



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

SECOND APPEAL NO. 236 OF 2022

Arun Gunwantrao Nit,
aged about 65 years, Occ. - Agriculturist,
R/o. Dhanora,
Tah. and District – Yavatmal.

.... **APPELLANT**

// VERSUS //

Champat Kondbaji Sawarkar (Dead)
Through Legal Representatives :

- 1-A) Haribhau Champat Sawarkar,
Aged about 60 years, Occu. - Labour,
R/o. Wadgaon Police Station, Yavatmal.
- 1-B) Vitthal Champat Sawarkar,
Aged about 57 years, Occ. - Labour,
R/o. Durgamata Ward, Ghatanji,
Behind Police Station,
Tah. Ghatanji, Dist. Yavatmal.
- 1-C) Pandurang Champat Sawarkar,
Aged about 50 years, R/o. Dhanora,
Tah. and Dist. Yavatmal.
- 1-D) Beby Shankar Dambhare,
Aged about 47 years, Occ.-Household Work,
R/o. Veni (Kotha),
Tah. Kalamb and Dist. Yavatmal.
- 2) Babarao Narayanrao Upate,
Aged about 75 years, Occ.-Agriculturist,
- 3) Pandurang Narayanrao Upate,
Aged about 66 years, Occ.-Agriculturist,

- 4) Namdev Narayanrao Upate,
Aged about 63 years, Occ.-Agriculturist,
No.2 to 4 R/o. Dhanora,
Tah. and Dist. Yavatmal.

.... **RESPONDENTS**

Mr. P. V. Ghare, Advocate for Appellant.

Mr. H. V. Thakur, Advocate for Respondent Nos.2 to 4.

CORAM : SANJAY A. DESHMUKH, J.

DATE OF RESERVING THE JUDGMENT : 26.08.2024.

DATE OF PRONOUNCING THE JUDGMENT : 30.08.2024.

JUDGMENT.

1. This appeal is preferred against the Judgment and decree passed by learned District Judge-1, Yavatmal in Regular Civil Appeal No. 2 of 2015, dated 12.04.2022, which was preferred against the common Judgment and decree passed by learned Joint Civil Judge, Junior Division, Yavatmal in Regular Civil Suit No.60 of 2012 (Old Spl.C.S. No.57/2002) and Regular Civil Suit No.59 of 2012 (Old Spl.C.S. No.73/2002) dated 19.11.2014. The suit of this appellant bearing Regular Civil Suit No.59 of 2012 was dismissed and Regular Civil Suit No.60 of 2012 filed by respondent was decreed.

2. Brief facts of these two cases are as under :

(i) The suit property bearing old Survey No.2/2 new Block No.20, admeasuring 4H 36R, situated at village Dhanora, Tahsil and

District Yavatmal is owned by respondent Champat Kondba Sawarkar. It is alleged that he executed two contracts of sale of suit property in favour of two plaintiffs. The Plaintiffs in R.C.S. No.60/2012 and defendant Nos.2 to 4 in R.C.S. No.59/2012 are referred to as “party No.1”. The Plaintiff in R.C.S. No.59/2012 and defendant No.2 in R.C.S. No.60/2012 is referred to as “party No.2”. The Legal representatives of owner of suit property i.e. late Champat Sawarkar are referred to as “party No.3”.

(ii) The party No.1 pleaded that by an agreement to sell dated 29.06.1998, Champat/party No.3 agreed to sell the suit property to him for consideration of Rs.81,000/-. He executed a contract of sale of it accordingly. He received an amount of Rs.11,000/- as earnest money. It was agreed that sale-deed will be executed after entering his name to the Record of Rights of the suit property as it was owned by his brother. His brother was missing for 13 years. It was his presumptive death. Therefore, late Champat party No.3 filed M.J.C. No.52/1998 for getting succession certificate. The said case was decided on 12.08.1999. But he failed to pay court fees for it as per directions of the Court. Therefore succession certificate was not issued in his name. Thereafter, party No.1 paid remaining amount of Rs.2,000/- on 23.11.1998, Rs.5,000/- on 08.01.1999 and

Rs.450/- on 02.02.1999 to the party No.3. However, he avoided to mutate his name to the Revenue Record. Therefore, party No.1 issued notice on 11.07.2002 to him to execute the sale-deed by accepting remaining amount of consideration. But he did not respond to it. Thereafter, party No.1 came to know that party No.3 has executed false agreement to sell with party No.2, to avoid execution of the sale-deed in his favour. The party No.1 was always ready and willing to perform his part of contract.

