

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

**SECOND APPEAL NO. 95 OF 2020
with
CIVIL APPLICATION NO.3973/2021
CIVIL APPLICATION NO.2682/2020**

1) Sushilabai Ambaji Kotlapure
and Ors. **= APPELLANTS
(Orig.Plaintiffs)**

VERSUS

1) Dattatraya Gokul Jadhav and
Anr. **= RESPONDENTS
(Orig.Defendants)**

Mr.AV Indrale-Patil,Advocate for Appellants;

Mr.KK Kulkarni,Advocate for Respondent No.1

CORAM : SMT.VIBHA KANKANWADI,J.
DATE : 10th August, 2021.

PER COURT :-

1. Present appeal has been filed by original plaintiffs, challenging judgment and decree passed in Regular Civil Appeal No.62/2013, by learned District Judge-1, Osmanabad on 27.12.2019. The said appeal was filed by original deft.No.1, challenging the judgment and decree passed in RCS No.71/2001 by Joint Civil Judge, Junior Division, Tuljapur, District Osmanabad on 5.1.2013. The said suit filed by the present appellants-original plaintiffs was decreed. The said suit was filed for declaration

(2)

of ownership and permanent injunction. After the said decree was challenged by original deft.No.1, who was the only contesting party, after hearing both sides, the appeal came to be allowed. The decree passed by the trial Court was set aside and the suit was dismissed.

2. Heard learned Advocates appearing for the respective parties. In order to cut short it can be stated that both of them have made submissions in support of their respective contentions.

3. It has been vehemently submitted on behalf of the appellants that the learned first Appellate court failed to consider the factual aspects and went unnecessarily against the decision given by the lower Court. In fact, the suit was entirely decreed on 5.1.2013 and at that time there were in all four issues those were framed. However, deft.No.1 was challenging the execution of General Power of Attorney by mother of deft.No.1 – Bhamabai in favour of deft.No.2 and, therefore, by framing that issue on 19.3.2014, the first Appellate court had referred that issue to the

(3)

learned Trial Judge. Parties had led evidence and the finding, that was given on that issue by the Trial Court, was also in favour of the plaintiffs. Still the first Appellate Court come to a conclusion that the plaintiffs have failed to prove that Bhamabai had executed legal power of attorney (Exhibit-242) in favour of deft.No.2. After holding this in the negative, the sale-deed that was executed by deft.No.2 on the basis of said Power of Attorney in favour of the plaintiffs, has been held to be not valid and legal, giving title to the plaintiffs over the suit property and, therefore, substantial question of law is arising in this case is, as to whether the first Appellate Court was justified in considering all these factual aspects meticulously and went against the decision by the trial Court in respect of execution of the General Power of Attorney. In fact, when deft.No.1 was challenging the execution of that document as fabricated one, the burden ought to have been cast on deft.No.1 and not on the plaintiffs. Even in the appeal also, proper points for determination have not been formulated, as required under Order XLI Rule 33 of the CPC and

(4)

only two points were framed. The plaintiffs had examined PW 1 – Ambaji Malhari Kotlapure to prove that power of attorney and the execution is proved. That was in favour of deft.No.2. The learned First Appellate court failed to consider the provisions of Section 85 of the Indian Evidence Act regarding presumption about the legality and validity of the General Power of Attorney. Only on the basis of reversal of the finding regarding execution of the power of attorney, the entire suit has been dismissed. Hence, the Second Appeal deserves to be admitted and all those points are required to be adjudicated.

3. Per contra, learned Advocate appearing for Respondent No.1 – original deft.No.1, has entirely supported the reasons given by the learned First Appellate Court. It was submitted that when the plaintiffs were coming with a case that only the basis of the said Power of Attorney, deft.No.2 had sold the property to them, then they should prove that it is a legal transfer. All the minute things have also been covered and dealt with by the learned first Appellate court and, therefore, it

does not require any interference.

