



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

SECOND APPEAL NO. 106 OF 2021

Sumanbai w/o Nivrutti Kaddore

... APPELLANT
(Ori. Plaintiff)

VERSUS

1. Ananta s/o Vithoba Suryawanshi
2. Shripati Mahadev Mugale

... RESPONDENTS
(Ori. Defendants)

Mr. C. V. Dharurkar, Advocate for the appellant

CORAM : R. M. JOSHI, J.

DATE : 3rd JANUARY, 2024

P.C. :-

1. Appellant/original plaintiff has preferred this appeal under Section 100 of the Code of Civil Procedure (for short 'CPC') taking exception to the judgment and decree dated 19th July, 2011 passed in R.C.S. No. 264 of 2005 by Civil Judge, Senior Division, Omerga and the judgment and decree dated 4th August, 2016 passed by District Judge-1, Omerga in R.C.A. No. 23 of 2011 confirming the judgment of the Trial Court.

2. The parties are referred to as plaintiff and defendants for the sake of convenience. Facts in nutshell which was laid the filing of the present appeal can be narrated in brief as under.

(i) Plaintiff filed suit for declaration that sale deed dated 5th September, 1996 (Exh. 46) executed by her in favour of defendant No.1 in respect of plot No. 13 (suit property) was nominal one. The plaintiff has also sought possession of the suit plot. It is the case of the plaintiff that she was the owner of the jeep which she got repaired from defendant No.1 who is a motor garage owner. It is her further case that a sum of Rs.10,000/- was charged towards the repair of the said jeep and as the plaintiff was not able to pay the said amount, as per the oral agreement between them she executed nominal sale deed in respect of the suit plot in favour of defendant No.1 and the said transaction was a security transaction for the payment of Rs.10,000/-. It is further contended that on payment of amount of Rs.10,000/- the suit property was to be reconveyed in favour of plaintiff. She further claims that within six months thereafter she paid Rs.10,000/- to the defendant No.1, however, he neglected to execute sale deed in her favour. Hence, suit came to be filed with allegation that on 5th April, 2004 defendant Nos. 1 and 2 have forcefully obtained the possession of the suit plot.

(ii) Defendant No.1 contested the suit by filing written statement. It is his case that the plaintiff has executed registered sale deed on 5th September, 1996. On payment for consideration of Rs.33,000/- and a possession of the suit property was also handed over to this defendant.

It is claimed that it is transaction of sale and not security as claimed by the plaintiff. Defendant No.2 also filed written statement by contending that he has subsequently purchased the suit property from defendant No.1.

(iii) Parties led evidence before the Trial Court. The learned Trial Court rejected the contention of the plaintiff and dismissed the suit by passing judgment and decree dated 4th August, 2016, which was challenged unsuccessfully before the First Appellate Court in RCA No. 23 of 2011.

3. Learned counsel for the plaintiff submitted that Trial Court never framed issue of bar of limitation but the learned First Appellate Court has committed error by framing said issue while passing the impugned judgment thereby denying opportunity of leading evidence. This issue ultimately came to be decided against the plaintiff. According to him issue of limitation is not pure question of law but mixed question of fact and law and in the instant case it being not pure question of law could not have been raised during first appeal. To support his submissions reliance is placed on ***Chittoori Subbanna V. Kudappa Subbanna and others, AIR 1965 Supreme Court 1325***. Learned counsel for plaintiff seeks remand of appeal to First Appellate Court afresh to decide issue of limitation. It is his further contention that on merit the Trial Court as well

as the First Appellate Court committed error in appreciating the evidence on record and since findings recorded by them are perverse, they deserve interference in this appeal.

4. No doubt First Appellate Court framed issue of limitation and decided the same against appellant/plaintiff but the appeal is also decided on merit.

5. Perusal of the record indicates that there is no dispute about the execution of registered sale deed dated 5th September, 1996 by the plaintiff in favour of defendant No.1. It is not the case of plaintiff that said document is obtained from her by fraud, intimidation etc.

6. Learned Trial Court has considered evidence led by plaintiff to prove her claim and has dealt with entire evidence on record in detail. Learned Trial Court has refused to accept the case of plaintiff on available evidence on record. The evidence led by plaintiff before trial Court is wholly unreliable and rightly rejected by Trial Court. Moreover evidence led by defendant in the form of N.A. order in his name of suit property and failure on part of plaintiff to take action for 8 years also indicate that there is no substance in the case of plaintiff.

7. Apart from the fact that there is no denial of the execution of sale deed (Exh. 46), there is no case made out of fraud, coercion or intimidation by plaintiff. Section 92 of Evidence Act prohibits evidence of oral agreement or statement in respect of disposition of property required by law to be reduced in form of a document. The case of plaintiff does not get covered by proviso (1) to (6) of Section 92 of the Evidence Act.

8. Admittedly, recitals of the sale deed do not show reference of any oral agreement between parties indicating execution thereof against payment of vehicle repairing charges or any condition of resale/reconveyance to be effected of the suit property by the defendant No.1 in favour of the plaintiff.

9. Perusal of the impugned judgment passed by the learned Trial Court clearly shows that evidence on record has been rightly considered for recording the findings that the transaction in question is of sale and not by way of security towards payment of Rs.10,000/-. Considering the material on record this Court finds no perversity in the said findings recorded by the Trial Court which are confirmed by the First Appellate Court. Hence, no substantial question of law is involved in the present appeal. In view of above discussion, there is no propriety in remitting the

appeal back to the First Appellate Court as the finding recorded on limitation is inconsequential in view of dismissal of suit on merit. Hence, appeal stands dismissed.

(R. M. JOSHI, J.)

ssp