

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

SECOND APPEAL NO.10 OF 2016
SMT. GEETABAI KANHAIYALAL BHAVRE & OTHERS
VS
DEVIDAS TULSHIRAM KATHAWATE

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Shri V. K.Paliwal, Advocate for the appellants.
Shri N. B. Kalwaghe, Advocate for the respondent.

CORAM : A.S. CHANDURKAR, J.
DATED : JUNE 27, 2017.

This appeal has been filed by the original defendants who are aggrieved by the decree for possession passed by the trial Court which has been affirmed by the appellate Court.

It is the case of the original plaintiff that by virtue of sale deed dated 29-12-1997 he had purchased the suit property for consideration of Rs.35,000/-. He thereafter made certain constructions thereon. As there was a threat on the part of the defendants suit for perpetual injunction was initially filed on 10-3-2003. As the plaintiff claimed to have been dispossessed on 14-6-2005, the suit was amended and prayer for possession was added. The plaintiff thus sought possession on the basis of his title. In the written statement filed by the defendants, the sale deed was denied. A plea was taken that the plaintiff was doing money lending business and that the sale deed as executed was nominal in nature.

Before the trial Court, the plaintiff examined five witnesses while the defendant also examined five witnesses. On a consideration of this evidence, the trial Court held that the sale deed at Exhibit-66 was duly proved. Though the plaintiff was put in possession, he came to be dispossessed when he had gone out of station on 14-6-2005. It was further held that the defendants could not prove their defence that the sale deed was in fact a money lending transaction. The suit was accordingly decreed. The appellate Court re-affirmed those findings and maintained the decree.

Shri V. K. Paliwal, learned Counsel for the appellant submitted that though the defendants had taken a specific stand that the transaction was a money lending transaction, the trial court did not frame any issue in that regard and also did not consider the evidence led by the defendant. He submitted that in view of provisions of Section 92 of the Evidence Act, it was permissible for the defendant to plead that the document in question was a money lending transaction and not a document of sale. He referred to the pleadings and deposition of witnesses in that regard. He also relied upon the decision of the Hon'ble Supreme Court in *Smt. Gangabai v. Smt. Chhabubai* AIR 1982 SC 20 in support of said contention.

Shri N. B. Kalwaghe, learned Counsel for the

original plaintiff supported the impugned judgment. According to him, the sale deed at Exhibit-66 was duly proved. There were no pleadings in the written statement to indicate the defence of money lending transactions. In absence of any particulars both the Courts rightly disbelieved the stand of the defendants. He submitted that both the Courts have recorded findings on the basis of evidence on record and, therefore, no interference was called for.

I have heard the learned Counsel for the parties at length. The suit as filed was initially for perpetual injunction and thereafter by amending the suit, the prayer for possession was sought. The title is claimed on the basis of sale deed dated 29-12-1997. The plaintiff examined the scribe as well as the attesting witness to prove sale deed. It is on this basis that both the Courts have held that the plaintiff had title as per document at Exhibit-66.

In the written statement the defendants in para 15A have stated that the plaintiff was doing money lending business and the transaction was in fact the money lending transaction. Except these pleadings, there are no other particulars pleaded. The amount of loan advanced, the interest at which it was to be repaid and other particulars are absent. In the evidence, it was stated that the property was to be reconveyed. However, no steps were taken by the

defendants for its reconveyance. While considering the provisions of Section 92 of the Evidence Act, it would be necessary for the parties challenging such transaction to initially plead that the document was a sham document and give details about the nature of the actual transaction. In absence of any such pleading, no evidence could have been led in that regard. This position is clear from the law laid down in paragraph 11 of the decision in Smt. Gangabai (supra). Hence, this submission on behalf of the defendants cannot be accepted. For the same reason, the submission as made that the trial Court did not frame any issue in that regard cannot be accepted.

Both the Courts after considering the entire evidence found that the plaintiff had acquired title on the basis of the sale deed. The deposition of the witnesses examined by the defendants was not found sufficient to discard the case of the plaintiff. I find that both the Courts on a proper appreciation of evidence on record have held in favour of the plaintiff. The findings recorded are the findings of fact. No substantial question of law, therefore, arises for consideration. Appeal is accordingly dismissed. No costs.

JUDGE