

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL (STAMP) NO.18046 OF 2018

ALONG WITH

CIVIL APPLICATION NO.822 PF 2018

1. Prithviraj Ramkishan Agarwal,]
Age : 73 Yrs., Occupation : Doctor,]
2. Piyush Prithviraj Agarwal,]
Age : 28 Yrs., Adult,]
Occupation : Service,]
Both residing at Vashi, Navi Mumbai-400703] Appellants-Applicants

Versus

1. Rajendrakumar Ramkishan Agarwal,]
Aged, Adult,]
Residing at Preeti Diagnostic Centre,]
Antop Hill, S.M. Road,]
Near Antop Hill Church, Mumbai-400037.]
2. Anandsagar Co-op. Housing Society Ltd.,]
A registered Co-operative Housing Society,]
Having address at Anand Sagar, Plot No.34,]
Sector - 17, Vashi, Navi Mumbai-400705.] Respondents

Dr. Birendra Saraf, a/w. Mr. Rashid Khan and Mr. Jayant Wani, I/by
Ms. Suvarna Joshi, for the Appellants-Applicants.

Mr. Drupad Patil for the Respondents.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 12TH JULY 2018.

ORAL JUDGMENT :

1. Heard Dr. Saraf, learned Counsel for the Appellants-Applicants, and Mr. Patil, learned counsel for the Respondents.

2. This Second Appeal takes an exception to the 'Judgment and Decree' dated 26th April 2018 passed by the District Judge-4, Thane, in Civil Appeal No.195 of 2015, which was preferred against the 'Judgment and Decree' dated 21st August 2015 passed by the 5th Joint Civil Judge, Senior Division, Thane, in Special Civil Suit No.82 of 2011.

3. The said Suit was preferred by Respondent No.1 herein for a declaration that, the 'Power of Attorney' purported to be executed in the month of May, 2008 is illegal and bad in law, as the same was obtained by the Appellants with fraud and false representation. A further declaration was also sought that, the alleged 'Gift Deed' dated 26th May 2008, executed by Appellant No.1 herein in favour of Appellant No.2-the Original Defendant No.2 on the basis of the said 'Power of Attorney', is also illegal and, therefore, it should be cancelled and both the Appellants, i.e. Original Defendant Nos.1 and 2, be directed to handover peaceful and vacant possession of the suit property to Respondent No.1.

4. The facts, which were averred in the plaint are to the effect that, Appellant No.1 is the elder brother of Respondent No.1. He is

'Doctor' by profession and practices at Vashi, New Bombay. As per the case of Respondent No.1, he is the absolute owner of the property bearing Flat No.108, on the 1st Floor, in Anand Sagar Co-operative Housing Society at Vashi, New Bombay. In or about 1986-87, Appellant No.1 approached Respondent No.1 with a request to use the said property for carrying on his medical practice. Since Appellant No.1 is the owner of the three flats/properties, which are adjoining to the said flat, and considering the blood relation between the parties, Respondent No.1 had handed over possession of the said flat to Appellant No.1 to use the same for carrying on his medical practice. It was done in good faith, with no monthly or yearly compensation and also without any security receipt/deposit. Accordingly, Appellant No.1 commenced his medical practice in the said property.

5. In the month of May, 2008, Appellant No.1 approached Respondent No.1 with a false representation that, as he is facing some technical problems, as Defendant No.3-the Co-operative Society, in which the suit flat is situate, requires certain documents to be complied with, so that he can run his medical practice in the suit flat smoothly. On the basis of the said documents, it was represented that, Appellant No.1 will enter his name in the record of Defendant No.3-Society, so that the Society will not create any obstacles in carrying on his medical practice in the suit property. Respondent No.1, accordingly, signed the document,

which, later on, he came to know was the 'Power of Attorney'. On the basis of the said 'Power of Attorney', Appellant No.1 has executed the 'Gift Deed' of the suit property in favour of his son Piyush i.e. Defendant No.2. Only when the said fact came to the knowledge of Respondent No.1, he was constrained to file this Suit.

