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

SECOND APPEAL NO. 193 OF 2022

1) Mohan Harikisanji Chandak,
Aged about 39 years, Occu.-Builder,
R/o. Opp. Arvi Bus Stop, Arvi,
District Wardha.

2) Shriniwas Sambashiv Dhartiwar,
Aged about 39 years, Occ.-Business,
C/o. Ganesh Chandak,
R/o. Opp. Arvi Bus Stop, Arvi,
District Wardha. .... **APPELLANTS**

// **VERSUS //**

1) Yashwant S/o Charandas Gondane,
Aged about 46 years, Occu.-Agriculturist,
R/o. Plot No.29, C/o. H. B. Khandekar,
New Kailash Nagar, Post Bhagwan Nagar,
Nagpur – 440 027.

R-2 deleted as per Court's order dated 05.10.2023.

2) ~~Shri Arun S/o Haridas Gondane,~~
~~Aged about 46 years, Occ.-Agriculturist,~~
~~R/o. Ghat Road, in the building of~~
~~old Passport Office, Nagpur~~. .... **RESPONDENT**

Ms. Ritu Jog, Advocate for Appellants.
Mr. P. A. Gode, Advocate for Respondent.

CORAM : SANJAY A. DESHMUKH, J.

DATE OF RESERVING THE JUDGMENT : 09.09.2024.
DATE OF PRONOUNCING THE JUDGMENT : 09.12.2024.

JUDGMENT.

1. This appeal is preferred against the Judgment and decree passed by the Principal District Judge, Amravati in Regular Civil Appeal No.169 of 2015, dated 02.02.2022, which was filed against the Judgment and decree passed by the Civil Judge, Senior Division, Amravati in Special Civil Suit No.84 of 2008, dated 31.08.2013.

2. Brief facts of the plaintiff's case are as under :

(i) The plaintiffs filed a suit for cancellation of the sale-deed dated 05.05.2006 as well as for possession and a perpetual injunction, on the ground of payment of sale consideration of the suit property.

(ii) The plaintiffs agreed to sale the Suit property bearing Khasra No. 29/2, Gat No.77, admeasuring 5.75 HR., situated at Mouja Parsodi, Dhamangaon Railway, District Amravati, to the defendant for a consideration of Rs.41,50,000/-. However, the plaintiffs ultimately agreed to sale the suit property for a consideration of Rs.16,00,000/-. At the time of agreement, a cash amount of Rs.1,00,000/- was paid by the defendant and post dated cheques amounting to Rs.15,00,000/- were issued. As per the terms of sale-deed, possession of the suit property was to be handed over to the defendant upon execution of sale-deed. Thereafter Memorandum of Mutual Understanding (MOU) was executed wherein the defendant agreed to pay balance amount of Rs.25,50,000/- and post dated cheques were also mentioned in the said MOU. These Six post dated cheuqes total amount of Rs.25,50,000/- were issued in the name of plaintiffs under the MOU dated 05.05.2006. The plaintiffs executed a registered sale-deed 05.05.2006 in respect of the suit property. The post dated cheques amounting of Rs.16,00,000/- were also mentioned in the sale-deed before the Sub-Registrar, Dhamangaon Railway. The plaintiff demanded cash of Rs.1,00,000/- but, the defendant instead of amount, issued post dated cheque for that amount dated 20.05.2006 drawn on Buldhana Urban Co-operative Credit Society Ltd., Buldhana, Wardha Branch. The defendants requested the plaintiffs to execute two separate transactions i.e. the MOU for Rs.25,50,000/- and Rs.16,00,000/- in order to avoid income tax and stamp duty. The plaintiff accordingly executed the sale-deed. However, the cheques were dishonoured, therefore, the plaintiffs issued notices dated 26.07.2006, 18.10.2006, 26.03.2007 and 02.08.2007 to the defendants, demanding the payment of the consideration amount. The notices were duly served. The proceedings under Section 138 of Negotiable Instrument Act, 1881, bearing complaint case Nos.21327/2006, 16353/2006 and 5135/2007 were filed. But, those were dismissed. The appeals against these judgments were preferred and are currently pending. Additionally, another complaint case No.317857/2007 is pending against the defendant in the Court of ACJM, Nagpur. The plaintiffs contended that defendants failed to pay the consideration amount of Rs.41,50,000/- to them. The defendants are attempting to create third party interest, therefore, the plaintiffs filed a suit for cancellation of the sale-deed and for a perpetual injunction.

