Dnyanoba Bhaurao Shemade

Vs

Maroti Bhanrao Marnor

Civil Appeal No. 543 of 1989

(S. B. Majmudar, M. Jagannadha Rao JJ)

05.02.1999

JUDGMENT

S. B. Majmudar J.

1. In this appeal by special leave, the appellant-plaintiff has brought in challenge the Judgment and Order rendered by a learned Single Judge of the High Court of Judicature of Bombay at Aurangabad in Second Appeal No. 188-A of 1982. The High Court, by the impugned judgment, has allowed the appeal of respondent-defendant and has dismissed the appellant's suit. In order to appreciate the grievance of the appellant against the impugned judgment, a few introductory facts are required to be noted at the outset.

2. The appellant had purchased 2 acres and 33 gunthas of agricultural land from Survey No. 23/AA situated at village Shekta in Gevrai Taluka of Beed District in State of Maharashtra from one Dagdu in the year 1967. It is his case that as he was in need of money and when the respondent - defendant advanced him Rs. 1,000/-, he got executed a sale deed from the appellant for Survey No. 21/AA of the same village on 29th January, 1973 as a security. After some time, the appellant was in a position to return the said amount with interest to the respondent - defendant. Both, therefore, came to Gevrai for re-executing the sale deed in respect of Survey No. 21/AA. According to the appellant, at that time respondent - defendant demanded Rs. 500/- more and he was not prepared to re-execute the sale deed in respect of survey No. 21/AA unless the until Rs. 500/- more were paid to him by the appellant. As the appellant was not having Rs. 500/- more, the respondent asked the appellant to execute a sale deed in respect of suit field Survey No. 23/AA as a securing towards the amount of Rs. 500/-. The appellant had, therefore, executed the said sale deed and then only the respondent had re-executed the sale deed in respect of Survey No. 21/AA in favour of the appellant. It is the case of the appellant that despite the execution of the sale deeds by the appellant in favour of respondent - defendant in connection with Survey Nos. 23/AA & 21/AA both the lands remained with him as the sale deeds were nominal. As the respondent tried to interfere with the appellant's possession of Survey No. 23/AA, the appellant filed regular Civil Suit No. 51/76 on 10th February, 1976 in the Court of Civil Judge, Junior Division at Gevrai for a declaration that the sale deed dated 31st October, 1975 bearing No. 2159 regarding Survey No. 23/AA was null and void. The appellant also prayed for permanent injunction restraining the respondent-defendant from interfering with the plaintiff possession over the said field. Pending the suit an interim injunction was granted in favour of the appellant.

3. The respondent resisted the suit by filing written statement at Exhibit-43. His case was that he had purchased Survey No. 21/AA to the extent of 4 acres for Rs. 2,500/- from the plaintiff and the possession was delivered to him. That it was a contract of sale and was not towards the securing of

the amount. That after some days he purchased 5 acres and some gunthas of land from eastern side of Survey No. 23/AA from one Tulsiram. That portion is adjacent to the suit field. That there was an oral agreement between the plaintiff and himself, that the plaintiff would execute a sale deed in respect of suit field being some other part of Survey No. 23/AA in favour of the respondent and in its exchange respondent would execute a sale deed in respect of Survey No. 21/AA in favour of the appellant. That after the said oral agreement both came to Gevrai and exchanged their lands by executing the sale deeds in favour of each other. He was, therefore, the owner and in possession of the suit field.

4. On these pleadings, the following issues were framed by the learned Trial Judge :

> "1. Does the plaintiff prove that he executed the sale-deed bearing No. 2159 dated 31st October, 1975 as a security for the amount of Rs. 500/- ?
>
> 2. Does he further prove that he is in possession over the suit land ?
>
> 3. Is the document 2159 liable to be declared void ?
>
> 4. Is the plaintiff entitled for permanent injunction ?

