

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 352 of 1993

Rajendra Ganesh Kulkarni,
age about 32, Resident of
Yelavi, Tal: Tasgaon,
Dist : Sangli.

...Appellant
(Orig. Plaintiff)

Versus

1. Prakash Ganesh Kulkarni,
age about 37, Resident of
Yelavi, Tal: Tasgaon,
Dist : Sangli.

2. The Maharashtra State Co-
Operative Bank Limited,
Bombay, Branch Tasgaon,
District : Sangli.

...Respondents
(Orig. Defendants)

Mr. Mandar Limaye for the Appellant.

Mr. Umesh R. Mankapure, for the Respondent No. 1.

CORAM : R.D. DHANUKA, J.
RESERVED ON : 17th November 2016
PRONOUNCED ON : 25th November 2016

JUDGMENT :

1. By this Appeal filed under Section 100 of the Code of Civil Procedure, 1908, the appellant (original plaintiff) has impugned the Judgment and Decree dated 19th January 1993 passed by the Learned Joint District Judge, Sangli, dismissing the Regular Civil Appeal No. 429 of 1987 filed by the appellant *inter alia* impugning the Judgment and Decree dated 4th April 1986 passed by the learned Civil Judge, Senior Division, Sangli, dismissing the Special Civil Suit No. 121 of 1984 *inter alia* praying for specific performance and for possession and in the alternate for the refund of amount of Rs. 38,000/-. Some of the relevant facts for deciding this Second Appeal are as under :-

2. The appellant herein was the original plaintiff whereas the respondents herein were the original defendants before the Trial Court. For the sake of convenience, the status of the parties described in this Judgment is as per the status before the Trial Court.

3. The plaintiff and defendant No. 1 are brothers. It was the case of the plaintiff that on 30th July 1982, the defendant No. 1 agreed to sell his half share in the land bearing Gat No. 2181 situated at Yelavi, Taluka Tasgaon, District Sangli (hereinafter referred to as “*the suit property*”).

4. It was the case of the plaintiff that out of the total consideration of Rs. 40,000/- under the said Agreement to Sell, the plaintiff had already paid the amount of Rs. 38,000/- to the defendant No. 1 prior to the date of execution of the said Agreement to Sell. It was the case of the plaintiff that the balance amount of Rs. 2,000/- was payable by the plaintiff to the defendant No. 1 at the stage of execution of Sale Deed by the defendant No. 1 in favour of the plaintiff. It was the case of the plaintiff that since defendant No. 1 avoided to complete the transaction on one or the other pretext, the plaintiff issued a notice to the defendant No. 1 on 25th July 1983 through his Advocate calling upon the defendant No. 1 to complete the transaction by accepting the balance amount of Rs. 2,000/-. On 31st May 1984, the defendant No. 1 replied to the said notice

and denied the claim of the plaintiff.

5. The plaintiff accordingly, filed a Suit (Special Civil Suit No. 121 of 1984) in the Court of learned Civil Judge, Senior Division, Sangli *inter alia* praying for specific performance of the Agreement to Sell dated 30th July 1982, for possession of the suit land and in the alternate prayed for refund of the amount of Rs. 38,000/- against the defendant No. 1.

6. The defendant No. 2 was impleaded as a party defendant to the Suit by the plaintiff, in view of the fact that the defendant No. 1 had borrowed certain amount from defendant No. 2 and had mortgaged the suit property and the defendant No. 2 had claimed attachment on the suit property in respect of the alleged dues of the defendant No. 1.

7. The defendant No. 1 resisted the Suit by filing the Written Statement on 11th March 1985 and denied that the land bearing Gat No. 2181 was owned by the plaintiff and defendant No. 1 jointly. It was alleged by the defendant No. 1 that he was an exclusive owner of the whole land and the plaintiff was not

concerned with the same. The defendant No. 1 denied having executed the Agreement dated 30th July 1982 and also denied having accepted any amount from the plaintiff under the said alleged Agreement.

