

Friday, 3.5.2019

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 494 OF 2002**

Shri. Shashikant Haribhau Bandewar

Age : 43 years, Occ. Service,

House no.418, Arurdi,

Pune-411 035.

... Appellant

Orig. Plaintiff

Vs

Shri. Bhalchandra Haribhau Bandewar

Age : 53 years, Doctor

Residing at Sadashivnagar

Tal. Malshiras, Dist. Solapur

... Respondent

Orig. Defendant

...

Mr. Siddharth R. Ronghe, Advocate for the Appellant.

Mr. Sanjay Kshirsagar, for the Respondent.

CORAM : SANDEEP K. SHINDE J.

JUDG. RESD ON: APRIL 4, 2019.

JUDG. PRON. ON : 3RD MAY, 2019.

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JUDGMENT :

1. *In the case at hand, I am required to answer;*

“Whether the appellant-plaintiff has proved, that the sale-deed dated 3.2.1975, was a sham document and whether he could establish that, there was a different transaction altogether which was never intended to operate as an agreement but with some other agreement altogether not recorded in the document, was entered into between the parties ?”

- . *Besides, I have to answer substantial questions of law, framed while admitting the Appeal, thus;*

“(I) Whether the first appellate Court was right in failing to take cognizance of the issue of limitation when the trial Court had raised that issue and finding was recorded thereon on the basis of pleadings of the parties ?

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(ii) Whether the sale deed (Exh.204) dated 3.2.1975 is without consideration and contrary to Sec.54 of the Transfer of Property Act, then whether the same is void ab initio ?

(iii) Whether both the Courts below were justified in law in holding that a valid title of ownership, as and by way of transfer of sale had in fact been bestowed upon defendant when admittedly by the defendant there was no consideration paid for the transaction whatsoever ?

(iv) It ought to have been appreciated that even after the transaction, it was the plaintiff who inducted the tenants in the suit premises and in all other rooms of the two storied structure and it was the plaintiff who collected rents from them. (Exh.77 to Exh.87 original stamped rent notes/agreements executed by the plaintiff as the landlord of the suit property with various tenants) (Exhs.88 to 89 complaints received by the plaintiff from tenants about the problems faced by them in the property.)

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(v) It further ought to have been appreciated that it was the plaintiff who completed the construction and dealt with every authority for the purposes of completing the construction which is yet another indicator of the fact that the plaintiff was very much owner of the suit premises. (Exhs.91 & 92 permissions given by P.C.M.C. For construction of latrine and water tap connection in the said property). Exhs.93 to 137 are the vouchers for money paid by the plaintiff for effecting construction over the suit property. Exhs.138 to 144 the demand letter and correspondence made by contractor Shri. P.R. Chowgule demanding money for construction carried out at site. Exh.145 agreement between plaintiff and contractor P.R. Chowgule. Exhs. 146 to 158 documents relating to M.S.E.B. connection all in the name of the plaintiff.

(vi) The Courts below have further completely lost sight of the facts that the defendant in the written statement had categorically contended that the sale-

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deed (Exh.204) has been executed by the plaintiff only against payment of Rs.1,000/-. The plaintiff in his examination-in-chief at paragraph-3 has categorically stated that he was not paid the sum of Rs.1,000/- on the date of the sale deed. To this, defendant in his examination-in-chief in paragraph-8 also says that he did not paid any amount to plaintiff at the time of sale. This being the position it was beyond any further doubt or are the fact that consideration is not been paid for the transaction of 3rd February, 1975 was the admitted position itself. That being the case, there is no question of divesting ownership in favour of the defendant vide alleged sale-deed of 3rd February, 1975.”

2. *The facts giving rise to this Appeal are as under and I will refer the parties by their original nomenclature.*

. *The appellant-plaintiff had filed a suit for declaration that the sale-deed dated 3.2.1975 (“suit contract” for short) was a sham sale-deed which was never intended to be acted upon and was*

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executed in the form of a collateral security. The plaintiff and the defendants are brothers. The suit property is;

(a) land admeasuring 2 gunthas out of Survey No.13/1 at Village-Nigdi, Taluka-Akurli, District-Haveli, and

(b) two storeyed building consisting of 20 rooms constructed on the property as described in Clause (a).