(iii) The party No.2 pleaded that suit property was got by party No.3 by way of succession from his brother who is presumed to be dead as he was missing from 13 years. He agreed to sell the suit property for consideration of Rs.1,10,000/-. He executed an agreement to sell on 04.10.1997 by accepting Rs.10,000/- as earnest money. After receiving succession certificate, party No.3 agreed to execute sale-deed in favour of party No.2. He handed over the possession of suit property to party No.2 and since then he is cultivating the suit property. A party No.3 could not pay court fees and therefore, he did not get succession certificate from the Court. Party No.3 was acquainted with party No.1 therefore, he sought his help for the purpose of getting succession certificate. The party No.1 by taking disadvantage of illiteracy of party No.3, obtained his thumb

impression on blank paper and forged false agreement to sell. The party No.2 paid Rs.20,000/- to party No.3 on 13.11.2001, Rs.20,000/- on 12.04.2002 and Rs.50,000/- on 04.09.2002 as per agreement to sell. It is lastly contended that false agreement to sell is prepared between party No.3 and party No.1 in order to defeat the claim of party No.2. The party No.2 is always ready and willing to perform his part of the contract.

(iv) The defence of party No.3 is that, he agreed to sell the suit property to the party No.2 and not to the party No.1. He executed agreement to sell dated 04.10.1997 and he received Rs.10,000/- as earnest money from party No.2. Thereafter he received Rs.90,000/- from time to time from him. The suit property is in possession of party No.2 since 1997. He has not executed agreement to sell in favour of party No.1. The party No.1 prepared false agreement to sell and obtained his thumb impression on it. He is ready and willing to perform his part of contract as per agreement to sell dated 04.10.1997 in favour of party No.2.

3. The learned trial Court held that right of party No.1 is proved and right of party No.2 is not proved. Therefore, R.C.S. No.59/2012 was dismissed and R.C.S. No.60/2012 was decreed. It

directed party No.3 to execute the sale-deed and deliver the possession of suit property to the party No.1.

4. The learned first appellate Court dismissed the appeal filed by party No.2 and confirmed the judgment and decree of the trial Court. The party No.2 preferred this appeal.

5. This Court while admitting this appeal by an order dated 25th July, 2022 formed following substantial questions of Law :

(I) Whether the learned First Appellate Court has committed the grave error of law in misdirecting itself by framing a totally perverse point of determination and thereby breached the mandate of Order XLI, Rule 31 of the Civil Procedure Code, 1908?

(II) Whether both the Courts below have committed the grave error of law in disbelieving the agreement to sell dated 04.10.1997 executed by deceased Champat (original Defendant no.1) in favour of the appellant; particularly when the vendor i.e. deceased Champat had admitted about its execution?

6. Learned Advocate Mr. P. V. Ghare for the appellant/party No.2 submitted that agreement to sell of the suit property is flatly admitted by the late Champat Kondba Sawarkar -party No.3 in his

written statement. It is prior in time dated 04.10.1997. However, party No.1 thereafter, fabricated false agreement to sell dated 29.06.1988 and shown that it is executed between him and party No.3. However, learned trial Court as well as learned first appellate Court failed to appreciate the evidence in its proper perspective. He is relying upon the following precedential law ***K. Karuppuraj Vs. M. Ganesan***, reported in ***(2021) 10 SCC 777***, para 11 reads as under :

“11. Applying the law laid down by this Court in the aforesaid decisions, if the impugned judgment and order passed by the High Court is considered, in that case, there is a total non-compliance of the provisions of the Order XLI Rule 31 CPC. The High Court has failed to exercise the jurisdiction vested in it as a First Appellate Court; the High Court has not at all re-appreciated the entire evidence on record; and not even considered the reasoning given by the learned trial court, in particular, on findings recorded by the learned trial court on the issue of willingness. Therefore, as such, the impugned judgment and order passed by the High Court is unsustainable and in normal circumstances we would have accepted the request of the learned Senior Counsel appearing on behalf of the respondent to remand the matter to the High Court for fresh consideration of appeal. However, even on other points also, the impugned judgment and order passed by the High Court is not sustainable. We refrain from remanding the matter to the High Court and we decide the appeal on merits.”

