



IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
BENCH AT AURANGABAD

APPEAL FROM ORDER NO. 40 OF 2021  
WITH  
CIVIL APPLICATION NO. 2529 OF 2023  
IN  
AO/40/2021

Deelipkumar Sagarmal Saboo  
Age 60 years, Occ. Business,  
R/o. Builder Housing Society,  
Nandavan Colony, Aurangabad.

... Appellant  
(Orig. Defendant)

VERSUS

Ramavtar Sagarmal Saboo,  
Age 54 years, Occ. Business,  
R/o. 436, Sita Sagar, Darzi Bazar,  
Chavni, Aurangabad.

... Respondent  
(Orig. Plaintiff)

...

Advocate for Appellants : Mr. Anil S. Bajaj  
Advocate for Respondent : Mr. Anand P. Bhandari

CORAM : SHAILESH P. BRAHME, J.

RESERVED ON : 25.09.2025

PRONOUNCED ON : 04.10.2025

**JUDGMENT :**

Heard finally with the consent of the parties.

2. Appeal was admitted vide order dated 17.02.2023 on following substantial question of law :

(i) Whether there was any cause of action to seek partition of the suit property when admittedly the registered gift deed executed in favour of defendant is not challenged ?

3. Appellant is the original defendant, who is aggrieved by judgment and decree dated 04.03.2021 passed by the lower appellate Court in Regular Civil Appeal No. 59/2020, reversing order of rejection of plaint passed by the Trial Court below Exh. 16 and remanding the matter before Trial Court for decision on merits.

4. Appellant and the respondent are real brothers. They jointly purchased a house property bearing CTS No. 5254 situated at Tilak Peth Aurangabad vide sale-deed dated 10.06.2008. The appellant wanted to take financial assistance on the basis of the suit property, which was standing in the joint name. He requested the respondent to transfer the suit property in his name nominally. Considering the relationship, a conveyance deed was executed on 02.12.2014 transferring the suit property to the appellant. It was a registered instrument. Thereafter a correction deed was executed on 05.08.2015. On or about 10.11.2017, a memorandum of understanding was executed between the parties, whereby the appellant assured to re-transfer the suit property to the respondent. The appellant had unholy intention to grab the suit property. It was discovered that no loan was taken, and fraudulently the registered instrument got executed from the respondent. Appellant is said to have avoided to re-transfer the property. The document executed on 02.12.2014 revealed to be a gift-deed. The title and ownership of the respondent was denied on 28.03.2019. Respondent was constrained to file Spl. Civil Suit No. 109/2019 for the relief of partition, possession and injunction.

5. It is the defence of the appellant that the gift deed was executed by the respondent in favour of the appellant on 02.12.2014 consciously and it was registered also. Thereafter, registered correction deed was executed on 05.08.2015 to rectify the area shown in the earlier instrument. The appellant never wanted to raise loan on the basis of the suit property. The transfer of the property was with the understanding and knowledge of the respondent. The memorandum is denied by the appellant. It is further

contended that suit is barred by limitation. There is no cause of action and such a suit without seeking declaration in respect of the gift deed is not maintainable.

6. Appellant filed application Exh. 16 under 7 Rule 11 (a) and (d) of CPC. Respondent opposed the application by filing his say. Trial Court allowed the application vide order 24.02.2020 and rejected the claim on the basis of Order 7 Rule 11 (a). However, Trial Court, did not find favour with the appellant for rejection of plaint under Order 7 Rule 11 (d) so far plea of limitation is concerned. Being aggrieved respondent preferred Regular Civil Appeal No. 59/2020, which is allowed partly and order of rejection of plaint was quashed and set aside. The matter is relegated to Trial Court for deciding it on merits, in accordance with law, vide judgment and decree dated 04.03.2021, which is impugned in the present appeal.

7. Learned counsel for appellant Mr. Bajaj submits that the lower Appellate Court has committed perversity in allowing the appeal, when respondent was aware of the gift deed executed on 02.12.2024, which has not been challenged in the suit and bypassing the remedy only relief of partition and possession is sought for. It is submitted that in the absence of any preexisting right no relief of partition can be granted and the suit is not tenable. The suit property ceased to be of the joint ownership and therefore unless gift deed is quashed and set aside, no relief can be given to the respondent/plaintiff. It is submitted that there is no cause of action and a vexatious suit has been filed, which is clear from meaningful reading of the plaint. The clever drafting has created an illusion of a cause of action which needs to be nipped in the bud. It is further submitted that the gift deed is executed on 02.12.2024 and the suit is filed on 04.04.2019 which is barred by time.

