

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO. 133 OF 2018
WITH
CIVIL APPLICATION NO. 1352 OF 2017**

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| 1. Mrs.Padma Deepak Mehtre |] | |
| Age 54 years, Occ.Household, |] | |
| R/at. Saswadgaon, Tal. Purandar, |] | |
| District Pune. |] | |
| 2. Mr.Deepak Jaywant Mehtre |] | |
| Age Adult, Occ.Service, |] | |
| R/at.Sawadgaon, Tal. Purandar, |] | |
| District Pune. |] | |
| |] | <u>... Appellants /</u> |
| | | <u>Applicants.</u> |

Versus

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| 1. Mrs.Mansi Meghraj Inamke |] |
| Age 51 years, Occ.Household, |] |
| R/at. 129/311, Sasane Nagar, |] |
| Hadapsar, |] |
| Pune 411 028. |] |
| 2. Mrs.Vanita Sharad Shivarkar |] |
| Age 47 years, Occ.Household, |] |
| R/at. Gajanan Colony, Hole Chawl, |] |
| Near Aakashwani, Hadapsar, |] |
| Pune - 411 028. |] |
| 3. Mrs.Savita @ Sangeeta Pravin Aru |] |
| Age 47 years, Occ.Household, |] |
| R/at.425, Aru Mala, |] |
| Hadapsar, |] |
| Pune - 411 028. |] |
| 4. Mr.Prasad Pandurang Palaskar |] |
| Age 58 years, Occ.Agriculturist, |] |
| R/o. 1074, Sadashiv Peth, |] |
| Pune - 411 030. |] |

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| 5. | Mr.Ashok Tukaram Jadhav |] | |
| | Age Adult, Occ.Agriculturist, |] | |
| | R/at. 17 ½ nali, Hadapsar, |] | |
| | Pune - 411 028. |] | |
| 6. | Mr.Ashok Kumar Trivenisingh |] | |
| | Age Adult, Occ.Service, |] | |
| | R/at. Samarth Ashish Ostwara, |] | |
| | Andheri (West), |] | |
| | Mumbai - 400 053. |] | <u>... Respondents.</u> |

- Mr.R.A. Thorat, Senior Advocate a/w. Mr.Pandit Kasar for the Appellants.
- Mr.V.P. Sawant a/w. Mr.Prabhakar M. Jadhav, Mr.Veerdhaval Kakade and Ms.Tanaya Patankar i/b. Mr.Prabhakar Jadhav for Respondent Nos.1 to 3.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 16th JULY, 2018.

ORAL JUDGMENT :-

1] Heard learned counsel for the Appellants and learned counsel for Respondent Nos.1 to 3. With their consent this Second Appeal is taken up for final hearing at the stage of admission itself.

2] This Second Appeal is directed against the judgment and decree dated 12/07/2017 passed by the District Judge-15, Pune in Civil Appeal No.286 of 2010, which was preferred against the judgment and decree dated 15/03/2010 passed by the Addl. Judge, Small Causes Court, Pune, in Special Civil Suit No. 1285 of 1994.

3] The said suit was filed by Respondent Nos.1 to 3, herein, for declaration that the sale-deed dated 10/01/1994 alleged to be executed by their father Suresh Ramchandra Zagde in favour of Defendant No.1 is illegal, null and void, on the count that on the date of the sale-deed, he was not in a proper, physical or mental condition.

4] Brief facts of the suit are as follows :-

Respondent Nos.1 to 3 (org. Plaintiffs) are the daughters of deceased Suresh. The suit land bearing Survey No.93/22-B/1, situate at village Mundhava, Tal. Haveli, District Pune, was owned and possessed by Suresh. During his lifetime, he has sold some portion of the said land and at the time of his death, he was in possession of only 16 Ares (Gunthas) of the said land. It is alleged by Respondent Nos.1 to 3 that Suresh was addicted to alcohol. He had also taken treatment for the same, being admitted in the Kripamayai Hospital at Miraj. At the time of his death, he was also suffering from the septic shock and was admitted in Harjeevan Hospital at Pune where he succumbed to death on 11/01/1994.

