

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

**SECOND APPEAL NO.144 OF 2016
along with
CIVIL APPLICATION NO.228 OF 2016
in
SECOND APPEAL NO.144 OF 2016**

Manohar Pamandas Jani	)	
Age 55 yrs., Occu : Business	)	
R/o.33, Gurunanak Nagar,	)	
Gurunanak Chauk, Solapur.	)	.. Appellant/Applicant (original plaintiff)

Versus

1. Madhukar Trimbak Waychal	)	
Age 63 yrs., Occu : Contractor,	)	
2. Jitendra Madhukar Waychal	)	
Age : Adult, Occu : Businessman,	)	
3. Ritesh Madhukar Waychal	)	
Age : Adult, Occu : Businessman,	)	
All R/o. 27-B, Bhavani Peth,	)	
Solapur -2, District Solapur.	)	.. Respondents

Mr.S.K. Shinde a/w Ms.Tanya Goswami i/by Mr.Sudam Kale for the Appellants/Applicants.

Ms.Shruti Tulpule a/w Mr.Girish Godbole for the Respondents.

CORAM : R.D. DHANUKA, J.

DATE : 25th October 2016

Judgment :-

. 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 5th August 2015 passed by the learned

District Judge-5, Solapur dismissing the Regular Civil Appeal No.299 of 2014 and upholding the judgment and decree dated 22nd January 2014 passed by the Civil Judge, Senior Division, Solapur dismissing the Regular Civil Suit No.663 of 2012 filed by the appellant herein inter alia praying for specific performance of an agreement to sale dated 17th October 1995. The parties are described as per their original status in the suit before the trial Court. Some of the relevant facts for the purpose of deciding this second appeal are as under :-

2. It was the case of the plaintiff that the defendant no.1 was indebted to the Bank of India and was in need of money and thus decided to sell his immovable property bearing Gat No.55 to the extent of 11529 sq.mtrs and the land admeasuring 8839 sq.mtrs. out of Gat No.53/6/2 for total consideration of Rs.7,50,000/- i.e. Rs.1,50,000/- per acre and a shed existing in Gat No.53/6/2 for Rs.50,000/-. It was the case of the plaintiff that the total consideration agreed by the parties in respect of the aforesaid property was of Rs.8 lakhs. According to the plaintiff, on 17th October 1995, the plaintiff and the defendant no.1 entered into an agreement to sale in respect of the aforesaid properties. The defendant no.1 accepted Rs.1 lakh from the plaintiff under the said agreement and also handed over the possession of the suit property to the plaintiff. According to the plaintiff, the said sale transaction was to be completed within 11 months i.e. by September 1996. The defendant no.1 alleged to have demanded Rs.4 lakhs from the plaintiff in the month of November 1995 towards remaining consideration. It was the case of the plaintiff that the plaintiff paid sum of Rs.4 lakhs to the defendant no.1 on 18th November 1995 who acknowledged the said amount on the

agreement to sale. The defendant no.1, however, did not pay the bank loan and did not complete the sale transaction within 11 months in favour of the plaintiff.

3. It was the case of the plaintiff that the plaintiff insisted to cancel the agreement and called upon the defendant no.1 to return back the amount paid by the plaintiff. The defendant no.1 made a proposal that to compensate the delay in execution of sale deed, he would execute sale deed of the entire Gat No.55 admeasuring 15372 sq.mtrs. instead of 11529 sq.mtrs. The plaintiff alleged to have accepted the said proposal and paid additional amount of Rs.1,50,000/- to the defendant no.1. It was the case of the plaintiff that on 6th January 1997, the defendant no.1 executed sale deed of the entire Gat No.55 admeasuring 15372 sq.mtrs. in favour of the plaintiff.

4. It was the case of the plaintiff that the defendant no.1, however, did not execute the sale deed in respect of 8839 sq.mtrs. out of Gat No.53/6/2 alleging that the bank had not settled his loan matter. It was also the case of the plaintiff that the defendant no.1 agreed to execute power of attorney in favour of the plaintiff and accordingly executed such power of attorney in the month of October 1999 which was alleged to have been registered on 18th October 1999 with intimation to the plaintiff.