4. At the outset, it is required to be noted that, merely because there are contradictory findings, this Court cannot jump to a conclusion that the appeal deserves to be admitted. A basic rule for admitting a Second Appeal is, that the appellants should show that the case involves substantial questions of law. If certain facts or point of law were not considered by the Trial Court, which had led to a wrong conclusion and passing of the decree, and if that wrong has been set right or correct position of law has been appreciated and considered by the first Appellate Court, leading to the reversal of the decree passed by the Trial Judge, then it may not lead to substantial question of law.

5. In the instant case, the plaintiffs had come with a case that agreement to sell was executed in their favour on 21.8.1999 and at that time, they had given amount of Rs.1,00,000/- to mother of deft.No.1 and it was agreed that rest of the amount would be given at the time of execution of the sale-deed. Thereafter, they had given a

(6)

public notice on 23.8.1999 in Daily newspaper, stating that the transaction about the agreement to sell has been entered into between the plaintiffs and deft.No.2. Thereafter, they pleaded that on 21.8.1999 sale-deed was executed by paying remaining amount of Rs.1,20,000/- and the sale-deed was registered at Sub-Registrar's office at Tuljapur. According to the plaintiffs, they have become owner of the suit property on the basis of the said sale-deed and they were put in possession of the land on the date of the sale-deed. They contend that deft.No.1 is still obstructing them and, therefore, they filed the suit for declaration of ownership and permanent injunction.

6. As aforesaid, deft.no.1 challenged the fact of execution of General Power of Attorney by his mother in favour of deft.No.2. It appears that the learned Trial Judge has absolutely not considered that the said significant fact requires framing of the issue regarding execution of the Power of Attorney; yet on the presumption that such document exists, went on to decree the suit. Thereafter, when the first Appellate Court found

(7)

that this point in issue has not been dealt with properly by the Trial Court, the issue was framed and the finding was invited from the learned Trial Judge. Parties were then allowed to lead evidence. Finding was given by the Trial Court that it is a proper execution of the document. Then the said finding was to be considered in the appeal that was still pending before the first Appellate Court. The first Appellate Court has come to a conclusion that defendants have failed to prove that deceased – Bhagabai had executed the said Power of Attorney in favour of deft.No.2. Interesting point here to be noted is that as per the pleading, the agreement to sell was also executed on 21.8.1999 and on the same day, the sale-deed has been registered. Though Para No.8 in the plaint was amended, later on, there was no amendment to Para No.5, which was containing the averments that there was an agreement to sell on 21.8.1999. Even in the affidavit-in-chief of PW 1 – Ambaji, this is the same fact that is reflected. Therefore, obvious question is, when everything was to be done on that day itself, then why there should have been agreement to sell (*Isara Pawti*). That *Isara Pawti*

has not been produced in this case.

7. Another point to be noted is that if the sale-deed was executed on 21.8.1999 itself, then why there was necessity to give a public notice on 23.8.1999, containing the recitals that agreement to sell has taken place. This fact on the face of record itself is fishy. At the cost of repetitions, it can be seen that if the sale-deed was to be executed on that day itself, by giving the entire amount of consideration and as per the pleadings that amount of Rs.1,00,000/- was given to the mother of deft.No.1, then why she should not have taken to the Sub-Registrar's office for execution of the sale-deed ?

8. Another fact that is coming on record is that deft.No.2 is not related to deft.No.1 or Bhamabai. When Bhamabai had grown-up son, then why she should appoint deft.No.2 as her Power of Attorney. One more fact, that is required to be seen from the contents of the Power of Attorney, is that though the document titled as 'General Power of Attorney', it also contains recitals about

