

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**NAGPUR BENCH, NAGPUR.**

**SECOND APPEAL NO. 427 OF 2019**

Shri Arvind s/o Mahadeo Bakde, Aged  
 52 years, Occu : Service, R/o Plot No.  
 16, Chakradhar Nagar, Nagpur

... APPELLANT

**VERSUS**

Shri. Anil s/o Mahadeo Bakde,  
 Aged 49 years, Occu : Service, R/o  
 Plot No. 45, Alankar Nagar behind  
 Bhawani Hall Besa road, Nagpur.

... RESPONDENT

---

Shri A.A. Sambaray, Advocate for the appellant.  
 Shri V.A. Gosavi, Advocate for the respondent.

---

**CORAM** : **VINAY JOSHI, J.**  
**CLOSED FOR JUDGMENT ON** : **22.09.2022.**  
**JUDGMENT PRONOUNCED ON** : **13.10.2022.**

**JUDGMENT** :

Heard finally by consent of both the learned Counsel  
 appearing for the parties.

2. This is a Second Appeal of original plaintiff Arvind Bakde raising a challenge to the judgment and decree passed in Regular Civil Suit No.1041 of 2013 and confirmed in First Appeal bearing Regular Civil Appeal No.665 of 2017. The Trial Court has dismissed the suit whilst allowed the counter claim, which has been maintained by the First Appellate Court. The plaintiff Arvind has initially filed a suit for perpetual injunction restraining the defendant from disturbing his peaceful possession over the suit property. The Suit was suffered by an amendment by which an additional prayer seeking declaration that the sale-deed dated 07.03.2013 executed by his father in favour of the defendant, is null and void. The defendant raised a counter claim seeking relief of negative declaration that the plaintiff has no right, title or interest over the suit property, and also sought possession of the suit property. The suit was dismissed, counter claim was allowed and it was continued in Second Appeal. Concurrent finding is the subject matter of Second Appeal under Section 100 of the Code of Civil Procedure.

3. At initial stage, this Court has treated ground nos. (vii) and (viii) of appeal memo as a substantial questions of law and issued notices to the respondent. Those substantial questions of law are reproduced below :

*“(vii) The Courts below totally lost sight and given entire go bye to the provisions of Sec. 111 of Evidence Act. In view of the position of Defendant the entire burden to prove the transaction is done fairly, without undue influence, misrepresentation is lies on the Defendant. The Plaintiff has proved that no consideration was ever passed to father Shri Mahadeorao Bakde. Even none payment of entire consideration has been accepted by the Courts in their judgments and thus by ignoring this vital aspect the entire judgments of Courts below are vitiated.*

*(viii) The Courts below totally lost ignore the settle legal position that generally rule for proving the plea of fraud, misrepresentation or undue influence is on party claiming but with it is established that party is in fiduciary relationships then the burden shifts on such a party, who is in fiduciary relationship. Here the Defendant has utterly failed to discharge the said burden that the sale deed was done for necessity or for good reason by father Shri. Mahadeorao Bakde and thus by putting the burden on wrong party the Courts below has committed grave error of fact and law and on this count alone this Appeal needs to be allowed.”*

4. The facts in brief giving rise are that, the suit property is consisting of three storied building consisting of two shops on the ground floor and residential premises on upper two floors. The suit property was purchased by the plaintiff's father Mahadev in the year 1981 under the registered sale-deed. The defendant is the plaintiff's real younger brother. It is the plaintiff's case that after demise of his mother, father Mahadev has expressed his desire to allot ground floor premises to the defendant Anil, whilst upper two floors to the plaintiff. It is the plaintiff's case that he has spent sumptuous amount for

renovation of house property. Father Mahadev was residing with the plaintiff till the year 2013, however the defendant who is the plaintiff's younger brother, took Mahadev at his house and by misrepresentation got executed a sale-deed of said property (07.03.2013) in his exclusive rights. The said sale-deed was executed by practicing fraud. The plaintiff received a notice issued by the Mahadev on 01.07.2013 seeking to vacate the suit property on which he learnt about execution of sale-deed. Therefore, the plaintiff has filed a Suit for declaration that the sale-deed is null and void and also claimed perpetual injunction.