(iii) The defendants in their the written statement, strongly opposed the suit and contended that after execution of the sale-deed, they came to know that Regular Civil Appeal No.162/2005 was pending regarding the suit property. They have filed an application in that proceedings to join them as a necessary party. Therefore, they stopped the payment of the cheques and informed the plaintiffs to resolve all disputes related to the suit property. The defendant's contended that they are ready to pay balance consideration amount of Rs.15,00,000/- as per terms of the sale-deed. The criminal proceedings under Section 138 of Negotiable Instrument Act, 1881, were dismissed. The defendants further submitted that the plaintiffs suppressed the material fact regarding the pendency of the Regular Civil Suit No.50/2001 and Regular Civil Appeal No.162/2005, as the title of the suit property was not clear. The defendants lastly prayed for the dismissal of the suit.

3. The learned trial Court held that the consideration amount of Rs.41,50,000/- was fixed. The plaintiffs are not entitled to relief of possession or an injunction. The Court further held that the plaintiffs are not entitled to any assistance from the Court, of the fact that plaintiffs and defendants had entered into a conspiracy with a view to evade the income tax and stamp duty. The plaintiffs themselves were the perpetrator of the fraud. They are not entitled to get any discretionary relief as no one ought to be permitted to take advantages of his own fraud, and thus the salt was dismissed.

4. The Learned first appellate Court held that the transaction of sale of the suit property between the plaintiffs and defendants was without consideration and hence void. The plaintiff No.2 is entitled to a declaration of cancellation of the sale-deed to the extent of his share in the suit property and the appeal is allowed. The Judgment passed by the learned trial Court was set aside and the sale-deed dated 05.05.2006 was cancelled.

5. Learned Advocate for the appellants submitted that respondent No.1 and deleted respondent No.2 – Arun Haridas Gondane, executed a sale-deed of the suit property a consideration of

Rs.16,00,000/-. The cheuqes for that amount were issued in the name of the plaintiffs. There was a civil suit pending between the plaintiffs and one Gulabchand Chhogalal Rathi. There was an agreement between the plaintiffs and defendants that the defendants shall pay an amount of Rs.3,50,000/-. This amount was paid and the suit filed by Gulabchand against the plaintiffs was withdrawn. The learned Advocate for the appellants further argued that mere non payment of the consideration amount is not a ground to cancel the sale-deed unless the plaintiffs' plead fraud or misrepresentation. Although the cheques were dishonoured, the appellants were acquitted in those cases. Therefore, at most, the plaintiffs have the right to claim the consideration amount.

6. The learned Advocate for the appellants is relying upon the following authorities :

(i) ***Dahiben Vs. Arvindbhai Kalyanji Bhanusali (D) through L.Rs.*** reported in ***(2020) 16 SCC 366***, where the law was laid down that even if the entire amount of consideration is not paid, a suit for cancellation of sale-deed is not maintainable and and non-payment is not a ground for cancellation of the sale-deed.

(ii) ***Vidhyadhar Vs. Manikrao and Ors.***, reported in ***(1999) 3 SCC 573***, in which law was laid down that as per Section 55(4)(b) of the Transfer of Property Act, 1882 (for short, "TP Act"), if the possession is delivered and the title is passed before payment of consideration under the sale-deed, the deed cannot be invalidated.

(iii) ***Yogendra Prasad Singh (Dead) through LRs. Vs. Ram Bachan Devi and Ors.***, reported in ***AIR 2023 SC 3637***, lays down the law that if a sale is complete, even if the consideration is not paid at the time of execution and registration of the sale-deed, such a sale-deed cannot be cancelled solely for non payment of consideration and. Instead of a charge may be created on the unpaid amount.

(iv) ***Bellachi (Dead) By LRs. Vs. Pakeeran***, reported in ***AIR 2009 SC 3293***, in which law was laid down that there must be specific pleadings with sufficient particulars regarding fraud, undue influence or misrepresentation etc.

(v) ***Prem Singh & Ors., Vs. Birbal & Ors.***, reported in ***2006 (5) SCC 353***, establishes that there is a presumption that a registered document is validly executed under Section 58 of the Registration Act, 1908. A registered document, therefore, is *prima facie* valid in law. The onus of proof lies upon the person who leads evidence to rebut this presumption.

(vi) ***State of Madhya Pradesh Vs. Nomi Singh and Anr.,*** reported in ***(2015) 14 SCC 450,*** states that the plaintiff must stand on his own merit and prove his case.

