

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***CIVIL APPELLATE JURISDICTION*****SECOND APPEAL NO.661 OF 2008****ALONGWITH****CIVIL APPLICATION NO.230 OF 2008****Hari Chandu Adhal****..... Appellant
(Orig.Plaintiff)****VERSUS****1. Smt.Leelabai Kashinath Bhattad & Ors. Respondents**

Mr.A.B.Tajane for the Appellant.

Mr.R.N.Gite for the Respondent no.4.

CORAM : R.D. DHANUKA, J.**DATE : 10th OCTOBER, 2016****P.C.**

By this appeal filed under section 100 of the Code of Civil Procedure, 1908, the appellant (original plaintiff) has impugned the judgment and decree dated 26th February, 2007 passed by the learned Ad-hoc Additional District Judge-1, Nashik dismissing the Civil Appeal No.122 of 2004 filed by the appellant. The appellant had impugned the judgment and decree passed by the learned trial judge on 20th January, 2004 dismissing the Special Civil Suit No.36 of 1999 filed by the appellant for a declaration and injunction and in the alternate for compensation. Some of the relevant facts for the purpose of deciding this second appeal are as under :-

2. The parties in this order are described as per their original status before the trial court.

3. It was the case of the plaintiffs that the land bearing Gat No.35, admeasuring 3 H and 23 R, inclusive of 5R bagait land and 3.5 paddy land, had been in

possession of the plaintiff since 1986 as an owner and was cultivating the said land with defendant no.6. The defendant nos. 2 to 5 are the owners of the suit property. It was the case of the plaintiff that defendant nos. 2 to 5 had intended to sell the suit property to the plaintiff and defendant no.6 and had accordingly executed a sale deed on 15th May, 1986 in favour of the plaintiff and defendant no.6 in presence of the witnesses. The plaintiff and defendant no.6 paid consideration to the defendant nos.2 to 5 under the said sale deed.

4. The defendant nos. 4 and 5 who were admittedly minors on the date of the execution of the said sale deed on 15th May, 1986 upon attaining the age of majority, filed a suit bearing RCS No.47 of 1991 in the Court of learned Civil Judge, Junior Division, Igatpuri for a declaration that the sale deed executed by their mother on 15th May, 1986 in favour of the plaintiff and defendant no.6 was not binding on them.

5. It was the case of the plaintiffs that when the writ of summons was served upon the plaintiff and defendant no.6 in the said suit (RCS No.47 of 1991), when they approached the defendant no.1, he asked the plaintiff and defendant no.6 not to worry about the said suit filed by the defendant nos. 4 and 5. It is the case of the plaintiff that relying on the said assurance of the defendant no.1, the plaintiff and defendant no.6 remained absent in the said suit (RCS No. 47 of 1991). On 29th June, 1994, the said suit proceeded ex-parte and came to be decreed in favour of the defendant nos. 4 and 5. The other defendants also remained absent. By the said judgment and decree dated 29th June, 1994, the learned trial judge declared that the sale deed in respect of the suit property dated 15th May, 1996 was declared as null and void and the said sale deed was not binding on the plaintiff and also on the plaintiff's share in the suit property. It was also declared that the plaintiffs were

entitled for 2/5th share in the suit property. The learned trial judge directed that precept be sent to the Collector for effecting partition of the suit land described in paragraph (1) of the plaint. The said decree passed by the learned trial judge in the RCS NO.47 of 1991 is not challenged by any of the defendants to the said suit including the plaintiffs and the defendant no.6 to this suit.

6. Sometime in the year 1999, the plaintiffs herein filed a suit (Special Suit No.36 of 1999) in the Court of Joint Judge, Senior Division, Nashik inter alia praying for a declaration and for injunction and in the alternative for compensation. The plaintiffs also prayed for setting aside the decree passed by the learned trial judge in RCS No.47 of 1991 on the ground of fraud.

7. The suit was resisted by the defendant nos. 1 to 5 by filing written statement. It was the case of the defendant nos. 4 and 5 that the plaintiff and defendant no.6 were aware that on the date of execution of the sale deed, defendant nos. 4 and 5 were minor and thus the sale deed was not binding on them to the extent of their share in the suit property. The defendant nos. 4 and 5 filed a separate execution petition (13 of 1998). The defendant no.6 remained absent. The suit proceeded against him ex-parte.