6. This Suit came to be resisted by the Appellants herein contending *inter alia* that, since purchase of the suit property in the name of Respondent No.1, Appellant No.1 is in possession thereof and he has maintained the same. Respondent No.1 has not contributed anything for the suit property till date. Conversely, Respondent No.1 has put Appellant No.1 in possession of the suit property since the year 1986 and on the basis of the 'Power of Attorney', voluntarily executed by Respondent No.1, Appellant No.1 was authorized to execute the 'Gift Deed' of the suit property in favour of his son Piyush i.e. Defendant No.2. Accordingly, the 'Gift Deed' executed by Appellant No.1 is legal, valid and proper. Therefore, the Suit filed by Respondent No.1 for possession and for declaration needs to be dismissed.

7. In support of their respective contentions, both the parties have examined themselves. The Authorized Representative from the Defendant No.3-Society was also examined.

8. In the light of this oral and documentary evidence produced on record by the parties, both, the Trial Court and the Appellate Court came to the conclusion that, the 'Power of Attorney' is a suspicious piece of document; especially the contents in the 'Power of Attorney' that, Appellant No.1 was at liberty to gift the suit property to his son Piyush i.e. Defendant No.2. Both the Trial Court and the Appellate Court were also pleased to record that, if Respondent No.1 really wanted to gift the suit property to his nephew, i.e. Defendant No.2, for which there was no reason at all to do so, but even then, assuming that he wanted to gift the suit property to Defendant No.2, there was no reason for him to execute the 'Power of Attorney'. He could have himself done it.

9. Moreover, it was also held that, when Respondent No.1 is having his own children and he is a 'Taxi Driver' by profession; whereas, Appellant No.1 is a 'Medical Practitioner' and having three other properties, on probability factor, it does not appeal to reason that Respondent No.1 will gift the suit property to Defendant No.2. Accordingly, the Trial Court has decreed the Suit and the Appellate Court confirmed the said finding of fact.

10. While challenging this concurrent finding of fact arrived at by both the Courts below, the submission of learned counsel for the Appellants is that, both the Courts below have ignored material evidence

and, therefore, in Second Appeal, interference at the hands of this Court is warranted and for that purpose, this Second Appeal needs to be admitted.

11. With the consent of learned counsel for the parties, the Second Appeal is heard finally at the stage of admission itself, after both the parties have produced on record the entire private compilation of all the pleadings and evidence adduced before both the Courts below and also the relevant case laws, on which they are placing reliance, including the Judgment of the Hon'ble Apex Court in the case of *Sebastiao Luis Fernandes (Dead) Through LRs. and Others Vs. K.V.P. Shastri (Dead), Through LRs. and Others, (2013) 15 SCC 161*, in which it is held that,

“The general rule is that the High Court will not interfere with concurrent findings of the Courts below. But it is not an absolute rule. Some of the well-recognised exceptions are where (i) the Courts below have ignored material evidence or acted on no evidence; (ii) the Courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the Courts have wrongly cast the burden of proof. When we refer to 'decision based on no evidence', it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding.”

12. Here in the case, the only question of law, which can, at the most, be called as 'substantial question of law', though it does not appears to be so in the present case is, *'whether both the Courts below have committed an error in ignoring the material evidence on record?'*

13. Before advertng to this contention, it would be necessary to consider the admitted facts on record.

14. It is undisputed that the suit flat was purchased in the name of Respondent No.1 in the year 1986 and since then, it was in possession of Appellant No.1. Appellant No.1's possession over the suit flat is admitted by Respondent No.1 also in his pleadings and also in his evidence before the Trial Court. According to Respondent No.1, however, as three other properties owned by Appellant No.1 were in the vicinity or adjoining the suit flat, on the request of Appellant No.1, he allowed Appellant No.1 to use the suit flat for the purpose of carrying on his medical practice. Though it is the case put up by Appellant No.1 in his written statement that, Respondent No.1 has not contributed for the purchase of the suit flat, that contention does not appear to be substantiated, because, neither the 'Sale-Deed' is produced on record, nor the specific case of *benami* transaction is pleaded. Therefore, it has to be held that, the suit flat was purchased and owned by Respondent No.1.