7. Learned Advocate for the appellant further submitted that this Court can consider fact of the case particularly as to whether trial Court as well as first appellate Court properly appreciated the evidence or not even though there is concurrent findings of both Courts. He lastly submitted to allow the appeal by setting aside judgment and decree passed by learned trial Court and first appellate Court.

8. Learned Advocate Mr. H. V. Thakur for the respondent Nos.2 to 4 submitted that there is concurrent findings and decision in favour of party No.1. The judgments of both the Courts are legal and correct. The evidence of both sides is properly appreciated by learned trial Court and first appellate Court. The date of agreement to sell is not important, but its legal proof is important. The agreement to sell executed between party No.2 and party No.3 is false and fabricated document. He submitted to dismiss the appeal as there is no scope to consider the evidence of both sides in view of substantial questions of law raised before this Court. The reasons are properly given and Order XLI Rule 31 of the Code of Civil Procedure (for short the "CPC") is sufficiently complied with. The reasons and findings of the learned trial Court as well as first appellate Court are

legal and correct. He lastly prayed to dismiss the appeal. He is relying upon the following precedential law :

(i) ***C. Doddanarayana Reddy (Dead) By Legal Representatives & Ors., Vs. C. Jayarama Reddy (Dead) By Legal Representatives & Ors.,*** reported in ***(2020) 4 SCC 659***, para 29 reads as under :

“29. The learned High Court has not satisfied the tests laid down in the aforesaid judgments. Both the courts, the trial court and the learned First Appellate Court, have examined the school leaving certificate and returned a finding that the date of birth does not stand proved from such certificate. May be the High Court could have taken a different view acting as a trial court but once, two courts have returned a finding which is not based upon any misreading of material documents, nor is recorded against any provision of law, and neither can it be said that any judge acting judicially and reasonably could not have reached such a finding, then, the High Court cannot be said to have erred. Resultantly, no substantial question of law arose for consideration before the High Court.”

(ii) ***G. Amalorpavam & Ors., Vs. R.C. Diocese of Madurai & Ors.,*** reported in ***(2006) 3 SCC 224***, in para 12 reads as under :

“12. It has been categorically recorded by the High Court that the First appellate Court had considered the evidence led on behalf of the parties and has given findings to come to the conclusions arrived at. It noted that the lower appellate Court had independently considered the evidence and had

given different findings on the issues framed by the trial Court and on the basis of the arguments which were advanced before it. It was further noted that there was detailed discussion giving reasons for affirming the order of the trial Court. Learned counsel for the appellants had urged that the suit filed by the plaintiff was not maintainable as the plaintiff was the diocese represented by its procurator. It was submitted that the plaintiff is not entitled to any relief as was prayed for in the suit. This point was not urged before the High Court and, therefore, it would not consider necessary to go into that aspect. Judged in the background of legal principles set out above, the judgment of the High Court does not suffer from any infirmity.”

9. The learned Advocate for the respondents pointed out that there is typographical mistake while forming point No.1 by the first appellate Court in which instead of “appellant” the word “respondent No.2” would have been typed. He submitted that it is not fault of the party No.1 but that of the appellate Court. He submitted to dismiss the appeal.

10. Perused the record and proceedings and the impugned judgment and the judgment of the trial Court.

11. This Court in second appeal cannot decide issue of facts of the case as last fact finding Court is first appellate Court. Except the exception laid down by the Hon’ble Supreme Court in

Suresh Lataruji Ramteke Vs. Sau. Sumanbai Pandurang Petkar & Ors.

reported on **2023 SCC OnLine 1210**, the Hon'ble Supreme Court observed as under :

“28.2 In ordinary course, the High Court in such jurisdiction does not interfere with finding of fact, however, if it does find any compelling reason to do so as regard in law, it can do but only after perusing the records of the Trial Court, on analysis of which the conclusion arrived at by such a Court is sought to be upturned. In other words, when overturning findings of fact, the Court will be required to call for the records of the Trial Court or if placed on record, peruse the same and only then question the veracity of the conclusions drawn by the Court below.”