8. It was alleged by the defendant No. 1 that there was a partition between his father and him in the year 1956 wherein the land bearing Gat No. 2181 was allotted to his share and he thus became the exclusive owner of the said land since the date of partition. The other properties were disposed of by the father of the plaintiff and the defendant No. 1 namely Ganesh Vishnu Kulkarni and their mother Indirabai. It was alleged that the property was disposed of by the plaintiff and the said Indirabai after the death of father of the plaintiff and defendant No. 1. It was the case of the defendant No. 1 that all the family members had pressurized defendant No. 1 and compelled him to sign the Agreement to Sell dated 30th July 1982. With a view to avoid unwarranted complications in the family, the defendant No. 1 was forced to sign the said document.

9. It was also the case of defendant No. 1 that he had obtained loan from the defendant No. 2 in his individual capacity as exclusive owner of the suit land. There was a charge on the said suit property in respect of the said loan obtained by the defendant No. 1. It was contended by the defendant No. 1 that it was thus, not possible to complete the alleged transaction with the plaintiff, in view of the defendant No. 2 also having an interest in the suit property. It was the case of the defendant No. 1 that the alleged Agreement to Sell was bogus and unenforcible to the knowledge of the plaintiff and their mother Indirabai.

10. Sometime in the year 1983, the mother of the plaintiff and the defendant No. 1 i.e. Mrs. Indirabai filed a Suit (Regular Civil Suit No. 215 of 1983) in the Court of learned Civil Judge, Junior Division, Tasgaon *inter alia* praying for partition of various properties including the suit property. It was alleged by the mother in the said Suit that the suit property was also a joint family property and had applied for partition in respect of the said property also. The defendant No. 1 also opposed the Suit on the ground that the married sisters of the

plaintiff and the defendant No. 1 were also involved in the joint family property and were admittedly, not parties to the alleged Agreement to Sell and thus, the plaintiff was not entitled to seek specific performance of the said alleged Agreement to Sell on this ground also. The defendant No. 1 also denied having accepted any amount by way of part performance under any alleged agreement from the plaintiff.

11. The defendant No. 2 Bank also filed a separate Written Statement and alleged that the defendant No. 1 in his capacity as a Manager of Joint Family had taken an agricultural loan of Rs. 17,600/- on 2nd February 1981 and had mortgaged the land bearing Gat No. 2181 against his dues to the bank. It is alleged that the plaintiff was not entitled to purchase the suit land from defendant No. 1. In their alternate plea, the defendant No. 2 urged that in case of any decree for specific performance granted in favour of the plaintiff, the charge on the property should be continued which was in force when the loan was taken by the defendant No. 1.

12. Learned Trial Judge formulated seven issues for adjudication including the issue as to whether the defendant No. 1 had proved that the Agreement dated 30th July 1982 was sham and bogus and whether it was proved by the defendant No. 1 that the said Agreement was got executed from him under pressure. The plaintiff and the defendant No. 1 led oral and documentary evidence before the learned Trial Judge. The learned Trial Judge held that the defendant No. 1 had proved that the Agreement dated 30th July 1982 was sham and bogus and the said Agreement was got executed from him under pressure by the mother and sisters to the plaintiff and defendant No. 1.

13. The learned Trial Judge held that the plaintiff had failed to prove that he had paid sum of Rs. 38,000/- to the defendant No. 1 by way of earnest money and/or part purchase price. It is held that the plaintiff was not entitled for a decree of a specific performance of the agreement or separate possession of the suit land. The learned Trial Judge dismissed the Suit filed by the plaintiff and also rejected the alternate prayer for refund

of the amount of Rs. 38,000/-. Being aggrieved by the Judgment and Decree passed by the learned Trial Judge in the year 1986, the plaintiff preferred an Appeal (Regular Civil Appeal No. 429 of 1987) in the Court of learned Joint District Judge, Sangli.

