

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**SECOND APPEAL NO.316 OF 2021
WITH
CIVIL APPLICATION NO. 7844 OF 2021**

Sow. Meena w/o Shamsundar Chandnani = **APPELLANT**
(orig.Defendant)

VERSUS

1. Sow.Kalpana w/o Rajkumar
Chandnani and another = **RESPONDENTS**
(orig.Plaintiffs)

Mr. Anil S.Bajaj, Advocate for Appellant;

Mr. SS Deshmukh, Advocate for Respondent No.2

CORAM : SMT.VIBHA KANKANWADI, J.

DATE : 14th September, 2021.

PER COURT :-

1. Present appeal has been filed by original defendant to challenge the judgment and decree passed by learned Adhoc District Judge-1, Hingoli in RCA No.6/2015, dated 10.12.2020, whereby, though declaration of ownership of plaintiff No.2 in respect of half share by the trial Court has been upheld; yet the prayer of injunction against the defendant is set aside and then the decree has been directed to be sent for effecting partition of the suit property to the Collector.

(2)

2. Present respondents are the original plaintiff Nos.1 and 2. They had filed RCS No. 120/2003 before Civil Judge, Junior Division, Hingoli, which came to be decreed by learned 2nd Joint Civil Judge, JD, Hingoli on 14.1.2015. The present appellant challenged the same in the aforesaid appeal, which can be said to have been partly allowed by the learned Adhoc District Judge, Hingoli. Hence, this appeal.

3. Heard learned Advocates appearing for the respective parties.

4. It has been vehemently submitted on behalf of the appellant that both the Courts below have not considered the legal points as well as oral and documentary evidence in its proper perspective. It had come on record that original plaintiff No.1 had filed RCS No.280/2002 against the appellant for injunction, preventing him from getting his entry relating to the suit property in the revenue record. In that suit, the plaintiff could have asked for partition as well as possession. However, no such prayer was made.

(3)

Therefore, it ought to have been seen by both the Courts below that present suit was barred under Order II Rule 2 of CPC. Further, both the Courts below have failed to appreciate and see the scope of Sections 91 and 92 of the Evidence Act. No permission is given to lead oral evidence apart from the documentary evidence. In fact, the witness of the defendant had stated that since husband of the defendant was running short of amount of Rs.40,000/- for purchasing the suit property, he had taken it from plaintiff's husband. Plaintiff's husband had put a condition that till that amount is returned, sale-deed would be executed in the name of plaintiff No.1 as well as the defendant. Reliance has been placed on the decision in the case of Smt. Gangabai w/o Rambilas Gilda Vs. Smt. Chhabubai w/o Pukharajji Gandhi - (1982) 1 SCC 4, wherein, it has been held that, -

" The bar imposed by sub-section 92 (1) applies only when a party seeks to rely upon the document embodying the terms of the transaction and not when the case of a party is that the transaction recorded in the document was never intended to be acted upon at all between the parties and

(4)

that the document is a sham. Such a question arises when the party asserts that there was a different transaction altogether and what is recorded in the document was intended to be of no consequence whatever. For that purpose oral evidence is admissible to show that the document executed was never intended to operate as an agreement but that some other agreement altogether, not recorded in the document, was entered into between the parties."

5. In fact, name of the plaintiff in the sale-deed was nominal and, therefore, this evidence ought to have been allowed to be brought on record. The relationship between the parties is not considered and, in fact, it was the cordial relationship between them. Therefore, possibility of not raising any objection, till the suit by the defendant, could not have been interpreted against her. Substantial questions of law are arising in this case and, therefore, he prayed for admission of the Second Appeal.

6. Per contra, learned Advocate appearing for Respondent No.2, supported the reasons given by both the Courts below and submitted that no

substantial questions of law are arising in this case.

7. At the outset, we can say that the point of the suit being barred by order II Rule 2 of CPC, appears to have not been raised by the present appellant before both the Courts below. Neither issue to that effect was framed nor it was raised in the appeal memo. However, since it has been tried to be projected as a law point, it is required to be considered as to whether there is necessity to admit the Second Appeal on this count. In her judgment, learned 2nd Joint Civil Judge, JD, has specifically stated that the defendant has admitted in her written statement that the plaintiff had filed RCS No.280/2002 against her, as the defendant was filing applications before the Revenue Courts for deletion of plaintiff's name. However, thereafter, none of the parties had pressed that issue during further course of the trial. It also appears that plaint, written statement, judgment, if any, in the said matter has not been produced at all before the Court below. Without there being production of these documents,

(6)

it cannot be said that, that case was also dealing with the same cause of action between the same parties and even in that case the present prayers could have been asked for. The ultimate result in that suit has not been produced and it cannot be also spelt out from both the Courts below. Therefore, now without any base, we cannot say that substantial question of law regarding the bar of the suit under Order II Rule 2 of CPC, is arising in this case.

