



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 577 OF 2023
WITH CA/14502/2023

Rahul Shikshan Prasarak Mandal through
president Pralhad Jalbhaji Kadam
and Anr

...Appellants

Versus

Pandurang Nanarao Ghogre and Ors

...Respondents

...

Mr. A. A. Mukhedkar, Advocate for the Appellant.

...

CORAM : R.M. JOSHI, J
DATE : JANUARY 02, 2024

PER COURT :

1. This Appeal is filed under Section 100 of Code of Civil Procedure (for short 'CPC') raising challenge to the judgment and order dated 29.08.2011 passed by learned CJSD, Nanded in Special Civil Suit No. 158/2008 decreeing the suit whereby sale deed in question was cancelled with further injunction against defendants and judgment dated 20.09.2023 passed in RCA No. 58/2016 confirming the judgment of trial Court.

2. Parties are referred to as plaintiffs and defendants for the sake of convenience. The facts which led to filing of the present Appeal can be narrated in

short as under:

Plaintiffs are owner and possessor of land bearing Gut No. 147 (for short 'suit property') admeasuring 1H 52R situated at Waghla, tq and dist. Nanded. Defendant no. 1 is a public trust and other defendants are its trustees. On 25.10.2005 plaintiffs executed sale deed bearing no. 559/2005 dated 25.10.2005 in respect of suit property in favour of defendant no. 1. On the same day, defendants issued three cheques to the plaintiffs towards consideration for sale of the suit property. The said cheques when submitted for realization, dishonoured. Last of such cheque is dishonoured on 14.02.2006. Plaintiffs, therefore, filed Spl.C.S No. 158/2008 seeking cancellation of sale deed in question and injunction against the defendants in respect of suit property.

3. Defendants appeared before the trial Court and objected the suit being barred by limitation. It is not in dispute that cheques mentioned in plaint were issued to the plaintiff, however, it is further claimed by these defendants that there was mutual understanding between the parties that the cash of Rs. 13,30,000/- is

paid by defendants through Advocate to the plaintiffs who in turn were to deposit the said amount in the account of the trust and thereafter cheques were to be encashed. It is claimed that Plaintiffs failed to deposit the said amount in the trust and got cheques dishonoured.

4. Trial Court framed the issues and both sides led their respective evidence. By judgment dated 29.05.2011 suit was decreed. Sale deed was cancelled so also injunction was issued against defendants in respect of suit property. Defendants carried the said judgment before the Appellate Court by filing RCA No. 58/2016. The said appeal came to be dismissed by impugned judgment and order dated 20.09.2023.

5. Learned Counsel for defendants submitted that trial Court as well as First Appellate Court failed to consider the evidence on record in its proper perspective and hence, the findings recorded by them are perverse. According to him, defendants have deposited the entire amount involved in three cheques before the criminal Court and though said fact was brought on record before the First Appellate Court, the

said Court failed to take the same into consideration while dismissing the Appeal. It is also contended that the suit is barred by limitation as the same is not filed within three years of execution of sale deed and that the trial Court has wrongly considered the last dishonoured cheque to be a cause of action for filing of the suit. Finally, it is submitted that the Courts have failed to consider the judgment of Hon'ble Apex Court in case of Dahiben Vs. Arvindbhai Kalyanji Bhanushali (Gajra)(D) Thr. LRS. And Others, (2020) AIR (SC) 3310.

6. In order to entertain the Appeal under Section 100 of CPC, the same must involve substantial question of law. Unless substantial question of law, which is debatable not previously settled by binding precedent exists, it is not open for this Court to entertain such Appeal.

7. There is no dispute about the fact that the Plaintiffs are the owners of the suit property and registered sale deed came to be executed by them in favour of defendants on 25.10.2005. There is further no denial of the fact that on the date of execution of

sale deed three cheques were issued by defendants and that these cheques are dishonoured. In the written statement defendants have claimed that there was a mutual understanding to pay cash of Rs. 13,30,000/- by defendants to plaintiff which was paid through Advocate, but the plaintiffs failed to deposit the said amount into the account of trust. The burden, therefore, was squarely on the defendants to prove the said fact.