5. What order and decree ?"

After recording the oral and documentary evidence offered by the parties, the learned Trial judge came to the conclusion that the appellant had proved that he executed the sale deed bearing No. 2159 dated 31st October, 1975 as a security for the amount of Rs. 500/-. He had also proved that he was in possession of the suit land. The learned Trial Judge came to the conclusion on the aforesaid findings, that the document in question was liable to be declared as void and that the appellant was entitled to a permanent injunction against the respondent. The decree passed by the learned Trial Judge on 27th April, 1978 was to the following effect :

"The suit is decreed with costs, as follows :-

(1) The sale deed bearing No. 2159 is declared null and void.

> (2) The defendant is hereby permanently restrained from interfering into the peaceful possession of the plaintiff over the suit field."

5. Being dissatisfied, the respondent - defendant carried the matter in appeal before the learned Extra Asstt. Judge, Beed. The appellate court, after hearing the respective parties, framed the following points for determination :

> "(1) Whether the appellant proves that the sale deeds executed on 31st October, 1975 in respect of Survey No. 21/AA and 23/AA were in nature of exchange.
>
> (2) Whether the respondent proves his actual possession of the suit property i.e. Survey No. 23/AA 2 acres and 33 gunthas portion on the date of suit.
>
> (3) Whether the respondent proves that he executed the sale deed in respect of the suit property in favour of defendant for security of an amount of Rs. 500/-.

(4) Whether the sale deed dated 31st October, 1975 in respect of Survey No. 23/AA, 2 acres and 33 gunthas portion is void.

(5) What order ?"

6. On re-appreciation of evidence, the learned Appellate Judge came to the conclusion that the respondent had failed to prove that the sale deeds executed on 31st October, 1975 in respect of Survey No. 21/AA and 23/AA were in the nature of exchange. It was also held that the appellant had proved his actual possession of the suit property i.e. Survey No. 23/AA two acres and 33 gunthas on the date of the suit. It was also held that the appellant had proved that he had executed the sale deed in respect of the suit property in favour of the respondent for securing an amount of Rs. 500/-. However, on the question whether the said sale deed was void, the learned Appellate Judge, disagreeing with the trial court, came to the conclusion that the said sale deed was voidable and not void and it was based on some consideration. As a result of these findings, the appellate court dismissed the appeal subject to the modification that the defendant shall re-convey the suit property to the plaintiff on receipt of the amount of Rs. 500/-. The decree for permanent injunction against the respondent was confirmed. The aforesaid decision of the Appellate Court was Challenged by the respondent before the High Court in second appeal and as noted earlier, the learned Single Judge, in exercise of his jurisdiction under Section 100 C.P.C., reversed the decrees of both the courts below and dismissed the appellant's suit.

RIVAL CONTENTIONS :

7. The learned counsel appearing for the appellant vehemently submitted that the learned Single Judge of the High Court, while exercising jurisdiction under Section 100 C.P.C., could not interfere with pure findings of fact reached by both the courts below on appreciation of oral and documentary evidence and that too without framing any substantial questions of law as required by Section 100 C.P.C. as amended from 1976. Even on merits, according to the learned counsel, the findings reached by the learned Single Judge of the High Court are against the weight of evidence and cannot be sustained. The learned counsel for the respondent-defendant, on the other hand, tried to support the judgment and order of the learned Single Judge.

8. Having given our anxious consideration to the rival contentions aforesaid, we find ourselves unable to sustain the decision rendered by the learned Single Judge of the High Court for the reasons that follow :

> It has to be kept in view that the learned Single Judge was exercising jurisdiction under Section 100 C.P.C. as it was amended in 1976. A mere look at the said provision shows that the High Court can exercise its jurisdiction under Section 100 C.P.C. only on the basis of substantial questions of law which are to be framed at the time of admission of the second appeal and the said appeal has to be heard and decided only on the basis of such duly framed substantial questions of law. The impugned judgment shows that no such procedure was followed by the learned Single Judge. It is held by a catena of Judgments by this court, some of them being, *Kshitish Chandra Purkait v. Santosh Kumar Purkait and others, 1997(5) SCC 438,* and *Sheel Chand v. Prakash Chand, 1998(6) SCC 683,* that the judgment rendered by the High Court under Section 100 C.P.C. without following the aforesaid procedure cannot be sustained. On this short ground alone, this appeal is required to be allowed.

