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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.370 OF 2018
WITH
CIVIL APPLICATION NO.875 OF 2018
IN
SECOND APPEAL NO.370 OF 2018.

1. Rajesh Premji Bhansari	]
age: 52 years,	]
r/o Ajgaonkarwadi, Ratnagiri	]
	]
2. Shri. Parshuram Prabhakar Dhekane	] Appellants
age: 38 years. Occn. Trade	] Original
	] Defendants.
3. Sou. Varsha Parshuram Dhekane	]
age: 34 years, Occn. Trade	]
	]
Nos. 2 & 3 r/o "C" Wing Shankeshwar	]
Garden, Opp. Geeta Bhavan	]
Khareghat Road, Tal. & Dist. Ratnagiri	]

V/s.

Manisha Mahesh Bhanushali	]
age: 46 years, Occn. Housewife	] Respondent
r/o. E-530, Sagar Park, Amrut Nagar	] Original
Ghatkopar (W)	] Plaintiff
Mumbai 400 086	]

Mr. Raju D. Suryawanshi, for the Appellants.
Mr. Mohan N. Devkule i/by Mr. Rakesh Bhatkar, for respondent.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

CLOSED FOR ORDER : 25th JULY, 2018.

JUDGMENT PRONOUNCED ON : 30th JULY 2018.

JUDGMENT :

1] Heard learned counsel for the appellants and respondent.

2] Admit.

3] With the consent of learned counsels for both the parties, this Second Appeal is taken up for final hearing, at the stage of admission itself.

4] This Second Appeal is directed against the judgment and decree dated 19.1.2017, passed by the Principal District Judge, Ratnagiri, in Civil Appeal No.90 of 2015, which was preferred against the judgment and decree dated 7.9.2015, passed by the Civil Judge Senior Division, Ratnagiri, in Special Civil Suit No.83 of 2012.

5] The said suit was filed by the respondent herein through her Power of Attorney, for declaration that the sale deed executed between the appellant Nos. 1 and 2 as well as the sale deed between the Power of Attorney holder of respondent and the appellant No.1, be declared as null and void and for the consequential relief of possession of the suit shop.

6] It is the case of the respondent that she has purchased the suit shop from Padmavat Construction by virtue of registered sale deed dated 17.11.2009, for consideration of Rs.3,32,400/-. The appellant No.1 is her brother. As he was not doing any business and suffering from various vices, in order to settle him in the life, she through her Power of Attorney, her father, decided to lease out the suit premises to appellant No.2 by executing a document in favour of appellant No.1. Accordingly, document dated 4.12.2009 came to be executed by her Power of Attorney-father with her brother. Since then the appellant No.2 is in possession of the suit shop.

7] It is her case that neither she has received any consideration for the said transaction nor appellant No.1 was in a position to give her any consideration as the transaction was never intended to be of "sale". However, only on 04.08.2012, she came across one public notice issued in the newspaper inviting objections for the sale transaction of suit premises, she realized that appellant No.1 has by praising fraud upon her and her father got executed the sale deed. Immediately thereupon, she has taken objection to the sale transaction through her brother Pratap. However, appellant No.1 proceeded with the sale transaction and as a result, sale deed dated 17.9.2012 was executed by appellant No.1 in favour of appellant No.3 in collusion with the appellant No.2. Immediately, thereafter, respondent has filed this suit through her Power of Attorney, her father, for declaring both these sale deeds as null and void and for recovery of possession of the suit shop.

8] The suit is resisted by the appellants, herein contending *inter alia* that the respondent has executed the sale deed in favour of appellant No.1 through her Power of Attorney, for valuable consideration of Rs.4,50,000/- on 4.12.2009. Since the date of the sale deed, appellant No.1 is in possession thereof. On the date of sale deed, he was handed over to appellant No.1, agreement of sale and sale deed executed by Padmavat Construction in favour of respondent.

9] Thereafter appellant No.1 has executed the sale deed of the suit shop in favour of appellant No.3, for valuable consideration of Rs.10,72,000/-, as appellant No.3 was in need of the premises for her business. Before execution of the sale deed, even notice was published in local newspaper "Tarun Bharat". At that time, respondent has not taken objection to the said transaction. Now, at the instance of another brother Pratap, she has filed this false suit against them and hence it deserves to be dismissed.

