



IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 140 OF 1994

Kusumbai w/o Shripatrao Kadam
died through LR's.

1. Shripatrao s/o Limbajirao Kadam
died through LR's.
- 1A. Vilas s/o Shripatrao Kadam
age 38 years, occ. Nil
(unsound mind since childhood)
u/g of Sow Mangal w/o Sundarrao More
age 39 years, occ. Household
r/o Beed, Tq. & Dist. Beed.
- 1B. Sow. Alka w/o Bapurao Choure
age 32 years, occ. Household
r/o Solapur, Tq. & Dist. Solapur
- 1C. Sow. Mangal w/o Sundarrao More
age 39 years, occ. Household
r/o Beed. Tq. & Dist. Beed.
2. Vilas s/o Shripatrao Kadam
age 36 years, occ. Nil
(unsound mind since childhood)
3. Alka d/o Shripatrao Kadam
age 21 years.
4. Kumari Mangal d/o Shripatrao Kadam
age 30 years, occ. Household
r/o Beed.

No.2 u/g of Shripatrao s/o Limbajirao
Kadam, r/o Beed.

.. Appellants

versus

Sahebrao s/o Dhondiba Gholap
age 55 years, occ. Agriculture
r/o Talwat Borgaon, Tq. Georai
Dist. Beed.

.. Respondent

Mr. V. R. Dhorde, Advocate for the Appellants.
Mr. S. D. Jaybhar, Advocate holding for Mr. D. R. Jaybhar, Advocate
for Respondent.

CORAM : R. M. JOSHI, J.

DATE : 14th JANUARY, 2025.

JUDGMENT :

1. This appeal under Section 100 of Code of Civil Procedure takes exception to the judgment and decree dated 25.11.1993 passed by the First Appellate court in Regular Civil Appeal No. 128/1983 dismissing the suit and thereby reversing the judgment and decree passed by the Trial Court in Regular Civil Suit No. 106/1974.

2. Parties are referred to as Plaintiff and Defendants for the sake of convenience.

3. In order to appreciate the submissions of rival parties, it is necessary to take note of the facts of the case in brief as under :

Plaintiff claims herself to be the proprietor of Champavati Adat Shop and Champavati Oil Mill at Beed. Suit is filed against Defendant Nos. 1 and 2. Defendant No. 2 is said to be working as a

Manager in Marketing Society's Adat Shop run by Beed District Cooperative Marketing society. It is alleged that Defendant No. 1 has received the amount from Plaintiff for its further payment to Beed District Cooperative Marketing Society Limited and since the said payment was not made, it was recovered by the said society from the Plaintiff. It is claimed by Plaintiff before the Trial Court that on 30.06.1971, Defendant No. 1 went to the Adat shop of Plaintiff and made demand of Rs. 4,738.70/- of society's Adat shop. Plaintiff directed Defendant No. 2 to make payment of the said amount to Defendant No. 1. A voucher (Exhibit 70) was obtained from Defendant No. 1 in that regard. Instead of paying the said amount to the account of the society, Defendant No. 1 used the said amount personally. A proceeding under Section 91 of the Maharashtra Cooperative Societies Act came to be initiated against Plaintiff by the society for recovery of the said amount. It was thus noticed by Plaintiff that the amount has not been paid to the society by Defendant No. 2. Hence, the suit came to be filed for recovery of the said amount.

3. Defendant No. 1 resisted the suit by filing written statement denying the allegations made by Plaintiff. It is admitted

that he was working in the Adat shop. He denied to have approached Defendant No. 2 and made any demand on 30.06.1971. According to him, he had signed the voucher (Exhibit 70) on 17.08.1971, the day on which the said amount was paid settling his private account. It is claimed that Plaintiff in collusion with Defendant No. 2, who is employee of Plaintiff, has falsely taken entries in the said voucher (Exhibit 70).

4. Defendant No. 2 accepted that he was serving with Plaintiff and for want of knowledge denied that Plaintiff was to pay any amount to society's Adat shop. He also denied that he was directed to make any payment of Defendant No. 1. Further, contentions about Defendant No. 1 approaching him, demanding money and payment thereof etc. are denied by this Defendant too.

5. Learned Trial Court framed issues. Plaintiff examined Shripatrao (husband of Plaintiff) and also led evidence of Vaijinath Shete. She relied upon extract of account book and voucher (Exhibit 70). Defendant No. 1 led his oral evidence.

6. Learned Trial Court decreed the suit partly against Defendant No. 1 directing him to pay sum of Rs. 4,378.70/- with interest at the rate of 4% per annum from the date of the suit till realisation of the amount. Decree was refused against Defendant No. 2. Defendant No. 1, being aggrieved by the said decree, preferred Regular Civil Appeal No. 128/1983. Learned First Appellate Court allowed the appeal and dismissed the suit. Hence, this appeal.

7. Learned counsel for Plaintiff submits that the First Appellate Court has committed error in reversing the findings of fact recorded by the Trial Court. It is his submission that the findings of the First Appellate Court are not in consonance with the evidence on record and as such they deserve interference. He drew attention of the Court to the evidence led before the Trial Court in order to contend that Defendant No. 1 has not disputed that he received amount of Rs. 4,378.70/- and at the same time has admitted that the said amount was due and payable to the society's Adat shop. It is his submission that even in the written statement, there is a candid admission in this regard. Thus, he claims that Plaintiff has discharged the burden to prove his case and the onus stood shifted upon the Defendant to prove contrary.

