IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.678 OF 2016
WITH
CIVIL APPLICATION NO.1353 OF 2016

Rajaram Shamrao Khot and Anr. ...Appellants
Versus
Bajirao Dhondiram Patil and Anr. ...Respondents

Mr. Chetan G. Patil for the Appellants.
Mr. Sandeep Koregave for the Respondents.

CORAM : SHARMILA U. DESHMUKH, J.
DATE : 14th FEBRUARY, 2024

P. C. :

1. Being dissatisfied by the judgment dated 10/3/2016 passed in Regular Civil Appeal No.261/2015 by which the Appellate Court dismissed the appeal thereby confirming the dismissal of Suit by the Trial Court *vide* judgment dated 4th July, 2015, the original plaintiff is before this Court .

2. Briefly stated the facts of the case are that RCS No.730/2008 was instituted seeking rectification of the sale deed dated 30/11/2007 under the provisions of Section 26 of the Specific Relief Act. The rectification was sought for the reason that fraud had been played in the execution of sale deed dated 30/11/2007. It is pleaded that what was

agreed upon between the plaintiff and defendant No.1 was to jointly purchase plot No.36 ad-measuring 259.5 square meter. It was the case of the plaintiff that the parties had no intention to bifurcate the plot and no boundaries were agreed upon. However the defendant No.1 taking advantage of the illiteracy of plaintiff-2 who was wife and POA holder of plaintiff No.1 has got executed the sale deed dated 30th November 2007 by setting out boundaries showing two portions of the plot. The case of the plaintiff as regards the fraud was set out in paragraph No.3 of the plaint that the defendant No.1 for his own benefit has bifurcated the plot as per his own convenience and set out boundaries. It was further pleaded in paragraph No.3 that boundaries as set out in the sale deed was not agreed upon by the parties for the reason that on the portion shown as plaintiff's share there could be no development. What is further pleaded was that the defendants have taken advantage of illiteracy of plaintiff No.2 and have executed the sale deed fraudulently. It was pleaded that the agreement of sale dated 12th June 2007 did not bifurcate the plot and while executing Sale Deed on 30th November 2007, fraud was played.

3. Defendants resisted the suit and set up the case of oral agreement as regards the boundaries of two portions of the suit plot pursuant to the agreement for sale. According to defendant No.1 after

agreement for sale was executed the parties had orally agreed to execute the sale deed by bifurcating the plot.

4. Armed with respective cases, the parties went to Trial Court. Trial Court framed the issues for consideration and arrived at a finding based on the evidence that the plaintiff has failed to establish fraud and dismissed the Suit. The findings of the Trial Court indicate that the Trial Court took into consideration the admission of plaintiff No.2 as regards the execution of mortgage deed which was executed on the same day of execution of the sale deed and based on sale deed 1/2 share in the property as shown in the sale deed was mortgaged with the bank.

5. As against the dismissal of the Suit plaintiff filed Regular Civil Appeal No.261/2015. The Appellate Court held that there appears no mutual mistakes or any fraud played by the defendants in execution of the sale deed dated 30/11/2007. The Appellate Court held that the pleadings and evidence is contradictory to the arguments of the learned counsel for the plaintiff. The Appellate Court noted that the sale deed and the mortgage deed were executed on the same day. The Appellate Court considered the condition in N.A. permission that the plot shall not be sub-divided and as such held that for the said purpose boundary was not

mentioned in the agreement for sale. The Appellate Court held that consent of co-sharer would be required at the time of mortgage and to avoid such difficulty, the sale deed must have been executed by mentioning specific boundaries. The Appellate Court found that there was no specific case of mutual mistake or fraud played by the plaintiff and dismissed the appeal.

6. Heard Mr. Chetan G. Patil for the Appellants and Mr. Sandeep Koregave for the Respondents.

7. Mr. Patil, learned counsel appearing for the appellants has taken this Court through agreement for sale as well as sale deed and would submit that the fact that there was no bifurcation of the plot by showing boundaries in the agreement of sale which finds place in the sale deed read with the condition of NA makes it evident that fraud has been practiced upon the plaintiffs. He submits that the plaintiff No.1 being an army man was not available for registration of sale deed and power of attorney came to be executed in favour of plaintiff No.2 who was illiterate and as such taking advantage of the said illiteracy of plaintiff No.2, fraud has been practiced upon plaintiff by defendant No.1 and sale deed has been executed by bifurcating the plots. He submits that it was never the

intention of the parties to bifurcate the plots as no development could have been carried out on the portion of plaintiff's share of the plot.

8. *Per contra*, learned counsel appearing for respondent would point out that the sale deed and the mortgage deed was executed on the same day and at the time of execution of the mortgage deed brother of the plaintiff was present. He would further submit that no case of fraud is established by the plaintiff and as such Trial Court and Appellate court has rightly dismissed the suit.

