IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 575 OF 2015
WITH
CIVIL APPLICATION NO.1276 OF 2015

Shivaji Tukaram Jadhav ... Appellant
Versus
Balu Dada Barge (since deceased) through LRs and Ors. ... Respondents.

Mr. Dilip Bodake, for the Appellant.
Mr. D.D. Rananaware, for the Respondents.

Coram : Sharmila U. Deshmukh, J.
Date : May 02, 2024.

P. C. :

1. Being dissatisfied by the judgment dated 19th November, 2014 passed by the Appellate Court dismissing the Appeal thereby confirming the judgment and decree of the Trial Court dated 8th August, 2012 passed in Regular Civil Appeal No.187 of 2010 decreeing the suit, the original-defendant is before this Court. For the sake of convenience, the parties are referred to by their status before the Trial Court.

2. The facts of the case are that the Regular Civil Suit No.187 of 2010 was instituted seeking declaration that the document dated 9th September, 2004 obtained by the Defendant was a fraudulent sale deed executed by the Plaintiff as security for loan transaction of Rs.20,000/- and for declaration that the transaction contained in the document dated 9th September, 2004 has ended and the property has become loan free.

3. The case of the Plaintiff was that the Plaintiff and the defendant were citizens of the same village and the Plaintiff is illiterate person whereas the defendant is well educated person and has retired from service. The suit property in question is Gat No.542 which is ancestral joint family property. It was contended that the Plaintiff was addicted to liquor and for satisfying his addiction had borrowed amounts from different persons which was demanded from the lenders leading to dispute between the Plaintiff and his family members. The Plaintiff's wife had issued a public notice on 15th December, 1999 cautioning against entering into any transaction with the Plaintiff in respect of the suit properties. It was contended that the defendant took advantage of the Plaintiff's situation and offered to pay sum of Rs.20,000/- to enable the Plaintiff to clear off his loans and suggested execution of a nominal sale-deed as security with an assurance that the Defendant would not mutate his name in the 7/12 extract and after the money has been repaid, the transaction would stand cancelled. It was contended that thereafter, in March, 2009 the Plaintiff repaid the sum of Rs.20,000/- obtained by way of loan however, despite thereof, on 15th June, 2009, the defendant made an application to the Talathi for mutating his name in the Revenue Records. Hence, the suit was filed.

4. The suit came to be resisted by the defendant contending that the agreement of 9th September, 2004 was in fact a sale-deed. It was also contended that the sale consideration was agreed at Rs.94,000/- after negotiation which was paid to the Plaintiff in August 2004 and 9th September, 2004 by payment of Rs.64,000/- and Rs.30,000/- respectively. It was contended that the sale-deed was executed and the possession was delivered after obtaining permission from the Rehabilitation Officer.

5. Parties went to trial. The Trial Court framed six issues for consideration including the issue of fraud, the nature of transaction and limitation. Pertinently, the Trial Court framed the issue as to whether the Plaintiff is entitled to get the suit property redeemed and answered that the same does not survive. Upon appreciation of evidence, the Trial Court decreed the suit declaring that the sale-deed dated 9th September, 2004 was executed towards security of the amount of Rs.20,000/- and directed the Plaintiff to deposit Rs.20,000/- and that the declaration as sought in prayer clause (e) would operate after the deposit of amount. The judgment of the Trial Court came to be challenged by the Defendant by way of Regular Civil Appeal No.426 of 2012. The Appellate Court framed the necessary points for consideration which included the nature of the transaction, the issue of limitation and answered the same in favour of the Plaintiff rejecting the Appeal.

6. Heard. Mr. Bodake, learned counsel appearing for the Appellant and Mr. Rananaware, learned counsel appearing for the Respondent.

7. Mr. Bodake, learned counsel appearing for the Appellant would submit that the substantial question of law arising is the issue of limitation as Article 59 of Limitation Act, 1963 applies as well as the nature of the document being construed as a mortgage by the Trial Court and the Appellate Court thereby committing jurisdictional error. He would further submit that the finding also suffers from perversity as the fraud has not been established by the Plaintiff. He has taken this Court to the prayers in the plaint and would submit that prayer clause (b) which sought a declaration that the property has become loan-free is in fact, a relief sought of redemption of mortgage. He would submit that by directing the Plaintiff to deposit an amount of Rs.20,000/- amounts to granting the relief of redemption of mortgage. He would further point out to the permission which was granted for sale by the Rehabilitation Officer and would submit that same lends credence to the document being sale deed.

8. *Per contra,* Mr. Rananaware, learned counsel for the Respondent would submit that the case of the Plaintiff was that the agreement was entered into as security for the loan of Rs.20,000/-. He further submits that once the document has been construed to be a document for security of the loan, there is no question of any redemption of mortgage even if there is a direction to deposit a sum of Rs.20,000/-. He has taken this Court to the findings of the Trial Court and the Appellate Court on the issue of fraud and submits that there are concurrent finding that the document has been obtained by fraud.

9. Considered the submissions and perused the records.

10. The Plaintiff has come with the case that the document of 9th September, 2004 was a sham sale-deed executed as security for loan and was not intended to be acted upon. The document was executed in the year 2004 and suit has been filed in the year 2010. The contention is that Article 59 of the Limitation Act, 1963 applies and the same Article has been considered by the Appellate Court. Perusal of Article 59 of the Limitation Act, 1963, would indicate that the limitation prescribed therein relates to the suits where the relief sought is for cancellation or setting aside an instrument or decree or for rescission of a contract. The said article is relatable to Section 31 of the Specific Relief Act, 1963.