12. This Court during the argument of the learned Advocate for the party No.1 was questioned as to how the Exhibit-77 i.e. notice/letter issued by Advocate A. P Dahale to his client party No.3 is admissible in evidence in view of Section 126 read with Section 136 of the Indian Evidence Act, 1872, (for short the “Evidence Act”). The Section 126 of the Evidence Act reads as under :

“126. Professional communications. — *No barrister, attorney, pleader or vakil, shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice*

given by him to his client in the course and for the purpose of such employment:

Provided that nothing in this section shall protect from disclosure —

(1) any such communication made in furtherance of any [illegal] purpose,

(2) any fact observed by any barrister, pleader, attorney or vakil, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment.

It is immaterial whether the attention of such barrister, [pleader], attorney or vakil was or was not directed to such fact by or on behalf of his client.

Explanation. — The obligation stated in this section continues after the employment has ceased”

13. The Exhibit-77 is the letter/notice sent by Advocate A. P. Dahale to the party No.3 is not admissible in the evidence as per Section 126 of the Evidence Act as the Advocate of the party No.3 cannot disclose such communication unless express i.e. written consent of his client party No.3 is obtained. No such written consent is filed on record. Both the Courts relied upon the notice/letter (Exhibit-77) by observing that, “It is necessary to note that documents at Exhibit Nos. 64, 65, 76 and 77 were shown to the witnesses and duly proved and therefore, those were exhibited. A letter/notice Exhibit-77 is letter in respect of succession certificate. In which there is reference of agreement to sell dated 29/06/1998 vide Exhibit-76. However, how the Party No.1 received that document is

not clarified by him. It did not come from proper/legal custody in the custody of party No.1. The Advocate Mr. A. P. Dahale, who had allegedly issued letter/notice Exhibit-77 was present before the Court at the time when PW-1 and PW-2 were cross examined. Noting that Advocate A. P. Dahale was present in the Court. Exhibit-77 was illegally exhibited which is not admissible in evidence as per Section 126 of the Evidence Act. The learned trial Court erred and relied upon a letter/notice Exhibit-77, which is not admissible in evidence. It is illegal evidence.

14. The learned trial Court as well as first appellate Court relied upon Exhibit-77, which is not admissible in evidence, which appears that it is fabricated document. It is because no such advise was called and expected from the Advocate A. P. Dahale, who was representing party No.3 Champat only for getting succession certificate, who is practicing in the Yavatmal District Court. Therefore, the reasons and findings of the learned trial Court in respect of the claim of party No.1 that agreement to sell was executed with him by the party No.3 Champat are not legal and correct. This is basic illegality in the judgment of the learned trial Court as well as learned first appellate Court.

15. The agreement to sell of the party No.2 at Exhibit-60 is admitted by party No.3. As per Section 58 of the Evidence Act, admitted fact need not be proved. The admission dispenses with the proof of contents of the Exhibit-60 as well as its due and valid execution and receiving of payment of entire consideration. The party No.1 allegedly got executed contract of sale at Exhibit-76 on 29.06.1998. However, earlier to that an agreement to sell was executed between the party No.2 and party No.3 on 04.10.1997 at Exhibit-60, which is admitted by party No.3, its execution and its existence is not disproved by the party No.1 that it is false and fabricated. But, for that he has relied upon Exhibit-77, which is inadmissible in evidence. The trial Court failed to consider the Sections 126 and 136 of the Evidence Act, which speaks about the restriction on the communication between Advocate and his client as well as admissibility of Exhibit-77.

16. The learned trial Court as well as learned first appellate Court failed to consider that agreement to sell Exhibit-60 dated 04.10.1997 is prior in time. They would not have held that it was false and fabricated document. On the contrary, except notice/letter Exhibit-77, which is inadmissible in evidence, there is no any other reliable evidence to believe the evidence of party No.1.

17. The learned trial Court as well as first appellate Court failed to appreciate the evidence on record in its proper perspective and come to the wrong conclusion on the basis of illegal document Exhibit-77. It erred in holding that the appellant/party No.2 has failed to prove contract of sale Exhibit-60.

18. The point No.1 in the judgment of the learned first appellate Court reads as under :

(1) Whether appellant proves that present appeal is not tenable as independent appeal is not preferred by Party No.3?

19. There is typographical mistake, instead of “appellant” the word “respondent No.2” should have been typed. The part of the argument of learned for the respondents is acceptable.

