

IN THE HIGH COURT OF BOMBAY AT GOA**FIRST APPEAL NO. 31 OF 2019****ANIL ANAND NAIK****... Appellant****Versus****YERUKALASRIGOVIND AND 2 ORS.,****... Respondents**

Mr. S. D. Lotlikar, Senior Advocate with Adv. Ms. S. Keny for the Appellant.

Mr. Sudin Usgaonkar, Senior Advocate with Adv. Padgaonkar Kishan for Respondent no.1.

Coram: DAMA SESHADRI NAIDU, J.**Date: 30th January 2020.****Oral Order:**

The appellant is the plaintiff in Special Civil Suit No. 21/2017/A before the Civil Judge, Senior Division, at Ponda. He has filed the suit against the respondent, seeking the following reliefs:

(a) By a judgment and decree, the Deed of Sale dated 21st April, 2015, registered at serial no.920/2015, and registered under No.1197/2015, at pages 15 to 32, Book No."I", Volume No.2834, dated 26/6/2015, executed in favour of defendant no.1 be recalled and canceled.

(b) By a Judgment and Decree, the defendant No.1 herein, his developers, agents, servants, laborers or any person/s claiming through him be permanently restrained from developing aforesaid property into plots and/or selling the same to prospective purchasers, and/or from doing any construction work of whatsoever nature by cutting down fruit and non-fruit bearing trees thereon.

(c) By a Judgment and Decree, the defendant No.1 herein, his developer, agents, servants, laborers or any person/s claiming through him be permanently restrained either mutating suit property and/or creating third party right/interest over said proper.”

2. After entering their appearance, the respondents as defendants applied under Order 7 Rule 11 CPC for having the plaint rejected. Eventually on the merits, the trial Court accepted the defendants' contentions and rejected the plaint, through its order dated 11.06.2018. Assailing that order, the appellant has filed this First Appeal.

3. It seems the second and the third respondents are the appellant's relatives and proforma respondents.

4. The learned Senior Counsel for the appellant-plaintiff has submitted that the first respondent-defendant wanted the trial Court to reject the plaint for one reason, but the trial Court has rejected it for another reason, which was not in the first respondent's contemplation. He has submitted that the plaint clearly reveals the cause of action and the relief sought is eminently sustainable.

5. In response, the learned Senior Counsel for the first respondent-defendant has submitted that once the sale has been effected through a registered instrument in accordance with law, failure of consideration, if any, does not affect the conveyance. According to him, the vendor could sue the purchaser for a valuable consideration, but not for having the conveyance cancelled. As the second limb of his arguments, the learned

Senior Counsel has submitted that soon after the sale in the first defendant's favour, the plaintiff, along with his wife, has executed a registered Gift Deed in his father's favour. According to him, by the time he filed the suit, the plaintiff had no subsisting interest in the property because of the Gift Deed. And finally, the learned Senior Counsel has submitted that under Section 31 of the Specific Relief Act, cancellation could be sought only when the document either becomes void or voidable.

6. To elaborate, the learned Senior Counsel has submitted that the plaintiff has lost his locus to sue under Order 1 Rule 1 of CPC because he had no subsisting interest by that time. Besides, under Order 31 of the Specific Relief Act, the sale deed becomes neither void nor voidable for the alleged failure of consideration.

7. Heard Shri Lotlikar, the learned Senior Counsel for the Appellant, and Shri Usgaonkar, the learned counsel for the Respondent No.1.

8. Indeed, the first defendant applied under Order 7 Rule 11 of CPC, before he could place on record his defence. That said, the defendant's defence hardly matters for the Court to consider his application under Order 7 Rule 11 CPC. So we will confine our discussion to the plaint averments alone.

9. The plaint reads to the effect that in the Registration office once he completed the execution of the sale deed and its registration, the first defendant was expected to pay the sale consideration through cheques. But the defendant disappeared. According to the plaint averments, the first

defendant has played fraud. So the plaintiff wanted the trial Court to declare the sale deed as void. On the other hand, to sustain his plea under Order 7 Rule 11 CPC, the first defendant maintains that failure of sale consideration, if any, does not affect the conveyance.