5. On the basis of the said power of attorney, the plaintiff got entered his name in other rights column of the 7x12 extract on 18th May 2002. The defendant no.1 issued a telegraphic notice dated 27/28th

March 2002 and denied the execution of the said alleged power of attorney. The plaintiff vide his letter dated 1st April 2002 showed his willingness to pay the balance consideration with a request to execute the sale deed. The plaintiff thereafter filed a suit (Regular Civil Suit No.663 of 2012) inter alia praying for specific performance of the said agreement to sale against the defendant no.1 in the Court of Civil Judge, Senior Division, Solapur. The defendant no.1 transferred the suit property in the names of the defendant nos.2 and 3 who are his sons.

6. The plaintiff also prayed for a declaration that sale of the suit property by the defendant no.1 in favour of the defendant nos.2 and 3 be declared as void. The suit was resisted by the defendant no.1 by filing a written statement. It was the case of the defendant no.1 that he had taken loans on interest from the plaintiff on several occasions in past who was doing money lending business without having any license. It was his case that the defendant no.1 had taken a loan from the plaintiff who insisted to execute an agreement to sale in his favour in respect of area admeasuring 3402 sq. mtrs. out of Gat No.55 and 8839 sq. mtrs. out of Gat No.53/6/2 in view of the plaintiff not having license under the provisions of the Bombay Money Lending Act. It was the case of the defendant no.1 that though in the said agreement dated 17th October 1995, it was mentioned that the defendant no.1 had handed over possession of the suit property to the plaintiff, the possession of the suit property was never handed over by him to the plaintiff.

7. It was the case of the defendant no.1 that the said agreement was executed as and by way of security in favour of the plaintiff. The plaintiff had also got executed from the defendant no.1 an agreement to

sale dated 4th January 1996 in respect of residential house bearing No.102/B/2, Bhavani Peth, Solapur. The plaintiff also got executed deposit receipt from the defendant no.1 in favour of the plaintiff in the sum of Rs.5 lakhs and obtained undated cheque bearing no.81481 drawn on Vyapari Sahakari Bank Maryadit, Solapur in the sum of Rs.5 lakhs. The defendant no.1 had paid interest on loan amount to the plaintiff. It was the case of the defendant no.1 that in the month of November 1996, he had sold his house property bearing no.102/B/2 of Bhavani Peth Solapur and from the said consideration amount offered to pay dues of the plaintiff.

8. The plaintiff, however, proposed the defendant no.1 that instead of 3402 sq.mtrs. of Gat No.55 and 8839 sq.mtrs. from Gat No.53/6/2, the defendant no.1 had actually sold the entire land bearing Gat No.55 admeasuring 15372 sq.mtrs. and its consideration should be shown as Rs.1,50,000/-. It was the case of the defendant no.1 that the plaintiff and the defendant no.1 actually executed an agreement on 6th January 1997 towards full and final settlement of all the claims of the plaintiff against the defendant no.1. It was the case of the defendant no.1 that after execution of the sale deed dated 6th January 1997, the plaintiff handed over the defendant no.1 original agreement to sale in respect of the house property bearing no.102/B/2, deposit receipt dated 5th January 1996 executed by the defendant no.1 in favour of the plaintiff in the sum of Rs.5 lakhs and undated cheque bearing no.81481 of Rs.5 lakhs.

9. It was the case of the defendant no.1 that in so far as the agreement to sale in respect of Gat Nos.55 and 53/6/2 executed on 17th October 1995 is concerned, the plaintiff pretended that the said document

was misplaced and he would return the same after it was found. The defendant no.1 believed the words of the plaintiff. It was the case of the plaintiff that after the sale deed dated 6th January 1997, there was no transaction between the plaintiff and the defendant no.1 and thus the agreement to sale dated 17th October 1995 was impliedly cancelled due to execution of sale deed dated 6th January 1997.

10. It was the case of the defendants that the general power of attorney relied upon by the plaintiff was fabricated by the plaintiff and was never executed by the defendant no.1 in favour of the plaintiff. The defendant no.1 also filed a criminal complaint against the plaintiff and his associates for fabricating the power of attorney. The defendant nos.2 and 3 filed their written statement and contested the suit. It was the case of the defendant nos.2 and 3 that they had purchased the suit property from the defendant no.1 for valuable consideration of Rs.8,80,000/-. The said amounts were deposited by cheques by the defendant nos.2 and 3 in the account of the defendant no.1.

11. The learned trial Judge framed ten issues for determination. Parties led oral evidence before the learned trial Judge. The learned trial Judge passed judgment and decree on 22nd January 2014. The learned trial Judge held that the plaintiff had proved that the defendant no.1 executed and signed an agreement for sale of the suit property. The plaintiff had proved the part consideration. The learned trial Judge held that the plaintiff was not entitled to relief of specific performance. The defendant had proved that the suit transaction was not of an agreement for sale but was transaction of security of loan. The learned trial Judge

rejected the alternative relief claimed by the plaintiff for refund of the earnest amount.

