

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

SECOND APPEAL NO.403 OF 2015

Sureshappa Tulshiramappa Karne and anr. ... Appellants.

-VS-

Prakashappa Tulshiramappa Karne ... Respondents.

Shri M. A. Vaishnav, with Shri S. M. Vaishnav, Advocate for appellants.
Shri S. D. Khati, Advocate for respondent.

CORAM : A.S.CHANDURKAR, J.
DATE : AUGUST 28, 2017

P.C.

The appellants are the original defendants who have filed the present appeal being aggrieved by the decree passed by the first appellate Court. By the said decree, the suit for possession filed by the respondent has been decreed.

2. It is the case of the respondent-original plaintiff that on 29/01/1982, he had purchased plot No.312 admeasuring 1245 sq.ft. along with a room admeasuring 6' x 6'. The appellants-defendants and the respondent are real brothers. The plaintiff was residing at his village when he got knowledge that the defendants has started use of the said room admeasuring 6' x 6'. On 12/06/2003 a notice was issued by the

plaintiff. The same was replied on 04/07/2003. In that reply a stand was taken that on the basis of agreement dated 24/10/1987 the defendants were in possession. Suit was thereafter filed seeking possession. In the written statement it was pleaded that the defendants had paid an amount of Rs.1,10,000/- to the plaintiff for purchasing and repairing the suit property. On that basis, agreement dated 24/10/1987 was entered into and hence they were entitled to continue in possession.

3. The trial Court after considering the evidence on record accepted the agreement dated 24/10/1987 relied upon by the defendants and dismissed the suit. The first appellate Court however, discarded that document and decreed the suit.

4. The learned counsel for the parties were heard on the following substantial question of law :

“ Whether the finding recorded by the appellate Court that agreement dated 24th October, 1987 (Exhibit-61) was fraudulently obtained by the defendants is on the basis of evidence available on record ? ”

5. Shri Vaishnav, learned counsel for the appellants submitted that the appellate Court was not justified in discarding the agreement dated 24/10/1987. He submitted that the defendant had examined four

witnesses including himself to prove the said agreement. Though the plaintiff admitted his signature on the first page of agreement, he denied the other signatures. The plaintiff did not take any steps for the said document examined by any handwriting expert. He also placed reliance on the decision in *Parimal vs. Veena alias Bharti 2011 (3) Mh.L.J. 725* and submitted that under Section 101 of the Evidence Act the burden was on the plaintiff to prove that the agreement in question was obtained fraudulently by the defendant. According to him, the trial Court had rightly appreciated the evidence on record while dismissing the suit. It was submitted that the appellate Court was not justified in discarding the evidence of the scribe as well as the stamp vendor. The reasons assigned by the appellate Court in paragraphs 17 and 18 of the impugned judgment did not indicate proper appreciation of the evidence on record. In absence of any evidence to prove fraud, the appellate Court wrongly held the agreement dated 24/10/1987 to be fraudulently obtained by the defendants. In support of his submission, the learned counsel placed reliance on the decisions in *Suhas Chandra Das Mushib v. Ganga Prosad Das Mushib and ors. AIR 1967 SC 878*, *Narbada Devi Gupta v. Birendra Kumar Jaiswal and anr. (2003) 8 SCC 745* and *Paka Venkaiah v. Budhi Reddy and ors. (2004) 4 ALD 889*. It was thus submitted that on the basis of the agreement at Exhibit-61 the suit was liable to be dismissed.

6. Shri Khati, learned counsel for the respondent supported the impugned judgment. According to him, the defence based on agreement dated 24/10/1987 was raised by way of an afterthought. He submitted that before filing the suit, a notice dated 12/06/2003 came to be issued. This was replied on 04/07/2003 at Exhibit-44. There was no reference whatsoever to the said agreement dated 24/10/1987 in the reply. It was thus clear that the defence as raised was by way of an afterthought. The burden to prove that such agreement was entered into by the plaintiff was on the defendants and the same was not discharged. It was thus submitted that there was no reason to interfere with the impugned judgment.

7. I have heard the learned counsel for the parties at length and perused the impugned judgment. The suit filed by the plaintiff is based on title which is created as per registered sale deed dated 29/01/1982. It is pleaded that in the year 2002 the defendants who are the plaintiff's brothers took forcible possession of the suit property. In defence, agreement dated 24/10/1987 was relied upon by the defendants. The first appellate Court has discarded the evidence of PW-3 Ganesh Wanjari on the ground that he did not depose about scribing the document dated 24/10/1987 at the instance of the plaintiff. The defendant No.1 in his

cross-examination admitted that no transaction in respect of any money or use of any premises had taken place. It was then found that pursuant to the notice issued by the plaintiff there was no reference to the agreement dated 24/10/1987 at Exhibit-61 in the reply given by the defendants. If the defendants were seeking to protect their possession on the basis of said agreement, it would have been natural that reference to the same would have been made.

8. The plaintiff in paragraph 3A of the plaint has pleaded that he had never entered into the agreement dated 24/10/1987 and the same was false. Though the Courts have used the expression “fraudulently obtained” while considering the case of the plaintiff, it is clear from the plaint averments that execution of said document was denied by describing the same as false. The requirement of compliance with provisions of Order VI Rule 4 of the Code of Civil Procedure, 1908 in the light of the plaint averments was therefore not called for. Hence, ratio of the decisions in *Suhas Chandra Das Mushib* and *Paka Venkaiah* (supra) therefore cannot apply to the facts of the case in hand. I therefore find that the appellate Court has rightly concluded that the trial Court wrongly shifted the burden upon the plaintiff to prove that he had signed the said agreement.

9. In so far as burden of proof of facts under Section 101 of the Evidence Act is concerned, the same rests on the party who substantially asserts it and not on the party who denies it as held in *Parimal* (supra). In the present case, the burden to prove title was on the plaintiff who was asserting the same on the basis of sale deed dated 29/01/1982. Thereafter, it shifted on the defendants as they were seeking to justify their possession on the basis of the agreement dated 24/10/1987. After finding the plaintiff's title, the appellate Court found that the witnesses examined by the defendants did not lead credible evidence to warrant acceptance of their version. While defendant No.1 admitted to the absence of any transaction with regard to the suit property, DW-2 who was another brother of the plaintiff and defendants clearly admitted that he was not aware of what was written in his affidavit at Exhibit-57. The stamp vendor who was examined as DW-3 stated that he was granted licence on 16/07/1989 while the agreement is dated 24/10/1987. The reasons assigned by the appellate Court for not accepting the evidence led by the defendants for proving said agreement appear to be acceptable. I find that the appellate Court was justified in not relying upon that evidence for holding in favour of the appellant.

10. Thus on the basis of title, the plaintiff has been held entitled for possession. I do not find that the appreciation of evidence by the

appellate Court to be perverse. Hence the substantial question of law as framed is answered by holding that the appellate Court has rightly held that agreement dated 24/10/1987 was not executed by the plaintiff.

In view of aforesaid answer, the second appeal stands dismissed with no order as to costs.

JUDGE