

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**SECOND APPEAL NO.679 OF 2012
WITH
CIVIL APPLICATION NO.11221 OF 2012**

KAUSABAI W/O CHANDRAHAS NAGARGOJE
AND OTHERS

VERSUS

DHONDIRAM S/O SOPAN NAGARGOJE

.....
Advocate for Appellants : Mr. S. S. Thombre
Advocate for Respondent : Mr. Vivek Bhavthankar
.....

CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 04-08-2021.

ORDER :

1) Present second appeal has been filed by the original plaintiffs challenging the concurrent Judgment and decree. They had filed Regular Civil Suit No.125 of 2008 for cancellation of sale deed in respect of 59 R agricultural land situated in Gut No.140 at village Nagdara, Taluka Parli Vaijnath, District Beed. The said suit came to be dismissed by learned Joint Civil Judge, Junior Division, Parli Vaijnath on 18-01-2011. The plaintiffs had challenged the said Judgment and decree before District Court, Ambajogai, District Beed, by filing Regular Civil Appeal No.19 of 2011. It was decided by learned District

Judge-2, Ambajgoai and was dismissed on 23-11-2011. Hence, present second appeal.

2) Heard learned Advocate Mr. S. S. Thombre for appellants and learned Advocate Mr. Vivek Bhavthankar for respondent.

3) It has been vehemently submitted on behalf of the appellants that plaintiffs had come with a case that the property was originally belonging to the husband of plaintiff No.1 and father of plaintiffs No.2 to 4 Chandrahas. Chandrahas expired and the property devolved on the plaintiffs. Plaintiffs No.2 to 4 were minors at that time. Plaintiff No.1 was having responsibility of the family and, therefore, she was in need of money. Taking disadvantage of her said situation, the defendant by getting executed a nominal sale deed dated 24-05-2002 for consideration of Rs.41,000/-, however, since plaintiffs No.2 to 4 were minors at that time sanction was not obtained from competent Court for the execution of the sale deed. In fact, it was agreed that the sale deed would be nominal and would be kept as it is for about five years till the plaintiff repays the loan. Thereafter, when the plaintiffs had gone to the defendant for repaying the amount of Rs.41,000/- together with interest, the defendant refused to take that amount and reconvey the sale deed

to the plaintiffs. Hence, the suit was filed.

4) It was not in dispute before the Trial Court as well as First Appellate Court that plaintiffs No.2 to 4 were minors and, therefore, it was necessary to obtain prior permission from the competent Court to sell the properties. No previous permission was sought and then both the Courts below erred in holding that the said sale was for the legal necessity. Both the Courts below failed to consider the evidence that the defendant was running an illegal money lending business. The value of the property that was conveyed under sale deed Exhibit 50 was much more than it has been shown in the sale deed. Both the Courts have failed to consider that the transaction between plaintiff No.1 and the defendant was a loan transaction and it was agreed that after the amount is repaid, the defendant would reconvey the property. Substantial questions of law are therefore arising in this case as to the construction and interpretation of the document and also the real intention of the parties especially when permission as required for the sale of property belonging to minors as per Section 8 (2) of the Hindu Minority and Guardianship Act was not obtained at all. He, therefore, prayed for admission of the second appeal.

5) Per contra, the learned Advocate appearing for the respondent strongly opposed the admission and he supported the reasons given by both the Courts below. He submitted that the Courts below have correctly assessed the factual aspects involved and also the law points. Both the Courts have correctly held that plaintiff No.1 is not disputing that she was in need of money but then it cannot be said that she could raise the money only by way of taking loan. She could definitely sell out the property and accordingly, after the negotiations, she has sold the said property. She has admitted in her cross-examination that she required money for the educational purposes of the minors and, therefore, it can be taken as a legal necessity, that was also for the benefit of the minors and, therefore, such transactions are not covered under Section 8 (2) of the Hindu Minority and Guardianship Act. The mother being a guardian of the property of the minor was not required to obtain that permission. Further, the possession of the land was also handed over by the plaintiff to the defendant. Perusal of the sale deed Exhibit 50 would show that there was no such relationship of debtor or creditor between the plaintiffs and the defendant. There is no evidence on the record as to what was the interest rate that was fixed between

them and exactly how much amount was allegedly taken by plaintiffs for repayment after the alleged expiration of five years. When both Courts below have appreciated the evidence as well as law points properly, the second appeal is not required to be admitted.

6) In view of catena of Judgments of the Hon'ble Supreme Court especially : -

- 1) *Ashok Rangnath Magar vs. Shrikant Govindrao Sangvikar*, reported in (2015) 16 SCC 763, and
- 2) *Kirpa Ram (since deceased through L.Rs.) and Others vs. Surendra Deo Gaur and Others*, reported in 2021 (3) Mh.L.J. 250,

The position of law is very much clear that unless the appellants in the second appeal are able to show substantial questions of law as contemplated under Section 100 of the Code of Civil Procedure, it is absolutely not necessary that the second appeal should be admitted. It can be dismissed in limine without framing substantial questions of law.

