

varsha

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 386 OF 2018
WITH
CIVIL APPLICATION NO. 249 OF 2018
IN
SECOND APPEAL NO. 386 OF 2018**

Devidas Banda Bhosale (through
POA) Sou. Surekha Hanumant Kale ... Appellant/Applicant

vs.

Sharda Pandurang Kale and Ors ... Respondents

Mr. R.M. Haridas i/b. Mr. Prasad Kulkarni, for Appellant.

Mr. Samir Kumbhakoni for Respondents.

CORAM : GAURI GODSE, J.

DATED : 30th SEPTEMBER 2024

ORDER:

1. Heard learned counsels for the parties. This second appeal is preferred by the original plaintiff to challenge the judgment and decree passed by the First Appellate Court dismissing the plaintiff's suit. The trial court had decreed the plaintiff's suit and granted a declaration that the sale deed executed in favour of defendant no. 1

and the sale deed executed in favour of defendant no.2 were not binding upon the plaintiff. The trial court further directed the plaintiff to pay an amount of Rs. 50,000/- to defendant no.1 with interest and on payment of the said amount to defendant no.1, he shall repay the entire consideration amount to defendant no.2, and on receipt of the amount, defendant no.2 was directed to reconvey the registered sale deed in favour of the plaintiff. Thus, the trial court passed a decree for reconveyance in favour of the plaintiff and restrained defendant no. 2 from causing any obstruction to the plaintiff's possession. This decree was challenged by defendant no.2. The First Appellate Court has set aside the trial court's decree and dismissed the suit. Hence, the second appeal filed by the plaintiff.

2. Learned counsel for the appellant submits that the registered sale deed dated 28th October 2004 was executed in favour of the plaintiff by defendant no.3 for a total consideration of Rs. 51,000/-. He submits that out of the total consideration amount, Rs. 25,000/- was paid to defendant no.3. He further submits that with the plaintiff's consent defendant no.3 executed the sale deed in favour

of defendant no.1 on 2nd December 2005 for total consideration of Rs. 1,10,000/-. He submits that on the same date a separate document was executed for cancellation of the agreement dated 28th October 2004 in favour of the plaintiff. He further submits that though there was a document executed for cancellation of an agreement in favour of the plaintiff, the real intention of the parties was not to cancel the document but to create a mortgage as the plaintiff was in need of Rs. 50,000/-. He, thus, submits that it was agreed between the parties that though both the documents were registered, the parties would not act upon the documents. He submits that the parties intended that after the amount of Rs. 50,000/- was paid by the plaintiff to defendant no.1, the sale deed in favour of defendant no.1 would stand cancelled and the original agreement in favour of plaintiff would revive. He submits that in view of the oral agreement between the parties, the plaintiff did not take any further steps as the plaintiff was already in possession of the suit property.

3. Learned counsel for the appellant thus, submits that inspite of the said oral agreement between the parties defendant no.1

executed sale deed dated 7th June 2010 in favour of defendant no.2. He thus submits that the plaintiff filed the suit for cancellation of the document dated 2nd December 2005, cancelling the plaintiff's original agreement. He thus submits that the plaintiff sought to declare the sale deed in favour of defendant no.2 as illegal and further also prayed for declaring cancellation agreement in favour of plaintiff to be illegal. He thus submits that the plaintiff would be entitled to seek specific performance of the original agreement dated 28th October 2004. He thus submits that the plaintiff has filed a suit for declaration and specific performance of the agreement dated 28th October 2004.

4. To support plaintiff's contentions regarding some other intention of the parties in executing two documents dated 2nd December 2005, learned counsel for the appellant relies upon the oral evidence of defendant no.3. He submits that defendant no.3, i.e. the original owner was examined as plaintiff's witness who deposed in favour of plaintiff's contention regarding the real intention of the parties in executing two documents of the year 2005. He thus, submits that the trial court after examining the oral

evidence on record of defendant no.3 and the three independent witnesses recorded a finding of fact with regard to the real intention of the parties. He thus, submits that the First Appellate Court while reversing the trial court's decree failed to take into consideration the oral evidence produced on record which supported the plaintiff's contention with regard to the real intention of the parties in executing the two documents of the year 2005.

5. In support of his submissions the learned counsel for the appellant relies upon the decision of this court in the case of ***Manohar Pamandas Jani Vs. Madhukar Trimbak Waychal and Ors***¹ He submits that this court held that inspite of registered documents, the other oral evidence relied upon by the parties to indicate the real intention of the parties can be considered in view of sections 91 and 92 of the Indian Evidence Act ("**said Act**"). Learned counsel relied upon the observations made by this Court in paragraph no.21 of the judgment. Learned counsel for the appellant thus submits that inspite of the registered documents of 2005, the oral evidence adduced on behalf of the plaintiff was required to be considered by the First Appellate Court before reversing the findings of facts

1 2017(2) Mh.L.J 523

recorded by the trial court. He thus, submits that the reasons recorded by the First Appellate Court would indicate that the oral evidence of the parties is not considered. Hence, the second appeal would require consideration by this Court as the same raises substantial questions of law with regard to appreciation of the oral evidence with reference to Sections 91 and 92 of the said Act.