9. However, we have, with the assistance of the learned counsel of both the parties, examined the merits of the controversy from all its angles, with a view to finding out whether this is a fit case for our interference under article 136 for the Constitution of India and whether equities are in favour of the appellant or the respondent. it must be said that the theory put forward by the respondent to defeat the case of the appellant was based on an oral agreement to exchange Survey No. 23/AA of the plaintiff with Survey No. 21/AA which is sia dot have been purchased by the defendant earlier from the plaintiff. This theory of oral agreement of exchange was tried to be supported by oral evidence led by the defendant and his witnesses on the one hand and was tried to be refuted by the plaintiff on the other. Both the courts below, held on appreciation of evidence, that the theory of oral agreement to exchange was not believable as the version regarding the same was full of contradictions. The defendant tried to depose that the talk took place 1_�_ months prior to the execution of the sale deed dated 31st October, 1975 and that according to him, the talk took place between the parties at the shop of the plaintiff while according to his witness Shantinath, the talk took place at the house of defendant and it took place one day prior to the execution of sale deed. Thus, defendant's version for supporting the theory of oral agreement to exchange of land was disbelieved by the trial court as well as the appellate court. Once this finding of fact was reached, it is difficult to appreciate how the learned Single Judge in exercise of his jurisdiction under Section 100 C.P.C., apart from the aforesaid procedural lapse on his part, could have persuaded himself to re-appreciate the evidence by going into various other circumstances for supporting his conclusion that the theory of oral agreement of exchange was established on record. The said finding reached by the learned Single Judge in the High Court was clearly without jurisdiction and an incompetent one apart from being against the weight of evidence. Once the theory of oral agreement to exchange is ruled out, there would remain no occasion for the High Court under Section 100 C.P.C. to consider the question of any other circumstantial evidence for going behind such a pure finding of fact reached by both the courts below. Even otherwise it has to be noted that the case of the respondent was that he had already purchased a part of eastern side land from Survey No. 23/AA prior to the impugned suit transaction from the Tulsiram and, therefore, he was in need of extending his occupancy of Survey No. 23/AA in the Western part and that was the reason why he persuaded the appellant to enter into an agreement to exchange these lands. The respondent-defendant for the reasons best known to him did not think fit to produce either the sale deed under which he is said to have earlier purchased part of Survey No. 23/AA from Tulsiram nor had he made any effort to prove the said transaction independently by examining the so called vendor, Tulsiram. This circumstance was relied upon by both the courts below for disbelieving the theory of oral agreement to exchange these lands. The learned Single Judge of the High Court, however, disagreed with the said finding reached by both the courts below and observed that non-production of sale deed by the defendant of the land purchased by him from Survey No. 23/AA had no significance because the plaintiff admitted it in his cross-examination and defendant specifically pleaded in paragraph 14 in the written statement. In fact, in para 6 of his deposition (exhibit 51/C), in cross-examination the appellant stated that there is one land of Tulsiram after one land from the suit field which is purchased by the defendant. It is not true that it was agreed between him and defendant that he could execute the sale deed in respect of the suit field in favour of the defendant and in this exchange the defendant would execute the sale deed in respect of Survey No. 21/AA in his favour. It is difficult to appreciate how the aforesaid statement of the appellant in his cross-examination can be treated as an admission on his part that defendant had earlier purchased a part of land from Survey No. 21/AA from Tulsiram.