15. Respondent No.1 has also admitted execution of certain document, which he subsequently came to be known as the 'Power of Attorney'. Both the Trial Court and the Appellate Court have considered in detail as to how there are several suspicious circumstances in the said 'Power of Attorney'; especially because, it is neither endorsed before the 'Notary', nor attested in due course. It is also considered by both the Courts below that, Appellant No.1 does not know whether any person has signed the said 'Power of Attorney' as a witness in his presence; he then does not know the 'Notary', namely, J.D. Fernandes; he even does not remember whether he has signed on the notarized document pertaining to execution of the said 'Power of Attorney'. It is pertinent to note that, the contents of the 'Power of Attorney' make it clear that, it was executed by Respondent No.1, as stated therein, to safeguard his interest and enjoy the right. Hence, if it was executed to safeguard his interest and enjoy his right, then, it does not appeal to reason that, Respondent No.1 will allow Appellant No.1 to gift the suit property to any other person.

16. As a matter of fact, further clause in the 'Power of Attorney' also states that, Appellant No.1 is not entitled to sell and dispose off or to receive any consideration in respect of the suit premises. However, at the same time, it is stated that, liberty is given to the 'Power of Attorney-Holder' to gift the same to his son. Now this clause is very peculiar and

there is every reason to believe, as believed by both the Courts below, that, if the 'Power of Attorney' was executed to safeguard the interests of Respondent No.1, it cannot be the intention of Respondent No.1 to allow Appellant No.1 to gift the suit flat to Defendant No.2-his son Piyush. As a matter of fact, as both the Courts have held that, if Respondent No.1 really wanted to bequeath the suit flat to his nephew, for which there was no reason also, then, Respondent No.1 could have himself done it. It is pertinent to note that, the 'Power of Attorney' was executed on 6th May 2008 and on 26th May 2008, the 'Gift Deed' was executed. As held by both the Courts below, Appellant No.1 and Respondent No.1, both, are residents of Mumbai and, therefore, Respondent No.1 could have himself executed the 'Gift Deed' of the suit flat directly in the name of Defendant No.2. No sufficient, much less, any explanation is offered by Appellant No.1 to remove this suspicious circumstance in the 'Power of Attorney' and the 'Gift Deed'.

17. Further, it is also worth to note that, if Respondent No.1 is a 'Taxi Driver' and having no other property, except the suit flat; whereas, Appellant No.1 is having three other properties and in the light of the fact that Respondent No.1 is having his own children also, on probability factor, it does not appeal to reason that Respondent No.1 will gift the suit property to his nephew i.e. Defendant No.2. On that aspect also, certain evidence was required from the side of Appellant No.1 as to why

Respondent No.1 could gift the property to his nephew, that too by executing the 'Power of Attorney' in the name of his brother. However, no evidence on that aspect is coming at all.

18. Moreover, this 'Power of Attorney' is as good as a 'Gift Deed' in the sense that, by this 'Power of Attorney', Respondent No.1 has allowed Appellant No.1 to gift the suit property to Defendant No.2. Especially considering the social and economic status of Respondent No.1 and having regard to the fact that he is a 'Taxi Driver' and, therefore, may be an illiterate person; whereas, Appellant No.1 is an educated Officer being the 'Medical Practitioner', naturally, heavy burden was upon Appellant No.1 to remove all these suspicious features in the entire transaction. Appellant No.1 has, however, failed to do so.

19. Learned counsel for Respondent No.1 has in this respect placed reliance on the Judgment of this Court in the case of *Dattatray Narayan Aher Vs. Bhaskar Narayan Aher, 2010 (6) ALL MR 31*, wherein the settled legal position was reiterated that, “*merely admitting signature on the document does not amount to admission of execution of a document*”. When there is a specific denial regarding execution of the document, then, the burden was upon Appellant No.1 to satisfy both the Courts below as to how the document is genuine and executed with full knowledge thereof. Appellant No.1 has, however, failed to discharge that

burden. Hence, nothing wrong can be found in the Judgments of both the Courts below, if they have allowed Respondent No.1's Suit by holding that, both these 'Power of Attorney' and 'Gift Deed' are not the genuine documents, on the basis of which the title of the suit property can be transferred to the Appellants.