7. Learned Advocate for the appellants referred to the judgment of learned trial Court and submitted that its reasons and findings are legal and correct. However, the first appellate Court erred and wrongly held that consideration amount was not paid, and hence the sale-deed is not legal. The judgment and decree of the first appellate Court are illegal and perverse. It is, therefore, prayed that the impugned judgment be set aside.

8. The Learned Advocate for the respondents – original plaintiff No.1 submitted that the defendants came with the false plea that they had paid Rs.1,00,000/- to the plaintiff, however, though it is mentioned in the sale-deed that an amount of Rs.1,00,000/- was paid, in fact, it was not paid, but a cheque of Rs.1,00,000/- was issued, which was dishonoured. The cheques of Rs.16,00,000/- were also issued, but admittedly, they too were also dishonoured. Regarding the defence of Gulabchand Rathi that defendant paid him Rs.3,50,000/- to settle the civil suit, it is a false story. The payment of that amount was also not proved. On the contrary, that suit between

the plaintiffs and Gulabchand Rathi was withdrawn. Thus, the intention of the defendants was not to pay the consideration amount as per the sale-deed of the suit property and as per MOU executed by the defendants on the day of sale-deed. It was agreed that, in addition to the amount of Rs.16,00,000/- and Rs.1,00,000/-, the defendants would pay Rs. 25,50,000/-. With regard to the said amount, the defendants took the defence that the said amount was agreed to be paid to the plaintiffs for the development of suit property and it was not a part of consideration of the sale-deed for the suit property. The recitals in the MOU are very clear in this regard. The learned advocate for the respondent submitted that it is not necessary for the plaintiffs to plead that it is a case of fraud or misrepresentation etc. The intention of the parties is always decisive. The learned first appellate Court rightly held that the said defence of the defendants is not acceptable. The plaintiffs have proved their case for the cancellation of the sale-deed, as it was without consideration, by gathering the intention of the parties from their conduct.

9. The learned Advocate for the respondent is relying upon the following precedential laws :

(i) ***Kaliaperumal Vs. Rajagopal & Anr.***, reported in ***(2009) 4 SCC 193***, in which law was laid down that on registration, a title will normally pass to purchaser from the date of execution of sale-deed. The true test is the intention of parties. It was also held that since the parties had intended title of properties to transfer only on payment of full consideration and the appellant purchaser had failed to make full payment. Hence the sellers were justified in refusing to make endorsement on sale-deed.

(ii) ***Kewal Krishan Vs. Rajesh Kumar & Ors.***, reported in ***2021 SCC OnLine 1097***, wherein it was held that a sale transaction was void as it was without consideration, therefore the sale was not completed.

(iii) ***Thulasidhara & Ors., Vs. Narayanappa & Ors.***, reported in ***(2019) 6 SCC 409***, wherein it was held that finding of fact cannot be entertained in a second appeal.

(iv) ***Champa Devi Vs. Sudama Dubey & Ors.***, reported in ***AIR 2017 SC 3433***, wherein it was held that the findings recorded by first appellate Court that the signatures of the sellers were obtained on the said sale-deed under the pretext of disbursing grants to patients suffering from disease of leprosy were just and proper, Therefore, High Court ought not to have reversed the said findings of the first appellate Court.

(v) ***Deepak Tandon & Anr., Vs. Rajesh Kumar Gupta***, reported in ***AIR 2019 SC 924***, in which law was laid down that if plea is not taken in the pleadings, no question of framing of an issue and findings would arise. Such a plea cannot to be raised by the parties for the first time in third Court, whether in appeal, revision or writ for want of any factual foundation and findings needed.

(vi) ***Jank Dulari Devi & Anr. Vs. Kapildeo Rai and Anr.,*** reported in ***(2011) 6 SCC 555***, lays down the law that in the case of sell of immovable property, the title passes only when actual and complete payment of sale consideration is made.

10. The Learned Advocate for the respondent lastly submitted that the judgment and decree of the first appellate Court are based on sound reasoning and no any interference is warranted. It is lastly prayed that the appeal be dismissed.

11. This Court formed following substantial questions of law :

(1) Whether the appellate Court was justified in reversing the findings of the trial Court and in holding that no amount towards consideration had exchanged hands in the facts and circumstances of the present case, in the context of registered sale-deed dated 05.05.2006?