10. It is interesting to note that after the execution of the impugned sale deeds for Survey No. 21/AA and 23/AA and 23/AA, the defendant does not seem to have made any effort to be put in

possession of the said lands as owner thereof save and except making an attempt to get mutation entry in his favour in connection with the Survey No. 23/AA. Even such a mutation entry seems to have been made without issuing any notice to the appellant as clearly deposed to by him before the court. The observation of the learned Single Judge that the plaintiff does not say that he raises any objection before the Revenue Authority at the time of certification of the mutation entry cannot be sustained for the simple reason that it was the plaintiff's case that no notice was issued to him. The learned Single Judge has not touched this aspect at all.

11. It is also to be noted that the theory of exchange as propounded by the respondent cannot be sustained on the additional ground that the respondent is said to have exchanged four acres of land (21/AA) by taking in return two acres 33 gunthas of land (Survey No. 23/AA) namely, the suit land. As admittedly, both these lands are situated in near vicinity and especially in view of the fact that according to the respondent, he had earlier purchased from the appellant four acres of land (21/AA) for Rs. 2,500/-, *ex-facie*, it becomes improbable to believe that four acres of land were exchanged for two acres 33 gunthas of land. There is nothing on record to show that four acres of land were in quality equivalent to two acres 33 gunthas of land of the other survey number situated in the same vicinity. The circumstance also belies the case of the respondent and support the case of the appellant that even the first transaction of 1973 in connection with Survey No. 21/AA was not a genuine sale transaction but was by way of a mere security for the loan taken by the appellant from the respondent and which was agreed to be reconveyed to the appellant in 1975 when he offered to repay the loan amount with due interest and at that stage for shortfall of Rs. 500/- respondent requested the appellant to execute to execute the impugned sale deed for Survey No. 23/AA merely by way of security. It is also important to note that the impugned sale deed does not mention any consideration for the said transaction. It, therefore, *ex-facie* appears to be a nominal transaction not really effecting any sale of Survey No. 23/AA in favour of the respondent. All these vital aspects are glossed over by the learned Single Judge in the impugned judgment. It is also pertinent to note that both the courts below had taken the view and had reached a clear finding of fact that despite the execution of impugned sale deed, the plaintiff remained all through out in possession of the land. That is the reason why ad-interim injunction was confirmed ultimately by the trial court and permanent injunction was issued against the respondent and that decree for permanent injunction continued all through out. It is also seen that even the learned Single Judge in the impugned judgment has nowhere categorically reversed the finding of fact, in this connection even apart from the fact that he had no jurisdiction to do so. the approach adopted by the learned Single Judge in the impugned judgment in paragraph 12 to the effect that as both the courts below ignored the weight of prepondering circumstances and allowed their judgments to be influenced by inconsequential matters, the High Court would be justified in re-appriciating the evidence and in coming to its own independent conclusion, is, to say the least, patently erroneous in law and cannot be sustained. Whether a finding of fact reached by courts below is against the weight of evidence or not is a question which will remain in the realm of appreciation of evidence and does not project any question of law, much less, any substantial question of law, which can enable the High Court in second appeal to upset such a finding of fact. On relevant evidence, both the courts below had come to the conclusion that the original sale deed (exhibit - 58) dated 29th January, 1973 was a nominal one and was executed by way of security for the loan taken by the appellant from the defendant and similarly the latter two sale deeds Exhibit - 52 dated 31.10.75 and exhibit - 53 of even date were nominal and were not part and parcel of any exchange transaction. These findings were well sustained on record and could not have been interfered with by the High Court in second appeal. Hence, even on merits of the controversy between the parties, the decision rendered by the learned Single Judge and the conclusion of facts to which he reached on re-appreciation of evidence cannot

be sustained. The appellant had made out his case on merits and equities were also in his favour. The respondent can not take advantage of such a nominal sale transaction to defeat plaintiff's claim. In the result, the appeal is allowed. The impugned judgment of the High Court is set aside and the decision of the learned Trial Judge decreeing the appellant's suit and as confirmed with modification in appeal by learned Extra Assistant Judge, Beed on 27th January, 1982 are restored. In the facts and circumstances of the case, there is no order as to costs.