10] On these rival pleadings of the parties, the trial Court has framed necessary issues. In support of her case, respondent has examined herself, her father, who has acted as her Power of Attorney and her brother Pratap. All the three of them were cross examined on behalf of appellants, but none of the appellants entered into the witness box and filed pursis stating that they do not want to lead any oral evidence.

11] On appreciation of the evidence produced on record, the trial Court was pleased to hold that the respondent has failed to prove that the appellant No.1 has played a fraud while getting executed the sale deed through her Power of Attorney. It was further found by the trial Court that the respondent has not taken any objection when the notice was published before the sale deed of appellant No.1 with appellant No.3. The Municipal taxes of the suit premises were also paid by appellant No.1 since the date of purchase in the year 2009. Therefore the trial Court dismissed the suit, holding that the respondent has failed to prove her case.

12] When respondent challenged the judgment of the trial Court before the appellate court, the appellate court, however, was pleased to reverse the judgment, holding that the intention of the parties at the time of executing the document was to be gathered from the evidence on record. Here in the case none of the appellants have led oral evidence to disprove the allegations of the fraud and in view thereof it was held that respondent has succeeded in proving her case. Accordingly the first Appellate Court decreed her suit. Being aggrieved thereby, original defendants have approached this Court.

13] This Second Appeal is heard and admitted on the following three substantial questions of law as raised by appellants in paragraph No.(H), (I) and (J), as under:-

"(H)Whether the Lower Appellate Court was right in cancelling and setting aside the registered document that is Sale deed dated 4.12.2009, on the basis of oral evidence of the plaintiff ignoring Section 90 of the Evidence Act, which raises the presumption that once a person admitted the signature on the document, there is a presumption that he has read the document properly?

(I)Whether the Lower Appellate Court rightly considered the evidence of P.W.1, P.W.2 and P.W.3 and cancelled and set aside the registered document merely because the defendant No.1 has not come forward to lead his evidence before the Court?

(J)Whether the Lower Appellate Court rightly considered the provisions of Section 92 of the Indian Evidence Act which lays down that the oral evidence contrary to the terms of the registered Sale deed is not admissible?"

14] According to learned counsel for the appellants, in view of Section 90 of the Evidence Act which lays down that when a person admits his signature on the document, there is presumption that he has read the document properly, here in the case, it has to be held that the sale deed is properly proved and it cannot be declared as null and void. In this case, it is submitted by learned counsel for the appellants that respondent's Power of Attorney, who has executed the initial sale deed dated 4.12.2009 in favour of appellant No.1 is not disputing his signature on the said sale deed. Conversely, he has admitted that he is a businessman, who, during his life time, had been to the office of Sub Registrar on 3 to 4 occasions and he knows that it is necessary to read the document before making signature thereon. Therefore, this presumption under Section 90 of the Evidence Act, is further fortified to hold that he was knowing that document on which he has signed was a sale deed and not a lease deed.

15] Here in the case, according to learned counsel for the appellants, no sufficient evidence is adduced on record by the respondent or her Power of Attorney to rebut this presumption and to prove that the contents of the document were not read by him and his signature thereon was obtained by practicing fraud. In support of his submission learned counsel for the appellant has relied upon the judgment of the Apex Court in the case of **Grasim Industries Limited and another -vs- Agarwal Steel**[1], particularly to the observations made in paragraph 6 thereof, which are as under:-

1 (2010)1 SCC 83

> "6. When a person signs a document, there is a presumption, unless there is proof of force or fraud, that he has read the document properly and understood it and only then he has affixed his signatures thereon, otherwise no signature on a document can ever be accepted. In particular, businessmen, being careful people (since their money is involved) would have ordinarily read and understood a document before signing it. Hence the presumption would be even stronger in their case".

16] It must be stated that, these observations were made by the Apex Court, in the context of the facts of the said case as there was no allegation of force or fraud made therein. Hence, it was held that it would be difficult to accept the contention of the respondent, while admitting that the document Exhibit D-8 bear his signature but it was signed under some mistake.

17] As against it, in the present case, respondent has since beginning approached the Court with a positive plea that the signature of the Power of Attorney of respondent, on the sale deed dated 4.12.2009, was obtained under the pretext that it was a lease document. Therefore, this judgment of **Grasim Industries Ltd and anr _vs- Agarwal Steel** cannot be applicable to the facts of the present case.

