

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

931 SECOND APPEAL NO.171 OF 2014
WITH
CA/2400/2014 IN SA/171/2014

Rajendra Dhondiba Jadhav,
Age 38 years, Occupation Agri.,
R/o Supa Tq. Parner Dist.
Ahmednagar.
And Others.

...Appellants/Applicants

VERSUS

Sau. Shevantabai Krishnarao Sabale,
Age 73 years, Occupation Agri.,
R/o Supa Tq. Parner Dist.
Ahmednagar.
And Others.

...Respondents.

...

Advocate for Appellants / Applicants : Mr. Garud N.C.
Advocate for Respondents No.1 to 3 : Mr. Jadhavar S. S.

...

CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 13-02-2019.

ORAL ORDER :

1. Present appeal has been filed by the original plaintiffs to challenge the Judgment and decree passed by learned District Judge -5, Ahmednagar in Regular Civil Appeal No. 323 of 2009 whereby appeal filed by them was dismissed. In the said appeal the Judgment and decree passed by learned Civil Judge, Junior Division, Parner Dist.

Ahmednagar in Regular Civil Suit No. 392 of 2006 dated 16-10-2009 was challenged.

2. The present plaintiffs had filed the said suit for declaration and in the alternative for recovery of the amount. Plaintiff No.1 is the son of plaintiff No.2. Plaintiffs No.3 to 7 are the daughters of plaintiff No.2. House property bearing City Survey No.541 admeasuring 22.60 square meters situated at village Supa Tq. Parner Dist. Ahmednagar was belonging to plaintiffs. Defendant No.3 is the son of defendant No.1. It is stated that, both of them are the relatives of plaintiffs. Defendants had decided to purchase the suit property from plaintiffs. It was also decided that, the sale deed would be executed on 26-02-2003. According to the plaintiffs entire amount of consideration was not ready with the defendants, however taking into consideration the fact that plaintiff No.2 is an old lady and other plaintiffs were under her control, it was represented by the defendants that they were unable to collect amount of Rs.20,000/- and since they were relatives they would make arrangement for the said amount within one year. By making such kind of representation the sale deed was got executed without consideration and without possession. It is also the contention of

the plaintiffs that, on the same day defendant No.3 on behalf of defendant No.1 and defendant No.2 got a document executed on a stamp paper of Rs.20/- stating that within one year, that means till 26-02-2004, the amount would be given. After the said period was over when plaintiffs demanded the said amount to defendants, the defendants started avoiding. Plaintiffs therefore contended that, either they should give amount or they should reconvey the property. Thereupon the defendants started giving threats, therefore plaintiff No.2 issued notice dated 23-05-2005 and demanded the amount together with 18 % interest. In spite of receipt of said notice, defendants No.1 to 3 contacted plaintiff No.2 and again promised that they will not dupe them. They took extension of six months to repay the amount and it was also told that the house is in their possession. However, even after the expiry of that period, when defendants did not act, plaintiffs have filed the suit. The plaintiffs prayed for declaration that the sale deed dated 26-02-2003 which is without consideration and without possession is void and it is not binding on the plaintiffs. Alternatively prayer has been made that, in pursuant to the agreement dated 26-02-2003 on the stamp paper of Rs.20/-, the defendants be directed to pay in all amount of Rs.33,600/- together with 18 % interest per annum.

3. It appears that, though the defendants were served, they failed to appear and therefore the matter proceeded ex-parte against them.

4. Plaintiffs have examined plaintiff No.1 Rajendra as P.W.1 and also examined one witness by name Suresh Dhanaji Gaikwad. After hearing the learned advocate appearing for the plaintiff and taking into consideration the evidence on record the learned trial Court has dismissed the suit on 16-10-2009. As aforesaid the civil appeal i.e. Regular Civil Appeal No.323 of 2009 filed by the present appellants has been dismissed by learned District Judge - 5, Ahmednagar on 19-01-2013, hence the present second appeal.

5. With consent of both the parties, the matter has been heard after the record and proceedings was called and it is perused by both sides.

6. Learned advocate appearing for the appellants submitted that, both the Courts have not taken into consideration the evidence properly. The oral evidence adduced by P.W.1 Rajendra and P.W.2 Suresh has gone unchallenged on record. The certified copy of the sale deed has been produced on record at Exhibit 10 and the

agreement which was executed on the same day of the sale deed has been produced at Exhibit 9. It was submitted that, there was no explanation by the defendant as to why the said agreement was got executed on the same day when the sale deed was executed. The learned trial Court went on to compare the signatures on the documents when in fact there was no challenge to the said aspect from the defendants. Reading the sale deed as well as agreement (Exhibit 9) would clarify that, though the amount of consideration has been stated to be Rs.30,000/- the document Exhibit 9 showed that amount of Rs.20,000/- has been given by the plaintiff No.2 to the defendants on the same day. That means, plaintiffs received only amount of Rs.10,000/- towards consideration. It was promised in Exhibit 9 that, they would pay the amount of Rs.20,000/- within one year, however that words has not been abided. Therefore at least the alternative prayer ought to have been considered by both the Courts below. In fact when there was no challenge to the pleadings as well as evidence adduced by the plaintiffs, both the Courts below were not justified in dismissing the suit and appeal.