3. *It is the plaintiff's case, that the suit property (a) was purchased by him from one, Raoji Sakore for the consideration of Rs.1,000/- by registered sale-deed dated 25th February, 1969 ("first sale-deed" for short) with a view to construct building thereon. He thus, got the plans sanctioned from the local authority and started*

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constructing the building in 1969 itself. The plaintiff was running short of funds and therefore requested his brother (defendant) to help him out. His brother was a Medical Officer, in Zilla Parishad, at Solapur. He agreed to lend money subject to condition that the plaintiff would execute the sale-deed of the suit property described in para-(a) in his favour, to enable him to secure loan from the Life Insurance Corporation. The plaintiff thus executed sale-deed on 3rd February, 1975 in favour of his brother for consideration of Rs.1,000/-; however, it was agreed that the same shall not be acted upon. Thereafter, the plaintiff appointed M/s. Shilp Gruha Rachana Prkalp a Contractor for constructing the building under the supervision of Engineer, Mr. Phadke. At the relevant point of time, the plaintiff was working at Pune with M/s. Rustom Bay Company and his brother-the defendant, was working as Medical Officer in the Zilla Parishad at Solapur. The plaintiff would plead that, his brother advanced him Rs.55,000/- to him from time to time

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which he repaid in installments either in cash or in cheque. He would further plead and contend that, he inducted tenants in the suit property and entered into tenancy agreements with them. It is the plaintiff's case that, he was collecting rent as a owner of the suit property consisting of land and two storeyed building constructed thereon. In support thereof, he has produced the tenancy agreements and bunch of rent receipts. He would further contend that, eviction suit was filed by him against one of the tenants for recovery of possession and the decree was passed in his favour. In the circumstances, he requested his brother to execute a deed of reconveyance of the suit property in his favour. But since he refused to do so, he filed a suit in the Court of Civil Judge Senior Division, Pune in February, 1988, seeking relief as to declare, that the sale-deed dated 3.2.1975 was never intended to be acted upon as it was executed in the form of collateral security for the loan of Rs.55,000/- advanced to him by his brother and for such consequential reliefs.

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4. On the other hand, it is defendant's case that, when the first sale deed was executed on 25.11.1969, the consideration for the same was paid by him on 12.11.1969 and soon thereafter he appointed M/s. Shilp Gruha Rachana Prakalp for constructing the building on the suit plot. It is his case that, in the year 1966-68, plaintiff's salary was around Rs.250/- and since he was associated to Zilla Parishad as a Medical Officer at Solapur, he thought it fit and convenient to request his brother to supervise the construction on the suit plot. It is his case that, there was none amongst his family members at Pune, except the plaintiff, to supervise the construction and therefore he requested the plaintiff to supervise the construction. In short, it is the defendant's case that construction of the two-storeyed building on the suit land was done by him through different agencies and his brother was simply supervising the construction. The defendant denied that, he extended financial help to the plaintiff as claimed.

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He would contend that, soon after the first sale-deed of 1969 and even after the second sale-deed, the construction was done at his own cost and as per his instructions. It is his case that, the plaintiff was simply supervising the construction, who time and again, submitted detailed accounts of construction to him. Defendant thus denied the suit claim in entirety.

5. *The learned trial Court upon appreciating the evidence dismissed the suit with costs and the Appellate Court too dismissed the Appeal, against which, plaintiff has preferred this Second Appeal.*

6. *Both the Courts concurrently held that;*

(a) the sale-deed dated 3.2.1975 was not a sham document nor was executed as and by way of collateral security,

(b) the suit was barred by limitation, (as held by the trial Court only)

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(c) *the plaintiff was simply supervising the construction work and the defendant alone expended for the construction.*

7. *The learned Counsel for the parties have taken me through the pleadings and the evidence on record. The plaintiff examined himself and another brother as a witness, P.W.2. The plaintiff was cross-examined at length. The defendant examined himself and proved the sale-deed dated 3.2.1975. The defendant has placed on record several letters written by the plaintiff at Exhibits- 173, 174 to 176, 183, 187, 188 to 194, 196 to 199 and 203. All these letters were written by the plaintiff to the defendant which were admitted by the plaintiff and therefore contents of these letters were read in evidence by both the Courts. That this Appeal has been admitted on the mixed question of law and facts, I have gone through the evidence of witnesses and the set of letters as detailed hereinabove.*

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These letters have established the fact that, defendant had paid construction cost to the different agencies through his brother, and such amount was not handloan given to the plaintiff.