8. Learned counsel for Defendant supported the impugned judgment and order by contending that there is documentary evidence to indicate that on 17.08.1971, the suit amount was paid by Plaintiff to Defendant No. 1. It is his submission that the case of the Plaintiff about the said amount being paid on 30.06.1971 through Defendant No. 1 is not proved in view of the fact that Defendant No. 2 has denied to have paid any amount on that day to Defendant No. 1 and documents i.e. account books relied upon also do not support Plaintiff's case. It is his submission that unless Plaintiff discharges burden to substantiate his case, the onus does not shift on Defendant and evidence led by Defendant would not help Plaintiff in any manner.

9. This Court, while admitting the appeal, had framed following substantial questions of law (Ground Nos.6 to 8 of memo of appeal) :-

- (i) Whether the appellate court has erroneously held that in absence of any pleadings in the written statement that he had signed on 17.08.1971 towards his personal amount he was entitled to lead any evidence ?

(ii) Whether the appellate court has misread and misconstrued the documentary evidence, namely, the entries in the ledger book produced by the appellants-original plaintiff ?

(iii) Whether it was the duty of the respondent-original defendant No. 1 to prove that the said amount was towards the goods supplied by him and not the amount payable towards dues of the appellant to the said marketing society ?

10. In view of the pleadings of the parties, initial burden was on the Plaintiff to prove that the amount involved in the suit was paid to the society through Defendant No. 1. In this regard, documentary evidence on record does not indicate any entry in the ledger showing any amount due to the society. It has further come in the evidence of Plaintiff's witness that he was not present at the time of execution of Exhibit 70 i.e. receipt. Section 101 of Evidence Act requires a person who desires the Court to give judgment as to his rights on the existence of the fact must prove that those facts exist. Similarly, according to Section 102, the burden of proof in a suit lies on that person who would fail if no evidence were given at all on either side. Thus, the burden to prove the case is cast upon Plaintiff and only when he gives the evidence to support a prima facie case, onus shifts

upon Defendant to adduce evidence in rebuttal to meet case of Plaintiff.

11. Once the Plaintiff was not present at time of payment and as there is specific denial of Defendant No. 2 about any amount being paid to Defendant No. 1 on 30.06.1971, there has to be substantial evidence led by the Plaintiff to prove her contention. Evidence of witness examined by Plaintiff is of her husband who has no personal knowledge and the other witness was not party to the document i.e. voucher (Exhibit 70).

12. It is sought to be argued on behalf of the Plaintiff that in the written statement as well as in the evidence of Defendant No. 1, it has come on record that certain amount was due and payable to society's Adat shop by Plaintiff. Perusal of the written statement as well as evidence of Defendant No. 1 does not show that there was any candid admission on his part that amount of Rs. 7,378.40/- was due and payable to the society's Adat shop. In this regard, it is pertinent to note that there is documentary evidence placed on record by Plaintiff in the form of ledger. However, this document does not show any amount payable to the society's Adat shop. As against

this, if the amount was not payable to Defendant No. 1, question of taking entry to that effect in individual name of Defendant No. 1 in the books of accounts would not arise. Plaintiff's husband admits that 'Bichayat Khata' means the account belonging to the person who brought the produce to Adat shop for sale and purchase. Name of Defendant No. 1 is shown in 'Bichayat Khata'. Pertinently, since there was no admission of Defendant No. 1 in this regard, no decree was passed on admission by the Trial Court. As such, the statement of receipt of amount and some other amount due to society's Adat shop, would not lead to decreeing the suit.

13. Judgment and decree passed by the Appellate Court is also sought to be assailed on the ground that in the written statement, there is no specific pleading taken by Defendant with regard to the nature of transaction against which the amount is paid by the Plaintiff. In such circumstances, it is claimed that the evidence led by Plaintiff with regard to supply of agricultural produce to Plaintiff cannot be accepted.

14. First of all, unless Plaintiff discharges the initial burden on her to prove her case, the onus does not shift upon the Defendant.

Moreover, this is not a case wherein Defendant No. 1 has not claimed that the amount was payable to him in his personal capacity. He did state so in the written statement. In such circumstances, evidence of Defendant No. 1 about he being an agriculturist and supplying agricultural products to Plaintiff even previously has not been disputed. In fact, it has come in the cross examination of Defendant No. 1 that he owns 40 to 45 acres land. Usually he used to sell the agricultural produce to marketing Adat shop. In the year 1971, i.e. prior to 17.08.1971, twice he sold groundnuts to Plaintiff. These suggestions made in cross examination are more than sufficient to substantiate case of Defendant No. 1.

15. Learned First Appellate Court has rightly considered the pleadings of the parties and evidence led before it. For want of any perversity therein, the appeal must fail. Substantial questions of law, therefore, are answered in negative. Accordingly, appeal stands dismissed.

(R. M. JOSHI)
Judge