

*IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION*

*SECOND APPEAL NO. 438 OF 2016
ALONG WITH
CIVIL APPLICATION NO. 610 OF 2016*

Shri Kisan Haribhau Bhilare & ors. ... Appellants/
Applicants
v/s

Saraswati Ganpatrao Yadav & ors. ... Respondents

Mr.A.V.Anturkar, senior advocate i/by Rushikesh Barge for the appellants/applicants.

Mr.Kishor Tambe for Resp. Nos.2A to 2D, 3A to 3D, 4A to 4C, 5 and 8.

Mr.V.S.Talkute for Resp. No.6.

Dr.Prakash Deshmukh for Resp. No.7.

Coram: N.M. Jamdar, J.

Dated: 4 July 2016

ORAL ORDER:

The Appellants challenge the concurrent findings of the Civil Judge, Junior Division, Wai, and District Judge, Satara, dated 17 October 2000 and 7 January 2016, respectively, whereby the suit filed by the Respondents/Plaintiffs was decreed and the appeal filed

by the Appellants has been dismissed.

2 The Respondents/Plaintiffs filed a suit bearing No.119 of 1981 stating that a sale deed was executed between the parties, which sale deed was not to be acted upon and in fact parties executed various documents which indicated that upon the payment of Rs.5,000/- the property shall be re-conveyed to the Plaintiffs. The learned Civil Judge decreed the suit directing the Respondents/Plaintiffs to deposit an amount of Rs.5000/- and directed the Appellants to re-convey the property. The appeal filed by the Appellants was dismissed by the learned District Judge.

3 I have heard learned counsel for the parties.

4 Learned senior advocate appearing on behalf of the Appellants firstly submitted that the suit is filed for re-conveyance of mortgage which is clear from the plaint. He submitted that Exhibit Nos.104 to 107, which are the mortgage deeds, etc., according to the Respondents/ Plaintiffs, are neither registered nor they are correctly stamped. He submitted that the decree for redemption by mortgage could not have been granted on the basis of unregistered and unstamped document. He relied on Section 34 of the Maharashtra Stamps Act for that purpose. He submitted that, even assuming the documents are not registered and they can be looked into for collateral purpose under Section 49 of the Registration Act, since the

suit is for redemption of mortgage and accepting the documents for the purpose of redemption of mortgage is not for collateral purpose.

5 For appreciating the above submission, the pleadings of the Respondents/Plaintiffs will have to be looked into. The suit is not filed for redemption of mortgage based on the receipts/documents Exhibit Nos.104 to 107. The main case of the Respondents/Plaintiffs is that the intention of the parties was that the sale deed was executed between the parties was not to be acted upon and property was to be re-conveyed upon the payment of Rs.5000/-. The thrust of the Respondents/Plaintiffs' case was on the intention of the parties in executing the said sale deed. Parties led their oral evidence. The oral evidence led by the Respondents/Plaintiffs, which is considered by both the Courts to come to the conclusion that the sale deed was not to be acted upon but the property was to be re-conveyed. Documents Exh. Nos.104 to 107 were used by both the Courts to conclude that the sale deed was not to be acted upon and the parties intended to re-convey the property. Had the suit been based on Exh. Nos.104 to 107 solely for redemption of mortgage, the argument based on registration and stamping may have merit. Such is not the present case. The conclusion of both courts that the parties intended to re-convey the property, is based on oral evidence and supported by documentary evidence. Therefore, the submissions based on the provisions of Maharashtra Stamps Act or the provisions of the Registration Act will not take the case of the Appellants any further.

6 Learned senior advocate for the Appellants then submitted that the heirs of Defendant No.9A were not brought on record. He submitted that Defendant No.9A is party to the sale deed, and since her heirs were not brought on record, the sale deed as against Defendant No.9A continues. He submitted that, for non-bringing heirs of Defendant No.9A on record, the entire suit has abated or in any case the sale deed as against Defendant No.9A, stands. I have considered these submissions. Firstly, it has to be noted that the present appeal is not filed by the heirs of Defendant No.9A. The heirs of Defendant No.9A were brought on record in the first appeal before the District Court. They did not challenge the decree and no contention is advanced by them even in the first Appellate Court nor have they approached this Court that the suit, had abated as against them and the sale deed as against them continues. This question of law which is sought to be advanced by the other Defendants, will have to be looked into in that context. Ultimately, as rightly contended by the learned counsel for the Respondents that the Defendant No.9A was daughter of Defendant No.9, whose other heirs were brought on record. It is only that Defendant No.9A's heirs have not been brought on record. Defendant No.9 was sufficiently represented in the suit. These heirs had ample opportunity to take the ground which is sought to be advanced by the Appellants. The heirs of Defendant No.9A had an adequate opportunity to agitate the issue. The provisions of Order XXII of the Code of Civil Procedure

are not a penal provisions and cannot be used to punish the parties and the Court must keep in mind the substantial justice.

7 No other ground was urged. The arguments do not raise any substantial question of law.

8 The second appeal is dismissed. The civil application is disposed of.

(N. M. Jamdar, J.)