

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

SECOND APPEAL NO. 455 OF 2019

Santosh Gajanan Vaibhase,
Aged about 45 years, Occ.: Business,
R/o. Borkhedi, Tq. Risod, Dist. Washim.

.... **APPELLANT.**

// VERSUS //

Vilasrao Sadhurao Ghuge,
Aged about 60 years,
Occ.: Agriculturist,
R/o. Rajankhed, Tq.Barshitakli,
Dist. Akola.

.... **RESPONDENT.**

Shri R.L.Khapre, Sr.Adv. a/b. Shri S.V.Kothekar, Adv. for Appellant.
Shri S.V.Sohoni, Advocate Respondent.

CORAM : ANIL S. KILOR, J.
DATED : APRIL 03, 2023.

ORAL JUDGMENT :

1. Heard.

2. **ADMIT.** Heard finally by consent of the learned counsel
for the parties.

3. The appellant in the present second appeal-Santosh Gajanan Vaibhase filed the Regular Civil Suit No.36 of 2009 for declaration that the respondent herein is not having any right, title and interest in the suit property and for perpetual injunction. The respondent herein also filed a suit namely Regular Civil Suit No. 02 of 2008 claiming declaration that he is the owner of the suit property and the defendant / appellant herein has no right, title or interest in the suit property and also for relief of perpetual injunction. The learned trial Court vide common judgment and decree dated 28/07/2014 dismissed the suit filed by the respondent and decreed the suit filed by the appellant. The respondent feeling aggrieved by the same, preferred Regular Civil Appeal No.71 of 2014 and Regular Civil Appeal No. 72 of 2014. In the Regular Civil Appeal No.71 of 2014 the judgment and decree passed in Regular Civil Suit No. 36 of 2009 was under challenge. Whereas, in Regular Civil Appeal No.72 of 2014 the judgment and decree passed in Regular Civil Suit No.2 of 2008 was under challenge.

4. The District Judge, Akola, vide impugned common judgment and decree dated 05/04/2019 allowed both the appeals and thereby dismissed the suit filed by the appellant i.e. R.C.S. No. 36 of 2009 and decreed the suit of the respondent namely R.C.S. No.2 of

2008 and thereby it is held that the respondent is the owner of the suit land and the defendant/appellant has no right, title and interest in the suit land. The said common judgment and decree dated 05/04/2019 is under challenge in these appeals.

5. The facts in brief are as follows: (The parties are referred to as per their status before the trial Court in Regular Civil Suit No.2/2008 filed by the respondent herein)

6. According to the plaintiff he was in need of money for his daughter's marriage and therefore, he approached to the defendant to provide a hand loan of Rs.40,000/- which he agreed to provide subject to payment of interest and execution of a sale deed showing amount of consideration as Rs.60,000/-.

7. It is further the case of the plaintiff that after receiving amount of Rs.40,000/- he accordingly executed a nominal sale deed of 3 acres of land showing total consideration as Rs.60,000/-, which includes Rs.40,000/- and interest thereon. It is stated that the possession was never delivered and the possession was with the plaintiff. It is stated that it was agreed that the sale deed shall be treated as cancelled after payment

of Rs.60,000/- i.e. including interest or if required the defendant shall execute the reconveyance deed. It is also pleaded that the sale deed is nominal and it is *void ab initio* therefore, the question of reconveyance does not arise. The plaintiff has further pleaded that the defendant started giving threats to the plaintiff and as the defendant was trying to alienate the suit property, the suit was filed.

8. The defendant/appellant filed his written statement opposing the suit thereby denying the allegations made in the plaint. It is the case of the defendant that the sale deed was not nominal, but it was actual transaction of sale.

9. The defendant in R.C.S. No.2 of 2008 filed a suit for declaration and permanent injunction against the plaintiff in the said suit claiming thereby that he is the owner and in possession of the suit land by virtue of registered Sale Deed dated 12/05/2006. It is his further case that the defendant in R.C.S. No.36 of 2009 was trying to disturb his possession and therefore, the suit was filed.