10. Both the issues put in the perspective, the plaintiff pleads fraud and defendant pleads the unsustainability of the relief sought in the suit. Indeed, whether the first defendant has played fraud, whether there is any failure of consideration and, if so, what could be the proper remedy for the plaintiff are all matters for trial.

11. Subject-matter wise, a court may not have been empowered to grant a relief under any circumstance. Then, it is a matter inherent lack of jurisdiction. In that event, a suit seeking such a relief as cannot be given by the court falls within the sweep of Order 7, Rule 11 (d) CPC: “suit barred by any law.” On the other hand, a court has the power to grant the relief, but the case, on the merits, may not deserve that relief. Then, the suit remains unaffected by Order 7, Rule 11 (d) CPC.

12. Here, the trial Court has the inherent jurisdiction to grant the relief under Prayer Clause (a): to “recall and cancel” the sale deed, dated 21st April 2015. But whether the plaintiff has earned that relief is a matter for trial. By no stretch can the plaintiff be non-suited for the “perceived” lack of merit in the case.

13. About the plaintiff’s lacking the subsisting interest when he filed the suit, the first defendant has indulged in circular argument: You cannot

get the relief because I am the owner; you cannot question my title because your father is the owner. That said, the plaintiff has pleaded that once he realized that the first defendant had played fraud on him, he executed a Deed of Gift in his father's favour “by abundant caution”.

14. It is the first defendant's contention that if at all the Gift Deed were to be accepted as proper conveyance, the plaintiff has denuded himself of any right to the property. So, by the time he filed the suit, he had no subsisting interest in the property. I am afraid this contention too must fail. A Gift Deed does not result in conveyance the moment it is executed. First, the parties' intention matters; second, the gift must have been delivered, accepted and acted upon. These are all matters of evidence. Besides, the plaintiff getting himself divested of the title depends on the suit outcome, that is the declaration sought in the suit.

15. Perhaps, the plaintiff is more than willing to accept the defendant's reading of his plaint that he has been divested of the title, but that should be only because of the gift deed he executed in his father's favour. Then, it presupposes that the sale in the first defendant's favour is a nullity. The defendant cannot run with the hare and hunt with the hound. Even to oppose the plaint—that is to read and interpret the plaint—the same principles of approbation and reprobation apply.

16. Order 1, Rule 1 of CPC requires the plaintiff to have in him “any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transactions is alleged to exist.” This provision, in essence,

talks about the joinder of plaintiffs. As the denudation of title is a question of evidence, I see no scope for Order 1, Rule 1 of CPC in this application under Order 7, Rule 11 of CPC.

17. Therefore, I reject the second plea as well.

18. Finally, I may consider the impact of Section 31 of the Specific Relief Act on the suit maintainability. It is well established that any party can seek a declaration as to the validity of a transaction, including a conveyance. But only a party to a deed of conveyance need to ask for its cancellation. Indeed, Section 31 does not bar the third party from seeking the cancellation of the document. Nevertheless, the declaration suffices vis-à-vis the third party.

19. The legislative mandate under Section 31 of the Specific Relief Act is that “any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable; and the court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.”

20. To maintain the suit, the plaintiff has taken in the plaint sufficient pleas. But to sustain them, he needs to lead evidence and discharge his burden. Thus, I see Section 31 of the Specific Relief Act posing no hurdle.

21. Under Section 31 of the Specific Relief Act, here the appellant has executed a sale deed. He pleads that the first respondent as the purchaser played fraud on him and because of that alleged fraud, he wants the Court

to declare the sale deed null and void and cancel it. I, reckon, going by the pleadings in the plaint this relief is eminently sustainable. Before parting with the matter, I may as well note that a plaintiff, too, can take pleas in the alternative. And if those pleas irreconcilably conflict, he is put to election. He must pursue his suit on the grounds that do not conflict. Here, the plaintiff's sale deed is anterior to his gift to deed to his father. The validity of the latter depends on the former. The former may disprove the latter but not vice versa; if it were otherwise, it should be to the first defendant's peril.

22. Thus, on all grounds the first respondent fails.

So I hold that the trial Court has erred in rejecting the plaint. I accordingly allow the First Appeal. As a result, the suit stands restored.

DAMA SESHADRI NAIDU, J.

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