18] Learned counsel for the appellants has then relied upon the provisions of Section 90 of the Evidence Act, which are necessarily applicable and their scope is limited only when the document is above 30 years old. Here in the case, as the document is only of five years old, the presumption laid under Section 90 of the Evidence cannot be applicable.

19] The next submission of learned counsel for the appellant is that when there is written document, the oral evidence to disprove the contents thereof cannot be admitted. In this respect learned counsel for the appellant has relied upon the provisions of Section 92 of the Indian Evidence Act. However, in my considered opinion, this submission also cannot be accepted because the law in this respect is fairly well settled as laid down by the Apex Court in the case of **Gangabai -vs- Chhabubai[2],** which is rightly considered by the Appellate Court, and which lays down that :-

> "the bar imposed by Section 92(1) applies only when a party seeks to rely upon the document embodying the terms of the transaction and not when the case of a party is that the transaction recorded in the document was never intended to be acted upon at all between the parties and that the document is a sham, such a question arises when the party asserts that there was a different transaction altogether and what is recorded in the

2 (1982) 1 SCC 4

> document was intended to be of no consequence whatever. For that purpose, oral evidence is admissible to show that the document executed was never intended to operate as an agreement but that some other agreement altogether, not recorded in the document was entered into between the parties".

20] Thus, the law is fairly well settled that oral evidence is admissible to show that document executed was never intended to operate as agreement, but that some other agreement altogether, not recorded in the document, was entered into between the parties. In view thereof, admission of oral evidence is not altogether prohibited even under Section 92 of the Evidence Act. Sub clause (1) of the said section clearly leaves open the way to admit oral evidence, to disprove the contents of the document, especially when the party asserts that there was different transaction altogether and what is recorded in the document was intended to be of no consequence whatever.

21] Here, in the present case, since beginning, respondent has come before the Court with specific plea that as appellant No.1, is her real brother and he was addicted to some vices, it was found necessary to settle him in his life and therefore, it was decided that the suit premises be leased out, so that he can conduct business therein either for himself or by letting out the same premises to some other, so that he can have some source of income. There is categorical evidence of respondent herself, her father as Power of Attorney and her brother Pratap proving that appellant No.1 was addicted to vices, several criminal cases were filed against him. His wife and the children had left him and therefore being the real brother of respondent and son of her Power of Attorney, they found it necessary to settle him in his life and for that purpose let out the premises to him for running some business therein and that was the intention of the parties when they executed document dated 4.12.2009. Therefore, though the document is titled as sale deed, respondent was not precluded from leading evidence, even under Section 92 (i) of the Evidence Act, to show that the transaction, which was undertaken by execution of this document, was totally different one, which was that of the lease and not the sale deed.

22] The next submission of learned counsel for the appellants is that, in order to prove fraud, evidence has to be very strong, as the standard of proof required is extremely high in such cases. In this respect, he has placed reliance on the judgment of the Apex Court, in the case of **A. C. Ananthaswamy and others -vs- Boraiah (dead) by L.Rs,**[3] wherein it was held that:-

3 (2004) 8 SCC 588

> "Fraud is to be pleaded and proved. To prove fraud, it must be proved that representation made was false to the knowledge of the party making such representation or that the party could have no reasonable belief that it was true. The level of proof required in such cases is extremely higher. An ambiguous statement cannot *per se* make the representor guilty of fraud"

23] In my considered opinion, there cannot be two opinions about this legal proposition. But the standard of proof of fraud in each case, depends upon the facts and circumstances and the evidence adduced in that case. Here in the case, appellant No.1, is the real brother of respondent and real son of her father, who is her Power of Attorney. Naturally her father, who has executed this document dated 4.12.2009, in favour of the appellant No.1, has kept faith on him. He was an old person whose eye sight has also become weak. Apart from that, appellant No.1 being his real son, there is every possibility of his relying on the representation made by appellant No.1 and in trust and in good faith, he has signed on the said document, expecting it to be a lease document and not the sale deed. His evidence has remained unchallenged on record that he has never intended this document to be a sale deed. The evidence of respondent further clearly proves that their sole intention, was to execute lease document so that the appellant No.1 can run some business in the shop premises and earn some income to settle himself and his family. Therefore, there is nothing unnatural in that desire. Their evidence also proves that the shop premises were purchased by respondent just 15 days prior, and that too for the purpose of investment. Hence, it does not appear probable that within 15 days from purchase, she will sell the premises to her brother though there is every possibility that she will let out the suit premises to her brother, so that he can settle in the business and maintain his family. It was for the appellant No.1 to prove that the transaction was intended to be that of "sale" and not "lease". It was for him to prove, as to for what purpose the suit shop was sold to him by respondent, immediately within 15 days after her purchase.