8. *It is disclosed in the evidence that, before executing the first sale-deed i.e. on 25.11.1969 defendant had paid Rs.3,000/- to the plaintiff. In cross-examination, plaintiff admitted this fact. It may be stated that, a bunch of letters written by the plaintiff to the defendant have proved, a fact in issue that, time and again, the plaintiff was demanding money from the defendant for making payments to the building material suppliers and other agencies. Though it is plaintiff's case that, money advanced by the defendant was in form of a loan and he repaid it in installments, he could not prove this fact in issue. I will make a reference to the contents of the letters, in later part of the judgment.*

9. *The burden was on the plaintiff to prove that, the sale-deed dated 3.2.1975 was a sham document and further burden was*

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to prove that Rs.55,000/- paid by the defendant to him from time to time was the handloan.

10. *It is disclosed in the evidence that in 1967-68 plaintiff's salary was in the range of Rs.250-Rs.450/- per month. At the relevant time the defendant was working as a Medical Officer, Zilla Parishad, Solapur. On 25.11.1969 the suit land was purchased by the plaintiff from Raoji Sakore for consideration of Rs.1,000/-. The evidence on record has established a fact that, soon before the execution of the first sale-deed Rs.3,000/- was paid by the defendant to the plaintiff and it is defendant's case that, the consideration of Rs.1,000/- was paid out of this Rs.3,000/-. Plaintiff in cross-examination admitted that, Rs.3,000/- were paid to him by his brother on 12.11.1969 but denied that, consideration was paid out of this Rs.3,000/-. The plaintiff in his evidence, time and again, agreed to produce the bank passbook and the diary maintained by him, however, he did not produce it at all. He would express his*

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inability to produce the same on the ground that, Faraskhana Police had seized the diary and the bank passbook from his custody. In the case at hand, burden was on the plaintiff-appellant to prove that the suit sale deed dated 3.2.1975 was not intended to be acted upon but there was a different transaction altogether, not recorded in the suit sale-deed dated 3.2.1975. Both the Courts upon appreciating the documents and oral evidence held that, the plaintiff could not establish that the transaction incorporated in the sale-deed dated 3.2.1975 was sham and there was a different transaction altogether not recorded in the sale-deed dated 3.2.1975 which was entered into between the parties. While admitting the Second Appeal, mixed questions of facts and law are framed and therefore I am required to ascertain whether the findings rendered by the Courts is consistent with the evidence and ensure that, no piece of evidence has been kept out of consideration.

11. *The learned Counsel for the appellant, would submit*

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that, the suit sale-deed dated 3.2.1975 executed without consideration being paid, is a void sale-deed in terms of Section 54 of the Transfer of Property Act. It is appellant's case that, the defendant has admitted in evidence that, no consideration was paid upon execution of the suit sale-deed dated 3.2.1975. Learned Counsel for the appellant, has taken me through the evidence of the defendant. Infact, the defendant has proved that, Rs.3,000/- were paid to the plaintiff soon before the execution of the first sale-deed i.e. 12.11.1969 and from the said amount, plaintiff paid consideration of Rs.1,000/- and purchased the suit property on 12.11.1969. The defendant has also proved a fact that, at the relevant point of time, the plaintiff's salary was in the range of Rs.250/- per month. The evidence on the record suggest that, after executing the first sale-deed on 24.12.1969, a agreement was made between the plaintiff and the defendant whereby the plaintiff had agreed to execute the sale-deed in favour of the defendant. This agreement dated 24.11.1969 was not

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produced either by the plaintiff or the defendant. According to the defendant, it was in the custody of the plaintiff. The plaintiff denied such an agreement, but it appears in one of the letters dated 31.8.1975 (Exhibit-188) addressed by the plaintiff to the wife of the defendant he referred to the said agreement executed between himself and the defendant in the year 1969. It may be stated that, consideration for the first sale-deed was Rs.1,000/-. Evidence shows, it was paid by the defendant. Suit sale-deed was executed in the year 1975 i.e six years after the first sale-deed, also for Rs.1,000/-. However, it is not the plaintiff's case that, he repaid Rs.1,000/- to the defendant. In fact, he neither rendered the account of Rs.3,000/- paid to him by the defendant before the execution of first sale-deed nor produced the accounts. Indisputedly, defendant had paid to the plaintiff the amounts in installments since 1969, which defendant has proved. Thus, evidence on record has proved that the consideration for the first sale-deed was paid by him through his

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brother and the evidence also suggest that, on 24.12.1969 agreement was executed whereby plaintiff had agreed to execute the sale-deed in favour of his brother.

12. *In evidence, plaintiff admits,*

(i) receipt of Rs.3,000/- from defendant on 12.11.1969;

(ii) that first sale-deed was executed on 25.11.1969.

