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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.64 OF 2021

ALONGWITH

INTERIM APPLICATION NO 3662 OF 2020

IN

SECOND APPEAL NO.64 OF 2021

Smt. Chandan P. Gupta Appellant.

V/s

Smt. Sitaradevi Rajkumar Kanojiya
and Anr. Respondents.

Mr. Vikram N. Walawalkar i/b Gajanan Shinde for the Appellant.

Mr. R.D. Suryawanshi i/b Mr. Suraj Naik for the Respondents.

CORAM: NITIN W. SAMBRE, J.

DATE : OCTOBER 03, 2022

P.C.:

1] This Second Appeal is by Defendant No.1 to Regular Civil Suit No.826 of 2012, which was dismissed on 30/09/2013. Claim in the suit was for declaration of ownership, recovery of possession, damages

and perpetual injunction.

2] Plaintiff i.e. Respondent No.1 preferred an Appeal being Regular Civil Appeal No.213 of 2013 which came to be allowed vide impugned judgment dated 12/3/2020 passed by the Principal District Judge, Thane. As such, this Second Appeal.

3] Facts necessary for deciding the present Second Appeal are as under:-

4] Respondent No.2 i.e. Defendant No.2 was the owner of the suit property which he has purchased under the provisions of Maharashtra Ownership of Flats Act (hereinafter shall be referred to for the sake of brevity as "MOFA"). Defendant No.1, present Appellant, was a licensee.

5] Defendant Nos. 1 and 2 entered into Memorandum of Understanding ("MOU") for purchase of the suit property which consists of shop block vide document at Exhibit-69 dated 18/8/2006.

6] Plaintiff i.e Respondent No.1 herein appears to have got executed Conveyance Deed-Exhibit-41 on 03/08/2006 in relation to the very same property.

7] Based on the aforesaid Conveyance Deed-Exhibit-41 aforesaid suit came to be initiated which was originally dismissed. However, in appeal suit came to be decreed.

8] Contentions of Counsel for the Appellant/original Defendant No.1 are, suit itself was not maintainable as document-Exhibit-41 does not confer any title in favour of the Plaintiff. In addition, his contentions are, once the Plaintiff has admitted status of the Appellant/Defendant No.1 as that of tenant, remedy for eviction/possession is somewhere else i.e. under the Maharashtra Rent Control Act and not by present proceedings. Further contention is lower Appellate Court has committed an error in decreeing the suit by taking recourse to the provisions of MOFA, as it was nobody's claim that conveyance in pursuance to provisions of MOFA confers absolute

title in favour of the original Plaintiff i.e. Respondent No.1. By inviting my attention to the provisions of Section 54 of the Transfer of Property Act which defines 'sale', claim put forth by Counsel for the Appellant is, document MOU-Exhibit-69 does not stand to the scrutiny of the said provisions and transaction under the said document cannot be held to be 'sale' and that being so, suit ought to have been dismissed. His further contentions are, lower Appellate Court, before taking recourse to the provisions of MOFA, ought to have followed the procedure contemplated under Order 41 Rule 25 by framing an additional issue by calling findings from the Trial Court, so that Appellant would have got an appropriate opportunity to establish her case.

9] So as to substantiate aforesaid claim, Counsel for the Appellant has drawn support from the judgment of the Apex Court in the matter of *Vishwanatha Achari vs Kanakasabapathy* reported in (2005) 6 SCC 56 so as to buttress his aforesaid argument of seeking remand or calling findings from the Trial Court on the issue of applicability of MOFA. He has also relied on the provisions of Section 107 of the Civil

Procedure Code. In addition to above, reliance is also placed on the judgment of the Apex Court in the matter of Nazir Mohamed vs J. Kamala and Others, particularly paras 33.1. 33.4, so also paras 43 and 44. Support is also drawn from the judgment of the Apex Court in the matter of *Santosh Hazari vs. Purushottam Tiwari (Deceased)* by *LRs* reported in **(2001) 3 SCC 179** so as to claim that Appeal preferred by the Appellant involves substantial question of law which warrants consideration.

10] While countering the aforesaid submissions, Counsel for the Respondent/decreed holder would urge that Trial court while dealing with the rival claims has framed issues at Exhibit-26. The said issues at Exhibit-26 and findings thereon read as under:-

<u>ISSUES</u>	<u>FINDINGS</u>
1] Does the plaintiff prove that she is the legal owner of the suit shop?	No.
1A] Does defendant No.1 prove that defendant No.2 has alienated the suit property to her?	No.
2] Does defendant No.1 prove that her possession of the suit shop is lawful?	No.

2A] Whether the plaintiff is entitled for the relief of declaration of ownership as sought?	No.
3] Whether the plaintiff is entitled for possession of suit shop?	No.
4] Whether the defendant is liable to pay compensation by way of damages?	No.
4A] Is the suit barred by law of limitation?	Yes.
5] What order and decree?	As per final order.