8. Learned counsel Mr. Anil Bajaj would further submit that the ground of parity pressed into service by the respondent by way of his affidavit in

reply relying on the decision rendered by coordinate bench in Civil Revision Application No. 45/2020 cannot be made applicable. It is submitted that the order passed in parallel proceeding i.e. Special Civil Suit No. 109/2019 was already considered while admitting appeal vide order dated 17.02.2023. No ratio as such has been laid down in the said matter. The appellant is said to have been entitled to claim rejection of the plaint independently because of the change in circumstances.

9. Per contra, learned counsel Mr. Bhandari for the respondent vehemently submits that in identical set of facts R.C.S. No. 108/2019 was filed. The appellant/defendant therein had filed an application for rejection of plaint, which was rejected by a reasoned order. The same was confirmed by the Apex Court. In the teeth of that order present appeal is liable to be dismissed. It is submitted that the gift deed in question is void and it is not necessary to challenge the same in the present suit. It is further submitted that memorandum of understanding executed on 10.11.2017 affirms the fact that the gift deed executed by the respondent was nominal in nature and no relief as against it is required to be solicited. It is further submitted that the lower appellate court has taken a plausible and reasonable view by meaningful reading of the plaint. A full fledged trial is required to conclude as to whether suit is tenable or it is barred by limitation or not. It is further submitted that present suit is not for partition of a joint family properties or ancestral properties.

10. I have considered the rival submissions of the parties.

11. The suit property was purchased by the parties jointly on 10.06.2008. In the strict sense this is not a joint family property of Hindu undivided family or ancestral property. Its a property of co-ownership. Due to some negotiations between the parties registered a gift deed was executed by the respondent on 02.12.2014 in favour of the appellant. By a registered correction deed dated 05.08.2015 the area of the subject matter was

corrected. The respondent wanted the appellant to re-transfer it. By intervention of the elder brother and well wishers a memorandum of understanding was executed on 10.11.2017. In this backdrop, a suit for partition, possession and injunction was filed without there being any challenge to the gift dated 02.12.2014.

12. Both the counsels cited authorities on the scope of enquiry under Order VII Rule 11 of CPC. There is no quarrel for the propositions that if no cause of action is made out and/or the suit is found to be barred by law, it is permissible to reject the plaint. If the plaint is found to be vexatious, having no cause of action or by clever drafting the cause action appears to have been created, that would be a ground to reject the plaint. The purport of this drastic provision is to save valuable time of the Court and the parties from the vexatious proceedings. The plaint and the documents filed along with it can be taken into account. There is no difficulty in taking into consideration the gift deed, memorandum of understanding, order passed by learned Single Judge in Civil Revision Application No. 45/2020 and order of Supreme Court dismissing the Special Leave Petition.

13. It reveals from record that Trial Court found that there was no cause of action. The submissions of the respondent that there was no need to seek declaration challenging gift deed was not approved and plaint was held liable to be rejected. However, the rejection of plaint on the ground of limitation was not accepted. In lower appellate Court no-cross objection/cross appeal was filed by the appellant challenging the finding of the Trial Court on the plea of limitation. The Lower Appellate Court did not appreciate the entitlement of the appellant to challenge finding on the limitation. Order XLI Rule 22 of CPC empowers the appellate Court to entertain challenge to findings without filing cross-objection or cross-appeal. A useful reference can be made to **Saurav Jain Vs. M/s. A.B.P.; A.I.R. 2021 Supreme Court 3673.**

14. I have carefully gone through the plaint. It was posed by the respondent that initially the respondent was not aware about the nature of the transaction between the parties. It is specifically averred in paragraph no. 3 that it was understanding between the parties to transfer the suit property nominally. It was represented to the respondent that to raise a bank loan the subject matter was required to be transferred to the appellant. Paragraph no. 4 of the plaint categorically discloses that the respondent only signed the document without understanding the nomenclature of the document blindly relying upon the appellant. Thereafter, it is further stated that the respondent was doubting the conduct and intention of the appellant. His foul play was disclosed and it was felt that the respondent was being defrauded. There was a meeting of the well wishers and the elder brother and the memorandum of understanding came to be executed. Its paragraph no. 5 further discloses that the respondent learnt the mischief of the appellant when no loan was found to have been incurred by him. It is averred that after 2018 appellant started avoiding to re-transfer the property. It is stated in paragraph no. 6 that on or about 28.3.2019 the ownership of the respondent was questioned, which prompted the respondent to file suit for partition and possession.