5] After the death of Suresh, when Respondent Nos.1 to 3 went to enter their names in the record of suit land, they came to know that the suit land was allegedly sold by Suresh to Appellant

No.1/Defendant No.1 and the pencil entry to that effect was also made in the revenue record. On further enquiry, they came to know that the sale-deed was executed on 10/01/1994, on the strength of the power of attorney alleged to be given by Suresh to Defendant No.2 on 05/01/1994, while Suresh was admitted in the hospital. It further came to their knowledge that, as per the averments in the sale-deed, the amount of Rs.30,000/- was allegedly paid on 05/01/1994, when the 'Agreement of Sale' was executed. However, 'Power of Attorney' did not mention the execution of the alleged 'Agreement of Sale'. According to Respondent Nos.1 to 3-Plaintiffs, therefore, by taking disadvantage of the mental and physical condition of Suresh, this bogus and fraudulent sale-deed is got executed from him and therefore, it was required to be declared as null and void.

6] This suit came to be resisted by the Appellants/Original Defendants, contending *inter-alia* that Suresh has executed the power of attorney in the proper state of mind. There are no suspicious features at all in the entire transaction and hence, the relief as claimed by the Plaintiffs, cannot be granted.

7] In support of their case, Respondent Nos.1 to 3 did not enter into the witness box, however, they examined two brothers of deceased Suresh, namely, Kalidas and Shantaram. They also led the

evidence of two doctors, namely, Dr.Sambhaji Deshmukh to prove that Suresh was suffering from alcohol addiction and he was admitted in the Kripamayyu Hospital at Miraj from 26/07/1990, as per the Court's order, till his discharge on parole on 16/09/1991. Respondent Nos.1 to 3 also led the evidence of Dr.Manohar H. Sheth to prove that on 05/01/1994 Suresh was admitted in the hospital on account of septic shock and he died in the hospital due to septic shock on 11/01/1994.

8] As against it, the Appellants examined themselves and relied upon the power of attorney and the sale-deed dated 10/01/1994.

9] On appreciation of the said evidence on record, the trial Court was pleased to hold that Respondent Nos.1 to 3 themselves have not entered into the witness box to their case of fraud. Secondly, there were no sufficient pleadings in the plaint as regards the alleged fraud. In view thereof, it was held that Respondent Nos.1 to 3/Plaintiffs have failed to prove that the sale-deed was illegal, null and void.

10] Against the dismissal of the suit, when Respondent Nos.1 to 3 approached the Appellate Court, the Appellate Court was after re-appreciation of the entire evidence on record, pleased to hold that there are sufficient averments, coupled with the adequate evidence to prove that the alleged sale-deed is not legal and valid but it is a

fraudulent and bogus document, obtained by playing fraud.

11] This finding of the fact as recorded by the Appellate Court is challenged in this Second Appeal by learned senior counsel for the Appellants, firstly on the count that in respect of allegation of fraud, as required under Order-6, Rule-4 and 2 of the C.P.C., there has to be the pleadings with specificity, particularity and precision. By placing reliance on the judgment of the Hon'ble Apex Court in the case of *Afsar Sheikh and Another V/s. Soleman Bibi and Others*¹, it is urged that, the general allegation in the plaint that the plaintiff was a simple old man of ninety two years, who had reposed great confidence in the defendant, was much too insufficient to amount to an averment of undue influence or fraud. Thus, it is urged that without sufficient pleadings, no case was made out for the Appellate Court to disturb the well reasoned judgment of the trial Court.

12] Secondly, it is submitted that, no relief of cancellation of the sale-deed as such is claimed under Section 31 of the Specific Relief Act and hence, on that count also, the suit should not have been decreed by the Appellate Court, especially when the trial Court has dismissed the suit.

1 (1976) 2 SCC 142

13] It is further submitted that there is no evidence brought on record to prove that Suresh was not in a proper mental state to execute such 'Power of Attorney' or 'Agreement of Sale'. Both the witnesses examined by Respondent Nos.1 to 3, namely, Kalidas and Shantaram have stated that they were not aware about the mental or physical condition of Suresh. Respondents/plaintiffs themselves have not entered into the witness box. Even Dr. Sambhaji Deshmukh, who has deposed about the alcohol addiction of Suresh, has stated that Suresh was discharged from the hospital on 16/09/1991 itself; whereas this power of attorney is executed in the year 1994. There is no evidence or record to show that, at that time also, Suresh was suffering from any addiction; especially because Dr.Sambhaji Deshmukh has admitted in his cross-examination that he does not know what happened after 20/06/1991.

