IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 226 OF 2019

1. Balaji Dattatraya Parit (Telang),
Age 36 years, Occupation Service and Agri.,
R/o Ayodhya Nagar, Hadgaon
Tq. Hadgaon Dist. Nanded.

2. Ravi Dattatraya Parit (Telang),
Age 32 years, Occupation Agri.,
R/o Ayodhya Nagar, Hadgaon
Tq. Hadgaon Dist. Nanded.

3. Shilpa Gajanan Wadlanwad,
Age 33 years, Occupation Household,
R/o Pandharkawada Tq. Kelapur
Dist. Yeotmal.

4. Kamalbai Dattatraya Parit (Telang),
Age 59 years, occupation Household,
R/o Ayodhya Nagar, Hadgaon
Tq. Hadgaon Dist. Nanded. **...Appellants.**

VERSUS

1. Mohanrao Bhimrao Kulkarni,
Age 56 years, occupation Nil,
R/o Ayodhya Nagar, Hadgaon
Tq. Hadgaon Dist. Nanded.

2. Shakuntalabai Mohanrao Kulkarni,
Age 54 years, Occupation Household,
R/o Ayodhya Nagar, Hadgaon
Tq. Hadgaon Dist. Nanded. **...Respondents.**

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Advocate for Appellants : Mr. S. S. Bora.

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CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 11-04-2019.

ORDER :

1. Heard learned advocate appearing for the appellants. Appellants are the original plaintiffs who had filed Regular Civil Suit No.64 of 2007 for declaration that the sale deed dated 20-12-2001 is Sham and nominal and for the consequential relief of perpetual injunction. The said suit was filed before Civil Judge, Junior Division, Hadgaon Dist. Nanded and it was dismissed on 30-03-2015. They had challenged it before District Court, Nanded by filing Regular Civil Appeal No.48 of 2015. The said appeal was heard by learned District Judge -6, Nanded and it was dismissed on 16-02-2019. Hence, the second appeal.

2. Learned advocate representing appellants submitted that, both the Courts below have not considered the evidence properly, so also the legal points involved. Though plaintiffs had admitted execution of the documents but according to them the real nature of the transaction was mortgaged when they had accepted loan of Rs.1,00,000/-. In fact Rs.1,25,000/- was paid to the defendants and this fact was admitted by the defendants. But instead of getting reconveyance an agreement to sell was got executed from the plaintiffs, by showing the consideration that is fixed at Rs.3,15,000/-. It was shown that, the remaining

amount of Rs.1,90,000/- would be paid. When the real nature of the document was a mortgage, the suit ought to have been decreed. Substantial question of law is arising in respect of the construction of or interpretation of the document. Plaintiffs were entitled to lead evidence to prove the real nature of the transaction even in view of Section 91 and 92 of the Indian Evidence Act.

3. He placed his reliance on the decision in, *Vikram and Ors. Vs. Dashrath*, reported in *2005 (2) Mh.L.J. 507*, wherein this Court has held that,

> "Oral evidence cannot be discarded as inadmissible when the real transaction is under Section 58-C of Transfer of Property Act read with Section 92 of the Indian Evidence Act."

4. Taking into consideration the Judgments of the Courts below as well as submissions by the appellants it is not even necessary to issue notice to the respondents. Unless it is shown that, there is possibility of framing substantial question of law as contemplated under Section 100 of Code of Civil Procedure even notice need not be issued to the respondent. Framing of substantial question of law is sine qua non for admission of the second appeal and when there are concurrent findings of fact then this Court would be slow in interfering with the Judgment and decree passed by the Courts below. Here plaintiffs had come with

a case that, original plaintiff No.1 Dattatraya was in need of amount of Rs.1,00,000/- to repay the loan taken by him from bank and private persons, therefore he approached defendant No.1 and obtained loan. According to him plaintiff No.1 executed sale deed as a security for the said loan. Plaintiff No.2 is the widow of Dattatraya. The said sale deed was executed in favour of defendant No.2 who is wife of defendant No.1. Though the mutation entry had taken place it is stated that, actual possession of the suit land was with plaintiffs. According to plaintiffs defendant no.1 is an unauthorized moneylender. Plaintiff repaid amount of Rs.1,25,000/- to defendants on 14-08-2003, in presence of two persons and then it is stated that the remaining amount of Rs.1,90,000/- was agreed to be paid before 31-12-2003. It is also stated that, on that day i.e. 14-08-2003 instead of issuing receipt of repayment, defendants got executed agreement to sell in respect of suit property and the consideration amount of Rs.3,15,000/- was shown. It is stated that, plaintiffs could not repay the remaining amount and then when defendants tried to threatened to dispossess, they filed the suit. It is stated that, the sale deed was not intended to be acted upon. In fact in this story the plaintiffs appears to be not consistent enough. Plaintiffs admit the execution of the documents, and therefore, heavy burden on them to prove that real intention was something else. There is absolutely no mention in the sale deed that, it is executed by way of security towards loan. Further when the sale deed was executed, what was the necessity for the parties to get the agreement to sell Exhibit 69 executed from defendant No.2 in favour of plaintiffs is a question. Said agreement to sell dated 14-08-2003 is executed by defendant No.2 in favour of plaintiffs. That means, the plaintiffs had accepted that defendant No.2 had become owner of the suit property by virtue of the sale deed. That means, the sale deed was acted upon, and therefore, agreement to sell was got executed.

5. The defendants had come with a case that, by virtue of sale deed they have become the owners. It is denied that, the real transaction was a mortgage. They have admitted the execution of the agreement to sell but it is stated that the plaintiffs did not perform their part of the agreement as per the said agreement to sell, and therefore, no right has been created in favour of plaintiffs. Another fact that is also required to be considered is that, when plaintiffs are admitting the execution of agreement to sell then why the suit for declaration and injunction is filed is not explained. The alternative efficacious remedy on the basis of said agreement to sell would have been t o file a suit for specific performance of the contract. Definitely when the agreement to sell was got executed form the defendants by the plaintiffs, they admit that the sale deed was acted upon.

6. The oral evidence has also been considered by both the Courts below thoroughly and it was held that, plaintiffs were not in possession of the suit properties since the date of sale deed. Plaintiffs could not have relied on the agreement to sell and could not have denied the execution of the sale deed by them at the same time. The ratio laid down in *2005 (2) Mh.L.J. 507* cannot be denied, but here the evidence on record and facts do not show that there was a relationship of debtor and creditor in existence between plaintiffs and defendants at the time of the sale deed or at the time of execution of agreement to sell. Under such circumstance, the plaintiffs cannot seek shelter of provision under Section 58 (C) of the Transfer of the Property Act as well as Section 92 of the Evidence Act.

7. Both the Courts below have considered the oral evidence as well as the legal point involved correctly, no substantial question of law is arising in this case, hence the second appeal is disposed of as not admitted.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.