11. In the present case, the relief sought by the Plaintiff is not of cancellation of the document dated 9th September, 2004 and what is sought is declaration as regards the nature of the document under Section 34 of the Specific Relief Act, 1963. The applicable Article would thus be Article 58 of the Limitation Act 1963 which provides for a limitation of three years when the right to sue first accrues. In the present case, the cause of action pleaded in the plaint is that in 2009 the amount of Rs.20,000/- was returned to the Defendant and despite thereof, on 15th June, 2009, an application was made to the Revenue Authorities for mutation of the name of the Defendant. The third column of Article 58 provides that the starting point of the limitation would be when the right to sue first accrues. It is only when acting upon the said document the Defendant sought to assert his right in respect of the property that the right to sue would accrue to the Plaintiff. The present suit therefore filed within period of three years from 15th June, 2009 and is therefore within limitation.

12. Now coming to the contention that the document was held by the Courts to be a mortgage deed, the finding is that the sham sale-deed was executed on 9th September, 2004 as security for loan transaction. The contention of Mr.Bodake is that the document would be mortgage by conditional sale deed under Section 58(c) of Transfer of Property Act, 1882 which falls under Chapter IV dealing with the mortgage of immovable property and charges. Firstly, it needs to be noted that the Plaintiff has come with a specific case that the document is not an outright sale but is a sham document executed as security for the loan without any intention to act upon the deed. It is nobody's case that the document constitutes a mortgage deed and finding is that it is a sham sale-deed. Mortgage has been defined under Section 58 of the Transfer of Property Act, 1882 as transfer of an interest in specific immovable property for purpose of securing the payment money advanced by way of loan.

13. The plea of Plaintiff is not of mortgage but of sham document not intended to be acted upon. There was no transfer of interest in the immovable property upon execution of the sham document. For a document to constitute mortgage the contents of the document has to necessarily satisfy the ingredients of the different kinds of mortgage provided under Section 58 of the Transfer of Property Act.

The sale deed when perused does not constitute mortgage by conditional sale. There is no prohibition in law for the parties who are otherwise competent to enter into a contract to arrive at an arrangement and it is not necessary that the same has to be necessarily fall within one of the documents provided under Section 58 of Transfer of Property Act. It is permissible for party to plead that the deed was not intended to be acted upon and was only sham document and not a bonafide sale. Having accepted that the sale agreement was executed as security for repayment of loan, the Trial Court has rightly directed deposit of Rs.20,000/-. The said direction cannot be construed as direction for redemption of mortgage.

14. As the document has been construed by both the Trial Court and the Appellate Court as security for the amount of Rs.20,000/- and not intended to be acted upon based on evidence which has come on record, the same constitutes a finding of fact which this Court will not interfere in exercise of powers under Section 100 of the Code of Civil Procedure, 1908.

15. As regards the contention that the pleadings of fraud do not satisfy the requirement of Order VI Rule 4 of CPC and fraud has not been established, the Trial Court and the Appellate Court had framed specific issue as regards the fraud committed by the Defendant and has answered the same in favour of the Plaintiff. The said finding constitutes a finding of fact and this Court will not interfere with the finding of fact unless it is demonstrated that the same is perverse. Before this Court nothing has been demonstrated to show that on the basis of the proven facts a wrong inference has been drawn by the Court while deciding the issue of fraud.

16. As regards the decision which has been relied upon by the learned counsel for the Appellant in the case of ***Amruta Kaluji Shejul and Ors. vs. Vithal Ganpat Wadekar and Ors., [2017(1) Mh.L.J.]***, the said decision was in context of a relief which was sought under Section 31 of the Specific Relief Act and it was in that context the provisions of Article 59 of the Limitation Act, 1963 was considered. In the present case, as already held that the applicable Article is Article 58 of the Limitation Act. As regards the decision in the case of ***Grasim Industries Limited and Anr. vs. Agarwal Steel, [(2010) 1 SCC 83]*** in that case the Trial Court considered the issue of presumption which arises when there is an execution of the document. In the facts of that case, there was no allegation of fraud whereas in the present case the Plaintiff has come with the case of the fraud which has also been held to be proved by the Trial Court and Appellate Court. As regards the decision in the case of ***Govindbhai Chhotabhai Patel and Ors. vs. Patel Ramanbhai Mathurbhai, [(2020) 16 SCC 255]***, in that case the provisions of Order 6 Rule 4 of the CPC were considered and that the necessary particulars are required to be stated in the pleadings. In the present case, the necessary pleadings to that effect can be found in paragraph 6 of the plaint where it is specifically pleaded that on an assurance that the defendant will not enter his name in the Revenue Records and the document is executed only as a nominal sale-deed as security for loan of Rs.20,000/- the document was got executed however thereafter, he asserts the title to the suit property on the premise that the document is a sale deed as such the necessary pleadings are found in the plaint and has been upheld by the Court.

17. In light of the above, no substantial question arises in the Appeal, Second Appeal stands dismissed. In view of the disposal of the Appeal, Civil/Interim Applications, if any, taken out in this Appeal, does not survive and same is disposed of.

[Sharmila U. Deshmukh, J.]

Signed by: Sanjay A. Mandawgad
Designation: PA To Honourable Judge
Date: 07/05/2024 11:08:54