7) At the outset, from the stand taken by the plaintiffs in their suit, it appears that they were not firm as to exactly which averments they should make and base their claim in the suit. At

one breath it is stated that since the defendant is doing illegal money lending business and plaintiff No.1 was in need of amount, she had executed the sale deed on 24-05-2002 for consideration of Rs.41,000/- but it was a Sham and nominal document. At another breath, she wants to say that the sale transaction is bad or void as it has been entered without obtaining permission as required under Section 8 (2) of the Hindu Minority and Guardianship Act. Important point to be noted is that the plaintiffs are trying to say that the duration of repayment of the loan was five years and when they had gone to repay the loan together with interest, the defendant had refused to accept. At the first place, it has not come on record through the evidence of the plaintiffs that what was the rate of interest that was agreed. Another fact that is required to be seen is that plaintiffs have not given reason as to why the possession of the suit property was handed over to the defendant on the date of the sale when according to the plaintiffs the sale transaction was nominal and real transaction or agreement between them was different than the contents of the sale deed Exhibit 50. At one place the plaintiffs are accepting that plaintiff No.1 was in need of money especially for the educational expenses of the plaintiffs No.2 to 4 and she is not coming with a case that there was any other guardian of

the minor plaintiffs. When the father of the plaintiffs had expired, definitely the mother would be the only guardian and the nature of the suit property appears to be the ancestral property. It was not necessary for the natural guardian to obtain permission when there is a legal necessity. The plaintiffs have not produced on record any evidence to support their contention that the defendant is running an illegal money lending business.

8) Another aspect that can be considered here is that if the real nature of the transaction was that after payment of the loan amount together with interest, the property was to be reconveyed to them by the defendant then why the suit has been filed for cancellation of sale deed, is not explained. The suit for specific performance of that contract for reconveyance could have definitely been filed.

9) It appears that the plaintiff had taken alternative pleas to get rid of sale deed Exhibit 50. Those alternative pleas are mentioned above. It was asked to the learned Advocate for the appellants, as to whether the plaintiffs would be justified in taking the alternative pleas ? He has relied on the decision in : -

1) *Praful Manohar Rele vs. Krishnabai Naryaan Ghosalkar and Others, reported in (2014) 11*

Supreme Court Cases 316, and
2) *Firm Srinivas Ram Kumar vs. Mahabir Prasad,*
reported in 1951 AIR (SC) 177.

However, facts in both these cases wherein it has been held that even the plaintiff can take alternative pleas, are different. In case of *Praful Manohar Rele (Supra)* it was observed that,

"The alternative plea of the plaintiff and the defence set up by the defendants was not different from each other."

The case of the defendants was that they were in occupation of the suit premises not as licensees but as tenants and, therefore, it was held that,

"Plaintiff is entitled on that basis alone to ask for an alternative relief of a decree for eviction on the grounds permissible under the Rent Control Act."

In this case, anyway, the relief claimed was the possession of the property which was admittedly belonging to the plaintiffs. In case of *Firm Srinivas Ram Kumar (Supra)* the case of the plaintiff was that some of Rs.80,000/- was advanced to the defendants by way of loan. It was observed that,

"A plaintiff may rely upon different rights alternatively

and there is nothing in the Civil Procedure Code to prevent a party from making two or more inconsistent sets of allegations and claiming relief thereunder in the alternative. The court cannot grant relief to the plaintiff on a case for which there was no foundation in the pleadings and which the other side was not called upon or had an opportunity to meet.”

Here in this case, though as aforesaid the case of the plaintiffs was that the advancing amount by way of loan but then the alternative plea was raised about claiming specific performance of the contract for sale. The Court further proceeded to hold that the appeal will have to be allowed in part the claim for specific performance was dismissed, however the plaintiff was held to be entitled to a money decree for some of Rs.30,000/- together with interest.

10) Here in this case, at the cost of repetition it can be said that at one place the plaintiffs contended that there is an agreement to reconvey the property separate from the sale deed and the real nature of the transaction was different, then the question would be whether a suit for cancellation of the sale deed without there being any relief for reconveyance could have been allowed. Another fact is that except bare words, there is nothing on record to show that the amount was tried to be returned to the defendant together with

interest after the alleged expiry of five years. The details of the agreement/concluded contract apart from the sale deed have not been given nor they are proved and, therefore, that alternative plea cannot be considered at all. Based upon the facts of a case, the plaintiff can definitely pray as many as reliefs as he/she can and any of those reliefs can be an alternative to each other. However, as regards the base for that alternative relief is concerned, it cannot be contrary to each other or alternative to each other. Even if the plaintiffs take such an alternative plea then they will have to elect one of the pleas at the time of leading evidence, however, it depends upon the facts and circumstances of each case. In *Prem Raj vs. The D. L. F. Housing and Construction (Private) Ltd. And another*, reported in AIR 1968 Supreme Court 1355, which has been referred by this Court in *Smt. Krishnabai C. Kadam and others vs. Wellworth Developers and others*, reported in 2001 Bombay 9, it has been held that,

"A plaintiff cannot be permitted to take such inconsistent pleas where each of them is not maintainable."

In the said case, the objection was raised for grant of alternative relief at the outset but then the defendant himself had agreed

specifically in clear terms to the alternative plea taken by the plaintiff and, therefore, it was held that provision of Order VII Rule 7 of the Civil Procedure Code can be invoked. Here the alternative relief was not claimed at all but a plea was tried to be taken which was not at all proved by the plaintiffs and, therefore, both the Courts below have correctly held that the plaintiffs have failed to prove that the sale deed dated 24-05-2002 was a nominal sale deed, executed as security with assurance to reconvey the suit land in the name of the appellants. It has also been correctly held that the defendant has proved that the sale deed was executed for legal necessity and for the benefit of minor owners.

11) No substantial questions of law are arising in this case requiring admission, hence the second appeal stands dismissed. Pending civil application stands dismissed.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-

GAWADE
VIRENDRA
J

Digitally signed
by GAWADE
VIRENDRA J
Date: 2021.08.24
14:08:49 +0530