5. *Per contra*, the defendant resisted the suit by contending that father Mahadev was all the while staying with the plaintiff. In the year 2012, Mahadev decided to dispose the suit property for distributing the sale proceeds amongst his children i.e. the plaintiff, defendant and two married sisters. At that time, option was given to the plaintiff to purchase the suit property to which he declined. The defendant expressed his willingness to purchase the suit property and thus, by paying consideration of Rs.55 lakhs, has purchased the suit property at his own rights. The defendant has obtained bank loan for paying partial consideration. It is the defendant's case that the plaintiff had agreed to vacate the suit property within two months, however, he did not. Therefore, father Mahadev had issued a legal notice to the

plaintiff to vacate the suit property. According to the defendant, instead of vacating the suit property, the plaintiff has filed a Suit with false contention and therefore, prayed for dismissal of the Suit. Moreover, he sought the relief of negative declaration against the plaintiff and claimed possession by way of counter claim.

6. The plaintiff has denied the counter claim by reiterating the contentions raised in the Plaint. On the basis of rival pleadings, the Trial Court has framed as many as twelve issues. The Trial Court held that the plaintiff has failed to establish that the questioned sale-deed is illegal and not binding on him. Moreover, it is held that the defendant is entitled for possession and accordingly, passed the judgment and decree in the aforesaid terms. Being aggrieved and dissatisfied by dismissal of suit and the relief granted in the counter claim, the plaintiff Arvind has filed the First Appeal, however, could not get any relief.

7. Learned Counsel appearing for the plaintiff first time in Second Appeal has raised a ground that both the Courts below have wrongly placed burden on the plaintiff to establish misrepresentation and fraud while executing the sale-deed. It is argued that since there was fiduciary relationships in between the defendant and executant Mahadev, provisions of Section 111 of the Evidence Act, would come

into play, meaning thereby burden lies on the defendant to establish good faith. Thus, according to him, both the Courts below have wrongly placed the burden on plaintiff and therefore the impugned judgment and decree, is perverse. Learned Counsel appearing for the plaintiff while challenging the impugned judgment and decree has submitted that, in the year 2013, the defendant took his father at his house and under his influence alleged sale-deed got executed by practicing fraud. It is for the defendant to establish that the transaction was in good faith. It is submitted that though the sale-deed discloses consideration of Rs.55 lakhs, however, the major part of the consideration i.e. Rs.27 lakhs have not been paid. Thus, according to him, for non-payment of consideration also sale-deed vitiates. He would submit that though the suit property was self-acquired property of Mahadev, however he being one of the legal heir, has a right to challenge the sale-deed, as after demise of Mahadev, he would succeed the suit property along with other heirs.

8. Learned Counsel appearing for the respondent/defendant has strongly resisted the submission on the count that the suit does not bear a specific pleadings about fraud and misrepresentation, which is the requirement under Order VI Rule 14 of the Code of Civil Procedure. It is submitted that, first time in Second Appeal, the plaintiff came with

a case of fiduciary relationship despite pleadings and evidence to that effect. It is submitted that, since it was a self-acquired property, the plaintiff being a third party, cannot challenge the sale-deed on the ground of non-payment of consideration. The learned Counsel for the defendant also took me through the certain documents to impress that in the year 2012 itself, in presence of the plaintiff, meeting was held. In said meeting the plaintiff refused to purchase the property and with his conscious knowledge, the defendant has purchased the same by paying the consideration. Lastly, it is argued that during life time of father Mahadev, the plaintiff has no locus to challenge the legality of the sale-deed.