20. Other relevant points were not formed by the first appellate Court in the impugned judgment. The findings and reasons in para No.25 of the judgment of first appellate Court are that “Therefore, there is sufficient ground to believe that to defeat the claim of Party No.1; Party No.2 and party No.3 might have joined hands with each other.” The word “might” used by the first appellate Court shows that the said conclusion and findings are not certain and concluding as to the fabrication of the alleged contract of sale

Exhibit-60 between the party No.2 and 3. Thus, said finding is perverse and illegal. It is not sustainable in the eyes of law.

21. It cannot be ignored that Advocate A. P. Dahale was duty bound as per Section 126 of the Evidence Act and the Advocate Act, 1961 to not to disclose the communication between him and party No.3 his client Champat, unless his express/written consent is obtained. He was representing for him in the proceeding for succession/heir-ship certificate. His opinion about transaction of sale as to the suit property was not demanded and expected by his client party No.3. He handed over the copy of notice/letter Exhibit-77 to the party No.1 illegally, which is professional misconduct. It is very shocking and interference in the administration of justice. To hand over that notice/letter Exhibit-77 to the party No.1 without express consent of party No.3 was the root cause for causing injustice to the party No.2. Therefore, it is necessary to communicate the said fact of his conduct to the Bar Council of Maharashtra and Goa for taking necessary disciplinary action for said professional misconduct against the Advocate A. P. Dahale of District Yavatmal.

22. It is held that first appellate Court did not form all points of facts which were dealt with by the trial Court as contemplated by

Order XLI Rule 31 of the CPC. Hence the substantial question of law No.1 is answered in the affirmative.

23. Both the Courts erred and committed gross error regarding the contract of sale Exhibit-60 and a notice/letter Exhibit-77 and failed to apply and consider Section 126 and 136 of the Evidence Act to it. Therefore, substantial question of law No.2 is answered in the affirmative in view of the judgment of ***Suresh Lataruji Ramteke*** cited *supra*.

24. In view of above reasons and findings, the impugned judgment of the learned first appellate Court as well as learned trial Court are perverse and illegal. Therefore, interference is warranted in it. Both the judgments deserve to be set aside and this appeal deserves to be allowed. The suit bearing R.C.S. No.59/2012 deserves to be decreed and R.C.S. No. 60/2012 deserves to be dismissed. For the reasons stated above, the case laws cited *supra* on behalf of party No.1 is not useful, therefore those are not relied upon. The argument of the learned Advocate for the respondents is not acceptable in this regard.

25. The appellants is compelled to file this appeal. He must have incurred some amount for it. Therefore, it would be proper to direct the party No.1 to pay **Rs.10,000/-** (Rs. Ten thousand only) as costs of this appeal to the appellant. The appeal deserves to be allowed. Hence the following order :

- (i) The appeal is **allowed**.
- (ii) The judgment and decree passed by learned trial Court in both the suits and first appellate Court in Regular Civil Appeal No.2 of 2015 on 12.04.2022 are quashed and set aside.
- (iii) The Regular Civil Suit No.60 of 2012 filed by party No.1 is dismissed and Regular Civil Suit No.59 of 2012 filed by party No.2 is decreed as under :
 - (a) The respondent Nos.1-A to 1-D party No.3 – legal representatives of Late Champat are directed to execute the sale-deed of the suit property bearing Block No.20, area 4.36 HR. land situated at village Dhanora, Tahsil and District Yavatmal in favour of the appellant i.e. plaintiff in Regular Civil Suit No.59, within six months. If it is not executed, the appellant is at liberty to get it

executed through the Court and recover its expenses from respondent Nos.1-A to 1-D.

- (iv) The copy of this judgment be sent to the Bar Council of Maharashtra and Goa for taking disciplinary action against the Advocate A. P. Dahale, Yavatmal for professional misconduct as per Advocate Act, 1961 as held in para No. 21 of this judgment.
- (v) The record and proceedings be sent back.
- (vi) The party No.1 shall pay costs of **Rs.10,000/-** (Rs. Ten thousand only) to the appellant within six months from today. If the said costs is not paid or deposited in the trial Court or executing Court within six months, the respondent Nos.2 to 4 to pay 9% interest thereon from the date of this judgment.

26. The appeal is **disposed of**.

(SANJAY A. DESHMUKH, J.)