14. Learned Joint District Judge formulated three points for determination including the point, whether the defendant had proved that the agreement was without consideration and was result of pressure brought on him. The learned Joint District Judge, Sangli passed the Judgment and Decree dated 19th January 1993 and dismissed the said Regular Civil Appeal No. 429 of 1987. The learned Joint District Judge held that the defendant had proved that the agreement was without consideration and was executed as a result of pressure brought on him. It is held by the learned Joint District Judge that the Court could not overlook the roll played by the mother in settling the dispute.

15. Being aggrieved by the said Judgment and Decree dated 19th January 1993 passed by the learned Joint

District Judge, Sangli, the plaintiff preferred this Second Appeal under Section 100 of the Code of Civil Procedure, 1908. This Court while admitting the Second Appeal on 21st August 1993 formulated the following substantial question of law:-

“2. Whether the said agreement dated 30th July 1982 was vitiated because of “undue influence” as contemplated by the definition in the contract Act, and whether the evidence about the duress would prove in law the existence of undue influence?”

16. Mr. Limaye, the learned Counsel for the plaintiff invited my attention to the findings recorded by the two Courts below and would submit that it was the case of the defendant No. 1 himself in the Written Statement that he was the exclusive owner of the whole land which was allotted to him in view of the partition between the father and the plaintiff and defendant No. 1 in the year 1956. He submits that in the agreement he made a representation that he was entitled to sell his half share in the said property to the plaintiff. He submits

that defendant No. 1 having admitted the execution of the said Agreement to Sell, the defendant No. 1 could not have disputed the contents of the said agreement including the factum of receipt of consideration.

17. It is submitted by the learned Counsel for the plaintiff that inspite of such plea of the defendant No. 1 claiming ownership in respect of the entire suit property, the Appellate Court has dismissed the Suit filed by the plaintiff *inter alia* praying for specific performance for the Agreement to Sell on the ground that the defendant No. 1 was not entitled to the entire property, but was entitled to the lesser share in the suit property.

18. It is submitted by the learned Counsel for the plaintiff that since the defendant No. 1 had alleged pressure and undue influence on the part of the mother and sisters of the parties, the onus to prove such alleged pressure and undue influence was on defendant No. 1, which he failed to prove before the learned Trial Judge. He submits that the learned Trial

Judge has rendered findings based on the presumption and surmises and not based on the evidence led by the parties.

19. In support of his submission, the learned Counsel for the plaintiff placed reliance on the Judgment of Supreme Court in case of Meenakshiammal (Dead) Through LRs. And Others Vs. Chandrasekaran and Another¹ and in particular paragraph 20 thereof.

20. Learned Counsel for the plaintiff also invited my attention to the Judgment and Decree passed by the learned Third Additional District Judge, Sangli in Regular Civil Appeal No. 70 of 1989, which was filed by the mother Indirabai Ganesh Kulkarni against the plaintiff, defendant No. 1, three sisters of the plaintiff and also against the defendant No. 2. The said Appeal was arising out of the Judgment and Decree passed by the learned Civil Judge, Junior Division in Regular Civil Suit No. 216 of 1985 dated 20th December 1988 dismissing the Suit filed by the mother against those parties for partition and possession of her share. He submits that the learned Third Additional

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District Judge, Sangli allowed the said Appeal filed by the mother and declared that the mother, plaintiff herein and defendant No. 1 each had 7/24th share in the suit properties and each of the sisters were entitled to 1/24th share in the suit properties. It is held that the mother and the plaintiff herein were entitled to partition and separate possession of their respective shares in the suit properties. It is held that the defendant No. 1 herein was entitled to recover the amount of his 7/24th share from the total consideration amount of sale of land bearing Gat No. 2197, on payment of requisite Court fees.

