

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 535 OF 2019

Appellants
(Orig. Deft. Nos. 1 & 2)

1. Narayan S/o Kishan Sirgire
Age: 70 years, Occu: Agri.

2. Kishor S/o Narayan Sirgire
Age: 32 years, Occu: Agri.

Both R/o. Pangaon, Tq. Renapur,
District: Latur.

Versus

1. Smt. Phulbai w/o Bhaguram Sirgire
Age: 74 years, Occu: Household,
R/o. Pangaon, Tq. Renapur,
Dist: Latur

2. Kondibai w/o Dnyanoba Muchampalle
Age: 79 years, Occu: Household,
R/o. Darji Boregaon, Tq. Renapur
Dist: Latur.

3. Vishwambhar s/o Tukaram Narhare
Age: 69 years, Occu: Agri.,
R/o. Khurdali, Tq. Chakur
Dist: Latur.

Respondents
(Res. No.1 Orig. Plaintiff
Res. Nos.2 to 7 Orig. Deft.
Nos.3 to 8)

4. Vitthal s/o Vishwambhar Nathare
Age: 44 years, Occu: Agri.,
R/o. Khurdali, Tq. Chakur,
Dist: Latur.

5. Namdeo s/o Vishwambhar Nathare
Age: 41 years, Occu: Agri.,
R/o. Khurdali, Tq. Chakur,
Dist: Latur.

6. Ramdas s/o Vishwambhar Nathare
Age: 39 years, Occu: Agri.,
R/o. Khurdali, Tq. Chakur,
Dist: Latur.

7. Chandrakala w/o Mohan Kallure
Age: 38 years, Occu: Household,
R/o. Ramwadi (Kharola), Tq. Renapur,
Dist: Latur.

Advocate for the Appellants: Mr. V. J. Dixit (Senior Counsel)
i/b Mr. S. V. Dixit
Advocate for the Respondent No.1/Caveator: Mr. A. N. Sabnis

CORAM : AVINASH G. GHAROTE, J.

JUDGMENT RESERVED ON : 19/06/2021
JUDGMENT PRONOUNCED ON : 23/06/2021

JUDGMENT : (AVINASH G. GHAROTE, J.)

1. The present Second Appeal, challenges the judgment and decree dated 02.05.2009 passed by 4th Joint Civil Judge, Senior Division, Latur in Special Civil Suit No.114 of 2006, confirmed in appeal by the District Judge-4, Latur in Regular Civil Appeal No.221 of 2012 by the judgment & decree dated 08.05.2019.

2. The brief facts of the case are as under;

a) The parties for the sake of convenience shall be referred as they were before the trial court. Kishan Sirgire had two sons, namely, Narayan/appellant-defendant No.1 and Bhaguram and two daughters, namely, Kondibai Dnyanoba Muchampalle/defendant No.3 and Champabai deceased through legal heirs the defendant Nos. 4 to 8. Agricultural lands bearing Gut No.904 admeasuring 5.59 Hectares and Gut No.129 admeasuring 3.49 Hectares, both situated at Village Pangaon, Taluka Renapur, District Latur, were the ancestral properties. Bhaguram died on 22.07.2005 leaving behind him the plaintiff-Smt. Phulbai as his widow and sole legal heir, who filed a suit for declaration, partition and separate possession of the above agricultural lands, claiming that the same were ancestral properties, in which, Bhaguram had a share and after his demise, the same was inherited by the plaintiff, since Bhaguram died intestate. A declaration was also sought that two sale deeds dated 30.12.2014 and 30.05.2005, claimed to have been executed by late Bhaguram in favour of the defendant Nos. 2 and 1, respectively were without consideration and therefore, null

and void and not binding upon the plaintiff. It was also contended, that Bhaguram, prior to 6 to 8 months of his demise, was seriously ill and therefore could not have executed the sale deeds. It was also contended, that the defendant No.1, was looking after the entire property, and was providing for the needs of the plaintiff, and after the death of Bhaguram, when he stopped doing so, the plaintiff was constrained to demand partition, which was refused and the factum of execution and registration of the above two sale deeds was disclosed. It is thus submitted, that the sale deeds were obtained by fraud upon Bhaguram, and therefore, the declaration as sought was claimed.

b) The suit was defended by the defendant Nos. 1 and 2 contending, that on Gudipadwa of 1982, there was an oral partition of the suit properties in the presence of panchas and 1 H. 64 R. of Gut No.129 and 2 H. 83 R. land out of block No.904 was allotted to the share of deceased Bhaguram, which had been cultivated separately and thus there was disruption of the joint family status. The sale deeds were justified contending, that consideration was paid some days before the execution in the presence of persons and therefore were legal and proper.