24] The appellant No.1 has, however, not entered into the witness box. No oral evidence is led by him or even by appellant No.2, who was very much witness to the said sale deed, to show that the transaction was intended to be that of "sale" and not of "lease". In this respect, therefore, the appellate Court has, rightly placed reliance on the judgment of the Apex Court in the case of **Vidyadhar -vs- Manikrao and another** [4]**;** wherein it is categorically held that where a party to the suit does not appear into the witness box and

4 1999 (3) SCC 573

states his own case on oath and does not offer himself to be cross examined by the other side, a presumption would arise that the case set up by him is not correct. As has been held in series of decisions of the various High Courts and also by Supreme Court, the law is well settled that if party abstains from entering the witness box, it would give rise to an inference adverse against him. In that respect reliance can also be placed on Section 114(g) of the Evidence Act, which lays down presumption that the evidence which should be produced and is not produced would, if produced, be unfavourable to the person who withholds it. The act of appellant No.1 or of appellant No.2 of not entering into the witness box clearly indicates their conduct of withholding the best evidence. It was for them to prove that the intention of the parties was to execute the sale deed and not the lease. The appellants, however, have not led such evidence to disprove the case put up by the respondent and further to prove their case. When fraud is alleged, burden was on the appellants to remove any suspicion about fraud being practiced. In this respect, the evidence of respondent about intention of the parties on their part, of entering into the transaction as that of the lease deed has remained un-shattered on record for non examination of any of the appellants or for adducing evidence of any attesting witnesses to the sale deed. Hence, it has to be held that respondent has proved that the sale deed dated 04.02.2009 is vitiated by fraud as the real nature of the transaction was not disclosed to respondent's Power of Attorney. This finding of the fact recorded by the appellate court, cannot be called as suffering from any infirmity, so as to warrant interference therein.

25] In this particular case, it is pertinent to note that there is no -evidence on record as to the appellant No.1 raising this amount of consideration and paying the same to respondent. He has not adduced any evidence to that effect also which makes it necessary to infer that it was only a transaction for the purpose of lease and therefore there was no question of passing any consideration amount. Merely because the Power of Attorney of respondent has admitted that when the agreement of sale was entered into, copy of the sale deed was handed over to the appellant No.1, it will not be sufficient to hold that it was transaction of sale. It was very much necessary for appellant No.1 to enter into witness box to prove the said fact, which he has not done.

26] On probability factor also, it has to be held that the case put up by respondent appears to be more reliable and believable, otherwise, respondent would not have within 15 days after the purchase of suit shop, offered to sell the same to appellant No.1. What appears more probable is that she has let out the suit shop to appellant No.1 in order to enable him to settle in his life for running business therein. The appellant No.1 has, however, taken disadvantage thereof and on the basis of the alleged sale deed executed further sale deed in favour of appellant No.3. Hence, both the sale deeds are required to be declared as null and void.

27] The impugned judgment and decree, therefore, passed by the Appellate Court, being just, legal and correct, the Second Appeal holds no merit; therefore, stands dismissed.

28] In view of dismissal of Second Appeal, Civil Application No.875 of 2018 becomes infructuous and the same is disposed off accordingly.

29] At this stage, learned counsel for appellants submits that the appellants may be granted reasonable time for vacating the premises as the premises being the commercial premises.

30] Mr. Rakesh Bhatkar a/w Mr. Mohan Devkule, counsels appearing on behalf of respondent takes objection.

31] Learned counsel for appellants submits that tomorrow is the date fixed for taking possession of the suit premises with the aid of police.

32] In view thereof, reasonable period of six months is granted to the appellants to vacate the premises subject to condition that they shall file an undertaking within two weeks from the date of this order, to the effect that they will hand over vacant and peaceful possession of the suit premises to the respondent within this period six months and will not create any third party interest or part with the possession of the suit premises during this period.

[DR.SHALINI PHANSALKAR-JOSHI, J.]