21. The learned Counsel for the plaintiff also invited my attention to the order dated 29th February 1996 passed by this Court in Second Appeal No. 428 of 1995 preferred by the defendant No. 1 herein against the said Judgment and Decree dated 22nd November 1994 allowing the Appeal filed by the mother. He submits that this Court has dismissed the Second Appeal filed by the defendant No. 1 herein and has confirmed the Judgment and Decree passed by the Third Additional District Judge on 22nd November 1994

allowing the Appeal filed by the mother wherein the Court had held that the mother, defendant No. 1 and the plaintiff were each entitled to 7/24th share in respect of the entire suit properties including the suit property herein. He submits that though in the partition Suit filed by the mother, the share of the defendant No. 1 is crystallized as 7/24 in the entire property including the suit property herein, the learned Trial Judge ought to have passed the Decree in favour of the plaintiff for specific performance and for possession at least to the extent of 7/24th share which the defendant No. 1 became entitled to under the said Decree passed in the said partition Suit.

22. It is submitted by the learned Counsel for the plaintiff that findings recorded by the two Courts below being perverse can be interfered by this Court under Section 100 of the Code of Civil Procedure, 1908.

23. Mr. Mankapure, the learned Counsel for defendant No. 1 on the other hand, invited my attention to the findings of the fact recorded by the two Courts below while

dismissing the Suit for specific performance filed by the plaintiff and would submit that the findings of fact being concurrent findings and not being perverse cannot be interfered with by this Court in the Second Appeal filed under Section 100 of the Code of Civil Procedure, 1908. He submits that there was no dispute that the plaintiff and defendant No. 1 were real brothers. The plaintiff was fully aware of the share of the defendant No. 1 in the suit property. He submits that in the partition Suit filed by the mother of the plaintiff and defendant No. 1, the plaintiff was also a party defendant and had filed a Written Statement supporting the case of the mother.

24. It is submitted that it was the case of the mother that there was no partition of the joint Hindu family property including the suit property herein and accordingly, she had applied for partition and separate possession. He submits that it was the case of the mother in the said Suit that the agreement entered into between the plaintiff and the defendant No. 1 was not binding on the mother. He submits that it was not the case of the plaintiff in the said Written Statement filed by

him in the partition Suit that the Suit filed by the mother was not maintainable on the ground that the partition in respect of the joint family properties including the suit property had already taken place and that the defendant No. 1 was allotted the entire plot bearing Gat No. 2181.

25. It is submitted that though in the Written Statement filed by the plaintiff in the said Suit, the plaintiff brought on record that the defendant No. 1 had entered into an Agreement to Sell in favour of the plaintiff in respect of the property which is the subject matter of the Suit, the learned Trial Judge did not accept the plea of the plaintiff. He submits that the plaintiff admittedly did not challenge the Judgment and Decree passed by the learned Third Additional District Judge in Regular Civil Appeal No. 70 of 1989, wherein it was held that the mother, the plaintiff and the defendant No. 1 each were entitled to 7/24th share in the property which were the subject matter of that Suit which included the land bearing Gat No. 2181. He submits that the plaintiff who had colluded with the mother in the said Suit and did not dispute the plea of the

mother contending that there was no partition of the suit properties including the property in this Suit could not raise the plea that the defendant No. 1 was exclusive owner of the land bearing Gat No. 2181.

26. It is submitted by the learned Counsel for the defendant No. 1 that it was an admitted position that the relation of the mother and sisters of the plaintiff were strained with the defendant No. 1. He submits that the defendant No. 1 had proved beyond reasonable doubt before the learned Trial Judge that the mother and sisters of the plaintiff and defendant No. 1 had pressurized and there was undue influence upon the defendant No. 1 by them for execution of the Agreement to Sell by the defendant No. 1 in favour of the plaintiff though the mother herself had filed the Suit for partition. He submits that both the Courts below have considered these issues in detail in the Judgment and Decree which do not require any interference by this Court.