8. Learned Trial Court as well as First Appellate Court dealt with the evidence on record adequately and recorded the findings about the defendants having failed to substantiate the said contention. This Court finds no perversity in the findings on the basis of material evidence on record. Pertinently, defendant no. 1 is a public trust registered under the provisions of Maharashtra Public Trusts Act and as rightly held by learned trial Court that there is not even a resolution in order to substantiate any such arrangement between the parties. On consideration of evidence on record findings recorded by both Courts are not perverse in order to cause any interference therein.

9. Another contention of Counsel for Defendants is about the bar of limitation in filing of the suit for cancellation of any instrument as per article 59 of Limitation Act, three years period is provided and time begins to run when facts entitling plaintiff to have the instrument cancelled. Admittedly, first two cheques were also dishonoured. Thus, the entire consideration became unpaid only on dishonour of third/final cheque. Thus, cause of action arose in filing of suit from cancellation of sale deed on execution of document becoming without consideration. From the evidence on record it is undisputed fact that in all three cheques were issued towards consideration and out of three cheques issued by defendants to plaintiffs last cheque was dishonoured on 14.02.2006. Hence, suit is filed within a period of three years from dishonor of cheque and it is rightly held to be within limitation.

10. The next contention is about failure on the part of the First Appellate Court to take into consideration the fact about the amount involved in three cheques being deposited by the defendants in criminal Court in the proceedings bearing SCC Nos.

636/2007 and 637/2007. It is sought to be contended that the documents were placed before the First Appellate Court and it was incumbent on the part of the said Court to take into consideration these documents while deciding appeal.

11. A specific query was made to the Counsel for Appellants as to whether this contention was taken as a ground in the Appeal memo before First Appellate Court. In reply to this query, it is sought to be contended that since the said fact is subsequent to the filing of the First Appeal, it is not included in the Appeal memo. Order XIV Rule 2 prohibits the Appellants to take up any ground except by the leave of the Court, which is not set forth in the memorandum of Appeal. It was open for the defendants to amend the Appeal memo to incorporate this to be additional ground for challenge to the impugned judgment and order passed by the trial Court. Defendants, however, have chosen not to amend the Appeal memo. Furthermore, there is nothing on record to indicate that any leave of the Court was sought/granted to take up said ground of objection though not included in the memorandum of Appeal.

12. Apart from this, it is pertinent to note that there is no amendment to the pleadings of the defendants incorporating the subsequent fact in the written statement. It is trite law that any amount of evidence cannot be considered sans pleadings. Thus, in any event, it was not open for the First Appellate Court to consider the additional material sought to be placed on record in absence of pleadings to that effect.

13. Finally, judgment of Hon'ble Apex Court in case of Dahiben (supra) also would not come to any help for the Appellants as the said judgment deals with the issue that once title in the property has already passed, even if balance sale consideration is not paid, the sale could not be invalidated on this ground. In the instant case, however, there is no consideration paid at all. As such, the essential requirement of passing of consideration for a valid transfer of property is not fulfilled. Moreover, recitals of sale deed provides that in the event cheques issued towards consideration are dishonoured, the sale transaction shall be treated as cancelled. These facts clearly indicates that for

want of honour of the cheques issued towards consideration for sale of suit property, the instrument of sale deed cannot sustain. All these aforestated aspects are rightly dealt with by trial Court and First Appellate Court and as such, this Court finds no perversity therein.

14. Having regard to the aforestated discussion, this Court finds no substantial question of law being involved in the present Appeal. As such, Appeal deserves to be dismissed. Hence, Appeal stands dismissed. Pending application is also disposed of.

(R. M. JOSHI, J.)

Malani