(iii) that for the consideration of Rs.1,000/- plaintiff did not explain as to why Rs.3,000/- were paid by the defendant to him on 12.11.1969;

(iv) that the plaintiff did not produce diary, though maintained by him, wherein particulars of financial transaction were recorded.

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. It is under these circumstances, coupled with the fact that, plaintiff did not produce the diary, though maintained by him, proves a fact in issue, namely, that the consideration for the second sale-deed was paid by the defendant and therefore it was not hit by the provisions of Section 54 of the Transfer of Property Act.

13. Let me now narrate, the essence and substance of letters written by the plaintiff to the defendant which crystallizes all facts in issue. A letter dated 12.3.1970 was addressed by the plaintiff to his brother, before executing the second sale-deed, but after the first sale-deed. Vide this letter, plaintiff demanded Rs.3,000/- from the defendant and informed him that, due to shortage of cement there was no substantial progress in the construction. In evidence, it is unfolded that initially M/s. Shilp Gruha Rachana Prkalp was appointed but after executing the second sale-deed, another Contractor, Mr. Chougule was appointed. However, construction was

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supervised by Mr. Phadke throughout. Next letter at Exhibit-185 dated 16.3.1975 was addressed by Mr. Phadke (Engineer), to the defendant, inter-alia, informing that estimated cost for constructing 2,000 feet would be Rs.40,000/- i.e. Rs.20/- per sq. feet and that construction of the first floor was over and coloumns were raised for constructing the second floor. This letter was addressed by Mr. Phadke on 16.3.1975 i.e. immediately after the execution of the second sale-deed which was executed on 3.2.1975. This letter clearly indicates and proves that, construction since beginning was commenced and carried out at the instance of the defendant through first Contractor and not by the plaintiff. It also means, immediately after the first sale-deed (of 1969), construction commenced, at the instance of the defendant. If at all, the construction was being carried out by the plaintiff, as claimed and contended, why Mr. Phadke would write a letter on 16.3.1975 and inform the defendant about the progress in the construction and

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estimated cost thereof. Vide this letter, Mr. Phadke had also informed that, construction has been carried out at reasonable rate and for constructing the second floor, additional Rs.40,000/- were required. Therefore, letters dated 12.3.1970 and 16.3.1975 have established that, after executing the first sale-deed but before the second sale-deed, the construction which was done on the suit land, was at the instance of the defendant and at his cost and certainly not by the plaintiff.

14. *The next letter is dated 16.4.1975 (Exhibit-91) written by the plaintiff after the execution of the second sale-deed. Vide this letter, the plaintiff furnished details of expenses and dues payable to the building material suppliers and requested him to send money. He informed the defendant that, Rs.3,000/- were payable to Modi Steel; Rs.2,000/- to Doctor Bery- a sand supplier and Rs.3,000/- were payable to wood supplier. Yet vide letter dated 16.4.1975 (Exhibit-174), plaintiff informed about the phase/stage of*

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construction to the defendant. Vide letter dated 19.6.1975 (Exhibit-176), he informed the defendant particulars of dues payable to suppliers and Contractor, Mr. Chougule and demanded Rs.12,000/-.

15. *Thus, above letter has established a fact that after purchasing the suit land, construction was done at the instance of the defendant at his cost and he paid it from time to time to the various agencies through the plaintiff.*

16. *Next letter is at Exhibit-177, written by Mr. Nagarkar, proprietor of M/s. Shilp Gruha Rachana Prakalp (first contractor) to the defendant wherein disputes and differences between the first contractor and the plaintiff were spelt out and narrated, which relates to dues payable to the Contractor. It may be stated that, M/s. Shilp Gruha Rachana Prakalp (proprietor Mr. Nagarkar) was the first contractor appointed soon after executing the first sale-deed. If at all it is the plaintiff's case that, he was the owner of the suit land and he made construction thereon, the question is why the first*

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Contractor would address a letter to the defendant in June, 1975 making grievance about the outstanding dues towards the construction made by him in 1969 to 1970. This letter therefore negates the case of the plaintiff and establishes a fact that, plaintiff was simply supervising the construction work and the defendant being the owner of the suit plot has constructed a building thereon at his own cost. Besides, there are letters at Exhibit-178, 186, 187 and 189 which clearly suggest and indicate that, time and again, plaintiff was informing the defendant about the progress in construction and demanding money from him stagewise. A letter at Exhibit-192 dated 27.4.1976 written by the plaintiff to the defendant shows that, one Mr. Mody, who was supplier of the construction material was likely to initiate legal proceedings against the plaintiff by informing his employer and apprehending the legal action, the plaintiff requested the defendant to arrange for money which was due and payable to Mr. Mody and other contractors.

