

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.216 OF 2016

Radhabai Kisan Gulwe,
Age 50 years, Occupation Household,
R/o Vishwakarma Nagar, Mehrun,
Jalgaon Tq. Dist. Jalgaon.

...Appellant.

VERSUS

1. Charandas s/o Harchand Gulwe,
Age Major, occupation Service,
2. Rohidas s/o Harchand Gulwe,
Age Major, occupation Service,
3. Kisan s/o Harchand Gulwe,
Age Major, Occupation Labour,

All R/o. Vishwakarma Nagar,
Mehrun, Jalgaon Tq. Dist. Jalgaon.

...Respondents.

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Mr. Girish Nagori, Advocate for appellant.
Mr. M. V. Navandar, Advocate for respondents No.1 and 2.

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CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 08-04-2019.

ORAL ORDER :

1. Present appeal has been filed by the original plaintiff. She had filed Regular Civil Suit No.159 of 2004 before 2nd Joint Civil Judge, Junior Division, Jalgaon for cancellation of sale deed and permanent

injunction. She had come with a case that, she herself and defendant No.3 had purchased suit property i.e. Survey No.266/1B, Plot No.66 admeasuring 75.30 Square Feet from defendant No.1 on 09-01-2001. Defendant No.3 is her husband. Defendants No.1 to 3 are real brothers. It is stated that, defendant No.1 has taken disadvantage of the addiction of defendant No.3 and by pressurizing / defrauding her to sell the suit property. She is illiterate and disadvantage is also taken of her illiteracy. It is stated that, defendant No.2 had issued notice to her on 27-11-2001 in respect of suit property contending that some amount has been given on 10-10-1999, that is to the tune of Rs.50,000/-. However, no such amount has been received by her. It is her contention that, defendant No.1 took plaintiff as well as defendant No.3 under the pretext that, their names are required to be mutated to the Municipal Corporation and then got a sale deed executed on 29-04-2004 for a consideration of Rs.24,000/- in respect of southern side constructed premises with open kitchen admeasuring 68.37 Square Feet. In fact the said sale deed is followed without consideration. It is stated that, because of the said sale deed the defendants No.1 and 2 are obstructing her from using toilet block. Therefore, she filed the said suit for cancellation of the sale deed and for permanent

injunction.

2. The defendant No.1 contested the suit by filing written statement. The description of the suit property was challenged. It has been contended that, the defendant No.1 has purchased constructed room situated towards the southern side along with the open land and kitchen for a consideration of Rs.24,000/- to the plaintiff and defendant No.3. Plaintiff and defendant No.3 had handed over the possession of suit property to him in presence of witnesses on the day of sale deed, and therefore, there is no question of any fraud played on the plaintiff. The said sale deed is legal and now he has become owner of the said property by virtue of said sale deed.

3. Defendants No.2 and 3 were duly served but failed to appear, and therefore, matter proceeded ex-parte against them.

4. Taking into consideration the rival contentions, issues came to be framed. Parties have led oral as well as documentary evidence on record. Taking into consideration the evidence on record, the learned trial Court has held that, plaintiff has failed to prove that the sale deed was got executed from the plaintiff by defendants No.1 to

3 by pressurizing her or there was any kind of cheating by the defendant No.2 by executing sale deed in his favour on a stamp paper of Rs.20/-. It is held that, the sale deed dated 29-04-2004 is legal and valid. Plaintiff has surrendered her right to use latrine and open space in favour of defendant No.1 by said sale deed, and therefore, the suit came to be dismissed.

5. The original plaintiff then approached District Court, Jalgaon by filing Regular Civil Appeal No.68 of 2010. The said appeal was heard by learned Principal District Judge, Jalgaon and after hearing both sides, the appeal has been dismissed on 28-10-2015. Hence, present second appeal.