6. Learned counsel for defendant no.2 supports the First Appellate Court's decree. He submits that the document being registered document has a presumptive value to support the theory of possession. He further submits that except for the oral evidence, the plaintiff has not placed on record any supporting documents indicating his possession over the suit properties. He therefore submits that the second appeal would not require any consideration by this court.

7. To examine the contentions raised on behalf of the parties, I have perused the reasons recorded by both the courts. The execution of the documents is not in dispute. The ground raised on behalf of the appellant is with regard to the real intention of the

parties in executing the documents of 2005. It was argued on behalf of the appellant that the real intention of the parties was that the plaintiff would repay the amount of Rs. 50,000/- to defendant no.1 and on such repayment the sale deed in favour of defendant no. 1 would stand cancelled and original agreement in favour of plaintiff would revive. However, there is nothing to record to indicate the terms and conditions agreed upon between the parties regarding the so called the real intention or different intention then what was stated in the registered documents.

8. The plaintiff has not pleaded anything with regard to the terms and conditions regarding acceptance of Rs. 50,000/- or repayment of Rs. 50,000/- within particular time. Nothing is argued so far as actual repayment of Rs. 50,000/- to defendant no.1 as sought to be argued with reference to the real intention of the parties. If appellant's theory with regard to real intention of the parties is considered, it would amount to novation of contract between the parties. However, the plaintiff has not filed any suit for specific performance based on any novation of contract or based on any oral agreement between the parties stating that there was

any concluded contract entitling the plaintiff to seek either reconveyance or sale deed in his favour based on oral agreement. Nothing is argued with regard to the time period for repaying the amount to defendant no.1 or any actual repayment.

9. The arguments raised on behalf of the appellant is based on oral evidence of defendant no. 3 and other three independent witnesses. The plaintiff's pleading does not support the argument raised today with regard to the real intention of the parties or any specific terms and conditions indicating any contract between the parties. In the absence of any specific pleadings to support the real intentions of the parties both the documents of the year 2005 cannot be said to be hollow documents as the same are registered. The registration of the document would create a presumptive value in favour of the terms and conditions and of the document. Even otherwise, the plaintiff does not dispute the execution of both the documents. The points argued today with regard to oral evidence would not require any consideration by this court as the same would amount to appreciation of oral evidence on record.

10. The reasons recorded by the First Appellate Court indicate

that the oral evidence led by the plaintiff's witness is discussed in detail in the impugned judgment. The First Appellate Court also considered the evidence led by the plaintiff through the plaintiff's daughter who was plaintiff's Power of Attorney Holder. I cannot find any fault in the reasons recorded by the First Appellate Court as the First Appellate Court has thoroughly examined the oral evidence on record. I do not find any substance raised on behalf of the appellant that the First Appellate Court has not examined the oral evidence led by the parties or plaintiff's contentions regarding reconveyance of the property in favour of the plaintiff.

11. With reference to the discussion on the oral evidence, the First Appellate Court has also considered the parameters of Sections 91 and 92 of the said Act. After referring to the aforesaid oral evidence, the First Appellate Court also referred to the issue regarding possession. The First Appellate Court in paragraph nos. 38 and 39 has referred to the documents and the clauses in the documents regarding possession. Thus, the First Appellate Court reversed the findings of possession recorded by the trial court. Since the plaintiff's case was for seeking specific performance of

the original document of 2004, the First Appellate Court has referred to the provision of Section 92 of the said Act and referred to the documents executed by defendant no.3 in favour of defendant no.1 and thus, disbelieved the plaintiff's contention based on the oral evidence by relying upon Section 92 of the said Act. In view of the aforesaid findings on facts as recorded by the First Appellate Court, the decision of this Court relied upon by the learned counsel for the appellant would be of no assistance to the appellant.

12. I do not find any illegality or perversity in the reasons recorded by the First Appellate Court accepting the registered documents of the year 2005. Hence, the arguments raised on behalf of the appellant regarding the intention of the parties in executing the documents of 2005 would not require any consideration by this court as the same do not raise any substantial question of law. Hence, second appeal is dismissed.

13. In view of dismissal of the second appeal, the pending civil application is dismissed as infructuous.

(GAURI GODSE, J.)