3. Mr. Dixit, learned Senior Counsel appearing for the appellants submits, that there is no detailed pleading in the plaint about fraud and misrepresentation as is required under Order 6 Rule 4 of the Civil Procedure Code and so also, there is no evidence on this point. The plaintiff was not witness to any of the sale deeds and therefore, her evidence is hearsay. The sale deeds were registered documents and carried a presumption under Section 66 of the Registration Act, 1908, which was not rebutted. The courts below, wrongly shifted the burden on defendant Nos.1 & 2 to prove genuineness of documents and passing of consideration. The two witnesses examined by the plaintiff to indicate absence of partition in the year 1982, were not reliable. Contradictory pleas were made by the plaintiff regarding the allegation that the defendant No.1 was looking after her needs. He submits, that there was an admission of oral partition in the evidence of the plaintiff, and merely because no entries in the mutation were taken, that did not detract from the factum of partition. Inviting my attention to the document dated 30.06.1962, he submits, that partition had indeed taken place. Presuming otherwise, he submits, that it was permissible

for Bhaguram to sell his undivided share on which count also, the sale deeds could not be faulted with. Learned counsel placed his reliance upon **Subhash Chandra Vs. Gangaprasad Das, AIR 1967 SC 878 (Paras 4, 7,10 and Afsar Shaikh Vs. Soleman Bibi, AIR 1976 SC 163 (Para 15)**. He submits, that both the Courts below, have erred in shifting the burden upon the defendant No.1/appellant and therefore, substantial questions of law in that regard arises for consideration.

4. Mr. Sabnis learned counsel for the plaintiff/respondent No.1 contends, that the factum of partition claimed by the defendant No.1, was not proved at all, which is indicated by the fact, that the compensation for acquisition of a portion of the land of Gut No.129, acquired in the year 1999 was jointly received. The 7/12 extract at Exhibits – 62 & 63 or for that matter the entire revenue record, did not indicate any partition of the properties, including the document dated 30.06.1962. He further submitted, that the burden had correctly been placed upon the defendant Nos.1 & 2 for the reason that it was the defendant Nos. 1 and 2, who pleaded passing of consideration under the two sale deeds. The learned counsel has

placed his reliance upon **Subhra Mukherjee and Another Vs. Bharat Coking Coal Ltd. & Ors., 2000 (3) SCC 312; Rangammal Vs. Kuppuswami and Anr., 2011 (12) SCC 220 and Krishna Mohan Kul Alias Nani Charan Kul and Another Vs. Pratima Maity and Others, 2004 (9) SCC 468**, to contend, that when a plea of validity and passing of consideration in a document is raised, the burden necessarily rests upon the person claiming benefit under the document to establish its genuineness and passing of consideration. Insofar as the nature of pleadings regarding fraud is concerned, learned counsel submits, that what is necessary is a plea and not the evidence and relies upon **MSEB Vs. NTC, 1992 Mh.LJ 1505 and Joseph John Peter Sandy Vs. Veronica Thomas Rajkumar, 2013 (3) SCC 801 (Para-18)**. Insofar as presumption in favour of the sale deeds is concerned, the learned counsel relies upon **T Shankar Prasad Vs. State of A.P., 2004 (3) SCC 753** to contend, that the standard of proof, depends upon the degree of probability of a fact. Learned counsel further contends, that the defendant Nos. 1 & 2, were the persons who claimed that consideration had passed to Bhaguram, and therefore, it was necessary for them to have stepped into the witness box,

however, they did not do so and therefore adverse inference against them was rightly drawn, for which, he relies upon the case of **Vidhyadhar Vs. Manikrao & Anr., AIR 1999 SC 1441**. He further submits, that in place of the defendant Nos. 1 & 2, the wife of the defendant No.1/Smt. Kantabai was examined as their Power of attorney holder, who was absent at the time of the execution of the sale deed, and therefore had no knowledge in that regard and therefore her evidence cannot be accepted, for which, he placed his reliance upon **Mann-kaur Vs. Hartar Singh Sangha, 2010 (10) SCC 512**. The learned counsel further submits, that even the witnesses to the sale deeds were not examined though one of the witness to the sale deeds, namely, Shri. Gurle was the son-in-law of the defendant No.1. He further submits, that the property was situated at Renapur whereas the sale deeds were executed and registered at Latur, which was again a suspicious circumstance in their execution. Learned counsel also submits, that the theory put up by the defendant Nos.1 and 2, that the consideration was paid some time previously to the execution and registration of the sale deeds, in presence of panchas, has not been established. Learned counsel

therefore submits, that the second appeal does not raise any substantial questions of law and therefore needs to be dismissed.