27. The learned Counsel for the defendant No. 1

distinguished the Judgment cited by the learned Counsel for the plaintiff and submits that the said Judgment does not assist the case of the plaintiff. Since the defendant No. 1 had proved that the Agreement to Sell was bad in law, in view of the pressure and undue influence upon the defendant No. 1 by the mother and sisters of the plaintiff and defendant No. 1, the entire transaction between the plaintiff and the defendant No. 1 was illegal and not binding on the defendant No. 1.

REASONS AND CONCLUSIONS

28. There is no dispute that the plaintiff and defendant No. 1 are brothers. There is no dispute that the mother of the plaintiff and defendant No. 1 had filed a suit inter alia praying for partition of the larger properties including the suit property in which suit the plaintiff as well as the defendant No. 1 were also party defendants. The plaintiff and defendant No. 1 had filed separate written statement in the said suit. It was the case of the mother in the said suit that none of the properties which were subject matter of the said suit

including the property which is subject matter of this suit were partitioned and the agreement entered into between the plaintiff and defendant No. 1 was not binding on the mother. The plaintiff did not contest the averments made by the mother in the said suit though had averred that there was an agreement to sell entered into between the plaintiff and the defendant No. 1 in respect of the property which is subject matter of this suit which was also the subject matter of that suit.

29. It is not in dispute that the averments made by the plaintiff in the said written statement filed in the said partition suit in respect of the agreement to sell entered into between the plaintiff and defendant No. 1 herein was not accepted by the trial court in the said partition suit filed by the mother. There is no dispute that the first appellate court in the said partition suit filed by the mother had accepted the plea of the mother and had held that the plaintiff herein and defendant No. 1 and mother were each entitled to 7/24th share in respect of the entire suit property which was subject matter of the said suit which included the property which is subject matter of this

suit. Though the defendant No. 1 had filed the second appeal against the said judgment and decree passed in the said partition suit, admittedly the plaintiff accepted the said findings rendered by the first appellate court in the said partition suit declaring the share of the parties thereto and did not file any second appeal.

30. In my view there is no substance in the submission of the learned counsel for the plaintiff that in view of the said decree passed by the first appellate court in the said partition suit filed by the mother declaring the share of the defendant No. 1 at 7/24th, the trial court ought to have passed a decree for specific performance at least in respect of the said share of the 7/24th of the defendant No. 1. Admittedly the plaintiff had not made any averments in the plaint for specific performance for seeking specific performance of the part of the property or did not aver that the consideration alleged to have been paid by the plaintiff to the defendant No. 1 in respect of the entire property would be the consideration in respect of the said 7/24th share. In my view the plaintiff thus cannot be

allowed to raise this plea for the first time across the bar for seeking specific performance of the agreement to sell in respect of the share of the defendant No. 1 to the extent of 7/24.

31. Insofar as submission of the learned counsel for the plaintiff that in view of the averments made by the defendant No. 1 in the written statement that he was exclusive owner of the whole land which was allotted to him when partition took place between the father, the plaintiff and the defendant No. 1 in the year 1956 and thus the trial court ought to have passed a decree for specific performance in respect of the plaintiff in respect of the whole property is concerned, in my view though the defendant No. 1 has taken such plea in the written statement, the fact remains that in the partition suit, the plaintiff himself had taken contrary plea and did not deny the plea raised by the mother in the partition suit that the entire property was not partitioned and each of the party thereto were entitled to certain undivided share in the said properties. In my view the decree passed in the partition suit in which the plaintiff and defendant No. 1 were also parties and wherein the property

which is subject matter of this suit was also the subject matter of that suit which decree has attained finality would be binding on the parties. The plaintiff cannot be allowed to raise any issue contrary to the findings rendered by the court in the said partition suit between the same parties in view of the said decree having attained finality and contrary to the averments made by the parties in the said suit.

