

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.400 OF 2021

WITH

**CIVIL APPLICATION NO.10467 OF 2021
IN SA/400/2021**

DAGADU S/O DHONDIBA GAIKWAD
VERSUS
KALYAN S/O BHIMRAO SHIKETOD AND OTHERS

.....

Advocate for Appellant : Mr. M. P. Kale holding for Mr. S. K. Naikwade

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CORAM : SMT.VIBHA KANKANWADI, J.

DATE : 16-11-2021.

ORDER :

1. Present appeal has been filed by the original plaintiff challenging the concurrent Judgment and decree by the Courts below.
2. The present appellant had filed R.C.S. No.165 of 2011 for declaration, perpetual injunction and cancellation of sale deed dated 30-08-2001. The suit came to be dismissed by learned 3rd Jt. Civil Judge, Jr.Divn., Bhoom Dist.Osmanabad on 25-04-2018. R.C.A.No.28 of 2018 filed by the present appellant was dismissed by learned Adhoc District Judge-1, Bhoom, District Osmanabad, on 08-04-2021. Hence, this second appeal.

3. Heard learned Advocate Mr. M. P. Kale holding for Advocate Mr. S. K. Naikwade for appellant.

4. It has been vehemently submitted on behalf of the appellant that both the Courts below have not considered the evidence properly. The alleged presumptions drawn by the Courts below are misinterpreted. Both the courts below failed to consider that real transaction between the plaintiff and the defendant was of loan. The condition for reversing the sale deed after payment of entire amount was in ten years. However, both the Courts below have erred that the suit was beyond the period of limitation. Both the Courts failed to consider the provisions of Maharashtra Money-Lending (Regulation) Act, 1914. In fact during the pendency of the appeal inquiry under the said Act was initiated against defendant No.1 and it has been concluded by District Deputy Registrar that the transaction under challenge in this suit was for money-lending and as such the order of cancellation of the sale deed and entering the name of the plaintiff in the revenue record has been passed. Now revenue record shows the plaintiff as the owner and possessor of the property. Therefore, substantial questions of law are arising in this case requiring admission of the second appeal.

5. At the outset, unless the appellant shows that the substantial questions of law as contemplated under Section 100 of the C.P.C. are arising in this case, the second appeal need not be admitted. Therefore, it is now required to be seen as to whether the appellant is making out the said case. Another fact which is important to be noted is that along with the second appeal as on today Civil Application No.10467 of 2021 is filed which is for Stay to the impugned Judgment and decree. Along with the same, photocopy of the mutation entry has been produced which shows that the Sub-Registrar had passed certain orders in favour of the plaintiff. It appears that, that application before the sub-Registrar appears to have been filed in the year 2018 by the present appellant. The certified copy of the order is not filed on record which has been passed by the Sub-Registrar. But it appears that either during the pendency of the appeal or after the decision of the appeal by the First Appellate Court that action has been taken. When the plaintiff had knocked the doors of the Civil Court on 02-11-2011, then whether the Sub-Registrar could have exercised his jurisdiction, is a question. On 25-04-2018 itself the civil Court had held that plaintiff has failed to prove that he is the owner and possessor of the suit

land, it was held that the defendants are the bonafide purchasers of the suit land and the suit was not within limitation. The sale deed was executed on 30-08-2001. No simultaneous proceedings were taken by the plaintiff before the Sub-Registrar under the Money-Lending Act. Then after a long period of more than 17 years, whether the Sub-Registrar could have entertain the complaint and could have held the inquiry, is a question. Another fact to be noted is that the ownership of a person over an immovable property could be decided only by the Civil Court and as such the plaintiff himself had knocked the doors of the Civil Court's jurisdiction. Now merely on the basis of some decisions by the Sub-Registrar, the decision by the Courts below cannot be reversed. Oral submission has been made that the plaintiff is not aware as to whether the defendant has challenged the said decision by the Sub-Registrar further. Under such circumstances, that alleged subsequent development need not be considered by this Court.

6. The plaintiff had come with a case that he is the owner of the suit property. He was in need of money. He demanded amount of Rs.50,000/- to defendant No.1. Defendant was ready to pay amount of Rs.30,000/- on interest and accordingly the plaintiff says

that in the presence of certain witnesses, defendant No.1 extended amount of Rs.30,000/-. Then he says that defendant No.1 further orally agreed that the plaintiff will be required to pay the said amount within 10 years with interest and according to the plaintiff he has returned that amount. In view of the agreement, plaintiff had executed sale deed on 30-08-2001 but it was by way of security. The pleading also says that it was in fact the mortgage deed. Defendant No.1 was never put in possession of the suit property but then defendant No.1 executed sale deed in favour of defendant No.2 on 11-11-2011. Further, defendant No.2 executed sale deed in favour of defendant No.3 on 24-10-2016 i.e. during the pendency of the suit. Thus, it is to be noted that plaintiff contended that since he was ready to pay the amount of Rs.30,000/- which was taken as loan and defendant No.1 avoided to re-convey the property, he filed the suit. Thus, it is to be noted that the plaintiff was praying for specific performance of the alleged oral agreement. The first and the foremost fact which raises doubt is, whether for the repayment of Rs.30,000/- together with interest, there could have been duration of 10 years. No same person would enter into such kind of agreement. When a person is lending money, he would be interest in getting it back the same as early as possible, and for

amount of Rs.30,000/- it could not have been ten years. Plaintiff has not explained as to why the said oral agreement was not reduced in writing by way of a separate agreement or it was not included in the recitals of the sale deed. No doubt if the real nature of the transaction is different then to a particular extent the plaintiff would be entitled to lead evidence in spite of bar under Section 92 of the Indian Evidence Act to lead the evidence. But when no such basic pleadings are available as to why a proper document was not executed and why as regards the alleged oral agreement is concerned, no document in writing was executed, the story put forward by the plaintiff remains unbelievable. If we consider the cross-examination of the plaintiff then it can be seen that he has admitted that the scribe has written the document as per his narration and, thereafter, he had signed that document. Though he is contending that the possession was never handed over, yet there are recitals in the sale deed in respect of handing over of possession and his own witness Babasaheb Gaikwad admits in the cross that plaintiff is not possessing the suit property. Further, PW 3 Popat Sable in his cross-examination has taken a total summer-salt and admitted that defendant No.1's name was entered to the revenue record on the basis of the sale deed executed by the plaintiff and

defendant No.1 had become owner of the said property in view of the sale deed. He also admits that recitals in respect of reconveying the property was not written. These admissions are sufficient to hold that the transaction was absolute sale and not the sale with condition to repurchase. Plaintiff has not given exact date of repayment of the entire amount. Therefore, taking into consideration all these aspects, both the lower courts were justified in holding that defendant No.1 was the bonafide purchaser of the property and the transaction was not at all hit by money-lending. Plaintiff was not the owner and possessor of the property on the date of the suit.

7. On the desk preponderance of the probabilities, it is unbelievable that there would have been a separate oral agreement between the plaintiff and defendant No.1 that the plaintiff would repay the amount of Rs.30,000/- together with interest within a period of ten years and then defendant No.1 would re-convey the property to the plaintiff. That agreement itself is not proved and, therefore, it cannot be stated that as regards the sale deed is concerned which was executed on 30-08-2001, for its cancellation, the suit filed on 02-11-2011 would be within limitation. The point of limitation has been correctly appreciated by both the Courts below.

Therefore, no substantial questions of law are arising in this case requiring admission of the second appeal as contemplated under Section 100 of C.P.C.. Hence, the second appeal stands dismissed at the threshold. Pending Civil Application for Stay stands disposed of.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-