9. Considered the submissions and perused the record.

10. The execution of the agreement for sale dated 12th June 2007 as well as sale deed dated 30th November 2007 is not disputed. The plaintiffs seeks rectification of the sale deed on the ground that fraud has been committed upon the plaintiffs at the time of execution of the sale deed. The fraud which is pleaded in paragraph No.3 of the plaint is that as per the agreement of sale the property was to be purchased jointly and there was no bifurcation of the plot and that the boundaries of the plot described in the sale deed to the share of the plaintiffs was never intended to be purchased by the plaintiffs for the reason that on the said portion of

the property no development could have been taken place. Fraud is further pleaded that taking advantage of illiteracy of plaintiff No.2, bifurcated plots are shown in the Sale Deed. The case appears to be that in view of variances in the agreement for sale and the sale deed, there is fraud played upon the plaintiff. The statutory provisions governing rectification of the instrument finds place in Section 26 of the Specific Relief Act which reads thus:

> *"When, through fraud or a mutual mistake of the parties, a contract or other instrument in writing not being the articles of association of a company to which the Companies Act, 1956 (1 of 1956) applies does not express their real intention, then—*
> *(a) either party or his representative in interest may institute a suit to have the instrument rectified; or*
> *(b)the plaintiff may, in any suit in which any right arising under the instrument is in issue, claim in his pleading that the instrument be rectified; or*
> *(c) a defendant in any such suit as is referred to in clause (b), may, in addition to any other defence open to him, ask for rectification of the instrument.*
> *(2) If, in any suit in which a contract or other instrument is sought to be rectified under sub-section (1), the court finds that the instrument, through fraud or mistake, does not express the real intention of the parties, the court may, in its discretion, direct rectification of the instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value.*
> *(3) A contract in writing may first be rectified, and then if the party claiming rectification has so prayed in his pleading and the court thinks fit, may be specifically enforced.*
> *(4) No relief for the rectification of an instrument shall be granted to any party under this section unless it has been specifically claimed:Provided that where a party has not claimed any such relief in his pleading, the court shall, at any stage of the proceeding, allow him to amend the pleading on such terms as may be just for including such claim."*

11. Plain reading of the provision would indicate that instrument may be rectified when through fraud or mutual mistake of the parties the instrument does not express the real intention of the parties. For establishing case of fraud, specific pleadings are required to be pleaded in the plaint as mandated by the provisions of Order VI Rule 4 of the Civil Procedure Code, 1908. In the present case what has been put forward as case of fraud is there is variance in the agreement for sale and the sale deed for the reason that in the agreement of sale there was no bifurcation of the plot whereas in the sale deed the same occurs.

12. While considering the issue of fraud the Trial Court and the Appellate Court has rightly taken into consideration the execution of the mortgage deed executed by the plaintiffs. Perusal of the mortgage deed dated 30th November 2007 would disclose that the description of the mortgaged property matches the description of the property in the Sale Deed. The mortgage deed has been executed by the plaintiffs and the Bank and the defendant No.1 is not party to mortgage deed. From description of property in the mortgage deed it is evident that the description of suit property as set out in the sale Deed was the property intended to be purchased by the plaintiffs. While executing mortgage deed, the title deed would have been deposited in the bank which is sale

deed in the present case. If half share of the property without setting out respective boundaries was to be mortgaged, the consent of co-sharer would be necessary and in the present case in the Application for mortgage it does not appear that consent of the co-sharer by way of his signature is obtained. As such the Appellate Court has rightly considered the aspect of execution of mortgage deed and on the basis of the same has held that the bank has sanctioned loan based on the sale deed which has been executed by mentioning specific boundaries of the portion purchased by them.

13. Taking into consideration the fact that on the same day the mortgage has been executed in respect of the same property which formed part of the sale deed, it cannot be said that there was any fraud practiced upon the plaintiffs while executing sale deed. The presence of brother of plaintiff No.1 at the time of execution of mortgage deed militates against the case of the plaintiffs that taking advantage of illiteracy of plaintiff No.2 the present sale deed was executed through fraud. It was necessary to plead and establish specific case of fraud which the plaintiffs have failed to establish. There are concurrent findings and no perversity has been demonstrated. The documentary and oral evidence has been rightly appreciated by the Trial Court and the Appellate Court to come to

a finding that there is no fraud. In exercise of powers under Section 100 of the Civil Procedure Code, 1908, this Court cannot re-appreciate the evidence on record in absence of perversity of findings. As such, no substantial question of law arises.

14. Appeal stands dismissed. Civil Application does not survive and is accordingly disposed of.

(SHARMILA U. DESHMUKH, J.)