14] As regards the evidence of Dr.Manohar Sheth, it is submitted that, he has merely stated that Suresh was admitted in the hospital due to septic to his leg and died on the account of septic shock. It is urged that his evidence is also not sufficient to prove in any way that mentally or physically Suresh was affected during that period. Moreover, Dr.Manohar Sheth has also not personally attended to Suresh, when Suresh was admitted in the hospital. Thus, according

to learned counsel for the Appellants, First Appellate Court has committed a grave error in disturbing the findings of fact recorded by the trial Court and decreeing the suit.

15] Per contra, learned counsel for the Respondent Nos.1 to 3 has supported the judgment of the Appellate Court by submitting that the facts in the present case are self speaking. It is urged that admittedly Suresh was addicted to alcohol. Not only that, he was also admitted for the treatment in the mental hospital at Miraj. Moreover, physically also he was not keeping well. He was admitted in the hospital on 05/01/1994 and the alleged 'Power of Attorney' and 'Agreement of Sale' is executed on the very day when he was in the hospital. The 'Agreement of Sale' is not produced on record and the general power of attorney does not make reference to the agreement of sale or does not confer any specific power on Defendant No.2 to sell the said property to anyone. As regards the consideration of Rs.30,000/-, which is alleged to be paid also, there is no evidence on record. Hence, according to learned counsel for Respondent Nos.1 to 3, considering these suspicious features in the entire transaction, the Appellate Court was well within its rights to set-aside the findings recorded by the trial Court on re-appreciation of evidence. Hence, in this Second Appeal, this Court should not interfere in to the findings of

fact, recorded by the First Appellate Court.

16] In this respect, learned counsel for Respondent Nos.1 to 3 has relied upon the judgment of the Hon'ble Apex Court in the case of *Chacko and Another V/s. Mahadevan*² wherein interference in Second Appeal with findings of fact of the First Appellate Court was held not permissible, on the count that Second Appeal is confined only to questions of law.

17] I have given my thoughtful consideration to the submissions advanced at bar.

18] In the instant case, the admitted facts on record, as considered by the Appellate Court are that, Suresh was at-least not physically well, as he was suffering from septic to his leg. He was admitted in the hospital on 05/01/1994 and on the very day itself, it is stated that Suresh has executed the alleged 'Power of Attorney' and the 'Agreement of Sale' in favour of Defendant No.2. Surprisingly, the said 'Agreement of Sale' is not produced on record on the specious plea that it is missing. The general power of attorney, which is produced on record and which is executed on the very day itself is conspicuously silent about the execution of the agreement of the sale. The power of

2 (2007) 7 SCC 363

attorney even does not specifically authorise Defendant No.2 to dispose of the property by sale or in any other way dispose of the suit property in favour of other Defendant No.1 or any other person. No such specific power is given under the said power of attorney. If on the same day two documents are executed, then there should have been cross reference of both the documents in their recitals. However, it is not there and the 'Agreement of Sale' is not produced.

19] It is pertinent to note that, though the power of attorney is stated to be 'Notarized', the First Appellate Court has considered in detail as to how the Notarizing thereof was not possible. As per the evidence of the Appellants, deceased Suresh has executed power of attorney in favour of Defendant No.2, which was Notarized with Advocate Mr.Khaladkar. However, Advocate Mr.Khaladkar has admitted that his office is at the distance of about 15 k.m. from the Harjeevan Hospital, where Suresh was admitted. Advocate Mr.Khaladkar has also not produced the original register in which the power of attorney was registered. He was also unable to tell the registration number of the power of attorney. Therefore, if his evidence is considered, then the inference as drawn by the Appellate Court is inevitable. It becomes difficult to accept that Suresh travelled for 15 k.m. on that day from the hospital that too when he had septic

to his leg and notarized the power of attorney in the office of notary.