7. Per contra, the learned advocate appearing for the respondent submitted that, both the Courts have taken into consideration the

oral as well as documentary evidence on record together with the law. In fact what was executed was a registered instrument, and therefore, the burden was on the plaintiff to prove that something contrary has taken place. Taking into consideration those facts the learned trial Court has rightly compared the signatures and has arrived at the conclusion that by said document Exhibit 9 it can be stated that the sale deed was without consideration. He submitted that, no substantial question of law is arising in this matter.

8. The first and the foremost fact that is required to be considered is that, though the defendants were duly served, they failed to appear and therefore the matter proceeded ex-parte against them. Thereafter the plaintiffs have adduced evidence in the form of affidavit by plaintiff No.1 Rajendra and witness Suresh. Plaintiffs have come with a case that, the sale deed was executed on 26-02-2003 in respect of the suit property and the consideration amount that was fixed was Rs.30,000/-. They are not disputing the execution of the sale deed (Exhibit 10). Here itself it is to be noted that, the endorsement at the end of the registered instrument show that the parties, especially the plaintiffs, accepted that they have received the amount of consideration. The contents of the sale deed

specifically say that, the said amount is given. If the factual aspect was that the defendants were not having a substantial amount i.e. Rs.20,000/- with them, then they could have written such contents regarding payment of part of the consideration and then part promise to be paid within a stipulated period in the sale deed itself. Section 54 of the Transfer of Property Act defines 'Sale'. It provides that,

"Section 54 : - "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised."

So there was no hurdle in writing contents about amount promised and to be paid at a later stage, it will not bar sale transaction. However in the document Exhibit 10, no such contents have been written. Now in view of bar under Section 91 and 92 of the Evidence Act, they were estopped from saying something contrary to the contents of the sale deed. No doubt oral evidence in respect of intention of the parties to arrive at a particular transaction can be adduced but it is under certain circumstances only. If we consider that, plaintiffs had a reason to say that, since it was represented by the defendants to them, that they being relatives would pay the amount at a later stage and they believed in those statements, then

it cannot amount to fraud. When the defendants had clarified the things prior to the execution of the document it cannot amount to fraud as tried to be contended by the plaintiffs. Therefore, from any angle it cannot lie in the mouth of the plaintiffs that, they had received only amount of Rs.10,000/- on the day of the sale deed (Exhibit 10). At the cost of repetition it can be stated that there was no hurdle for the parties to right in specific words that, amount of Rs.10,000/- is only given on that day and Rs.20,000/- is promised to be paid at a later stage.

9. Now the plaintiffs want to rely on agreement (Exhibit 9) which is stated to have been executed by defendants No.2 and 3 in favour of plaintiff No.2 on the same day i.e. 26-02-2003. The first and the foremost fact that why and how defendant No.3 was brought in picture has not been clarified in the document Exhibit 9. In the plaint the plaintiff say that, defendant No.3 had executed it on behalf of defendant No.1. Certain more particulars in fact were required i.e. the time of execution of Exhibit 9, the place where it was executed and who were the persons who were present at the relevant time. If we consider that, Exhibit 09 was executed immediately after sale deed (Exhibit 10) then what was the hurdle

for defendant No.1 to sign Exhibit 09 also. Another fact that is predominantly absent in Exhibit 09 is that, it does not show any kind of connection with the sale deed (Exhibit 10). It does not say in specific words that, out of sale consideration of Rs.30,000/-, amount of Rs.20,000/- was shown to have been given by defendants No.2 and 3 to plaintiff No.2. Plaintiff No.1 who is the son of plaintiff No.2 had purchased the said stamp paper. Under such circumstance he ought to have explain for what purpose he had purchased that document. His evidence is silent on that specific point. Further if he was present then why he did not insist on proper contents of the document. Under such circumstance when the plaintiffs had failed to establish the connection of document Exhibit 09 with document Exhibit 10, both the Courts below were justified in saying that, plaintiffs have failed to prove that either the sale deed is without consideration and without possession or in the alternative that any right was created in favour of plaintiffs to recover amount.

10. Merely because the evidence, either oral or documentary, adduced by the plaintiffs has gone unchallenged on record that does not bind the Courts of law to accept the said evidence as gospel truth. That evidence has to be tested on its own footings and then

an independent conclusion is required to be arrived at. If the evidence adduced by the plaintiff in such a suit that is where the matter has proceeded ex-parte, the evidence is of acceptable nature, then discretion is given to the Court to pronounce a decree. In the present case taking into consideration the facts and circumstances as well as evidence adduced, the discretion given to the Courts has been exercised judiciously which requires no interference at all. Under such circumstance, no substantial question of law is raised, hence appeal is not admitted and stands disposed of accordingly.

11. Pending Civil application No.2400 of 2014 is also stands disposed of.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.