8. The learned trial judge framed six issues. The plaintiff examined himself and produced various documents. The defendant no.5 examined himself and also defendant no.1.

9. The learned trial judge after considering the oral and documentary evidence, held that the plaintiff had failed to prove that the defendant nos. 4 and 5 had obtained decree in RCS No.47 of 1991 by committing fraud. The learned trial judge also rejected the alternate relief of compensation prayed by the plaintiff. Being aggrieved by the said judgment and decree dated 20th January, 2004, the

plaintiff filed an appeal (Civil Appeal No.122 of 2004) in the District Court. The learned District Judge formulated five points for determination. After considering the documentary and oral evidence, the first appellate court held that the plaintiff had failed to prove that the defendant nos. 4 and 5 obtained a decree in RCS No.47 of 1991 by effecting fraud. It is also held that the plaintiff is not entitled to a declaration or compensation as prayed.

10. The first appellate court by a judgment and decree dated 26th February, 2007 dismissed the said Civil Appeal No.122 of 2004 filed by the plaintiff. Being aggrieved by the said judgment and decree, the plaintiff has preferred this second appeal under section 100 of the Code of Civil Procedure, 1908.

11. Mr.Tajane, learned counsel appearing for the plaintiff invited my attention to the copy of the sale deed dated 15th May, 1986 and would submit that in the said sale deed, the name of the defendant nos. 4 and 5 was specifically mentioned as vendors represented by their mother Smt.Lilabai Kashinath Bhatted. He submits that the said Smt.Lilabai Kashinath Bhatted was Karta of HUF and thus while executing the said sale deed in favour of the plaintiff and defendant no.6, the consent of the court or appointment of the guardian of the defendant nos. 4 and 5 was not necessitated. It is submitted by the learned counsel that the defendant no.1 had assured that in case of any claim in future, she would take care of such claim. The defendant no.1 even did not bother to appear in the suit filed by the defendant nos.4 and 5. He submits that it was a clear case of fraud upon the plaintiff committed by the defendant no. 1 and defendant nos. 4 and 5 in obtaining such decree in RCS No.47 of 1991.

12. In support of his submission that when a joint Hindu family property is sold by the Karta involving an undivided interest of the minor in the said joint Hindu

family property, section 8 of Hindu Minority and Guardianship Act, 1956 is not attracted and thus permission of court by a natural guardian of the property of the Hindu minor before he disposes of any of the property of the minor was not required, the learned counsel placed reliance on the judgment of this court in case of ***Sri Narayan Bal and others vs. Sridhar Sutar and others (1996) 8 SCC 54*** and in particular paragraph (5).

13. Learned counsel appearing for the plaintiff invited my attention to the points for determination framed by the first appellate court and the brief discussion on those points for determination in the impugned judgment and decree and would submit that the first appellate court did not discuss any oral or documentary evidence in the impugned judgment and decree as required under section 96 of the Code of Civil Procedure, 1908. He submits that since the first appellate court had failed in its duty to record its findings after dealing with all the issues of law as well as the facts and with the oral and documentary led by the parties, this court must interfere with such judgment and decree by exercising powers under section 100 of the Code of Civil Procedure. In support of this submission, learned counsel for the plaintiff placed reliance on paragraph (5) of the judgment of Supreme Court in case of ***Madhukar and others vs. Sangram and others (2001) 4 SCC 756***.

14. Mr. Gite, learned counsel for the respondents placed reliance on the findings of fact recorded by the two courts below and would submit that the findings of the two courts below are not perverse and cannot be interfered with by this court in this second appeal. He submits that several grounds raised across the bar by the learned counsel for the plaintiff have not been urged in the memo of appeal and the said objections were not even raised in the pleadings filed before the learned trial court as well as before the first appellate court.

REASONS AND CONCLUSIONS

15. A perusal of the sale deed dated 15th May, 1986 executed in favour of the plaintiff and defendant no.6 by the defendant no.1, defendant no.2 and defendant no.3 clearly indicates that in the said sale deed, the age of the respondent nos. 4 and 5 were mentioned as 15 years and 14 years respectively. The defendant no.1 had purported to have represented the defendant nos. 4 and 5 in the said sale deed. The plaintiff was thus fully aware that on the date of the execution of the said sale deed, the defendant nos. 4 and 5 were minor. In spite of these admitted facts to the knowledge of the plaintiff and defendant no.6, both these parties entered into a sale deed with the defendant nos. 1,2 and 3 based on the alleged assurances given by the defendant no.1 that in case of any claims made by anybody in future, the said claim would be resolved by her.

