

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT NAGPUR, NAGPUR.

...

SECOND APPEAL NO. 424/2019

Sau.Chindhabai w/o Nilkanthrao Thakare	.. <u>Appellant</u>
versus	
Narendra s/o Vithoba Pusadkar and others	.. <u>Respondents</u>
.....	
Mr. R.U.Lekurwale, Advocate for the appellant	
Mr. A.V.Khare, Advocate for the respondent No.1	
Respondents 2(a), 3(a) are served.	
.....	

CORAM: ANIL L.PANSARE,J.
DATED: 17.08.2023

COURT'S ORDER:

Heard the learned counsel for the respective parties, at length.

2. The appellant/original defendant no.2 has challenged the judgment and decree dated 22nd February, 2019 passed by the learned District Judge-4, Nagpur in Regular Civil Appeal No.523/2016 thereby confirming the judgment and decree dated 25th April,2016 passed by the learned 4th Joint Civil Judge,Junior Division, Nagpur in Regular Civil Suit No.441/2012 (old RCS No.19/2001).

3. The appellant will be hereinafter referred to as the 'defendant no.3'; respondent no.1 as the 'plaintiff'; respondent no.2 as the 'defendant no.1' (since deceased) and now represented by respondent nos. 2-a and referred to as the 'defendant no.1-a'; whereas

the respondent no.3 as the 'defendant no.2'. The present Appeal is filed by the defendant no.3 only.

4. The relevant facts of the case, in brief, are these :

The plaintiff and defendant nos.1 and 3 had entered into an agreement to sell dated 6th September, 2001 in respect of the suit property consisting of Plot No.13, Khasra No. 198/3, admeasuring 1500 sq.ft., situated at Mouza Zingabai Takli, Nagpur, along with *kuccha* constructed thereon. The plaintiff has paid Rs. 90,000/- as an earnest money. The total amount of consideration agreed was Rs. 3,75,000/-. The balance consideration amount was to be paid within six months. Later on, there occurred some dispute between the parties and, therefore, the suit came to be filed.

5. Pending suit, the defendant no.2 has executed a registered sale deed on 11th May, 2011 in favour of the plaintiff to the extent of his undivided share by accepting Rs. 95,000/-. The defendant no.1 expired pending the suit and his legal heir was brought on record. He has also executed a registered sale deed dated 28th December, 2012 to the extent of his 1/3rd undivided share in favour of the plaintiff, by accepting Rs. 95,000/-. The plaintiff, therefore, continued the suit for specific performance of contract against the defendant no.3.

6. Initially, the defendant nos. 1 and 3 resisted the claim of the plaintiff by filing written statement. They pleaded that the agreement in question was illegal, void and a fraudulent document. Their stand was that defendant nos. 1 and 3 were illiterate persons. The plaintiff has

obtained their signature on blank paper under the garb of helping them to mutate their names in City Survey record.

7. The defendant nos. 1 and 3 have also filed counter claim thereby seeking a declaration that the sale deed dated 11th May 2011 executed by defendant no.2 in favour of the plaintiff, is null and void and not binding upon them. As stated earlier, pending suit, the legal heir of defendant no.1 has also sold his 1/3rd share to the plaintiff vide sale deed dated 28th December, 2012. The defendant no.1, who was plaintiff no.2 in the counter claim, was therefore transposed as defendant no.3 in the counter claim. By way of amendment, a further declaration was sought that the sale deed dated 28th December 2012 is also null and void and not binding upon the plaintiff therein, viz. the defendant no.3 herein.

8. The basis of counter claim was identical to what has been said by these defendants in the written statement. The counter claim was also based on the allegation that the plaintiff herein, has obtained the signature of the defendants on the pretext of getting their names mutated in the City Survey records. Another limb of submission was that there was no partition of the suit property. The co-owners cannot transfer the suit property unless and until partition takes place. The plaintiff contested the counter claim by reiterating his theory of execution of agreement to sell.

9. Both the Courts below have found substance in plaintiff's case and, accordingly, decreed the suit; whereas the counter claim was dismissed.

10. This Court has issued notice on the following substantial questions of law :-

“(i) Whether both the Courts below erred in holding that the disputed document dated 06.09.2001 was got obtained by practising fraud?”

“(ii) Whether both the Courts below wrongly held that the respondent no.1 is entitled for specific performance?”

11. Mr.R.U.Lekurwale, the learned counsel for the defendant no.3/appellant contends that the plaintiff has admitted in his evidence that the defendant no.3 was illiterate and, therefore, there is every reason to believe that she has signed the blank documents. He further submits that in absence of partition amongst the defendants, the co-owners could not have sold his undivided share to the plaintiff. He further submits that there was an injunction operating against the defendants, to not alienate the suit property.

12. The Courts below have dealt with these contentions elaborately. On the point of illiteracy of defendant no.3, the Courts below have held that merely because the defendant no.3 is illiterate, one may not jump to the conclusion that she has signed blank documents or that fraud has been played upon her. So far as the transfer of undivided share is concerned, the first appellate Court has relied upon Section 44 of the Transfer of Property Act which recognizes the right of co-sharer or co-owner to transfer his share in a joint property. As regards the order of injunction, the first appellate Court has held that the defendants were restrained from creating third party interest in the suit property, but were not restrained to transfer the suit property in favour of the plaintiff.