12. Being aggrieved by the judgment and decree dated 22nd January 2014, the plaintiff filed an appeal (Regular Civil Appeal No.299 of 2014) in the Court of District Judge-5, Solapur. The learned District Judge framed seven points for determination. By a judgment and decree dated 5th August 2015, the learned District Judge-5, Solapur dismissed the said Regular Civil Appeal No.299 of 2014. This judgment and decree of the first appellate Court is impugned by the appellant in this second appeal filed under Section 100 of the Code of Civil Procedure, 1908.

13. Mr.Shinde, learned counsel appearing for the plaintiff invited my attention to the possession receipt, various findings recorded by the learned trial Judge and by the first appellate Court. It is submitted by the learned counsel that the defendant no.1 had admitted the execution of the agreement for sale dated 17th October 1995. He submits that in view of admission of execution of the said agreement for sale by which the defendant no.1 had agreed to sell portion of two lands i.e. the land admeasuring 11529 sq.mtrs. out of Gat No.55 and the land admeasuring 8839 sq.mtrs. out of Gat No.53/6/2 for consideration of Rs.7,50,000/- and a shed existing in Gat No.53/6/2 for Rs.50,000/-, the defendant no.1 could not have led oral evidence to contradict/vary/add/subtract the terms of the written agreement for sale dated 17th October 1995 as per the provisions of Sections 91 and 92 of the Indian Evidence Act, 1872. He submits that both the Courts below have placed reliance on the oral evidence of the defendant no.1 which was contrary to Sections 91 and

92 of the Indian Evidence Act and thus the decree passed by two Courts below deserves to be set aside on that ground alone.

14. It is submitted by the learned counsel for the plaintiff that agreement for sale dated 17th October 1995 which was admittedly signed by the defendant no.1 was a document recording composite transaction in respect of the land bearing Gat No.55 and also the land bearing Gat No.53/6/2 for total consideration of Rs.8 lakhs. He submits that the defendant no.1 has admittedly executed a subsequent sale deed in respect of the land bearing Gat No.55 admeasuring 15372 sq. mtrs. He submits that the defendant no.1 having admitted the sale deed dated 6th January 1997 which was in furtherance of agreement for sale dated 17th October 1995 could not have taken a contrary stand that the said agreement for sale dated 17th October 1995 was not to be acted upon as agreement for sale but was signed for keeping the said document as a security with the plaintiff against the loan advanced to the defendant no.1. He submits that the stand of the defendant no.1 was thus contrary to Sections 91 and 92 of the Indian Evidence Act, 1872.

15. Learned counsel appearing for the defendants, on the other hand, submits that the defendant no.1 had taken a loan of some amounts from the plaintiff who was a money lender and did not have money lending license under the provisions of the Bombay Money Lending Act. She submits that the plaintiff had insisted for execution of agreement for sale which was kept as a security with the plaintiff till the said loan was repaid. She submits that the defendant no.1 had offered to repay the loan amount to the plaintiff which was not accepted by the plaintiff. The plaintiff in turn suggested that the sale deed be executed in favour

of the plaintiff in respect of the entire land of the defendant no.1 admeasuring 15372 sq. mtrs. bearing Gat No.55. She submits that after execution of the sale deed in favour of the plaintiff in respect of the land bearing Gat No.55, there was no further transaction between the plaintiff and the defendant no.1. The plaintiff, however, though returned several original documents signed by the defendant no.1 in favour of the plaintiff including the cheque, the plaintiff did not return the original agreement to sale dated 17th October 1995 to the defendant no.1 on the pretext that the same was not traceable. It is submitted by the learned counsel that it was the case of the plaintiff that the defendant no.1 had also alleged to have executed a power of attorney in favour of the plaintiff simultaneously at the time of execution of the said agreement for sale which power of attorney was fabricated by the plaintiff. She submits that on the basis of such fabricated power of attorney, the plaintiff had entered his name in the revenue record in respect of the suit property.

16. Learned counsel for the defendants invited my attention to the judgment and decree dated 29th June 2013 passed by the learned Civil Judge, Senior Division, Solapur in Regular Civil Suit No.338 of 2002 which was filed by the defendant no.1 against the plaintiff inter alia praying for a declaration that the said alleged general power of attorney dated 18th October 1999 was false and fabricated and also prayed for perpetual and mandatory injunction against the plaintiff herein. She submits that the learned trial Judge in the said Regular Civil Suit No.338 of 2002 has rendered a finding of fact that the said alleged power of attorney dated 18th October 1999 was false and fabricated by the plaintiff.