16. It is not in dispute that defendant nos. 4 and 5 upon attaining the age of majority, filed a suit (47 of 1991) inter alia praying for a declaration and possession in respect of their 2/5th share. There is no dispute that the writ of summons in the said suit were served upon all the defendants to the said suit. The plaintiff no.1 in this suit was defendant no.4 whereas defendant no.6 in this suit was defendant no.5 in the said suit. None of the defendants filed any written statement in the said suit including the plaintiff and defendant no.6 herein. The said suit proceeded ex-parte against all the defendants. The defendant nos. 4 and 5 herein who were the plaintiffs in the said suit led oral evidence. The learned trial judge passed a judgment and decree on 29th June, 1994 after considering oral and documentary evidence led by defendant nos.4 and 5 herein and decreed the said suit and declared that the sale deed in respect of the suit property dated 15th May,1986 was null and void and was not binding on the plaintiff thereto and to their shares in the suit property to the extent of 2/5th share. It is not in dispute that

none of the defendants including the plaintiff and defendant no.6 herein filed any appeal against the said judgment and decree. In my view the said judgment and decree dated 29th June, 1994 has thus attained finality.

17. Insofar as the suit filed by the plaintiff herein is concerned, the plaintiff applied for setting aside the said decree passed in RCS No.47 of 1991 on the ground that the defendant no.1 had though assured that no loss would be caused to the plaintiff in case of any claim in respect of the suit property in future, she colluded with the defendant nos. 4 and 5 and committed fraud upon the plaintiff and the court and obtained ex-parte decree.

18. A perusal of the judgment and decree dated 20th January, 2004 passed by the learned trial judge indicates that the learned trial judge has rendered a finding that though the plaintiff and defendant no.6 were served with writ of summons, they were negligent by remaining absent before the learned trial judge and by not filing written statement. The learned trial judge has rendered a finding that no fraud was practiced upon the plaintiff. The plaintiff failed to prove as to how the fraud was committed by the defendant nos. 1 to 3. The plaintiff was fully aware of the age of the defendant nos. 4 and 5 as 15 and 14 years respectively on the date of the execution of the sale deed. Upon attaining the age of majority within three years thereof, the defendant nos. 4 and 5 had challenged the execution of the sale deed. The learned trial judge has not set aside the entire sale deed but has declared that the same was not binding upon the defendant nos. 4 and 5 to their 2/5th share in the suit property.

19. In my view the learned trial judge after considering the documentary and oral evidence has rightly rendered a finding that the plaintiff had failed to prove

any fraud alleged to have been committed upon the plaintiff and the court by the defendant nos. 1 to 3. In my view the plaintiff having chosen to remain absent in RCS No. 47 of 1991 filed by the defendant nos. 4 and 5 inspite of the service of writ of summons and inspite of the opportunity granted by the learned trial judge, the plaintiff could not have alleged any fraud upon the other defendants to the said suit in obtaining ex-parte decree. It was for the plaintiff to protect his own interest and could not have depended upon the defendant no.1 based on her alleged assurance given to the plaintiff. The said decree passed by the learned trial judge in RCS No. 47 of 1991 was passed on merits after considering the oral and documentary evidence led by the defendant nos. 4 and 5 herein (original plaintiffs in the said suit) in that suit which decree has attained finality. In my view the allegations of fraud made by the plaintiff were totally frivolous and in any case were not substantiated before the learned trial judge.

20. Insofar as submission of the learned counsel for the plaintiff that the sale deed was executed by the defendant no.1 as Karta of HUF and thus permission of court by the natural guardian under section 12 of the Hindu Minority and Guardianship Act, 1956 was not required is concerned, a perusal of the sale deed does not indicate that the defendant no.1 had signed the said agreement as Karta on behalf of any HUF. The defendant nos. 2 and 3 who were admittedly adult on the date of execution of the said sale deed were signatories to the said sale deed. In my view the judgment of Supreme Court in case of **Sri Narayan Bal and others** (supra) therefore does not assist the case of the plaintiff.

