

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO. 134 OF 2022
WITH
INTERIM APPLICATION NO.920 OF 2022
IN
SECOND APPEAL NO. 134 OF 2022**

Baburao Sawanta Patil & Anr.	...Appellants
Versus	
Dada Bandu Khochage	...Respondent

Mr. Vivek V. Salunke, for the Appellants.
Mr. P. D. Dalvi, for the Respondent.

**CORAM : MADHAV J. JAMDAR, J.
DATED : 22nd FEBRUARY 2023**

P.C. :

1. Heard Mr. Salunke, learned counsel appearing for the Appellants and Mr. Dalvi, learned counsel appearing for the Respondent.

2. Mr. Salunke, learned counsel appearing for the Appellants submitted that the following substantial questions of law are involved in this Second Appeal:-

- i. Whether the judgment of the learned First Appellate Court which is the last fact finding Court is perverse, as the evidence of D.W.2, D.W. 3, D.W. 4 and D.W.5 has been completely ignored?

ii. Whether as cloud is raised over the Plaintiff's title, suit as filed by the Plaintiff is maintainable in view of the law laid down by the Supreme Court in **Anathula Sudhakar vs. P. Buchi Reddy (Dead) By LRS.**?¹

3. Before considering the substantive questions of law raised by Mr. Salunke, it is necessary to set out certain factual aspects.

4. The Appellants are the original Defendants. The Respondent-Plaintiff is brother-in-law of Defendant No.1. It is the case of the Plaintiff that from time to time, various amounts were advanced to the Defendant No.1 and as the Defendant No.1 failed to repay the same, ultimately, he agreed to sell house property to the Plaintiff and therefore, registered agreement of sale dated 25th September 2008 was executed. As per the said registered document, Plaintiff is the purchaser whereas the Defendant No.1 is the vendor and Defendant No.2 i.e. wife of Defendant No.1 was the consenting party. The said registered document clearly shows that the property in

1 (2008) 4 SCC 594

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question has been sold to the Plaintiff. It is the contention of the Plaintiff that as the Defendant No.1 is the brother-in-law, he was allowed to continue to occupy the premises for sometime which was purchased by the Plaintiff and ultimately as he failed to vacate, suit for possession was filed on 30th January 2014. The Defendants filed counterclaim. In the counterclaim, the Defendants have sought relief that the said registered document dated 25th September 2008 was executed by playing fraud and therefore, the same be set aside.

5. Learned Trial Court by Judgment and Decree dated 7th March 2018 held that the Plaintiff is entitled to recover the possession on the basis of Sale Deed and that the Defendants are not entitled for the declaration that the said Sale Deed dated 25th September 2008 is false, bogus, illegal and not binding upon them. In view of the said findings, the learned Trial Court passed decree of possession and dismissed the counterclaim of the Defendants.

6. The Defendants challenged the said decree by filing Reg. Civil Appeal No.143 of 2018. The learned Appellate Court held that the Plaintiff proved that Defendants had executed Sale

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Deed of the house property vide Sale Deed dated 25th September 2008 and said document is not for mortgage and Defendants failed to prove that they executed the said document by assuming the same to be the mortgage deed. The learned Appellate Court has held that Plaintiff is entitled to recover the possession of the house property on the basis of Sale Deed. Learned First Appellate Court further held that Defendants are not entitled for the declaration that the said Sale Deed dated 25th September 2008 is false, bogus, illegal and not binding upon them.

7. The first substantial question of law raised by Mr. Salunke is that the learned First Appellate Court has not taken into consideration the evidence of D.W.2, D.W.3, D.W.4 and D.W.5. On the basis decision of Supreme Court in the matter of **Malluru Mallappa (Dead) through LRS. vs. Kuruvathappa & Ors.**² it is contended by Mr. Salunke that Appellate Court hearing Appeal filed under Section 96 of the Code of Civil Procedure, 1908 is duty bound to hear the Appeal both on law as well as on the facts. The First Appeal is a valuable right of the Appellant and therein all questions of fact and law decided by the Trial Court

2 (2020) 4 SCC 313

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are open for re-consideration. Therefore, the First Appellate Court is required to address itself to all the issues and decide the case by giving reasons. The Appellate Court dealing with First Appeal must record its findings only after dealing with all issues of law as well as fact and with the evidence, oral as well as documentary, led by the parties. The judgment of the First Appellate Court must display conscious application of mind and record findings supported by reasons on all issues and contentions.