5. I have given my anxious consideration to the rival contentions. The position as to burden of proof in case whether a transaction is genuine one or is sham and bogus, on any count whatsoever, is elucidated in **Subhra Mukherjee** (Supra) which holds, that the party alleging the transaction to be sham and bogus need not take the burden of proof until the transaction is proved to be bonfide by the opposite parties. The logic behind this, clearly appears to be that the genuineness of the transaction which is evinced by a written document and attested by witnesses, can be easily proved by examining the witnesses as well as the parties to the transaction. The same position is reiterated in **Rangammal** (Supra). That apart, it would material to note, that the relationship between the defendant no.1 and (late) Bhaguram, was clearly of a nature, where the defendant No.1, was indeed in a position to influence (late) Bhaguram. In such a case also, the burden, would shift to the defendant Nos. 1 and 2, in light of the dictum as laid down in **Krishna Mohan Kul** (Supra) which holds, that the onus to prove the validity of a

document, is on the person claiming benefit under the document and when fraud misrepresentation or undue influence is alleged by a party in a suit, normally though the burden would be on such party, but when a person is in a fiduciary relationship with another and the latter is in a position of active confidence, the burden to prove absence of fraud, misrepresentation or undue influence would be upon the person in the dominating position and he has to prove that there was fair play in the transaction and that it was genuine and bonafide. In view of this position, the burden to prove the genuineness of the two sale deeds, claimed to have been executed by Bhaguram, in favour of the defendants Nos.1 and 2 and passing of consideration thereunder, naturally fell upon the defendant Nos.1 and 2. The courts below therefore, did not err in law, in holding accordingly.

6. It is further material to note, that none of the defendant Nos. 1 & 2, who were the parties to the sale deeds executed by Bhaguram, entered the witness box. Neither the witnesses to these sale deeds were examined, which is an admitted position. Though a plea was raised, that the consideration under both the sale deeds, was paid to Bhaguram,

in presence of witnesses **Bramhanand Gurle and Shankar Yerale**, both these witnesses were not examined for the reason best known to the defendant Nos.1 & 2. The further plea raised by the defendant Nos.1 & 2, that the amount of consideration paid under the two sale deeds was withdrawn from Vaidhyanath Co-Operative Bank, also fell-flat in face of the account statement of the defendant No.1, which showed that there was no such withdrawal, a couple of months prior to the date of the sale deeds, though DW-1 had stated, that the amount was paid in the first instance eight days prior to the sale deed dated 30.12.2004 and four days prior to the sale deed dated 30.05.2005. The plea raised, that part consideration of Rs.1,00,000/- was borrowed from Brahmanand Gurle, the son- in-law of the defendant No.1, also was not substantiated by examining him. Both the courts, in my humble opinion, have rightly, drawn adverse inference against the defendants, for not entering the witness box and so also in not examining, the witnesses to the sale deeds or the witnesses, namely, Brahmanand Gurle and Shankar Yerale in whose presence, the consideration was claimed to have been paid to (late) Bhaguram and reliance on **Vidhyadhar** (Supra)

which holds, that non-examination of a material witness whose evidence was vital to the matter justifies the drawing of an adverse inference, by the Courts below is fully justified. The theory, that the consideration was paid under the two sale deeds by the defendant Nos. 1 and 2 to the deceased - Bhaguram, therefore has been correctly found to be false by both the Courts below and needs no interference.