15. The meaningful reading of the plaint discloses that there was a cause of action. It is arguable that an educated person is executing a document which is being registered also and claiming ignorance of nature of transfer cannot be fathomed. However, it is not permissible to arrive at any conclusion at this juncture of the proceedings. The case of the respondent that appellant was his elder brother. He was being misrepresented and later on he was being assured to re-transfer the property, cannot be ruled out at this stage. Therefore, merely, on two occasions the registered instruments were executed cannot dislodge the probable theory of the respondent plaintiff. It has been categorically averred in the plaint that there was a foul play on the part of the appellant, a fraud was practised and the property was

got transferred by the respondent. It would require objective scrutiny. The respondent will have to discharge burden to make out a case of misrepresentation and fraud, but at this juncture, it cannot be said that there is absolutely no cause of action.

16. It is pertinent to note that respondent has set up a theory of fraud and *mala fides*. These peculiar pleadings if proved during the course of trial would vitiate the transaction between the parties and the instrument dated 02.12.2014. The transaction needs to be examined in the wake of Section 121 of Transfer of Property Act. The claim is that it is *void ab initio*. Therefore, I find substance in the submission of learned counsel Mr. Bhandari that respondent is not required to solicit relief of declaration in respect of gift deed. This Court is not expressing any opinion on the merit of the matter. However, the finding recorded by the lower appellate Court that objective scrutiny is required to come to any conclusion cannot be faulted.

17. I find that paragraph nos. 4 to 6 of the plaint would adequately make out cause of action for filing suit. The respondent may or may not succeed in the suit and ultimately his suit may be found to be not tenable for want of relief of declaration but that cannot be a parameter to reject the plaint. The arguable and attractive submissions for maintainability of suit would not come within sweep of Order VII Rule 11(a) or (d) of CPC. No specific provision has been pointed out by the appellant to show that suit is statutorily barred or there is a prohibition to entertain the suit. I find that the parties will have to wait till the objective scrutiny is conducted in a full fledged trial.

18. Ground of limitation is also being pressed for rejection of the plaint. Plea of limitation is a mixed question of facts and law. Gift deed was executed on 02.12.2014 and suit is filed on 04.04.2019. The purport of the plaint is that by playing fraud the suit property was being transferred in favour of the appellant. Considering Article 59 of the Limitation Act, it

cannot be said that the limitation would commence immediately when gift deed was executed on 02.12.2014. Going by the plaint on the said date even the respondent was not aware that it was a gift deed. It was being executed by misrepresentation and later on a fraud is found to have been played by the appellant. Therefore, I am of the considered view that the plaint is not liable to be rejected under Order VII Rule 11(d) of CPC on plea of limitation.

19. My attention is adverted to memorandum of understanding dated 10.11.2017 produced on record. The averments in the document have significance to hold that the suit is within limitation and the theory of the respondent-plaintiff is probable. Considering the averments, there is a reason to infer that the exact nature of transfer of the suit property was not known and it was made to believe that brother was requiring the property to incur loan. When it was realized that a gift deed was being executed, by memorandum of understanding it was assured that the subject matter would be re-transferred. There is nothing wrong for the respondent in relying on the understanding, than to rush to the Court for filing the suit. In my considered view, the memorandum of understanding corroborates the respondent's theory that there was a cause of action and suit is within limitation.

20. Learned counsel for the appellant has relied on the judgment of **Dahiben Vs. Arvindbhai Kalyanji Bhanusali (Gajra) (D), Thr. Lrs. & Ors; 2020 SAR (Civ) 793**. The law laid down therein cannot be disputed. I have gone through paragraph No. 9, 12.1, 12.3, 14. The scope of order VII Rule 11 has been explained and it is a exposition on the concept of cause of action. I am bound by the law.