17. Learned trial Judge dealt with oral and documentary evidence in the said decree and totally disbelieved the evidence of the plaintiff herein. She submits that it was the case of the plaintiff that the said power of attorney was executed by the defendant no.1 in favour of the plaintiff pursuant to the said agreement for sale dated 17th October 1995 executed by the defendant no.1 in favour of the plaintiff.

18. Learned counsel also invited my attention to the judgment and decree dated 19th June 2015 passed by the District Judge-1, Solapur in Regular Civil Appeal No.371 of 2013 which was filed by the plaintiff herein inter alia impugning the judgment and decree dated 29th June 2013 passed by the learned Civil Judge, Senior Division, Solapur in Regular Civil Suit No.338 of 2002 filed by the defendant no.1. She submits that by the judgment and decree dated 19th June 2015, the learned District Judge-1, Solapur dismissed the said appeal filed by the plaintiff in which it was held that the said power of attorney relied upon by the plaintiff was fabricated. She submits that the plaintiff has not challenged the said judgment and decree passed by the first appellate Court on 19th June 2015 till date and the said finding of the trial Court that the said power of attorney was fabricated by the plaintiff has attained finality.

19. Learned counsel for the defendants also invited my attention to the findings of facts recorded by the learned trial Judge while dismissing the suit filed by the plaintiff for seeking specific performance of the agreement dated 17th October 1995. She submits that the learned trial Judge has rightly held that even according to the plaintiff, the consideration in respect of the alleged 5 acres land in agreement to sale

dated 17th October 1995 was fixed at the rate of Rs.1,50,000/- per acre. However, in the sale deed dated 6th January 1997 produced at Exhibit 109, the consideration of the entire Gat No.55 admeasuring 1 hector i.e. 53 are i.e. 15372 sq.mtrs. was mentioned as Rs.1,50,000/- in toto. There was no reference to the previous agreement to sale dated 17th October 1995 in the sale deed dated 6th January 1997. The trial Court held that it was established that various amounts were obtained by the defendant no.1 from the plaintiff towards full and final settlement, the sale deed dated 6th January 1997 was executed by the defendant no.1 in favour of the plaintiff. The consideration of the sale deed dated 6th January 1997 was in fact paid in cash. The learned trial Judge also considered the fact that the plaintiff was handed over the possession of the entire land bearing Gat No.55 pursuant to the said sale deed dated 6th January 1997 and not pursuant to the agreement for sale dated 17th October 1995 though handing over the possession recorded in the agreement for sale. The learned trial Judge has further held that the defendant no.1 clearly proved through witness of the plaintiff himself that the plaintiff had even made alteration in the area of property in agreement to sale dated 17th October 1995. The learned trial Judge after considering the oral and documentary evidence has also held that it had been proved by the defendant no.1 that the transaction was not for an agreement to sale but was as a security of loan.

20. A perusal of the judgment and decree passed by the first appellate Court indicates that the first appellate Court has considered the oral and documentary evidence and has rendered a finding of fact that the defendant no.1 had proved that the document dated 17th October 1995 was executed as a security and was not to be acted upon. The defendant

no.1 also had proved that there was material alteration in document dated 17th October 1995.

21. In so far as the submission of the learned counsel for the plaintiff that the defendant no.1 could not have been permitted to lead evidence contrary to the contents of the agreement to sale dated 17th October 1995 is concerned, the first appellate Court has held that the defendants were entitled to adduce oral evidence to show that the real intention of the parties behind the agreement for sale dated 17th October 1995 was to secure the loan. The first appellate Court has considered the several judgments including the judgments of the Supreme Court in the cases of **Udai Chand Dutt Vs.Saibal Sen**, reported in AIR 1988 SC 367, **M/s.Hindustan Fasteners Vs. Nashik Workers Union**, reported in 2007 11 SCC 660, **Krishna Bai Vs. Appasahen**, reported in AIR 1979 SC 1880 and **Tyagaraja Mudaliar Vs.Vedathani**, reported in AIR 1936 PC 70 and has followed the principles of law laid down in that judgments and held that there was no hurdle to adduce other evidence to show that the document executed by the party was sham and was not to be acted upon.