20. Now coming to the submission of learned counsel for the Appellants that the material evidence was ignored by both the Courts below, learned counsel for the Appellants has in this respect drawn attention of this Court to the evidence of Respondent No.1-Plaintiff; especially his cross-examination, wherein he has admitted that, since purchase of the flat, Appellant No.1 is in possession thereof. Then Respondent No.1 has further admitted that, he had not deposited any charges towards maintenance of the suit flat to Defendant No.3-Society and further admission that the suit flat was purchased by Defendant No.1 i.e. Appellant No.1 and he does not know its description. He also does not know when it was purchased or its price. It is submitted that, these admissions on the part of Respondent No.1 make it clear that, the flat was actually purchased by Appellant No.1 and that is why Respondent No.1 does not know its purchase price or even its description and that is why he has not deposited any amount toward the society charges. According to learned counsel for the Appellants, if this evidence was considered by both the Courts below, the finding would

have been different and the Judgment of the Trial Court and the Appellate Court shows that they have not even considered this evidence.

21. In my considered opinion, in the first place, the Appellate Court has, in paragraph No.17 of its Judgment, quoted the arguments/submissions advanced by learned counsel for the Appellants herein. It may be true that, there is no specific discussion on this aspect, but then, whether it will go to the root of the matter, so as to change the decision of the case, in my considered opinion, the answer thereto has to be in the negative. If it is the case of the Appellants that the suit flat was purchased *benami* in the name of Respondent No.1, then, the specific case should have been pleaded to that effect. However, neither in the written statement, he has stated so, nor in the 'Power of Attorney', he has stated so; or, even in the Gift Deed, there is a mention that he has purchased it in the name of Respondent No.1 and, therefore, Respondent No.1 has, by executing the 'Power of Attorney', allowed him to gift it to his son. Sans any specific pleading or evidence to that effect, on the basis of some stray admissions given by Respondent No.1 in the course of his cross-examination, Appellants cannot make out a case, so as to reverse the finding of fact arrived at by both the Courts below.

22. The second piece of evidence, which, according to learned counsel for the Appellants was not considered by both the Courts below, is the evidence of the witness examined on behalf of Defendant No.3-

Society. It is submitted that, this witness Ramanand Tumbe, the Chairman of Defendant No.3-Society, has admitted that Respondent No.1 has come to the Society Office and submitted his Driving License and other documents for transferring the suit flat in the name of Appellant No.1; however, this witness has admitted in his cross-examination that, Plaintiff has not been to the Society Office in his presence for submitting the application for transfer of the suit flat. No Register is maintained by the Defendant No.3-Society Office for marking presence of the persons. As a matter of fact, his evidence proves that, since beginning, Respondent No.1 was the owner of the suit flat.

23. In such situation and even assuming his evidence to be true and correct that, at the same time, Respondent No.1 has come to the Defendant No.3-Society and given his Driving License etc., as admitted by Respondent No.1, that fact will not make much difference, because, Respondent No.1 has clearly stated in the plaint itself that, for the purpose of removing the technicalities, so that Appellant No.1 can run his medical practice in the suit flat smoothly, he has executed certain documents and, therefore, he is not disputing even execution of the 'Power of Attorney' for the smooth running of the medical practice of Appellant No.1 in the suit premises. This evidence otherwise also cannot make any difference on appreciation of the 'Power of Attorney' produced in the case, including the 'Gift Deed', both the Courts below were

constrained to hold that the 'Power of Attorney' cannot be called as a genuine document. It is also not the case of Appellant No.1 that it was executed by Respondent No.1 out of love and affection for his nephew. The case of Appellant No.1 that, it was purchased by Appellant No.1 *benami* in the name of Respondent No.1 and, therefore, Respondent No.1 has allowed him to transfer it to Defendant No.2, is also not specifically pleaded. There is no evidence on record to show that why such 'Power of Attorney' should be executed. If the suit flat was really purchased by Appellant No.1 in the name of Respondent No.1, then Respondent No.1 himself could have executed such 'Gift Deed'. All these aspects are considered by both the Courts below in proper perspective and the evidence, which, according to learned counsel for the Appellants, is not considered or ignored by the Courts below, even if considered in this Second Appeal, it does not make any difference to the outcome of the case.

24. The Second Appeal, therefore, being devoid of merits, stands dismissed.

25. In view of the above, Civil Application No.822 of 2018 pending in the Second Appeal does not survive and the same is disposed of as infructuous.

[DR. SHALINI PHANSALKAR-JOSHI, J.]