

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

**THE HON'BLE JUSTICE HARISH TANDON
&
THE HON'BLE JUSTICE KAUSIK CHANDA**

**S.A.T. 250 OF 2019
WITH
C.A.N. 2 OF 2020
C.A.N. 3 OF 2020**

Manik Lal Jaiswara and others.

Vs.

Smt. Monju Devi @ Manju Devi and another.

**Mr.Samiran Giri, Adv.
Mr.Abhijit Laik,Adv.
For the Appellants...**

**Mr.Subhasish Pachhal, Adv.
For the respondents...**

Judgment On: **08.04.2021**

Harish Tandon, J.:

The instant second appeal arises from a judgment and decree dated 28th February, 2019, passed by the learned Additional District and Sessions Judge, 1st Court, Serampore, Hooghly in Title Appeal No. 90 of 2016 reversing the judgment and decree dated 7th

May, 2016 passed by the learned Civil Judge, Junior Division, 1st Court, Serampore in Title Suit No. 21/2014.

The parties are related to each other which is discernible from the facts pleaded in the plaint. The plaintiff no. 1 is the father of the defendant no.1 and father-in-law of the defendant no. 2 whereas the remaining plaintiffs are the sons and daughters of the plaintiff no. 1. The plaintiffs jointly filed a suit for declaration that the deed of conveyance being no. 1774 for the year 2009 registered with Additional Registrar of Assurances III in favour of the first defendant is fraudulent, invalid and inoperative. The second relief claimed in the plaint further relates to a declaration that the defendants did not acquire any right, title and interest on the basis of the purported deed of conveyance.

The facts pleaded in the plaint are that the plaintiffs along with one Ramrati Devi were the owner of the property being the subject matter of the suit. The defendant no. 1 being the daughter of the plaintiff no. 1 is all along residing in her matrimonial house. There was no intention on the part of the plaintiffs to

transfer and/or alienate the property as they were all along residing therein, but a proposal was made from the defendants where the defendant no. 2 intended to secure a loan from the bank and requested the plaintiffs along with the Ramrati Devi to execute the deed of sale with clear stipulation that after such crisis is over they would revert the said property by executing a deed of gift. Since, the relation between the parties were cordial and they never sensed any foul intention, executed a purported deed of sale in favour of the defendant no.1. Subsequently, the plaintiffs wanted the execution and registration of the deed of gift by the defendant no. 1 who refused to honour such stipulation and tried to sell the property to the third party.

The moment the refusal to execute and register the deed of gift was sensed and realised the plaintiffs filed a suit for declaration that the purported deed of sale was obtained by practising fraud and misrepresentation and, therefore, does not convey any right, title and interest in defendant no. 1.

The defendants entered appearance and contested the suit by filing the written statement along with the

counter claim. All the facts pleaded in the plaint have been denied. It is specifically contended that the plaintiffs wanted to sell the property to a third party and the moment such intention was made known to the defendants, the defendant no. 1 offered to purchase the said property at the market price upon consensus/agreement having arrived in this regard, the plaintiffs along with Ramrati Devi voluntarily executed the said deed of conveyance and got the same registered with the registering authority.

Since the relation between the parties were cordial they were permitted to stay in the property as a licensee and on being asked to vacate the premises they flatly refused to do so and thereafter the defendants revoked the licence and seek for a decree for recovery of possession by way of counter-claim.

The Trial Court though returned the finding on the issues but the main focus was made on the jurisdiction of the Court to entertain the suit. Ultimately, the Court held that the suit is not maintainable for want of pecuniary jurisdiction and dismissed the suit. So far as, the finding on the counter-claim is concerned the Trial Court held that

despite having no doubt over the ownership of the defendants in respect of the suit property it does not instil any confidence pertaining to the revocation of licence after a gap of nearly five years. The Trial Court proceeded to dismiss the counter-claim as well.