giving power to deft.No.2 to sell the suit land. It is not styled as 'Special Power of Attorney'. Further fact to be noted is that the Power of Attorney dated 5.11.1990 was executed before the Executive Magistrate, Solapur when Bhamabai was resident of Tamalwadi, Tq. Tuljapur, District Osmanabad. The plaintiffs have examined deft.No.2 after additional issue was referred for finding. However, if we see his testimony, then it can be seen that he is not giving the reasons as to when he came in contact with Bhamabai; how confidence was reposed by Bhamabai in him. We cannot miss out that deft.no.1 is son of Bhamabai. Therefore, it should be shown that there was some reason for which Bhamabai had given preference for execution of the Power of Attorney than asking her son to enter into the transaction. No such things have been stated by him in his Examination-in-chief. He has simply stated that the document bears her thumb impression and it has been executed in presence of Executive Magistrate. Again at the cost of repetitions, he has not given any reason as to why Bhagabai was taken to Solapur only to get the General Power of Attorney executed. The plaintiffs

or deft.No.2 are not coming with a case that no such authority is there at Taluka level at Tuljapur.

9. Another fact that is required to be considered is that deft.No.2 in his Examination-in-chief has not stated that he had handed over the amount, which was given by the plaintiffs, to Bhamabai. He is also silent as to why agreement to sell was executed on the same day and the sale-deed was registered on the same day. The plaintiffs have also examined the scribe, who had scribed the Power of Attorney. He has admitted in his cross-examination that Bhagabai was introduced to him by deft.no.2 and he was not knowing her prior to that date. She was not able to read or write. But then neither the Power of Attorney nor his testimony in clear terms say that he had read over to her the contents.

10. Learned first Appellate Court has taken into consideration the legal position and the oral evidence that has been led. From Para Nos.13 to 30, all the aspects, governing the dispute or

(11)

involved in the dispute, have been considered properly. Further, the admissions, those have been given by PW 1 – Ambaji, have also been considered, in which he has clearly stated that the market price of the suit land on the date of the sale-deed was Rs.13,27,000/- and they have purchased it only for Rs.2,20,000/-, as per the pleadings. All these aspects, when considered properly and the law point is also considered properly, including the provisions of Section 85 of the Indian Evidence Act, then it cannot be seen that the present appellants are raising any substantial questions of law. It has been correctly observed by the first Appellate Court that presumption, under Section 85 of the Indian Evidence Act in favour of the Power of Attorney, would arise only in case the said Power of Attorney is legally and validly executed. Further, that presumption is rebutted and the circumstances, which have been brought on record by deft.No.1 in this case, would definitely show that he has rebutted that presumption. Under such circumstance, when the alleged General Power of Attorney itself is not legally and validly executed in favour of deft.No.2, then the act of deft.No.2

(12)

in executing the sale-deed in favour of the plaintiffs, cannot be held to be legal and valid.

11. Taking into consideration the detailed and correct assessment of facts and application of law by the learned first Appellate Court, no substantial question of law, as contemplated under Section 100 of CPC, is arising in this case and, therefore, in view of the decision in the case of Kirpa Ram (Deceased) Through L.Rs. And Ors. Vs. Surendra Deo Gaur and Ors. - (2021) 3 Mah.L.J. 250, the Second Appeal stands dismissed. Pending Civil Application if any stands disposed of.

12. After pronouncing the decision, learned Advocate appearing for the appellants prayed for order of *status quo*. He pointed out that the learned Trial Judge had decreed the suit and thereby held the plaintiffs as owner of the property and restrained deft.No.2 from interfering with the possession of the plaintiffs over the suit land and thereafter the said order was in force till the first Appellate Court decided the appeal. Since the plaintiffs intend to approach the Hon'ble

(13)

Supreme Court, he prayed for the protection.

13. Learned Advocate for the respondent objected for the same.

14. It is to be noted that, at this stage it is not brought on record as to whether the first Appellate Court had stayed the judgment and decree passed by the Trial Court after the suit was decreed. But the position stands, on the basis of the documents which have been produced here, is that the suit was decreed and then the appeal has been dismissed and there is gap of about five years in the same and, therefore, since the plaintiffs intend to approach the Hon'ble Apex Court, the parties to maintain *status quo* as on today for a period of four weeks.

(SMT. VIBHA KANKANWADI)
JUDGE

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