7. Insofar as the contention by learned Senior Counsel Mr. Dixit, regarding the paucity of the pleadings based upon the requirement of Order 6 Rule 4 of the Civil Procedure Code is concerned, the provision requires, that in all cases, in which, a party pleading relies upon any misrepresentation, fraud, breach of trust, willful default or undue influence, particulars with dates and items if necessary shall be stated in the pleading. It is necessary to note, that a pleading does not include proof and it would be enough if sufficient facts are placed on record, to justify the inference sought to be made in respect of the plea raised of fraud, misrepresentation etc. The copy of the amended plaint, has been placed on record and perusal thereof clearly indicates, that a specific plea has been raised, that (late)

Bhaguram was illiterate and a simpleton, was suffering from diabetes and was admitted to hospitals for treatment of his ailment six to eight months before his demise. Para-6 (a) to (f), of the plaint, raised specific pleas as to why the sale deeds were claimed to be fraudulent and therefore, it cannot be said, that there were no pleadings whatsoever in the plaint to satisfy requirement of Order 6 Rule 4 of the Civil Procedure Code. The reliance by learned counsel Mr. Sabnis upon **Joseph John Peter Sandy** (Supra), which holds, that if there are facts on the record to justify the inference of undue influence, the omission to make an allegation of undue influence specifically, is not fatal to the plaintiff being entitled to relief on that ground and all that the court has to see is that there is no surprise to the defendant, relying upon **Hari Singh Vs Kanhaiya Lal** reported in **1999 (7) SCC 288**, is clearly justified. Though learned Senior Counsel Mr. Dixit, has relied upon **Suhas Chandra Das Mushib** and **Afsar Shaikh** (Supra) which holds, that courts must scrutinize pleadings to find out that a plea has been made out and that full particulars thereof have been given before examining whether undue influence was exercised or not, the same in view of the

pleadings in Para-6 (a) to (f) of the plaint, is not of any assistance to him.

8. Though Mr. Dixit, learned Senior Counsel has tried to justify, the theory of oral partition of the year 1982 put-forth by the defendant Nos.1 and 2, the same has rightly been rejected by the courts below as all the revenue records including the document dated 30.06.1962, do not support the theory of partition as the land is shown as joint, therein and so also, the fact that in the year 1999, compensation was jointly received by (late) Bhaguram and defendant No.1, in respect of acquisition of a portion of the land of Survey No.129. That apart, none of the defendant Nos. 3 to 8 have entered into witness box, to support the theory of partition of the year 1982, for in fact had there been a partition, the defendant No.3 and mother of the defendant Nos. 5 to 8 and wife of defendant No.4, namely Smt. Champabai would have been aware of the same.

9. It is further material to note, that Smt. Kantabai DW-1, who entered into the witness box on behalf of the defendant Nos. 1 and 2, herself does not state, that she was present during

the entire course of the transactions, relating to the execution and registration of the sale deeds dated 30.12.2004 and 30.05.2005, and therefore was capable of tendering evidence on behalf of the original defendant Nos. 1 and 2, in view of which, her evidence, could not be accepted as the evidence of the defendant Nos. 1 and 2, as held in the case of **Mann-Kaur** (Supra) and **S. Kesari Hanuman Goud Vs. Anjum Jehan & Ors., 2013 (12) SCC 64** which holds, that it is a settled legal position that the power of attorney holder cannot depose in place of the principal and the word “acts” employed in Order 3 Rules 1 and 2 of the Civil Procedure Code is confined only to acts done by the power of attorney holder, in exercise of the power granted to him by virtue of the instrument and would not include deposing in place and instead of the principal.

10. Any presumption, under Section 66 of the Registration Act regarding execution and registration of a sale deed, is a presumption which is rebuttable in nature and such rebutted, depends upon the nature of the plea raised and the evidence led on the basis of the onus upon the party. Considering that the onus was upon the defendant Nos.1 and 2

to prove the genuineness of the transactions considering their relationship with (late) Bhaguram, and the nature of evidence led, both the Courts below have correctly held, that the sale deeds, were void for want of consideration.

11. The judgment of the Courts below, are well reasoned and properly consider the law applicable to the facts of the matter. The present Second Appeal, therefore, does not raise any substantial question of law. The same being without any merits, is therefore dismissed. Considering the circumstances, there shall be no order as to costs. In view of disposal of appeal, pending Civil Applications are also disposed of.

(AVINASH G. GHAROTE, J.)

12. Mr. Dixit learned Senior Counsel, prays for extension of the oral undertaking given by Mr. Sabnis learned counsel for respondent No.1 that he shall not execute the decree as passed by the trial court for a further period of six (6) weeks. Though Mr. Sabnis, learned counsel vehemently opposes the same. However, considering the request made and the fact, that the

decree is yet to be executed, a time of four (4) weeks is granted. Mr. Sabnis, learned counsel will be bound by his undertaking for a further period of four (4) weeks from today not to execute the decree.

(AVINASH G. GHAROTE, J.)

Sameer