Curiously enough the plaintiffs did not prefer an appeal immediately after the passing of the judgment/decreed dismissing the suit, but the appeal was preferred by the defendants against the judgment and decree dismissing the counter-claim. The reason is obvious that a person who emerged successful in getting the suit dismissed shall not be considered to be an aggrieved person entitling them to file an appeal.

The First Appellate Court reversed the judgment and finding made on the counter-claim on the categorical findings that once the person has established the title over the suit property and the plaintiff was unsuccessful in getting away with the deed of conveyance executed and registered by him, it was inconsequential that the revocation of license was made after a gap of five years.

The plaintiff/appellants have filed the instant second appeal before this Court and urged a point that

the Court of Appeal below failed to consider that the purported execution of deed of conveyance was a conditional one in the sense that it was agreed to execute a deed of reconveyance and, therefore, not an absolute sale. It is further submitted that the purported deed of conveyance was managed to be executed as the defendant no. 2 intended to secure a loan from the bank and, therefore, the deed is illegal, inoperative and void on the ground of fraud and misrepresentation. It is thus, submitted that in fact it was not an absolute sale but the plaintiffs accommodated the defendant no. 2 to secure the loan on the promise that a deed of gift would be executed subsequently the moment the said defendant overcome with the financial crisis.

Though the respondents have no right of audience at the stage of admission of an appeal under Order 41 Rule 11 of the Code, but, considering the gamut of the controversy we digress from such proposition of law and invited the respondents to address us as we feel that it is required for ends of justice. The facts as enumerated herein above are the reflection of the respective stands of the parties projected in the

pleadings filed before the Court. What can be deduced therefrom is that there was the execution of the deed of conveyance by the plaintiffs along with Ramrati Devi divesting of right, title and interest in respect of the suit property in favour of the defendant no. 1 for the considerations mentioned therein.

Both the Courts have recorded the evidence of the first witness of the plaintiff that the transaction was fixed at a consideration of Rs. 4,00,000/- (four lakhs) and such consideration was in fact the highest market value of the suit property at that relevant point of time.

The admitted position is, thus, that the deed of conveyance was executed in favour of the defendant no. 1 upon receipt of the consideration money and the challenges thrown over the same on the ground of fraud and misrepresentation. The deposition of the first witness of the plaintiff is categorical that the consideration mentioned in the purported deed of conveyance was received through an account payee cheque and it is nobody's case that the said cheque was dishonoured or the money did not pass on to the plaintiffs.

It is a mandate under Order 6 Rule 4 of the Code of Civil Procedure to plead the particulars of fraud and/or misrepresentation.

It is thus axiomatic to exclude the unnecessary details and the facts which are essential to clearly make out the case of fraud and/or misrepresentation must be pleaded to prevent the surprise and to make the adversary aware of the real point of dispute. All particular details pertaining to fraud and misrepresentation must be averred and pleaded in details so as to enable the defendants to raise the defense on the basis thereof.

The aforesaid provision does not invite mere user of the expression “fraud or misrepresentation” but the averments must be set up in the plaint with clear precision and what constitutes the fraud and/or misrepresentation must be apparently discernible therefrom.

It is no gain saying that the fraud unravels all act and a perpetrator of fraud should not be allowed to reap the benefit therefrom. Although “fraud” and “misrepresentation” are cognate vices and sometimes may overlap but they are still considered to be of

distinct categories and, therefore, the separate incidents of fraud and misrepresentation should be pleaded with all precision. The fraud and misrepresentation are two distinct concepts and, therefore, the onus lies heavily upon the person seeking a particular act to have founded thereupon must adduce a strong evidence and should not be permitted to take advantage of the weakness of the defense case.