> (2) *Whether the decree for part cancellation of the sale-deed could have been passed in the light of the law laid down by the Hon'ble Supreme Court in the case of* ***Vidhyadhar Vs. Manikrao and Ors., 1999 (3) SCC 573*** *as followed in the case of* ***Dahiben Vs. Arvindbhai Kalyanji Bhanusali (D) through LRs. and Ors., 2020 (16) SCC 366****?*

12. The admitted facts are that the sale-deed for the suit property was executed on 05.05.2006 and the criminal cases for dishonoured cheques filed by the plaintiffs against the defendants were dismissed.

13. The learned Advocate for the appellant has emphasized on the case of ***Dahiben Vs. Arvindbhai Kalyanji Bhanusali*** (cited supra) and submitted that even if the entire amount of consideration is not paid, a suit for cancellation of sale-deed is not maintainable. The sale-deed, Exhibit 50, mentions that a cash of Rs.1,00,000/- was received by the plaintiffs and the remaining amount of Rs.16,00,000/- was to be paid by cheques, the numbers of which are mentioned in the sale-deed. The MOU, Exhibit 157, was executed by the defendant in favour of the plaintiffs, wherein they agreed to pay Rs.25,50,000/-. This document is denied by the defendants. A Civil Suit bearing R.C.S. No.50/2000 was withdrawn by the Gulabchand Rathi on 20.12.2007. According to the defendant, he paid

Rs.3,50,000/- to him, which the plaintiff was bound to pay. Another notable incident/conduct is that plaintiff No.1 executed a Power of Attorney in favour of plaintiff No.2 for conducting the sale but later withdrew the Power of Attorney on 08.02.2010. Plaintiff No.1 filed Pursis and Affidavit for withdrawal of the suit but did not remain present before the Court. He had stated in that pursis, he received consideration cash of Rs.1,00,000/- at the time of registration of the sale-deed. He has also stated that he received Rs.2,50,000/- towards settlement of the matter. The affidavit is marked as Exhibit 121.

14. It is well settled that the intention and acts of the parties are decisive. An agreement without consideration is void. <u>The sale without consideration is also void</u>. The intention of the parties must be gathered from the recitals of the sale-deed as well as their subsequent conducts in the execution of MOU at Exhibit 157. Although, the defendant denied that the MOU relates to the consideration of the sale-deed of the suit property, he has not adduced such evidence to disprove it. The first appellate Court has rightly appreciated the said fact, and after evaluating the evidence, the first appellate Court came to the conclusion that though defendant issued the cheques, has no such intention to pay that amount of consideration to the plaintiffs. The plaintiffs have pleaded

and claimed that the defendants had not paid consideration amount of sale was the suit property and, therefore, sale-deed is void. The plaintiffs have discharged that burden of proof by adducing evidence of the sale-deed (Exhibit 50) and MOU (Exhibit 157). It is very clear from the receipt of payment of Rs.3,50,000/- (Exhibit 156) that it is neither executed by the plaintiffs nor he signed it. The withdrawal of the suit by Gulabchand Rathi also does not establish that the defendant paid them Rs.3,50,000/- which is part of the consideration of the sale-deed.

15. The judgments of the Criminal Court is not binding upon the Civil Court regarding dishonouring of the cheques, which were decided by the learned Judicial Magistrate First Class and Sessions Court in the appeal. Mere denial of MOU without an explanation as to the admission for payment of remaining amount of Rs.25,50,000/- is not sufficient. It is not an evidential admission but judicial admission. As per Section 58 of the Indian Evidence Act, 1872 the said admission can be safely relied upon when the defendant is coming with the case that no such MOU was executed, and his signature is not denied, in view of the Section 103 of the Indian Evidence Act, 1872. The contents of the MOU (Exhibit 157) are therefore proved. Therefore, the learned first appellate Court has

rightly concluded that total consideration amount was Rs.41,50,000/-.

16. An admission by plaintiff No.1 in the Pursis of withdrawal of his part of the suit, in which he states that he received Rs.1,00,000/- as per the sale-deed, is contrary to the pleading and contents of MOU at Exhibit 157. Such an admission by plaintiff no.1 cannot bind the plaintiff No.2. It is because as per his pursis, he had compromised the matter and received Rs.7,50,000/- from the defendants as his share in the suit property. However, in case of plaintiff, he did not receive any amount of consideration, only a cheque of Rs.1,00,000/- was received but, it was not honoured. On that point, the defendants did not cross examine the plaintiff No.2. Therefore, the non payment of Rs.1,00,000/- in cash is rightly upheld by the first appellate Court in para 19 to 22. The defendants witness Rahul Mundada though deposing that in his presence cash of Rs.1,00,000/- was paid by the defendants to the plaintiff, he was not a witness to the sale-deed. Therefore, his evidence is rightly not believed. Thus, it is proved by the evidence that the plaintiffs did not receive cash amount of Rs.1,00,000/- otherwise expected natural conduct on the part of defendants is that he would have not issued the cheque of that amount separately.