10. The defendant in R.C.S. No.36 of 2009 and plaintiff in R.C.S. No.2 of 2008 filed written statement and opposed the suit

11. The learned trial Court, after scrutinizing the evidence, dismissed the suit bearing R.C.S. No. 2 of 2008 and decreed the R.C.S. No.36 of 2009 vide common judgment and decree dated 28/07/2014. Feeling aggrieved by the same, the plaintiff preferred two appeals before the District Judge, Akola vide Regular Civil Appeal No.71 of 2014 and Regular Civil Appeal No.72 of 2014, which came to be allowed and thereby the judgment and decree passed by the trial Court was set aside vide common judgment and decree dated 05/04/2019. The same is under challenge in the present appeal.

12. On 16/10/2019 this Court framed following Substantial Questions of Law :

- (i) Whether the Appellate Court was justified in reversing the judgment and order passed by the trial Court and granting decree in the suit for declaration filed on behalf of Vilasrao Ghuge when only a prayer for declaration was made seeking a declaration that the appellant did not have right, title or interest in suit property in the absence of prayer for cancellation of registered sale deed executed in favour of the appellant?
- (ii) Whether the finding rendered by the Appellate Court while reversing the judgment and order passed by the Trial Court on the aspect of possession are perverse in the face of the evidence and material on record?

- (iii) Whether the Appellate Court was justified in holding in favour of the respondent based on orders passed in revenue proceedings, when such findings would not be binding on the Civil Court?

13. Shri Khapre, learned Senior Advocate appearing for the appellant submits that the suit simpliciter for declaration and injunction is not maintainable in absence of any relief sought by the plaintiff for specific performance of oral agreement of reconveyance of the suit property by registered instrument. In support of his submission he has placed reliance on a judgment of the Hon'ble Supreme Court of India in the case of *N.V. Srinivasa Murthy ..vs.. Mariyamma*, reported in (2005)5 SCC 548 and the judgment of this Court in **Second Appeal No.82 of 2005** (Shripat Haride Dhamde & anr. ..vs.. Natthu Bhijudeo Dhopre), decided on 08/10/2018.

14. It is submitted that the findings recorded by the learned lower Appellate Court on the point of possession are perverse as the learned lower Appellate Court has ignored the oral as well as documentary evidence produced by the defendant. He further submits that much emphasis has been placed by the learned lower Appellate Court on the fact that the defendant resides at a distance of 120

kilometers and it is not probable to cultivate 3 acres of land by travelling 120 kilometers, while deciding the point as regard possession.

15. He further submits that unnecessary weightage has been given by the learned lower Appellate Court to the orders passed in revenue proceedings and thereby the learned lower Appellate Court has committed error in holding that the plaintiff is in possession of the suit property. He accordingly, prays for quashing and setting aside the impugned judgment and decree.

16. On the other hand, Shri Sohoni, learned counsel for the respondent/ plaintiff submits that the judgments in the case of *N.V. Srinivasa* (supra) and *Shripat Dhamde* (supra) are distinguishable and are of no help to the appellant, as in the present case, there was no oral agreement of reconveyance as it was in the above referred cases. It is submitted that the plaintiff has specifically pleaded that the sale deed is *void ab initio* and even it needs no cancellation. He therefore, submits that the suit simpliciter for declaration and injunction is maintainable and it was rightly entertained by both the Courts below and allowed by the learned lower Appellate Court.

17. The learned counsel for the plaintiff/ respondent submits that the plaintiff has examined the witnesses from the same village on the point of possession and even the revenue entries show the possession of the plaintiff. He, therefore, submits that the possession was proved and hence, there is no perversity committed by the learned lower Appellate Court holding that the plaintiff is in possession of the suit property.

18. It is submitted that though the orders in the revenue proceedings are not binding, however, it has persuasive value and it can be considered independently. He, therefore, submits that no error or perversity has been committed by the learned lower Appellate Court in passing the decree in favour of the plaintiff.