9. At the inception, it would be apposite on my part to make reference of few facts for which there is no dispute in between the parties. The plaintiff and defendant are the real brothers. The suit property was purchased by father – Mahadev under sale-deed dated 19.03.1981 and it was his self-acquired property. It is not in dispute that owner Mahadev had executed the registered sale-deed dated 07.03.2013 in favour of the defendant. Moreover, it is admitted that father Mahadev had issued a legal notice to the plaintiff on 16.08.2013 to vacate the suit property. It is also admitted that Mahadev had filed a Police report against the plaintiff's wife wherein the plaintiff's

statement has been recorded. Moreover, there is no dispute that though Mahadev was not made a party defendant in the Suit, he was very much alive till disposal of the Suit.

10. The first and foremost contention of the appellant/plaintiff rests upon Section 111 of the Evidence Act, pertaining to burden of proof. It is submitted that in the year 2013, the defendant took father Mahadev at his house and thereafter, Mahadev - an old man, was under his control. It is submitted that, since Mahadev was residing with the defendant, the latter was in position of active confidence of the father and thus, there was fiduciary relationship in between them. Therefore, it is for the defendant - Anil to discharge the burden of proving that the transaction of sale was in good faith.

11. Undoubtedly, this submission has been made first time in the Second Appeal. There are no specific pleadings to that effect, however on the basis of emerging facts, the submission is to be tested. In support of said contention, the plaintiff relied on the decision of the Supreme Court in case of *Krishna Mohan Kul vs. Pratima Maity and ors. (2004) 9 SCC 468*, wherein it is ruled that usual rule of onus of proof in cases of fraud and misrepresentation, would be reversed in case of active confidence or fiduciary relationship in between the parties. There can be no dispute about the said proposition of law,

however on the basis of emerging facts, it is to be established that the parties were in fiduciary relationship or the beneficiary was in a position of having full confidence of the executant.

12. The plaintiff has pleaded that his father Mahadev and defendant were residing with him in suit house from the year 1983 till March, 2013. He has not specifically pleaded as to when the father has left the suit house and started to reside with the defendant elsewhere. Learned Counsel appearing for the defendant has submitted that when the sale-deed was executed, Mahadev was very much residing with the plaintiff. For that purpose, he took me through the copy of sale-deed dated 07.03.2013, which discloses the address of the executant Mahadev of suit property. Pertinent to note that, the sale-deed bears the defendant's address of the same property meaning thereby both were residing in suit property at the time of execution of sale-deed. In absence of specific pleadings, the recital of sale-deed goes to show that the Mahadev was staying with the plaintiff at the time of execution of sale-deed. Moreover, the plaintiff himself has pleaded that till the month of March 2013, father Mahadev was staying with him whilst the sale-deed was executed in first week of March, 2013 meaning thereby at the time of execution of sale-deed both were residing together.

13. The defendant has produced a copy of legal notice dated

01.07.2013 issued by Mahadev to the plaintiff, which is admitted one. The notice bears recital as per the defendant's stand that in the month of September 2013, there was family meeting wherein Mahadev expressed his desire to dispose of the suit property and distribution of sale proceeds. It bears a reference that the plaintiff showed his reluctance to buy the suit property on which the defendant has expressed his willingness and accordingly, purchased the suit property for valuable consideration of Rs.55 lakhs. The said recital along with the act of father of issuing legal notice discloses that the plaintiff's contention that Mahadev was suffering from ailments and unable to understand the things, is unacceptable. Moreover, admittedly, father Mahadev had filed a report with the Police on 27.05.2013 (after sale-deed) against the plaintiff's wife namely Sheela (Exhibit 71). The said report bears a reference about family meeting and execution of sale-deed in favour of defendant as per prevailing market rate. Further grievance was put by Mahadev that the plaintiff's wife had driven him out of the house, threatened him and therefore, the report. Admittedly, on the basis of said N.C. report, the Police have recorded the plaintiff's statement on 16.06.2013 (Exhibit 74).

14. In said statement, the plaintiff admits about the prior family meeting as well as execution of sale-deed in favour of the defendant-

Anil. Thus, the said recital falsifies the plaintiff's claim that, on receipt of Mahadev's notice in the Month of August 2013, first time he came to know about the execution of sale-deed. All above circumstances clearly shows that there was no fiduciary relationship in between the parties to invoke the provisions of Section 111 of the Evidence Act.

