed dated 7-12-1991 could have been examined to show that the transaction of sale was not real sale and there was parallel oral agreement. There is no such independent evidence and due to that the Courts below have not believed the plaintiff. The contention of the counsel for the appellant that the first appellate Court ought to have considered all the issues which were framed

by the trial court is also not acceptable. It can be said that on the basis of the title of the suit, relief claimed, the Advocate of the appellant argued for relief of specific performance in the District Court and accordingly the points were considered. There were two alternatives open. Possibility that the Advocate of the appellant chose one is there and so no error can be found in the decision given by the first appellate Court.

15) The points involved are questions of facts and there are concurrent findings of both the Courts on those points. No interference is possible in the findings of the Courts below and no substantial question of law as such is involved in the matter. In the result, the appeal stands dismissed.

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

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