32. It was not the case of the plaintiff in the said written statement filed in the said partition suit filed by the mother that the said suit was not maintainable on the ground that the partition in respect of the joint family properties including the suit properties had already taken place and that the defendant No. 1 was allotted the entire plot bearing plot no.2181. I am inclined to accept the submission of the defendant No. 1 that the plaintiff had colluded with the mother in the said partition suit and did not dispute the plea of the mother containing that there was no partition of the suit properties including the property which is subject matter of the suit and thus cannot be allowed to take a contrary plea in this

proceeding.

33. The learned trial judge has rightly held that the mother had played important role in the settlement of the dispute between the plaintiff and the defendant No. 1. There were strained relation between the defendant No. 1 and the plaintiff, three sisters and the mother. Both the courts in my view has rightly held that the defendant No. 1 was pressurized and there was undue influence upon him by mother and three sisters for execution of the agreement to sell in favour of the plaintiff though herself had filed a suit for partition. These findings rendered by the two courts below being concurrent findings of fact and not being perverse, cannot be entertained by this court under section 100 of the Code of Civil Procedure, 1908.

34. Be that as it may, in my view the first appellate court rightly held that the defendant No. 1 being not exclusively entitled to deal with the property which is subject matter of this suit and his share in the said property having found only to the

extent of 7/24th share, no decree for specific performance could be granted. The plaintiff being the real brother of the defendant No. 1 and was also claiming the share in the joint family property which was not partitioned was fully aware of the share of the defendant No. 1 in the suit property and still entered into an agreement to sell in respect of the suit property with the defendant No. 1. These facts clearly indicates that there was a pressure and undue influence upon the defendant No. 1 from the mother and the sisters to execute such agreement to sell in favour of the plaintiff.

35. In my view the findings of fact rendered by the trial court that the plaintiff had failed to prove that he had paid a sum of Rs.38,000/- to the defendant No. 1 by way of earnest money and/or part purchase price is based on the evidence led by both the parties and being not perverse cannot be interfered with by this court. Similarly the findings of the learned trial judge that the defendant No. 1 had proved that the agreement dated 30th July, 1982 was sham and bogus and was got executed from him under the pressure of the mother and sisters

does not warrant any interference.

36. Insofar as judgment of the Supreme Court in case of *Meenakshiammal (Dead) Through LRs. and Ors.* (supra) relied upon by the learned counsel for the plaintiff is concerned, Supreme Court in the said judgment had considered section 63 of the Succession Act, 1925 and has held that When the Will is alleged to have been executed under undue influence, the onus of proving undue influence is upon the person making such allegation and mere presence of motive and opportunity are not enough. In my view this judgment of Supreme Court does not assist the case of the plaintiff. Be that as it may, defendant No. 1 had led evidence to prove that there was an undue influence and pressure of the mother and three sisters upon him to execute the agreement to sell in favour of the plaintiff.

37. Insofar as order passed by this court in Second Appeal No.428 of 1995 which was preferred by the defendant No. 1 herein arising out of the judgment and decree passed in

the partition suit filed by the mother is concerned, in my view even if the said second appeal filed by the defendant No. 1 came to be dismissed, at the most it could be contended that the decree passed by the first appellate court in that said partition suit declaring that there was no partition of the suit property between the parties to the said proceedings, had attained finality. In my view the said judgment and decree passed by the first appellate court which attained finality would assist the case of the defendant No. 1 and not the plaintiff. In my view the second appeal is thus devoid of merits and thus no relief can be granted in favour of the plaintiff in this appeal.

38. Insofar as substantial question of law formulated by this court referred to aforesaid is concerned, for the reason recorded aforesaid, in my view the said agreement dated 30th July 1982 was vitiated because of the undue influence contemplated under the definition of the 'Contract Act, 1872' and the evidence about the duress led by the defendant No. 1 would also prove in law the existence of the undue influence. The said substantial question of law is accordingly

answered in affirmative.

39. I, therefore, pass the following order :-

(a) Second Appeal No. 352 of 1993 is dismissed.

(b) No order as to costs.

[R.D. DHANUKA, J.]