20] Even as regards the alleged 'Agreement of Sale', the Appellate Court has considered that if Defendant No.1 has agreed to purchase the suit property for Rs.1,60,000/- and Suresh has received sum of Rs.30,000/- on the date on which 'Agreement of Sale' was executed, then there is no evidence, as to, what he did of the said amount.

21] It is pertinent to note that the mental condition of Suresh was also not of a person of a sound health. The evidence on record clearly proves that he was addicted to the alcohol. He has also taken treatment for the same in the mental hospital as per the Court's order. There is no evidence to show that after 20/06/1991 he was in good mental condition or his addiction was stopped. There is specific allegation in the plaint also, that he was addicted to alcohol and no evidence to show that addiction was totally gone. Admittedly, he was suffering from septic shock to his leg and as deposed by Dr.Manohar Sheth during that period he was serious and unable to do any normal duties physically or mentally. It may be true that he has not treated Suresh but his evidence is not disturbed in cross-examination.

22] Therefore, having regard to the totality of the facts and

circumstances on record, it becomes difficult to accept that Suresh has executed this 'Agreement of Sale' or 'Power of Attorney' on the basis of which the sale-deed is executed, in a proper, sound, mental or physical state of health. There is also considerable doubt about the payment of consideration amount. The very manner in which the 'Agreement of Sale' and the 'Power of Attorney' are made leads much to suspicion. There are sufficient pleadings to that effect in the plaint, as to, how Suresh was addicted to alcohol, how he was not physically and mentally in proper condition; he was admitted in the hospital and how without the knowledge of the Respondent Nos.1 to 3, who are his real daughters the entire transaction consisting execution of three documents took place in such a short duration and in a quick succession of five days. Just a day before his death, even the sale-deed also came to be executed in their favour by the Appellants/defendants, who are not in any way related to Suresh. As they say, here in the case, the circumstances speak for themselves to draw the inference of fraud which is spelt out in the plaint and also in the evidence brought on record. The very execution of the document in the circumstances in which it has happened, even in the absence of any evidence on the part of the Respondent Nos.1 to 3 makes it necessary to draw the inference of such fraudulent act, which is sufficient to vitiate the entire transaction as such.

23] As regards the judgments on which learned counsel for the Appellant has placed reliance, the observations made therein are in the context of the facts stated therein. For example, in the case of *Kisan s/o. Ramji Khandare V/s. Kausalyabai w/o. Gangaram Korde & Ors.*³ a general allegation was made that defendant took disadvantage of the illiteracy of the plaintiff. In that context, it was held that, mere allegation that the plaintiff No.1 is illiterate and such a situation was used to her disadvantage will be of no avail to substantiate the plea of fraud. Here, in the case, more than sufficient averments are made to show how the transaction is vitiated by fraud. Apart from the illness, both physical and mental of Suresh, which is specifically pleaded in the plaint, there are also other circumstances brought on record that the Respondents are the daughters of deceased Suresh, they were not kept in the loop of this execution of the 'Agreement of Sale' or the 'Power of Attorney' and also the execution of the sale-deed. It was executed when Suresh was just on the death bed, a day before his death. These facts are proved on record. Therefore, it cannot be stated that there is only general allegation in the plaint.

24] Similarly in the case of *Afsar Sheikh and Another V/s. Soleman Bibi (supra)* on which learned counsel for the Appellant has

relied upon also there was only one allegation in the plaint that the plaintiff was a simple old man, who has reposed great confidence in the defendant. Naturally such a general averment cannot be sufficient to prove or to infer the exercise of undue influence or fraud. Here, in the case, as stated above, there are sufficient averments in the plaint. Over and above that the circumstances speak for themselves. They are proof of the fraud.

25] Therefore, in my considered opinion, the Appellate Court has rightly decreed the suit by setting aside the findings as recorded by the trial Court. These findings of the fact, arrived at by the Appellate Court on proper appreciation of the evidence on record are not open to any challenge in the Second Appeal.

26] Hence, Second Appeal being devoid of any merit, stands dismissed.

27] In view of dismissal of the Second Appeal, nothing survives in the Civil Application and therefore, it also stands disposed of.

[DR.SHALINI PHANSALKAR-JOSHI, J.]