In the instant case, the plaintiffs admitted to have executed the purported deed of conveyance voluntarily but sought for declaration of such deed to be void on the ground of fraud and misrepresentation. Both appears to have been interlined when they pleaded that such execution and registration of the purported deed of conveyance was on the promise/assurance to secure a loan from the bank with further stipulation that it would be returned by executing a deed of gift. The misrepresentation appears to have taken a front seat and the fraud ancillary thereto. It is not in dispute that the consideration mentioned in the purported deed of conveyance was received by the plaintiffs and a logical inference can be drawn that the same was duly

appropriated in due course. Neither of the witnesses cited by the plaintiffs could depose that they offered the return of the money rather it came at the bar at the time of hearing of the instant appeal for admission that they are agreed to return the consideration price. The evidence is lacking on the alleged fraud or misrepresentation which can be deciphered from the findings recorded by both the Courts below. However, the facts which swayed the mind of the Trial Judge appears to be misplaced when the entire focus was laid on the jurisdiction of the Court taking shelter under the Bengal Agra and Assam Civil Courts Act, 1887. The Trial Court held that the relief claimed in the plaint seeking declaration that the purported deed of conveyance is void on the ground of fraud and misrepresentation should be valued on the basis of the consideration price mentioned therein. The Trial Court further proceeded to hover around the pecuniary jurisdiction of the Court enshrined in the said Act and ultimately held that a suit with such relief is not maintainable.

No doubt the said Act defines and limits the jurisdiction of the Court both on a territorial and

pecuniary aspect. The distinction is sought to be made by the Trial Court that once the said Act limits the pecuniary jurisdiction the provision contained in the Code of Civil Procedure cannot override the same as it does not contain any provision limiting the jurisdiction of the Court both on pecuniary and territorial.

There is no quarrel to the proposition of law that the aforesaid Act not only defines and limits the jurisdiction of the Court on pecuniary and territorial aspect but the moot question which appears to us is whether it impinges upon the root of the jurisdiction and under no circumstances the Court can entertain the proceeding exceeding pecuniary or territorial jurisdiction. It is one thing to say that by an advent of the statute defining and limiting the pecuniary and territorial jurisdiction it is absolutely different when the Court proceeds to decide the dispute without having any objection from the defendant relating to pecuniary or territorial jurisdiction and inviting the court to decide the matter on merit.

The pecuniary and territorial jurisdiction can be waived by the defendant and, therefore, there is no fetter on the part of the Court to proceed and decide

the matter on merit. Ordinarily, the jurisdiction of Court is divided into three categories namely I) Territorial II) Pecuniary and III) plenary. Section 21 of the Code of Civil Procedure laid down the exposition of law pertaining to waiver of the territorial and pecuniary jurisdiction by the defendant. The matter decided by a Court even lacking territorial and pecuniary jurisdiction cannot be assailed on the ground of such jurisdiction unless the parameters laid down therein are satisfied. It is ardent duty of the defendant to take the plea of territorial and pecuniary jurisdiction at an earliest preferably before the settlement of issue and not at the latter stage. More particularly, the restrictions are envisaged at the stage of appeal or revision under the said Section. However, the jurisdiction relating to subject dispute which strikes at the root of the competence or the jurisdiction of the Court can neither be waived nor acquiesced by the defendant. Even the plenary jurisdiction cannot be conferred upon a Court lacking it by an agreement or the consent of the parties. If, the Court is competent to decide a subject dispute had it been within its pecuniary or territorial limits it cannot refuse to decide

the same in absence of any objection raised by the defendant at an earlier stage or before the settlement of issue of its own. There is no hesitation in our mind had the consideration money reserved in the purported deed of conveyance is below the pecuniary limit, the Trial Court was competent to decide the matter on its merit and, therefore, it does not fall within the third category of jurisdiction i.e., the plenary jurisdiction.

The Apex Court in case of ***Koopilan Uneen's Daughter Pathumma –Vs- Coopilans uneen's Son Kuntala reported in 1981 SC 1683*** propounded the exposition of law on the applicability of Section 21 of the Act. It is held that there are three essential conditions namely I) the objection must be taken at the first instance II) it must be taken at an earliest opportunity and in all cases at/or before the settlement of issues and III) there has been a consequent failure of justice.

