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

**SECOND APPEAL NO.575 OF 2017
WITH
CIVIL APPLICATION NO.9458 OF 2017
WITH
CIVIL APPLICATION NO.13201 OF 2017
IN
SECOND APPEAL NO.575 OF 2017**

Vitthal s/o Hari Maske,
Age: 74 years, Occ: Agri.,
R/o. Vadali, Tal. Kannad,
Dist. Aurangabad.

..APPELLANT

VERSUS

1. Ambadas s/o Baburao Sabale,
Age: 74 years, Occ: Agri.,
R/o. Shivrai, Tq. Kannad,
Dist. Aurangabad.
2. Smt. Sakarbai w/o Babasaheb Chavan,
Age: 54 years, Occ: Agri.,
R/o. Vadali, Tq. Kannad,
Dist. Aurangabad.
3. Dwarkabai w/o Malharrao Kulkarni,
(died) through her L.Rs.
- 3-i Chandrakant s/o Malharrao Kulkarni,
Age: 50 years, Occ: Service,
R/o. Plot No.4, 'Malhar',
Shivkrupa Colony, Backside of
Shivbhuvaneshwar, Beed Bye-pass,
Satara Parisar, Aurangabad,
Tq. and Dist. Aurangabad.
- 3-ii Anil s/o Malharrao Kulkarni,
Age: 46 years, Occ: Electrician,
R/o. Plot No.4, 'Malhar',
Shivkrupa Colony, Backside of

(2)

Shivbhuvaneshwar, Beed Bye-pass,
Satara Parisar, Aurangabad,
Tq. and Dist. Aurangabad. ..RESPONDENTS

Mr S.K. Rahane, Advocate for appellant;
Mr A.D. Kasliwal, Advocate for respondent Nos. 1
and 2;
Mr G.S. Gadiwan, Advocate for respondent Nos.3(i)
and 3(ii)

CORAM : NITIN W. SAMBRE, J.

DATE : 10th NOVEMBER, 2017

ORAL ORDER :

This appeal is by original plaintiff to the Special Civil Suit No. 157 of 2006, which was instituted for cancellation of contract under Section 31 read with Section 10 of the Specific Relief Act, 1963. The sale deed executed for 6 acres of land out of Gat No.186/2-b by original defendant No.3 in favour of defendant No. 2 at the behest of defendant No.1 is the subject matter of the suit. Based on the agreement of sale dated 2nd June, 2003 viz., Exhibit-50, suit for specific performance of contract and declaration was filed claiming that the sale deed (Exhibit-45) dated 1st April, 2004 executed in favour of defendant No.2 by defendant No. 3 be declared as null and void.

(3)

2. Learned trial Court decreed the suit vide its judgment and order dated 29th June, 2011, thereby declaring the sale deed dated 1st April, 2004 executed by defendant No. 3 in favour of defendant No.2 to the extent of suit property viz., 6 acres of land out of Gat No.186/2-b situated at Hatnoor, Taluka Kannad, District Aurangabad stands cancelled and the appellant-plaintiff is declared as owner and possessor of the entire property Gat No.186/2-b admeasuring 10 acres 20 guntha. The present appellant-plaintiff was directed to deposit Rs.1,00,000/- with interest @6% p.a. from the date of disputed sale deed dated 1st April, 2004. It is ordered that defendant Nos. 2 and 3 shall execute sale deed in favour of appellant-plaintiff for the area of 6 acres out of Gat No.186/2-b, which is disputed property.

3. The defendant Nos.1 and 2 being father and son, feeling aggrieved, preferred Regular Civil Appeal No.413 of 2012 in the Court of Adhoc

(4)

District Judge-3, Aurangabad, which came to be allowed vide judgment and order dated 9th March, 2017. As such, this second appeal.

4. Heard Mr. Rahane, learned Counsel for the appellant-original plaintiff, Mr. Kasliwal, learned Counsel for respondent Nos. 1 and 2 and Mr. Gadiwan, learned Counsel for legal heirs of respondent No.3.