17. It is surprising to note that in sale-deed (Exhibit 50) and MOU (Exhibit 157), there are no any recitals regarding the payment of Rs.3,50,000/- to the Gulabchand Rathi. Therefore, the adjustment of that amount towards the sale consideration is rightly held by the first appellate Court to be not believable. The first appellate Court, in para 26 held that the defendants, in their written statements claimed that plaintiffs compelled them to pay Rs.2,50,000/- to the Gulabchand Rathi. However, the defendants' witness Gulabchand claimed that he received Rs.3,50,000/-, the receipt at Exhibit 157 was executed on 05.05.2006 and the suit was withdrawn earlier to it. Therefore, the learned first appellate Court rightly disbelieved the evidence of Gulabchand and the defendants. The learned first appellate Court in para 29 of it's reasoning in the judgment, rightly held that the Pursis filed before the Court by the defendant No.1 was wrongly relied upon by the learned trial Court, which has no evidentiary value.

18. The learned first appellate Court, after reappreciation the evidence and after considering matter before it, rightly concluded that no payment of consideration at all was paid by the defendants to the plaintiffs towards the sale of the suit property. Thus, in para No.31 of the impugned judgment, the first appellate Court gave valid

reasons regarding the case of ***Dahiben*** (cited supra) on behalf of defendants in which the plaint was rejected by the trial Court as per Order VII Rule 11 of the Code of Civil Procedure, and also held that the suit was barred by limitation, as there was no cause of action to file the suit. The learned first appellate Court in para 31 of the judgment gave valid reasons for not relying upon the law laid down in ***Vidhyadhar Vs. Manikrao*** reported in ***1999 (3) SCC 573***, in which the Hon'ble Supreme Court held that payment of whole price of the consideration at the time of execution of sale-deed is sine qua non for completion of the sale. Even if the whole price is not paid but the document was executed and registered thereafter, the sale-deed would be completed, and title would pass to the transferee under transaction. Further, in that case, the decisive factor was the intention of the parties, which has to be gathered from the facts and circumstances of the particular case. Therefore, this become a ratio unless the facts of the case at hand are found to be similar. In the case in hand, the consideration for the said sale-deed has not been paid. On the contrary, from the conduct of the plaintiffs, who denied the MOU (Exhibit 157) to pay the consideration amount, it is evident that they have not proved payment of Rs.1,00,000/- by cheque, which was dishonoured. Furthermore, they have denied that total amount of consideration of Rs.41,50,000/- as proved from the sale-deed and the MOU. Based on all these conducts, it reveals that the defendants never paid any amount of consideration to the plaintiffs. The cheques were dishonoured, therefore, they were not willing to pay consideration amount to the plaintiffs even after execution of sale-deed.

19. All these conducts, if considered together, indicate an intentional refusal on the part of the defendants to pay the consideration to the plaintiffs. Only because mutation entry of the suit property was made in the name of defendants, such sale transaction cannot become legal, which is absolutely without consideration. Thus, a contract without consideration is void, and therefore, on the different factual matrix, the precedential laws (cited supra) by the appellant/defendant are not helpful to them. As held by the Hon'ble Supreme Court in the case of ***Kewal Krishan*** (cited supra), though there was sale-deed of the immovable property under Section 54 of the TP Act, it declared that it was without consideration and therefore it is void.

20. The reasons and findings of the first appelate Court are legal and correct as stated above. Therefore, first substantial question of law is answered in the 'affirmative', that the first appellate Court was justified in reversing the findings of the trial Court, holding that

no amount towards consideration has been paid for the sale of the suit property.

21. With regard to the substantial question of law No.2, the decree for cancellation of part of the sale-deed is justified because the fact in the case of ***Vidhyadhar*** (cited supra) which was followed in ***Dahiben*** (cited supra) is justifiable.

22. For the reasons discussed above, the argument of the learned Advocate for the appellants/defendants is not acceptable. There is no any illegality and perversity in the impugned judgment. The first appellate Court rightly reappreciated the evidence and no interference is warranted in it. Hence, the Second Appeal is **dismissed**. No costs.

(SANJAY A. DESHMUKH, J.)

Kirtak