21. A perusal of the pleadings filed by the plaintiff in the present proceedings and in the proceedings before the learned trial court as well as the first appellate court clearly indicates that no such issue was raised by the plaintiff. On the

contrary the plaintiff had contended before the learned trial judge that the suit land bearing Gat no.35 was originally owned by all the defendants and had accordingly entered into a sale deed in favour of the plaintiff and defendant no.6. The submission now made across the bar by the learned counsel for the plaintiff is contrary to the submissions made before the learned trial judge and is made in absence of any pleadings and/or grounds. The plaintiff ought to have defended the civil suit filed by the defendant nos. 4 and 5 on its own merits which he did not defend admittedly.

22. Insofar as submission of the learned counsel for the plaintiff that the first appellate court has failed in its duty to record its findings after dealing with all the issues of law as well as the facts and with the oral and documentary evidence led by the parties and has recorded very cryptic reasons in the impugned judgment and decree is concerned, a perusal of the judgment and decree passed by the first appellate court indicates that the first appellate court has formulated five points for determination. The first appellate court has dealt with the pleadings and submissions in paragraphs 2 to 6. In paragraphs 10 to 14 of the judgment and decree, the first appellate court has referred to various documentary evidence produced by the parties and has dealt with the oral/documentary evidence led by the parties. In paragraph 18 of the judgment and decree, the first appellate court has dealt with further submissions of the plaintiff.

23. In paragraph 22 of the judgment and decree, the first appellate court has formulated points for determination. In paragraphs 23 to 43, the first appellate court has recorded various reasons and have discussed the points for determination.

24. In paragraph 24 of the impugned judgment and decree, the first appellate court has recorded undisputed facts. It is held by the first appellate court that the plaintiff had received summons in RCS No. 47 of 1991. The first appellate court also considered the pleadings and affidavit filed by the plaintiff as a witness. It is held that the plaintiff had remained absent in the proceedings in RCS No. 47 of 1991 and also did not file any appeal against the judgment and decree in the said suit. It is held that since plaintiff has failed to substantiate the allegation of fraud, thus the learned trial court was justified in dismissing the suit.

25. Insofar as issue no.2 which was for declaration and issue no.3 which was for compensation are concerned, the first appellate court has held that since the issue no.1 was decided against the plaintiff, he was not entitled to be granted any declaration as sought. Insofar as issue regarding alleged entitlement of the plaintiff for compensation is concerned, the first appellate court has considered the point no.3 in paragraphs 37 to 41 of the impugned judgment and decree. The first appellate court has dealt with sections 21 and 23 of the Specific Relief Act and sections 73 and 74 of the Indian Contract Act which deal with relief of compensation. The first appellate court has rendered a finding that the case of the plaintiff does not fall under the ambit of the Indian Contract Act or the Specific Relief Act and thus not entitled to be awarded any compensation.

26. In my view since the plaintiff had failed to prove any fraud alleged to have been committed by the defendant nos. 1 to 3 upon the plaintiff or upon the court which findings are recorded not only by the learned trial judge but also by the first appellate court, the courts below rightly did not allow the claim for compensation and could not have granted any declaration/relief which was dependent upon the outcome on the first point. In my view there is thus no substance in the

submission of the learned counsel for the plaintiff that the first appellate court has failed to do its duty as described in section 96 of the Code of Civil Procedure, 1908. The first appellate court has rendered various reasons and has independently rendered findings on the question of fact and law on various points for determination after considering oral and documentary evidence led by the parties.

27. In my view there is no substance in the submission of the learned counsel for the plaintiff that the impugned judgment and decree passed by the first appellate court is not in compliance with the mandatory duty of the first appellate court under section 96 of the Code of Civil Procedure. There is no dispute about the proposition of law laid down by the Supreme Court in case of ***Madhukar and others*** (supra). The said judgment however does not assist the case of the plaintiff in view of the first appellate court having complied with the said provisions in the impugned judgment and decree.

28. In my view the findings of fact recorded by the two courts below being concurrent findings and being not perverse cannot be interfered with by this court under section 100 of the Code of Civil Procedure, 1908. No substantial question of law has arisen in this appeal. The appeal is devoid of merits. I, therefore, pass the following order :-

- (a) Second Appeal No.661 of 2008 is dismissed. No order as to costs.
- (b) In view of dismissal of the second appeal, Civil Application No.230 of 2008 does not survive and is accordingly dismissed.

(R.D.DHANUKA, J)