5. Mr. Rahane, learned Counsel for the appellant would urge that Exhibit-50, agreement of sale is not in dispute, which was executed by original defendant No.3 in favour of appellant – plaintiff and recitals of handing over possession of the suit property in favour of the appellant. According to him, respondent No. 3 has admitted the execution of the sale deed and possession of the plaintiff and in view thereof, provisions of Section 53-A of the Transfer of Property Act will come to the rescue of the appellant. According to him, the said aspect is lost sight of by the

(5)

appellate Court and as such, judgment and decree of the lower appellate Court is not sustainable in the eyes of law. According to him, present appellant was ready and willing to perform his part of contract and possession over the suit property is apparent from Exhibit-50 having been admitted by defendant No.3, original owner of the suit property. The lower appellate Court ought not to have dismissed the suit of the appellant.

6. Mr. Rahane, learned Counsel for the plaintiff-appellant would urge that Section 92 of the Evidence Act acts as an exception to Section 91 of the Evidence Act. According to him, under Section 92 of the Evidence Act, oral evidence is admissible to show that the document executed was never intended to operate and it was sham document. He would draw support from the judgment of Apex Court in the matter of **Smt. Gangubai vs Smt. Chhabubai**, reported in **A.I.R. 1982 SC 20**. From the said judgment, which is further followed in the judgment of this Court in the matter of **Shankarlal**

(6)

Ganulal Khandelwal, since deceased through L.R. Rameshchandra Shankarlal Khandelwal vs Balmukund Surajmal Bharuka, since deceased through L.Rs. Anil Balmukund Bharuka, reported in **1999(2) Mh.L.J. 569**. He would submit that sub-section (1) of Section 91 of the Evidence Act is not attracted when transaction recorded in the document was never intended to be acted upon, between the parties and the document is sham is the case put forth by the party viz., plaintiff. According to him, in view thereof, sale deed executed in favour of defendant No.2 by defendant No. 3 was not to be acted upon as is held by learned lower appellate Court.

7. Mr. Rahane, learned Counsel would then invite attention of this Court to the fact that original defendant No.3, who was respondent before lower appellate Court died during the pendency of the appeal and his legal heirs were not brought on record. As such, according to him, the judgment of the lower appellate Court is nullity. He would also invite attention of this Court to the fact

(7)

that document at Exhibit-45, sale deed in favour of original defendant No.2 by defendant No.3 is only for the purpose of security, as the appellant was short of amount of Rs.1,00,000/- for getting sale deed executed. The appellant has borrowed loan of Rs.1,00,000/- resulting into execution of nominal sale deed at Exhibit-45. The appellant was ready and willing to repay the amount of Rs.1,00,000/- with interest and as such, the lower appellate Court lost sight of the said issue and has recorded findings contrary to the interest of the appellant.

8. Per contra, Mr. Kasliwal, learned Counsel for respondent Nos. 1 and 2 would urge that the provisions of Section 53-A of the Transfer of Property Act will not be attracted in the factual matrix of the present case for the reason that the execution of the sale deed in favour of original defendant No.2 vide Exhibit-45 was with the consent of plaintiff, as is apparent from the pleadings of the plaintiff in the plaint. According to him, from perusal of language employed in Exhibit-45,

(8)

sale deed, in favour of respondent-defendant No.2 by defendant No.3, it cannot be inferred that the sale deed was nominal one or for the purpose of security. According to him, Exhibit-45 speaks of blanket sale transaction and consideration of Rs.3,00,000/- as is paid vide Exhibit-45 could be inferred from the factual matrix, particularly if compared with consideration agreed in Exhibit-50 as reasonable. He would then urge that even if defendant No.3 has supported the claim of the plaintiff, learned lower appellate Court has rightly appreciated the claim of present appellant based on the language of Exhibit-45 and Exhibit-50.

9. Mr. Kasliwal, learned Counsel for respondent Nos. 1 and 2 would then urge that against the judgment of the appellate Court, even if presuming that defendant No.3 has supported the claim of the plaintiff, still the said defendant or his legal heirs have not preferred any appeal and in view thereof, present second appeal lacks merit and is liable to be dismissed.

(9)

10. So far as legal heirs of defendant No. 3 are concerned, they have supported the claim of the appellant.

11. Considered rival submissions.

12. So far as the claim of present appellant before the trial Court is concerned, the original owner of the suit property viz., defendant No.3 has through written statement, admitted the claim of the plaintiff. The trial Court framed following issues and answered the same accordingly.

ISSUES	FINDINGS
1. Whether plaintiff proves his ownership over 10 Acres 20 Gunthas land out of Gat No.186/2-b?	In the affirmative.
2. Whether plaintiff proves that, sale deed executed on 01-04-2004 in favour of defendant No.2 by defendant No.3 was for security of loan of Rs.1,00,000/- (Rs.One Lac only)?	In the affirmative.