19. In the above referred backdrop of rival contentions, I have perused the record and the impugned judgment and decree.

20. In the present matter, it is the case of the plaintiff that, as he was in need of Rs.40,000/- for the expenses of marriage of his daughter, he approached to the defendant and against the same the defendant asked for execution of Sale Deed, accordingly a Sale Deed was executed for Rs.60,000/-. Thus, according to the plaintiff, the Sale Deed was a

nominal one. It is the further case of the plaintiff that it was agreed that the sale deed shall be treated as cancelled after the repayment of Rs.60,000/-.

21. Thus, I will first consider whether without seeking specific performance of an oral agreement of reconveyance can the plaintiff maintain the suit simpliciter for declaration and permanent injunction.

22. In a case of *Prem Singh vs. Birbal*, reported in (2006)5 SCC

353 the Hon'ble Supreme Court of India has held thus :

"14. A suit for cancellation of instrument is based on the provisions of Section 31 of the Specific Relief Act, which reads as under:

"31. When cancellation may be ordered.--(1) Any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable; and the court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.

(2) If the instrument has been registered under the Indian Registration Act, 1908 (16 of 1908), the court shall also send a copy of its decree to the officer in whose office the instrument has been so registered; and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation."

15. Section 31 of the Specific Relief Act, 1963 thus, refers to both void and voidable documents. It provides for a discretionary relief.

16. When a document is valid, no question arises of its cancellation. When a document is void ab initio, a decree for setting aside the same would not be necessary as the same is non-existent in the eye of law, as it would be a nullity.

17. ...

18. ...

19. ...

20. *If the plaintiff is in possession of a property, he may file a suit for declaration that the deed is not binding upon him but if he is not in possession thereof, even under a void transaction, the right by way of adverse possession may be claimed. Thus, it is not correct to contend that the provisions of the Limitation Act would have no application at all in the event the transaction is held to be void."*

23. This Court in the case of *Ananda ..vs.. Pandurang*, reported in **2011(3) Mh.L.J. 61**, by placing reliance on the judgment in the case of *Prem Singh* (supra) held that in such suits the plaintiff is entitled to file a suit for declaration, in view of the fact that the defendant was trying to interfere with the plaintiff's possession on the basis of the sale deed and it was therefore, not necessary for the plaintiff to seek declaration of his title or for cancellation of the sale deed. It is further held that a sham or nominal sale deed need not be set aside or cancelled, only if it is a real transaction it has to be set aside or cancelled.

24. The Full Bench of Madras High Court in the case of *Muppudathi ..vs.. Krishnaswami*, reported in **A.I.R.(47) 1960 Madras 1**, has held thus:

"11. ... The relief as to cancellation of an instrument is provided for under Section 39 of the Act. It becomes, therefore, relevant to consider as to what are the cases to which Section 39 would apply and whether it would comprehend the case of an instrument executed by a person claiming under a title different from and hostile to the person 'seeking cancellation. Section 39 states:

“Any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable; and the Court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.

If the instrument has been registered under the Indian Registration Act the Court shall also send a copy of its decree to the officer in whose office the instrument has been so registered; and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation.” It may be noticed that the above section applies not merely to the case of an instrument which is voidable but also one that is void. Section 35 provides for the case of rescission of voidable contracts. It is evident that Section 39 covers not only a case contemplated under Section 35, but also a wider field, that is, a case of a void document, which under the law need not be set aside.

12. The principle is that such document though not necessary to be set aside may, if left outstanding, be a source of potential mischief. The jurisdiction under Section 39 is, therefore, a protective or a preventive one. It is not confined to a case of fraud, mistake, undue influence etc. and as it has been stated it was to prevent a document to remain as a menace and danger to the party against whom under different circumstances it might have operated. A party against whom a claim under a document might be made is not bound to wait till the document is used against him. If that were so he might be in a disadvantageous position if the impugned document is sought to be used after the evidence attending its execution has disappeared. Section 39 embodies the principle by which he is allowed to anticipate the danger and institute a suit to cancel the document and to deliver it up to him. The principle of the relief is the same as in quia timet actions.