8. In this particular case, the crucial document is the document of sale which is at Exhibit-53. It is admitted position that Appellants i.e. Defendant Nos.1 and 2 are educated persons. The document in question is in Marathi. The document specifically states that by said document, the property in question is sold to the Plaintiff.

9. As far as the consideration is concerned, it is mentioned that consideration of Rs.75,000/- is paid from time to time. The document is registered document. The document shows that at the time of registration, the parties to the document i.e. Plaintiff and Defendant Nos.1 and 2 were present in the

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registration office and therefore, the photographs and thumb impression are taken in the registration office.

10. As far as the contention that the learned First Appellate Court has not considered the evidence of D.W. 4 and D.W.5 who are attesting witnesses, it is significant to note that bare perusal of depositions of said witnesses shows that D.W. 4- Sanjay Sakharam Khabde has specifically mentioned that the Plaintiff and his wife were present at Panchayat Samiti, Hatkanangale and at that time, Plaintiff called him and took his signature on the said document by saying that the said document is of mortgage. It is significant to note that the said document is registered document signed by the Plaintiff as well as Defendant Nos. 1 and 2. It is significant to note that D.W. 4 does not mention in his Affidavit of Evidence anything about the presence of Defendant No.1 and Defendant No.2 and in the cross examination admits that he has not received any witness summons and his evidence affidavit has been prepared as per the say of Defendant No.1. It is significant to note that D.W.4 in his cross-examination has admitted that he has signed on the said document on the say of Plaintiff and Defendant No.1.

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Therefore, he admitted the presence of Defendant No.1 at the time of execution of the said document. Therefore, it is clear that this witness is not credible.

11. The other attesting witness D.W.5-Shashikant Aakaram Khabde in his examination-in-chief also mentioned about the presence of Plaintiff and nothing is mentioned about the presence of the Defendants.

12. It is significant to note that both D.W.4 and D.W.5 are consistent that both of them have executed the said document at the same time. However, Defendant No.5 in the cross-examination has stated that the Defendants were not present along with D.W.4 for execution of the said document. Therefore, it is clear that evidence of D.W.4 and D.W.5 is contradictory and cannot be believed. D.W.5 in the cross-examination admitted that as 8 years have passed he is not remembering things. The learned Trial Court after considering the evidence of D.W. 4 and D.W.5 have highlighted the said contradictions. In fact, the evidence of D.W.2 and D.W.3 is also considered in detail by the learned Trial Court and the same has been discussed in detail.

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13. As far as the learned Appellate Court is concerned, the learned Appellate Court has discussed that said Sale Deed was written by a bond writer Mr. Ghorpade. He had prepared the Sale Deed and gave it to Defendant Nos. 1 and 2 for reading. The Defendant No.1 had purchased three stamp papers and the contents of the Sale Deed were typed.

14. The learned First Appellate Court discussed that Defendants have signed on the Sale Deed in the presence of the Plaintiff and the witnesses. To the said Sale Deed 7/12 extract, N.A. Certificate, identity card of all persons were annexed and the same was submitted to the Sub-Registrar office. Thereafter, two witnesses namely Sanjay Bapu Hanmant and Shantinath Ramu Kochage had signed on the Sale Deed as they identified the purchaser and the seller. Thereafter, all of them made their signatures, thumb impressions and their photographs were taken and the registration of the Sale Deed was completed on 25th September 2008.

15. The learned First Appellate Court took into consideration the various aspects namely, the Sale Deed was given for reading to both the Defendants and therefore, the same was not

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hurriedly executed. The learned First Appellate Court further observed that if any fraud is played by the Plaintiff on the Defendants, then police complaint should have been filed and as no complaint was filed, document of Sale Deed is a genuine document. It has also been taken into consideration that no suit for cancellation of Sale Deed was filed at earlier point of time. The learned First Appellate Court also took into consideration the following factors:-

(a) The Plaintiff after execution of Sale Deed, immediately entered his name in the revenue record of the house property. He paid house taxes and the water charges of this property.

(b) If the Defendants had not executed the Sale Deed then they ought to have paid house assessment tax and water charges of the house property from the year 2008 to 2014. Therefore, the learned First Appellate Court disbelieved the case of the Defendants that they came to know about the execution of the Sale Deed in the year 2014 when the suit was filed.

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(c) The learned First Appellate Court also took into consideration the presumption that the registered document endorsed by the Registrar is admissible in evidence along with its contents, as per Section 60 of the Registration Act.

(d) As far as the contention of the Defendants that the said document is really of mortgage, the learned First Appellate Court discussed the same very elaborately. Learned Appellate Court also relied on the fact that the stamp papers are purchased by the Defendant No.1. He read the document before signing it.