(10)

3. Whether plaintiff proves that, In the sale deed dated 01-04-2004 is affirmative. sham, bogus and nominal document?
4. Whether plaintiff is In the entitled to relief of affirmative. declaration as prayed for?
5. Whether plaintiff is In the entitled to relief of affirmative. cancellation sale deed executed in favour of defendant No.2?
6. Whether plaintiff is In terms of entitled to relief of final order. specific performance of contract?
7. What order and decree? In terms of final order.

13. The plaintiff in support of his claim has examined himself at Exhibit-36, PW-2 Prakash at Exhibit-43, PW-3 Chandrakant at Exhibit-44, PW-4 Rangnath at Exhibit-52 and has produced documentary evidence viz., 7/12 extracts at Exhibits-71 to 73, sale deed at Exhibit-45, agreement to sell at Exhibit-50 and other sale deeds at Exhibits-63 and 64 so as to demonstrate that original defendant No.1 was dealing in money lending business.

(11)

14. Defendant No.1 examined himself at Exhibit-55.

15. The trial Court disbelieved evidence of defendant Nos. 1 and 2 and after evaluating the claim under Section 53-A of the Transfer of Property Act in favour of the appellant has decreed the suit of the plaintiff.

16. In appeal, preferred by respondents – defendant Nos. 1 and 2, lower appellate Court formulated following points for consideration and reversed the findings of the trial Court.

POINTS	FINDINGS
(1) Does the plaintiff prove that, he became owner and also in possession over the suit property in view of agreement to sale dated 02-06-2003?	In the Negative.
(2) Does he further prove that, the sale deed dated 01-04-2004 executed by defendant No.3 in favour of defendant No.2 is sham and bogus and it	In the Negative.

(12)

was executed as security
for handloan only?

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|-----|---|---------------------|
| (3) | Does he entitled to relief of specific performance of contract? | In the Negative. |
| (4) | Does he entitled the relief of perpetual injunction as prayed? | In the Negative. |
| (5) | What order? | As per final order. |

17. So far as the judgment of the trial Court is concerned, perusal thereof would reflect that defendant No.3 in his written statement supported the claim of the plaintiff, however, the said defendant was not examined. The plaintiff has examined himself at Exhibit-36 alongwith other witnesses PW-2 Prakash, PW-3 Chandrakant, PW-4 Rangnath and also produced certain documentary evidence. The defendant Ambadas has examined himself at Exhibit-55 and produced copy of panchnama at Exhibit-74 and statement of other witnesses.

18. Further scrutiny of the judgment of the trial Court, wherein suit of the appellant was

(13)

decreed, what is noticed is but for certain passing references out of evidence of PW-2 and PW-3, trial Court in depth has not considered the evidence of the parties for decreeing the suit by reconciling the case of rival parties. In cryptic manner, the trial Court has proceeded to evaluate the claim and decreed the suit. Though the trial Court has taken shelter of the judgment of this Court in the matter of ***Shankarlal Ganulal Khandelwal, since deceased through L.R. Rameshchandra Shankarlal Khandelwal***, cited supra, pursuant to Sections 91 and 92 of the Evidence Act, however, has failed to evaluate oral evidence pursuant to the said provisions produced by the plaintiff.

19. So far as the judgment of the lower appellate Court is concerned, it is to be noted that the lower appellate Court has not touched the evidence of any of the witnesses, which it was duty to. The lower appellate Court, rather, has proceeded in mechanical manner by relying upon the provisions of Section 17 of the Indian Registration

(14)

Act, Section 114 of the Evidence Act and allowed the appeal.

20. The Apex Court in the matter of **Santosh Hazari vs Purushottam Tiwari deceased by L.Rs.** reported in **2001(2) Mh.L.J. 786**, in paragraph-15 has observed thus:

“ A perusal of the judgment of the trial Court shows that it has extensively dealt with the oral and documentary evidence adduced by the parties for deciding the issues on which the parties went to trial. It also found that in support of his plea of adverse possession on the disputed land, the defendant did not produce any documentary evidence while the oral evidence adduced by the defendant was conflicting in nature and hence unworthy of reliance. The first appellate Court has, in a very cryptic manner, reversed the finding on question of possession and dispossession as alleged by the plaintiff as also on the question of adverse possession as pleaded by the defendant. The appellate Court has jurisdiction to reverse or affirm the findings of the trial Court. First appeal