15. The learned Counsel for the plaintiff would submit that, ordinarily burden of proof to establish fraud and misrepresentation lies on the party, who comes to the Court of law with such a pleadings. For this purpose, he relied on the decision of the Supreme Court in case of ***Anil Rishi vs. Gurbaksh Singh (2006) 5 SCC 558***. In that case, it has been ruled that avernments as regards to the fiduciary relationship must be established failing which the provisions of Section 111 of the Evidence Act, would not apply. The learned Counsel for the defendant by placing reliance on the decision of the Supreme Court in case of ***Raja Ram vs. Jai Prakash Singh and ors. (2019) 8 SCC 701*** would contend that mere close relation are insufficient to presume undue influence. There must be a specific pleadings to that effect. Both the Courts below have rightly placed onus of proof on the plaintiff, who was unable to make out exceptional case of fiduciary relationship.

16. To the next, learned Counsel for the plaintiffs has argued that the entire consideration amount has not been paid. In this regard,

he took me through some bank account entries to impress that apart from payment of Rs.25 lakhs, the rest amount though shown paid by cheque, however it was reversed. The defendant's learned Counsel in response submitted that passing of entire consideration is not a sole criteria for deciding the legality of sale. In this regard he relied on the decision of the Supreme Court in case of *Dahiben vs. Arvinbhai Kalyanji Bhanusali (Gajra) (2020) 7 SCC 366*, wherein it is expressed that non-payment of entire sale consideration cannot be a ground for cancellation of the sale-deed. The plaintiff may have other remedies in law for recovery of the balance consideration. Moreover, the plaintiff has not disputed payment of part consideration of Rs.25 lakhs. Having regard to the said legal position, the said ground is untenable.

17. The learned Counsel for the defendant primely assailed the maintainability of the suit on the point of locus. He would submit that the suit property was admittedly self-acquired property of Mahadev. Therefore, the plaintiff who has no interest in the suit property during life time of his father, cannot dispute either legality of sale-deed or passing of consideration. In this regard, he relied on the decision of the Supreme Court in case of *Muddasani Venkata Narsaiah (dead) thr. Legal representatives vs. Muddasani Sarojana (2016) 12 SCC 288*, wherein it has been ruled that the question of passing of consideration

cannot be questioned by a third party. Since, admittedly on the date of challenge, the plaintiff had no interest whatsoever in the suit property, therefore he has no right to challenge the legality of the sale-deed.

18. Pertinent to note that the plaintiff has not joined the executant Mahadev as a party defendant in the suit, though he has challenged the legality of the sale-deed executed by Mahadev. It requires to be noted that at the fag end of the suit i.e. when the suit was posted for the final judgment, the plaintiff has filed an application under Order I Rule 10(2) of the Code of Civil Procedure for joining Mahadev as party defendant. The Trial Court has rightly rejected the said application for convincing reasons. The plaintiff was well aware that the sale-deed was executed by his father and he was seeking to set aside the same on the ground of fraud, misrepresentation and non-receipt of consideration. In the circumstances, it was incumbent on the plaintiff to implead Mahadev as a party but consciously allowed to prevail the proceedings till fag end and perhaps after hearing arguments of other side, applied when the matter was posted for judgment. The said conduct of the plaintiff speaks volumes. During lifetime, Mahadev has not challenged the sale-deed on the premise of fraud or misrepresentation nor questioned about non-receipt of consideration. On the contrary, Mahadev has affirmed the execution of

sale-deed by issuing legal notice as well as filing a police report. Though the scope of Second Appeal is quite restricted, I have thoroughly considered the rival submissions and gone through the entire evidence. Both the Courts below have rightly considered the evidence adduced in the trial while deciding the suit.

19. In view of the above, no case of interference is made out with concurrent findings of fact recorded by the Courts below.

20. The Appeal carries no merits, hence, stands dismissed. No order as to costs.

21. All pending civil applications, if any, stand disposed of.

**(VINAY JOSHI, J.)**

*Trupti*