22. In so far as the first submission of the learned counsel for the plaintiff that the defendant no.1 could not have been permitted to lead evidence to contradict the contents of the agreement to sale dated 17th October 1995 in view of Sections 91 and 92 of the Indian Evidence Act, 1872 is concerned, in my view, the defendant no.1 had not led evidence to contradict the contents of the said agreement for sale dated 17th October 1995. The case of the defendants before the trial Court was that the said transaction entered into between the parties was not to be acted

upon as the same was to be kept as a security in favour of the plaintiff and was not to be acted upon as an agreement to sale. The defendant no.1 had disputed the entire transaction and thus could lead evidence in that regard in view of Section 92 of the Indian Evidence Act, 1872. The first appellate Court, in my view, has rightly adverted to the judgments of the Supreme Court referred to aforesaid and has rightly rejected the contention raised by the plaintiff. In my view, there is no substance in this submission of the learned counsel for the plaintiff.

23. In so far as the second submission of the learned counsel for the plaintiff that the transaction between the plaintiff and the defendant no.1 being a composite transaction in respect of the land bearing Gat No.55 and the land bearing Gat No.53/6/2 and the defendant no.1 having partly acted upon by executing the sale deed dated 6th January 1997 in respect of the land bearing Gat No.55 and thus cannot take a plea that the said agreement for sale was not to be acted upon or was to be kept as a security is concerned, a perusal of the record clearly indicates that both the Courts have rendered findings after considering oral and documentary evidence that the said sale deed dated 6th January 1997 entered into between the parties was in full and final settlement of the loan transaction between the plaintiff and the defendant no.1. If according to the plaintiff, the sale deed was in furtherance of the said agreement for sale dated 17th October 1995 which recorded the payment to be made at the rate of Rs.1,50,000/- per acre, the said sale deed, on the other hand, showed the total sum of Rs.1,50,000/- for the area agreed to be sold which was totally different.

24. It is not in dispute that the plaintiff had returned all the documents signed by the defendant no.1 in favour of the plaintiff including the cheque to the defendant no.1 after execution of the sale deed except the said agreement for sale. The learned trial Judge as well as the first appellate Court rightly considered the submission of the learned counsel for the defendant no.1 that the said agreement for sale was not returned on the pretext that the same was misplaced.

25. It is not in dispute that it was not the case of the plaintiff that any supplementary deed was executed between the parties for enforcement of part of the transaction recorded under the agreement for sale dated 17th October 1995 on the revised terms after execution of the sale deed. Both the Courts, in my view, have rightly disbelieved the case of the plaintiff that there was any transaction of agreement for sale under the said agreement for sale dated 17th October 1995 and have rightly held that the transaction was a loan transaction and the said document was furnished as a security which was liable to be returned after payment of loan amount.

26. It is not in dispute that it was the case of the plaintiff that the power of attorney was executed by the defendant no.1 in favour of the plaintiff in furtherance of the said agreement for sale. The learned trial Judge after recording the oral and documentary evidence in Regular Civil Suit No.338 of 2002 filed by the defendant no.1 has already declared that the said power of attorney relied upon by the plaintiff was a fabricated document which finding was upheld by the first appellate Court in Regular Civil Appeal No.371 of 2013 filed by the plaintiff. Admittedly the plaintiff had not challenged the said judgment and

decree passed by the first appellate Court on 19th June 2015 in Regular Civil Appeal No.371 of 2013 till date. It is thus clear that the conduct of the plaintiff in fabricating the power of attorney in the name of the defendant no.1 has been deprecated by the Courts in those proceedings.

27. A perusal of the record indicates that the plaintiff had obtained such agreement for sale which was to be acted upon as and by way of security and there was no transaction for agreement for sale in respect of two properties of the defendant no.1. The plaintiff had fraudulently refused to return the original agreement for sale to the defendant no.1 on the pretext that the same was misplaced and has filed a false and frivolous suit against the defendants for specific performance of the said agreement. In my view, the findings recorded by the two Courts below are recorded after considering the oral and documentary evidence relied upon by both the parties and the findings are not perverse and thus cannot be interfered with by this Court under Section 100 of the Code of Civil Procedure, 1908. In my view, the appeal is totally devoid of merit. No substantial question of law arises in this appeal.

28. I therefore pass the following order :-

- (i) Second Appeal No.144 of 2016 is dismissed;
- (ii) In view of dismissal of the second appeal, civil application does not survive and is accordingly dismissed;
- (iii) There shall be no order as to costs.

R.D. DHANUKA, J.