(e) It has been held that no effort has been made by the Defendant No.1 for repaying the loan, if the transaction is of the mortgage.

(f) The learned Trial Court has rightly held that the Defendants have failed to prove that Plaintiff has obtained their signature on this document representing it as mortgage deed.

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16. Therefore, various factors are taken into consideration by the learned Appellate Court while holding that the Defendants have executed the Sale Deed and the said Sale Deed is not a mortgage deed. Although, there is some substance in the contention of Mr. Salunke that, certain evidence is not elaborately discussed by the learned First Appellate Court, however, the same has been elaborately discussed by the learned Trial Court. The learned Appellate Court while endorsing the findings of the learned Trial Court has held that the learned Trial Court has considered the evidence and came to the proper conclusion. The learned Appellate Court has also given other elaborate reasons as set out hereinabove. Therefore, there is no substance in the contention raised by Mr. Salunke that the decision of the learned First Appellate Court is perverse, as material evidence is not taken into consideration.

17. It is also relevant to note that the evidence on which Mr. Salunke has strongly relied, is not the material evidence and the same is not believable. The same is rightly discarded by the learned Trial Court and the learned First Appellate Court has held that learned Trial Court after appreciating the evidence on

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record has come to the proper conclusions and has also given various cogent reasons for endorsing findings recorded by the learned Trial Court. Therefore, there is no substance in the first substantial question of law raised by Mr. Salunke.

18. The second substantial question of law raised by Mr. Salunke is that cloud is raised over the Plaintiff's title and therefore, the Plaintiff should have sought declaration of his title and the possession as per the law laid down by the Supreme Court in **Anathula Sudhakar (supra)**. He relied on paragraph No.21 of the said judgment. The said paragraph No.21 reads as under:-

“21.(a) Where a cloud is raised over plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter.

(b) As a suit for injunction simpliciter is concerned only with possession, normally the issue of title will

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not be directly and substantially in issue. The prayer for injunction will be decided with reference to the finding on possession. But in cases where de jure possession has to be established on the basis of title to the property, as in the case of vacant sites, the issue of title may directly and substantially arise for consideration, as without a finding thereon, it will not be possible to decide the issue of possession.

(c) But a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issue regarding title (either specific, or implied as noticed in *Annaimuthu Thevar*). Where the averments regarding title are absent in a plaint and where there is no issue relating to title, the court will not investigate or examine or render a finding on a question of title, in a suit for injunction. Even where there are necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.

(d) Where there are necessary pleadings regarding title, and appropriate issue relating to title on which

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parties lead evidence, if the matter involved is simple and straight-forward, the court may decide upon the issue regarding title, even in a suit for injunction. But such cases, are the exception to the normal rule that question of title will not be decided in suits for injunction. But persons having clear title and possession suing for injunction, should not be driven to the costlier and more cumbersome remedy of a suit for declaration, merely because some meddler vexatiously or wrongfully makes a claim or tries to encroach upon his property. The court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case.”

19. It is significant to note that in paragraph 13 of the said judgment, the Supreme Court has clarified the issue which was under consideration. It is indicated that the issue under consideration was when a mere suit for permanent injunction will lie, and when it is necessary to file a suit for declaration and/or possession with injunction as a consequential relief. Therefore, it is clear that the said principle will apply when suit for simplicitor injunction is filed and when in such a suit

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declaration is required to be sought. The said question is elaborately discussed and various parameters in that regard are set out by the Supreme Court. In the present case, suit is for possession on the ground of title and therefore, the said decision of the Supreme Court is not at all applicable to the present case. In any case, in this particular case, the Appellants i.e. Defendants filed counterclaim seeking relief that the said registered document dated 25th September 2008 was got executed by playing fraud and therefore, the same be set aside and both the Courts have concurrently upheld the validity of said document. Therefore, there is no substance in the second substantial question of law raised by Mr. Salunke.

20. For the above reasons, as there is no substance in the Second Appeal, the same is dismissed, however, with no order as to costs.

21. In view of the dismissal of the Second Appeal, nothing survives in the Interim Application and the same is also dismissed as such.

22. At this stage, Mr. Salunke, learned counsel appearing for the Appellants states that the decree of possession be stayed for

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reasonable period. Mr. Dalvi, learned counsel appearing for the Respondent strongly opposes the said request. However, in the interest of justice, the eviction decree shall not be executed upto 31st August 2023.

[MADHAV J. JAMDAR, J.]