13. The learned counsel for the plaintiff has rightly supported the above findings. He submits that the counter claim filed by defendant no.3 was based on similar allegation of fraud having been played by the plaintiff upon the defendant no.3. This story of fraud has been declined by the Courts below by dismissing the counter claim. The defendant no.3 has not challenged the said finding and, therefore, it has attained finality. The defendant no.3, therefore, cannot now pursue the claim of plaintiff playing fraud upon the defendant no.3.

14. In addition, the learned counsel has drawn my attention to the first Appellate Court's reasoning to contend that there is absolutely no substance in the plea put forth by the defendant no.3 that the plaintiff has played fraud upon her. It appears that the certified copies of evidence led by defendant no.3 and her witness -Jagannath Mahalle in an application registered as MJC No.52/2008, were placed on record. The same were admitted in evidence before the trial Court as Exhs.128 and 129. The defendant no.3 and her witness in the said application, have categorically deposed that the defendants herein are the co-owners of the suit property and they had entered into an agreement to sell the suit property with the plaintiff and on the strength of that agreement, the plaintiff has filed the suit. Thus, the defendant no.3 herself in another proceeding has cemented the case of the plaintiff as regards execution of agreement to sell.

15. Thus, except for mere words of playing fraud, there is absolutely no evidence to support the said contention of defendant no.3.

The Courts below, therefore, have correctly rejected the theory of fraud as pleaded by defendant no.3.

16. Mr A.V.Khare, the learned counsel for the respondent no.1 has relied upon upon the judgment passed by the coordinate bench of this Court, in the case of Kamlabai Khadse vs. Tukaram Ingole and others, reported in 2015(2) Mh.L.J.93, in support of his contention of effect of dismissal of counter claim. This Court has made a reference to the judgment of the Hon'ble Supreme Court, more particularly para no.7, which reads thus :-

“7. In a recent decision, the Supreme Court in Sri Gangai Vinayagar Temple and another vs. Meenakshi Ammai and others; 2014(11) SCALE 654, in clear terms observed as under in para 22:

“Where a common judgment has been delivered in cases in which consolidation orders have specifically been passed, we think it irresistible that the filing of a single appeal leads to the entire dispute becoming sub-judice once again. Consolidation orders are passed by virtue of the bestowal of inherent powers on the Courts by Section 151 of the Civil Procedure Code, as clarified by this Court in Chitivalasa Jute Mills vs. Jaypee Rewa Cement (2004) 3 SCC 85. In the instance of suits in which common Issues have been framed and a common Trial has been conducted, the losing party must file appeals in respect of all adverse decrees founded even on partially adverse or contrary speaking judgments. While so opining we do not intend to whittle down the principle that appeals are not expected to be filed against every inconvenient or disagreeable or unpropitious or unfavourable finding or observation contained in a judgment, but that this can be done by way of cross-objections if the occasion arises. The decree not assailed thereupon metamorphoses into the character of a “former suit”. If this is not to be so viewed, it would be possible to set at naught a decree passed in Suit A by only challenging the decree in Suit, B. Law considers it an anathema to allow a party to achieve a result indirectly when it has deliberately or negligently failed to directly initiate

proceedings towards this purpose. Laws of procedure have picturesquely been referred to as handmaidens of justice, but this does not mean that they can be wantonly ignored because, if so done, a miscarriage of justice inevitably and inexorably ensues.”

From the aforesaid, it is clear that in absence of any appeal being filed from the common judgment deciding two suits, failure to challenge the decree passed in one of them would not permit the appellate Court to decide the appeal challenging the other decree.”

17. Thus, it is held that the losing party must file appeal in respect of all adverse decrees and in appropriate cases, by filing cross-objections as well.

18. In the present case, the written statement and counter claim were laid on common foundation of plaintiff playing fraud upon the defendants. The Courts below have declined to accept this plea and hence decreed the suit filed by plaintiff and dismissed the counter claim filed by the defendant no.3. The defendant no.3 has challenged the decree passed in favour of the plaintiff but has not challenged the dismissal of counter claim. In that sense, the finding given by the trial Court that the defendant no.3 failed to prove fraud has attained finality. In the circumstances, if the said finding is to be upset in the present appeal, on the ground of plaintiff playing fraud upon the defendants, the result will have an adverse impact on the dismissal of counter claim as well. Thus, the judgment and decree that has attained finality will be disturbed by such finding, which is not permissible, is what has been indicated in the judgment cited *supra*. I find substance in the contentions so raised by the plaintiff.

19. On the point of readiness and willingness of contract, the Courts below have held that defendant nos.1 and 2 have already sold their part of undivided share by accepting the balance consideration amount. The plaintiff has paid 2/3rd of the consideration amount and thus was always ready and willing to perform his part of contract. The trial Court has refused to set aside those two sale deeds. What remains is 1/3rd share of the defendant no.3, the challenge to which appears to be devoid of merit, considering the reasons given by the Courts below in declining to believe the theory of fraud pleaded by the defendant no.3.

20. In the result, no question of law, much the less substantial question of law is involved in the present Appeal. The Appeal is therefore dismissed, with no order as to costs.

[ANIL L. PANSARE, J.]

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