6. Heard Mr. Girish Nagori, Advocate for appellant and Mr. M. V. Navandar, Advocate for respondents No.1 and 2.

7. It has been vehemently argued on behalf of the appellant that, both the Courts below have not considered the facts and the law point in proper perspective. Proper issues and / or points have not been framed. It was not considered properly that, due to the addition of defendant No.3, the defendants No.1 and 2 have overpowered the plaintiff and defendant No.3. It was also not

considered that, the plaintiff was illiterate and she was taken the Sub-Registrar's Office under the pretext that, their names is required to be mutated to the Municipal record. Plaintiff has categorically stated on oath also that, she has not received any amount towards consideration. He also submitted that, the matter may be remanded for giving an opportunity to the plaintiff to prove the fraud in proper perspective.

8. Per contra, the learned advocate appearing for respondents No.1 and 2 supported the reasons given by both the Courts below. He submitted that, plaintiff has not led any evidence to prove the alleged fraud. Respondent No.3 in this case was served but failed to appear.

9. At the outset it is required to be seen that, both the Courts below were concurrent in giving findings. Therefore, this Court would be slow in approaching the second appeal and only if it is show that there is perversity in finding or appreciating the evidence by Courts below, there cannot be any interference. In other words unless substantial question of law has been pointed out as contemplated under Section 100 of Code of Civil Procedure, the second appeal cannot be entertained / admitted. Here in this case

execution of sale deed dated 29-04-2004 is admitted to the plaintiff. However, she comes with a case that, it was got executed from her by playing fraud. As regards her part is concerned, it is stated that, disadvantage has been taken by the defendant No.1 of her illiteracy. Though she has contended that, defendant No.3 is addicted to liquor and the defendants No.1 and 2 have taken disadvantage of the said fact yet it is to be noted that, he has not been made as a plaintiff. He did not appear before the trial Court and had not filed written statement admitting the claim of the plaintiff. The sale deed has been executed by plaintiff as well as defendant No.3. Under such circumstance plaintiff ought to have explain as to why defendant No.3 has not been made as a plaintiff. She has not come with a case that, when she learn about sale deed then her relationship with defendant No.3 have undergone change and she is now not residing with him. Thus it can be said that, the particulars of the fraud have not been properly given by the plaintiff as contemplated under Order VI Rule 4 of the Code of Civil Procedure. In her cross-examination she has specifically admitted that, the suit property was purchased in the name herself and defendant No.3 out of the income of defendant No.3. Under of such circumstance, the pleadings ought to have been more clear. She has tried to contend that, she as well as

her husband were taken to Sub-Registrar's Office under the pretext that, their names are required to be mutated to Municipal record. When she is admitting the presence of her husband all the while at the time of execution of the sale deed then the case is tried to be made out that the fraud is on plaintiff as well as defendant No.3, but then the evidence is led by plaintiff alone. When there is a registered sale deed, there is a presumption under law in respect of the said sale deed that, it has been executed as prescribed by law or with due procedure. In order to rebut the said presumption, the evidence that would be required would be strong enough, cogent and material. Here except the bare words of plaintiff, there is no other evidence adduced by her to support her contention about fraud.

10. The contention raised by the appellant that proper issues were not framed by the learned trial Court does not hold any water for the simple reason that the conjoint reading of of issue Nos.1 to 3 would give a clear picture wherein use of word pressurize, cheated and fraud has been used. If at all the plaintiff was not satisfied with the wordings of the issues, there was an opportunity available to the plaintiff to get recast of the issues at the trial Court itself but then it

appears that, that opportunity was not encashed. Under such circumstance, the matter also does not require any remand. Pleadings were clear and the burden was also on the plaintiff to prove the contents of the plaint. Therefore, every possible evidence ought to have been adduced by the plaintiff. The first appellate Court also framed proper issue though in the appeal memo a ground was taken that the trial Court had not framed proper issues. The first appellate Court has re-appreciated the evidence properly and come to the correct legal point. Under such circumstance, when there is no error committed on the fact as well as on the law point, no substantial question of law arise in this second appeal. Hence, second appeal is disposed of as **not admitted**. No order as to the costs.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.