According to him, Issue No.1-A and 2 were answered against the present Appellant/original Defendant No.1. Said issues were in relation to alienation of property *inter se* between the Defendants and possession of Defendant No.1 over the suit shop being lawful. It is claimed that once both the issues were answered against the Appellant, Appellant should have lodged objection before the lower Appellate Court in the form of Appeal or Cross-objections in the Appeal. Further contentions of Counsel for the Respondent/decreed holder are, in view of law laid down by the Apex Court in *Veena Hasmukh Jain and Anr. vs. State of Maharashtra* and Others reported

in 1999 (5) SCC 725, particularly paras 4, 5 and 8 provisions of MOFA are applicable and that being so, lower Appellate Court was justified in relying on the provisions of MOFA for reversing the findings recorded by the Trial Court. According to him, provisions of Section 107 and Order 41 Rule 25 of the Civil Procedure Code are not required to be invoked, as for the purpose of recording reasons in support of a particular finding, the Court need not put the party against whom adverse findings are recorded to notice thereby calling for explanation of such party. Further contentions of Counsel for Respondent/decreed holder are, defense of the Appellant rest on MOU i.e. Exhibit-69, so also leave and license agreement. According to him, though both these agreements are exhibited, contents thereof are not proved. In addition, his contentions are, very soul of the suit claim i.e. Exhibit-41 is not questioned by the Appellant and that being so, lower Appellate Court was justified in recording findings on the said issue against the Appellant. As such, he has sought dismissal.

11] I have appreciated said submissions.

12] I have considered recitals in the document-Exhibit-41 dated 03/08/2006. Section 54 of the Transfer of Property Act defines 'sale' and mode to execute sale. It also defines contract for sale.

13] Section 54 which defines contract for sale in categorical terms provides transfer of ownership in exchange of consideration i.e. price paid or promised or part paid or part promised. Such sale/transfer in case of tangible immovable property having value of above Rs 100/- has to be by registered instrument. Only difference that can be noticed in case of 'sale' and 'contract for sale' is contract for sale by itself does not create any interest or charge over such property.

14] If we appreciate the claim put forth by rival parties in the Plaint, Written Statement and oral and documentary evidence, whether Defendant No.2 had intention to create sale in favour of the Plaintiff can be inferred. What can be noticed is, Plaintiff has paid consideration in its entirety and Defendant No.2 has accepted the said consideration with promise to deliver the possession. The case of the Plaintiff of getting title in the suit property by virtue of Exhibit-41 has

been duly supported by Defendant No.2 whose title at no point of time was under cloud as the Appellant/Defendant No.1 himself has asserted so, based on MOU at Exhibit-69. The intention of parties from language employed in Deed executed *inter se* in the matter of either transfer of title, vesting of title, or mortgage, sale or contract for sale within the meaning of Section 54 can be inferred. As such, intention of the parties as is referred to hereinabove between Defendant No.2 and Plaintiff was that of creating and vesting title i.e 'sale' within the meaning of Section 54 of the Transfer of Property Act. As such, what can be noticed from recitals of Exhibit-41 is, Defendant No.2 had every intention to transfer or create sale within the meaning of Section 54 of the Transfer of Property Act in favour of the Plaintiff which is rightly so inferred by the lower Appellate Court.

15] As far as document MOU-Exhibit-69 is concerned, fact remains that such document though was exhibited, contents thereof are not proved. Even if Appellant claims that by virtue of aforesaid MOU, the suit property was to be transferred to her, least that was expected of the Appellant was to either go for suit for specific performance or to

file a claim in the pending suit to that effect which, of-course, the Appellant has not taken recourse to. Apart from above issue Nos. 1-A and 2 which pertain to alienation of suit property in her favour i.e. continuous possession of the Appellant over the suit property to be lawful, were answered against her. Though the suit of the Plaintiff was dismissed, however there are findings recorded against the Appellant on the aforesaid two issues. These findings are not questioned by the Appellant either in First Appeal or even at later stage. Provisions of Order 41 Rule 33 gives remedy to question such findings even if final judgment or verdict is against or in favour of the party. Once such findings, in spite of there being remedy, are not questioned by the Appellant, such findings have attained finality against the Appellant and as such, rightly so, Trial Court has ordered possession of the present Appellant as not lawful. Once the possession of the Appellant is held to be not lawful, even if there is admission given by the Plaintiff that Appellant was a tenant in the suit property that by itself will not call for ordering protection in favour of the Appellant under the provisions of Section 24 of the Maharashtra Rent Control Act, 1999. Admittedly also, Appellant has stopped paying

rent to Defendant No.2 or to the Plaintiff and as such she cannot claim to have such right i.e. lawful tenant over the suit property. Such claim of the Appellant is also based on MOU-Exhibit-69 allegedly executed *inter se* by Defendant No.2 in favour of the Appellant. In case of such eventuality, rightly so claimed by the Counsel for the Respondent/decreed holder, findings recorded against issue Nos. 1-A and 2 have attained finality against the Appellant. In such an eventuality, Appellant cannot claim to have any protection under the provisions of the Maharashtra Rent Control Act and having established so, suit for possession is verymuch maintainable. Though lower Appellate Court has taken recourse to the provisions of MOFA so as to evaluate whether Conveyance Deed-Exhibit-41 can be termed to be vesting title in favour of the Plaintiff, however fact remains that such reference to the provisions of MOFA is out of reasoning which is recorded in support of the final findings. Merely because Appellant was not aware of the provisions of MOFA by itself will not make her entitle to claim relief under Section 107 or Order 41 of the Civil Procedure Code.

16] In the aforesaid backdrop, having regard to the fact that this Court has recorded finding that Exhibit-41 confers title in favour of the Respondent/Plaintiff and the fact that provisions of Section 107 of Civil Procedure code are not available to the Appellant, in my opinion, no question of law could be noticed in the present Second Appeal. As such, Second Appeal fails and same stands dismissed. As a consequence, pending Interim Application also stands dismissed.

(NITIN W. SAMBRE, J.)