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17. Thus, the letters written by the plaintiff to the defendant has amply established that, the construction was carried out on the suit plot by the defendant and material suppliers were paid by the defendant, through plaintiff and as such I hold and conclude that Rs.55,000/- were advanced by the defendant to the plaintiff from time to time was not the handloan as contended by the plaintiff. It also appears from the correspondence between the plaintiff and the defendant that, there were some disputes and differences between the brothers, as the defendant was not satisfied about the authenticity and correctness of the Accounts maintained by the plaintiff. A letter at Exhibit-183 dated 29.6.1975 written by the plaintiff to the defendant is a vital piece of evidence wherein plaintiff has narrated the facts relating to the nature of the transactions between himself and the defendant. This letter refers to the accounts maintained by the plaintiff which was disputed by the defendant. In this letter, plaintiff had admitted mistakes

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committed by him and for which he apologised to his brother. This letter crystallizes the case of the defendant, that the suit sale-deed was not executed as a collateral security but was a outright sale. This letter also proves, that the plaintiff was maintaining the accounts of the suit construction. The plaintiff admitted in this letter that he was just supervising the work of construction and would have no objection if work of supervision was entrusted to Mr. Chougule. Alongwith this letter, a statement of Accounts was submitted which shows he had received Rs.54,985.25 from the plaintiff from time to time and he expended Rs.67,296.21/-.

18. *It may be stated that, plaintiff in cross-examination, time and again, agreed to produce the Books of Accounts or statement of Accounts relating to the transaction between himself and the defendant. However, he did not produce the same on the ground that, same were attached by the police in other case. Infact, such Accounts was the primary evidence which the plaintiff ought to*

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have produced before the trial Court to substantiate his case that, he had received Rs.55,000/- from his brother in installments as a loan for making construction. Primary evidence was in possession of the plaintiff but since he did not produce, the Courts were justified in drawing an adverse inference which is consistent with the evidence on record and therefore no interference is called for.

19. *Though it is plaintiff's case that, he had inducted the tenants as owner of the suit property but the fact remains that, in the evidence he admitted that, he was rendering the Accounts relating to the collection of rent to his brother as evident from the letters at Exhibits-196, 197, 198 and 199.*

20. *The learned Counsel for the appellant would submit that, the trial Court erred in holding that, the suit was barred by limitation, and the Appellate Court has not addressed this issue at all, though raised. Be that as it may, the suit sale-deed was executed by the plaintiff in favour of the defendant on 3.2.1975. According to*

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him, he repaid the entire loan to the defendant in December, 1986 and suit was filed in the year 1988. The plaintiff pleaded that in the year 1987, the defendant attempted to enter his name in the Municipal records and thereby declined to execute the deed of conveyance in respect of the suit property as then agreed. It is therefore contended, that the suit was within limitation.

21. Upon perusing the pleadings, it appears that the cause of action arose in the year 1987 when defendant applied for entering his name in the revenue records and therefore the finding of the trial Court that the suit was barred by limitation was incorrect.

22. Thus, evidence has established following facts and facts in issue namely :

(i)that the first sale-deed dated 25.11.1969 though executed in the name of the plaintiff, the consideration for the same was paid by the defendant.

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(ii) *M/s. Shilp Gruha Rachana Prakalp (Proprietor, Mr. Nagarkar) was appointed as the first Contractor by the defendant, through plaintiff.*

(iii) *Mr. Phadke, Engineer was appointed to supervise the construction, by the defendant, through plaintiff.*

(iv) *The first Contract was terminated and Mr. Chougule was appointed as a Contractor in March, 1975 by the defendant.*

(v) *that the suit sale-deed was executed by the plaintiff in favour of his brother-defendant voluntarily and was not as a collateral security, for consideration of Rs.1,000/-, which was duly paid.*

(vi) *that the entire cost of construction since beginning was incurred by the defendant.*

(vii) *that the defendant had paid the construction*

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cost to different agencies through his brother and the plaintiff could not establish that Rs.55,000/- were paid by his brother to him in installments as a loan and he repaid it.

23. *Thus, taking into consideration the facts and the evidence on record, the plaintiff has failed to establish that the suit sale-deed dated 3.2.1975 was sham and was not intended to be acted upon but there were some different transactions altogether which was not recorded in the suit document entered into between the parties.*

24. *Questions of law, as framed, while admitting the Appeal are answered accordingly.*

25. *The Appeal is dismissed, with no order as to costs.*

(SANDEEP K. SHINDE, J.)