13. Whitley Stokes in the Anglo Indian Codes, Vol. 1, dealing with Ch. V of the Specific Relief Act states at page 934, as follows:

“Chapter V declares that any person against whom a written instrument is void or voidable, who has reasonable apprehension that if left outstanding it may cause him serious injury, may obtain an adjudication that it is void or voidable and an order that it be delivered up and cancelled. The relief extends to a forged instrument, and also to one originally valid but which has subsequently become forged. The chapter applies to cases not infrequent in India, where a party gets possession of a document,

on which he might not indeed be able to found a claim in a Court of Justice, but which might give him such prima facie right against the other as would expose him to vexatious demands and litigation.”

14. ...

15. ...

16. *There is one other reason for this conclusion. Section 39 empowers the Court after adjudicating the instrument to be void to order the instrument to be delivered up and cancelled. If the sale deed is or purported to have been executed by a party, the instrument on cancellation could be directed to be delivered over to the plaintiff. If on the other hand such an instrument is executed by a trespasser or a person claiming adversely to the plaintiff it is not possible to conceive the instrument being delivered over not to the executant but his rival, the plaintiff.*

17. *In 37 Mad LJ 113 (AIR 1919 Mad 105), Napier J. after referring to the provisions of Sections 39 and 41 of the Specific Relief Act observed at page 121 (of Mad LJ): (at pp 107-108 of AIR)*

“To my mind it is clear that there is no necessity to have this document cancelled. The illustrations to Sec. 39 indicates that it is only where a party cannot get his legal remedy without first having the document set aside that he comes within the section. This is a suit by the true owner to recover possession of the property. The title adverse to him is not one procured from him or from any one under whom he claims or from any one who purported to convey an interest of his. It seems to me therefore that there can be no necessity for him to apply to have the document cancelled and further that the Court would have no jurisdiction to do so.”

25. From the above referred observations the Full Bench of Madras High Court in a case of *Muppudathi* (supra) it is evident that a void document though not necessary to be set aside may, if left outstanding, be a source of potential mischief. The jurisdiction under Section 39 of the Act of 1877 is therefore, a protective or a preventive

one. It is not confined to a case of fraud, mistake, undue influence etc. and it is to prevent a document to remain as a menace and danger to the party against whom it might have operated. A party against whom a claim under a document might be made is not bound to wait till the document is used against him. Section 39 embodies the principle by which he is allowed to anticipate the danger and institute a suit to cancel the document and to deliver it upto him.

26. The provisions of Section 39 of the Specific Relief Act, 1877 is corresponding to Section 31 of the Act of 1963. Thus, the above referred judgment of the Full Bench of the Madras High Court is applicable to the controversy involved in the present matter.

27. Section 31 of the Act of 1963 makes it clear that three conditions are requisite for the exercise of the jurisdiction to cancel an instrument, (i) the instrument is void or voidable against the plaintiff, (ii) the plaintiff may reasonably apprehend serious injury by the instrument being left outstanding, (iii) In the circumstances of the case, the court considers it proper to grant this relief of preventive justice. [As held by the Full Bench of Madras High Court in the case of *Muppudathi* (supra)].

28. In light of above referred observations, I revert back to the facts of the present case.

29. In the present matter, the suit filed by the respondent for declaration and injunction, in para 4 the plaintiff has categorically pleaded that *“It was agreed that the sale deed shall be treated as cancelled after the payment of Rs.60,000/- i.e. including the interest or if required the deft. shall execute the reconveyance, however, the sale deed is nominal and it is void ab initio therefore, question of its reconveyance does not arise.”*

30. It is further pleaded that the defendant and his relatives are giving threats to the plaintiff and his family members and the defendant is trying to alienate the suit property urgently.

31. It is also pleaded that the sale deed is not by free will and consent of the plaintiff and at the relevant time the market value of the field in question was much more than that which has been shown nominally in the sale deed.

32. Thus, from the above referred pleadings, it is evident that it is the case of the plaintiff that as the sale deed in question is nominal and it is *void ab initio*, therefore, question of its reconveyance does not arise. It is further evident that there was no oral agreement of reconveyance, whereas, it was agreed that if required the defendant shall execute the reconveyance.