(15)

is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate Court must, therefore, reflect its conscious application of mind, and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate Court. The task of an appellate Court affirming the findings of the trial Court is an easier one. The appellate Court agreeing with the view of the trial Court need not restate the effect of the evidence or reiterate the reasons given by the trial Court; expression of general agreement with reasons given by the Court, decision of which is under appeal, would ordinarily suffice (See *Girijanandini Devi & Ors. Vs. Bijendra Narain Choudhary*, AIR 1967 SC 1124). We would, however, like to sound a note of caution. Expression of general agreement with the findings recorded in the judgment under appeal should not be a device or camouflage adopted by the appellate Court for shirking the duty cast on it. While writing a judgment of reversal the appellate Court must remain conscious

(16)

of two principles. Firstly, the findings of fact based on conflicting evidence arrived at by the trial Court must weigh with the appellate Court, more so when the findings are based on oral evidence recorded by the same presiding Judge who authors the judgment. This certainly does not mean that when an appeal lies on facts, the appellate Court is not competent to reverse a finding of fact arrived at by the trial Judge. As a matter of law if the appraisal of the evidence by the trial Court suffers from a material irregularity or is based on inadmissible evidence or on conjectures and surmises, the appellate Court is entitled to interfere with the finding of fact (See Madhusudan Das Vs. Smt. Narayani Bai & Ors., AIR 1983 SC 114). The rule is and it is nothing more than a rule of practice that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judges notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lies, the appellate Court

(17)

should not interfere with the finding of the trial Judge on a question of fact. (See Sarju Pershad Ramdeo Sahu Vs. Jwaleshwari Pratap Narain Singh & Ors., AIR 1951 SC 120). Secondly, while reversing a finding of fact the appellate Court must come into close quarters with the reasoning assigned by the trial Court and then assign its own reasons for arriving at a different finding. This would satisfy the Court hearing a further appeal that the first appellate Court had discharged the duty expected of it. We need only remind the first appellate Courts of the additional obligation cast on them by the scheme of the present Section 100 substituted in the Code. The first appellate Court continues, as before, to be a final Court of facts; pure findings of fact remain immune from challenge before the High Court in second appeal. Now the first appellate Court is also a final Court of law in the sense that its decision on a question of law even if erroneous may not be vulnerable before the High Court in second appeal because the jurisdiction of the High Court has now ceased to be available to correct the errors of law or the erroneous findings of the first appellate Court even on questions

(18)

of law unless such question of law be a substantial one."

21. In the background of above referred observations of the Apex Court, if the judgment of the lower appellate Court is analyzed, what could be noticed is, the lower appellate Court has at all not touched to the pleadings and evidence of the respective parties, who has proceeded to allow the appeal by ordering dismissal of the suit without considering the effect of evidence brought on record by the rival parties.

22. In view of above, in my opinion, the judgments delivered by the appellate Court is not sustainable in the eyes of law. The Court below, while considering the claim under Sections 91 and 92 of the Evidence Act, has at all not recorded finding as to manner and mode in which the evidence of PW-2 and PW-3 establishes the case of the plaintiff that sale deed by defendant No.3 in favour of defendant No.2 was sham one and only for the purpose of document and not to be acted upon.

(19)

At least, there is no such discussion of evidence in the judgment of the learned trial Court.

23. Learned lower appellate Court, on technical issues without looking into the claim and by cryptic judgment allowed the appeal.

24. In the backdrop of above, the judgment delivered by the first appellate Court viz. Adhoc District Judge-3, Aurangabad, in Regular Civil Appeal No.413 of 2012, on 9th March, 2017, is held to be not sustainable and as such, is quashed and set aside.

Regular Civil Appeal No.413 of 2012 stood restored to the file of learned District Judge, Aurangabad, before whom the parties hereto agree that they shall appear on 11th December, 2017.

Parties hereto assures this Court that they shall complete their hearing within eight

(20)

weeks from the date of appearance without any seeking adjournment.

The appellate Court shall make every endeavour to conclude the hearing and deliver final judgment in the appeal by 31st March, 2018.

25. With above observations, present second appeal stands partly allowed.

26. Consequently, pending civil applications stand disposed of.

(NITIN W. SAMBRE, J.)

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