It is further held that all three conditions must co-exists in order to attract Section 21 of the Code. In the present case, the plaintiffs themselves approached the Court claiming a relief which was otherwise within the competence of the said Court thought ought to have

been valued beyond the pecuniary limits but if there is no consequent failure of justice it ought not to have been decided in such way. At any rate the aforesaid observations have been made to clarify the applicability of the provisions contained in the Bengal Agra and Assam Civil Court Act vis-à-vis the Code of Civil Procedure.

The Trial Court dismissed the counter-claim solely on the ground that it is improbable that a prudent man would wait more than five years and then revoke the license. As indicated above, the parties are related to each other and it is not unusual that the permission was given for such occupation. However, the Appellate Court reversed the finding on the counter-claim solely on the ground that the moment the Court finds the transaction i.e., the deed of conveyance is legal, proper and valid, the plaintiffs cannot be said to have acquired any title or right to remain in possession except under the permissive occupation. There is a vast distinction between an occupation as licensee and the occupation on the basis of some other rights. The permissive occupation does not create any right in the property and runs counter to the concept of exclusive

possession. Furthermore, Section 5 of the Specific Relief Act entitles the title holder of the property to recover the possession from a person in wrongful occupation. The counter-claim was based on title being conferred by virtue of the deed of conveyance executed by the plaintiffs along with Ramrati Devi which has not been denied nor any cogent evidence was adduced by the plaintiffs/appellants to declare such deed to be void or inoperative. The moment the title to the property is established without conceivable doubts the title holder enjoys all the incidents of ownership including the power to recover possession. There is no absolute rule for serving a notice revoking the license. The suit itself is a notice and the intention to revoke is manifested therein.

The possession is an incident of the ownership and is capable of being transferred to any person and such possession does not create a right but the constructive possession remains with the owner. In case of a license the occupation in the property is on behalf of the owner. The possession is relevant if there is no title in support thereof but once the title is established which is to be given a due weightage and,

therefore, the possession cannot be considered in vogue. There may be cases where the presumption of possession of a person other than the owner is found but such possession remains permissive in absence of any document and is regarded as permissive. The possession in the past is one thing and the possession if continued in future is another. The real trouble starts when the possession is continued in future without any support of title. A suit for recovery of possession based on title has two distinct facets. Firstly, adjudication on the title and secondly, adjudication on possession. Once the cloud over the title is removed the possession of a person is regarded as a possession on behalf of the title holder.

The aforesaid observation shall get impetus from the observations of the Apex Court in case of ***Maria Margarida Sequeria Fernandes and Others Vs Erasmo Jack de Sequeria (Dead) through L.Rs. reported in 2012 (5) SCC 370*** wherein it is held

“67. In an action for recovery of possession of immovable property, or for protecting possession thereof, upon the legal title to the property being established, the possession or occupation of the

property by a person other than the holder of the legal title will be presumed to have been under and in subordination to the legal title, and it will be for the person resisting a claim for recovery of possession or claiming a right to continue in possession, to establish that he has such a right. To put it differently, wherever pleadings and documents establish title to a particular property and possession is in question, it will for the person in possession to give sufficiently detailed pleadings, particulars and documents to support his claim in order to continue in possession.”

Mere possession in the property how long it may be does not ipso facto establish a right into a person allowed to continue in possession by a title holder except a case of adverse possession is claimed and proved by cogent evidence. The relationship of the plaintiff with the defendant/appellant is also one of the relevant factor when the permission to continue in possession is evident and the moment such permission is revoked no impediment can be seen against the title holder to recover the possession.

It is beyond cavil of further discussion that the title over the property has been established and proved by production of the sale-deed which the appellant could not get away therewith as they claim that the same was to secure the loan and it was intended that the title holder would revert the title by executing a deed of gift in future is failed.

We, thus, do not find that the findings of the Appellate Court can be faulted with warranting interference by us in the instant second appeal.

The appeal is thus dismissed having not involved any substantial question of law.

No order as to costs.

Urgent certified website copies of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

I agree,

(Kausik Chanda, J.)

(Harish Tandon, J.)