33. In the judgment of *N.V. Srinivasa Murthy* (supra), it was the case that there was an oral agreement of reconveyance despite which the suit was filed merely for declaration without seeking relief of specific performance of oral agreement of reconveyance of the property by registered instrument. Thus, in the given facts and circumstances, the Hon'ble Supreme Court of India in the said matter has held that suit merely for declaration without seeking relief of specific performance of oral agreement of reconveyance is not tenable. However, as there was no oral agreement of reconveyance in the present matter and it is the case of the plaintiff that the sale deed in question is void and there is no need to even cancel the same. Hence, the judgment in the case of *N.V. Srinivasa Murthy* (supra) is distinguishable and of no support to the appellant.

34. Similarly, in the case of *Shripat Dhamde* (supra) the Coordinate Bench of this Court has relied upon the judgment in the case of *N.V. Srinivasa* (supra), as in the said matter there was an oral agreement of reconveyance. As I have already observed that there is no such agreement in this matter, the judgment in the case of *Shripat Dhamde* is also of no help to the appellant.

35. The learned appellate Court while examining the oral as well as documentary evidence available on record has considered the evidence of P.W. 2-Sanjay, who was the witness to the sale deed and who has categorically deposed that the transaction was in respect of hand loan of Rs.40,000/- subject to payment of interest and the amount to be repaid along with interest was Rs.60,000/-. It has also come in the evidence of P.W. 2 that the money was needed for marriage of plaintiff's daughter. Thus, there is sufficient evidence to hold that the sale deed was nominal.

36. Similarly, P.W. 3 and P.W. 4, who are the residents of Rajankhed where the land is situated, have deposed that the plaintiff is in possession of the suit land and he is cultivating the land. Thus, the plaintiff, by examining P.W. 3 and P.W.4 has established that he is in possession of the suit land.

37. Contrary to this, the defendant examined one Deelip, who was witness to the said sale deed and a driver of a tractor to show that the transaction was real one and he is in possession of the suit land. However, the learned appellate Court, considering the cross examination of the witnesses of the plaintiff, wherein only suggestions in the form of denial were put by the defendant. At the same time, the witnesses examined by the defendant have failed to given particulars and dates on which they visited the suit land along with the defendant. The further fact that the defendant resides at a distance of 120 kilometers away from the suit property and as it is not probable that the person would travel 120 kilometers for the land admeasuring 3 acres only. The learned appellate Court, after considering the above referred evidence and facts, held that the defendant has failed to prove that he is in possession of the suit property.

38. Thus, the plaintiff has succeeded to establish that the sale deed was a nominal one and there was no intention to act upon the same. Hence, when the document in question is void one, the question of seeking its cancellation would not arise at all. It is only when a document is a voidable one, that is valid until it is declared as void, the question of seeking its cancellation would arise.

39. Section 92 of the Indian Evidence Act precludes a party from adducing oral evidence for the purpose of contradicting, varying, adding to, or subtracting from the terms of a contract or grant, but for that it is necessary that there should be a contract in existence. When a party pleads that there was no contract at all or that the instrument is a sham one, not intended to be acted upon, it would be open to him to establish by oral evidence that there was no intention on the part of the parties to bring into existence a contract.

40. The plaintiff in the present matter has successfully pleaded and proved that the sale deed in question is a void document and therefore, the suit for declaration and injunction is maintainable without seeking a relief of specific performance of reconveyance.

41. Accordingly, I answer the Substantial Question of Law No. (i) to the effect that the suit simpliciter for declaration and permanent injunction is maintainable as the sale deed itself is void and there is even no need to seek cancellation of such instrument.

42. Further, I answered Substantial Question of Law No.(ii) that the learned lower Appellate Court has not committed any perversity

while recording the finding of fact that the plaintiff is in possession of the suit property.

43. As regards the Substantial Question of Law No.(iii), considering the oral as well as documentary evidence available on record as regards possession, even if the orders passed in revenue proceedings are ignored it would not change the fate of the present appeal, hence, according to me, any answer to the substantial question of law No.(iii) would be academic, which will not change the result of the present appeal. Hence, I do not find it necessary to answer the same. Accordingly, I pass the following order:

The Second Appeal is **dismissed**. In the circumstances, there shall be no order as to costs.

(ANIL S. KILOR, J)

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