8. Original plaintiff No.1 had come with a case that she, along with deft.No.1, purchased the suit property bearing Block No.35(Kha) of village Santuk Pimpri on 3.9.1998 and it appears that there were two sale-deeds, which have been produced at Exhibit-47 and 48. After the sale-deed, Mutation entry No.319 and 321 were sanctioned, because of which, the land came to be mutated in the name of plaintiff No.1 and defendant. The plaintiff has clearly pleaded that after the sale-deed, she along with the defendant, were enjoying the property. But when the defendant tried to delete name of the plaintiff from the 7/12 extract, she had filed said

RCS No.280/2002; still the defendant continued to alienate the property and dispossessed the plaintiff. Therefore, the plaintiff requested the defendant on 9.6.2003 to effect partition and allot her share in the property. Hence, the suit for partition and separate possession was filed.

9. The defendant denied those averments, which were amounting to allegations against her. It was contended that husband of the defendant as well as husband of the plaintiff are real brothers and they used to reside together. Her husband had no sufficient amount at the time of sale-deed and, therefore, it was mutually agreed that nominal joint sale-deed would be executed and later on the defendant would pay the amount to plaintiff's husband. Therefore, according to the defendant, half of the consideration was paid by plaintiff's husband and remaining half was paid by husband of the defendant. Defendant's husband tried to return the amount of Rs.40,000/- to the plaintiff's husband, however, he refused to accept the same. The defendant contended that she is sole owner of the property and plaintiff has no title and

interest in the same.

10. The plaintiff has examined herself and other witnesses to prove execution of the sale-deed and possession; whereas the defendant has examined her power of attorney and two more witnesses. Important point to be noted is that the defendant has kept herself away from the witness box for the reasons best known to her. In fact, the evidence of plaintiff No.1 was recorded through Court Commissioner. It will not be out of place to mention here that it appears that after the remand of the case to the Trial Court, it was brought on record that during pendency, the plaintiff No.1 has sold the suit property to plaintiff No.2 and, therefore, she was posed as a plaintiff. The evidence of the plaintiff would show that she had given amount of Rs.40,000/- and then joint purchase was made. It appears that the defendant's power of attorney in his testimony has not at all taken up the plea that since he was running out of the funds, he had taken loan from husband of the plaintiff and then recorded the sale-deed in the joint name of plaintiff No.1 and defendant. Any

way, though the point was not raised before the courts below; yet the law cannot be given a go-bye. The defendant is now trying to take a plea that name of plaintiff No.1 is nominally taken. In fact, the appellant cannot raise the point that she was not allowed to lead evidence to bring separate agreement on record in view of Section 91 of the Evidence Act. The ratio laid down in the decision of Smt. Gangabai (cited supra) cannot be questioned; rather opportunity was given to the defendant to lead evidence and then the defendant has examined DW 2 – Shaikh Hasan. Interesting point is that DW 2 – Shaikh Hasan is not an attesting witness to the sale-deeds. Why the vendor and/or the attesting witness and scribe were not examined is a question. Further, it can be seen that the said purchase was done on 3.9.1998 by two separate sale-deeds. DW 1 – Shamsunder has not stated as to when he had gone to repay the amount of Rs.40,000/- to husband of plaintiff No.1 and then he had refused. The defendant could not have taken too long to refund the amount. So also what was the exact oral contract between Shamsunder and husband of plaintiff Noi.1, is not explained by DW

1 – Shamsunder. Therefore, it would be rather said that though opportunity was given to lead that evidence, as contemplated under Section 91 of the Evidence Act; yet that opportunity has not been taken by the defendant. Hence, now it cannot be raised as substantial question of law.

11. It appears that the first Appellate Court found that the Trial Court has arrived at a conclusion that plaintiff No.1 is in possession of her half share when, in fact, the suit was for partition and then the Trial Judge granted injunction which was not proper and, therefore, only that part of granting injunction, has been set aside and it appears to be correct and legal.

12. No substantial questions of law are arising in this case, as contemplated under Section 100 of CPC. Hence, the Second Appeal stands dismissed. The Civil Application stands disposed of.

(SMT. VIBHA KANKANWADI)
JUDGE