21. Further reliance is placed on the judgment of **Rajendra Bajoria and others Vs. Hemant Kumar Jalan and others; 2021 SCC OnLine SC 764**. I have considered paragraph nos. 17 to 20. The principles laid down therein cannot be disputed and this Court is bound to follow the principles.



However, facts of the present case are distinguishable. This judgment will not help the appellant because the case at hand discloses that its not a sham litigation and a full fledged trial is required.

22. Further reliance is placed by the appellant on the Judgment of **K. Akbar Ali Vs. K. Umar Khan and others; 2021 SCC OnLine SC 238**. The principles laid down in paragraph no. 5 are applied to the present case, the plaint cannot be rejected.

23. Further reliance is placed on the judgment of **Raghwendra Sharan Singh Vs. Ram Prasanna Singh (dead) by L.Rs.; (2020) 16 Supreme Court Cases 601**. My attention is adverted to paragraph no. 7 and 8. In that case the execution of the gift deed was not disputed by the plaintiff. The plaintiff contended that gift deed was an ostensible showy document and it was not binding. It was sought to be challenged in the suit after 22 years. The plaintiff and his brother, who were coowner did not challenge the gift-deed though they had opportunity to do so. In that context the suit was held to be barred by limitation. Such are not the facts in the present case. Therefore, no benefit of the judgment can be given to the appellant.

24. Further reliance is placed on the latest judgment of **Ramisetty Venkatanna and another Vs. Nasyam Jamal Saheb and others; 2023 (8) SCALE 29**. I have gone through paragraphs no.6 and 7 of the judgment. In that case by clever drafting of the plaint, relief in respect of partition executed in the year 1993 was bypassed and suit was filed in the year 2014 for declaration and cancellation of the sale-deeds. In that context, the suit was held to be vexatious and the cause of action was found to be illusory. The facts are distinguishable and this judgment also cannot enure to the benefit of the appellant.

25. The learned counsel for the respondent relied on the judgment of **G. Nagraj and another Vs. B.P Mruthunjayanna and others; in Civil Appeal No. 2737/2023, decided on 11.04.2023**, to bolster submission that inconsistent

averment in the plaint would not be a sufficient ground to hold that there does not exist cause of action. It is further laid down that its not a parameter as to whether the plaintiff will ultimately succeed or not in the suit. I prefer to follow the ratio in upholding the submissions made by the learned counsel for the respondent. Ultimately, it would be upon the objective scrutiny the trial court will decide as to whether the suit is maintainable or it is within limitation or not.

26. Both sides vehemently argued on the decision rendered in Civil Revision Application no. 45/2020. Regular Civil Suit No. No. 108/2019 was filed for possession by the respondent against the appellant. The plaint was also sought to be rejected on the ground of want of cause of action and suit is barred by law. The application was rejected by the Trial Court and Revisional Court confirmed the order. On the ground of parity learned counsel for the respondent has pressed into service the judgment dated 03.07.2021 passed by the learned Single Judge which is confirmed by the Apex Court. Dismissal of Special Leave Petition without assigning specific reasons would not amount to confirmation. I find substance in the submissions of the learned counsel for the appellant Mr. Bajaj that the decision cannot be said to be binding precedent. The latest judgments of the Supreme Court in the matters of **Rajendra Bajoria, K. Akbar Ali, G. Nagraj, Ramisetty Venkatanna (supra)** which are cited in the present matter were not available either before Trial Court or the Revisional Court. The law is more crystallized. Therefore, instead of blindly relying upon the judgment of the coordinate bench, I independently conducted scrutiny and examined as to whether the plaint is liable to be rejected or not. In the absence of the plaint and a relevant documents of Regular Civil Suit No. 108/2019, I proposed to examine merits of the present case independently.

27. For the foregoing reasons, I find that there is no perversity or illegality in the impugned judgment and decree. The substantial question of law has to be answered in affirmative.

28. I, therefore, pass following order.

**ORDER**

- (i) Appeal from Order is dismissed.
- (ii) Pending Civil Application is disposed of.

**( SHAILESH P. BRAHME, J.)**

mkd/-