

SUPREME COURT OF INDIA

Gajaraba Bhikhubha Vadher

Vs.

Sumara Umar Amad

C.A.No.260 of 2020

(R.Banumathi,J., A.S.Bopanna and Hrishikesh Roy,JJ.,)

14.01.2019

JUDGMENT

A.S.Bopanna,J.,

SLP (Civil)No.33722 of 2016

1. Leave granted.

2. The appellants are before this Court assailing the judgment dated 19.10.2016 passed by the High Court of Gujarat at Ahmedabad in Second Appeal No.12 of 2014. Through the said judgment, though the appeal is allowed in part to the extent of setting aside the decree dated S'9,,,TT,03.12.2012 passed in the Regular Appeal No.130 of 2005 and confirming the judgment dated 07.11.2012 in Regular Civil Appeal No.130 of 2005, the High Court has held that insofar as the locus of the appellants, they being third parties had no right to challenge the judgment and order passed by the Lower Appellate Court. The appellants being purchasers of plot in the land bearing Survey No.36 of Dhinchna, Taluk and District Jamnagar which is the subject matter of the suit are therefore, before this Court claiming to be aggrieved by the impugned judgment.

3. The appellants were not the parties to the suit nor in the regular appeal. However, the adverse judgment in the first and second appeal has led to the present appeal. The brief facts noticed for the limited purpose of disposal of this appeal is that the predecessors of the respondents No.1/1 to No.1/4, namely, Sumara Umar Amad instituted a suit bearing Special Civil Suit No.77/1974 against his father Sumara Amad Osman seeking for partition of the land bearing Survey No.36 situate in Dhinchna village Jamnagar measuring 23 Acres, 27 Guntas. The claim put forth was that the said property was in the joint ownership, occupation and possession. The plaintiff referred to certain mortgage transaction with his father and in that light claiming to have a joint ownership right to the extent of half share in the said property, had sought for partition of the property, more fully described in Schedule A to the plaint. In that regard, certain exchange of notices by way of paper publication was referred as the cause of action since the defendant No.1, namely, the

father of the plaintiff is stated to have published a notice in the daily Newspaper “Nobat” on 29.03.1974 expressing the intention to sell the property. In the said suit the defendants 2 to 4 who were purchasers of the property under the Sale Deed dated 29.07.1975 were subsequently arrayed as defendants 2 to 4 though they were not parties initially. The defendants had opposed the claim put forth in the plaint. In that regard, the defendant No.1, namely, the father of the plaintiff had disputed the claim of joint ownership and had contended that the defendant had purchased the suit land before the birth of the plaintiff and the parties being Mohammedans, the plaintiff cannot have any right in the suit land based on his relationship as a son, during the lifetime of the father. The defendant No.1, therefore, claimed absolute right and the authority Page 3 of 19 to sell the property which was due to the bad financial situation of the defendant father. During the pendency of the suit the defendant No.1 father expired on 21.02.1978 and his heirs, namely, the siblings of the plaintiff were joined as defendants No.1/1 to 1/4.

4. Based on the rival pleadings, the Trial Court had framed five issues for its consideration. During the course of the suit, despite not having pleaded in the plaint, the plaintiff put forth a different version about his right to the property claiming right to the property under an oral gift from his grandfather. The Trial Court on having adverted to all aspects of the matter, through its detailed judgment had dismissed the suit by judgment and decree dated 17.04.1982. The plaintiff claiming to be aggrieved by the same preferred a Regular Appeal as contemplated under Section 96 of the Civil Procedure Code in R.C. Appeal No.130 of 2005. In the said Regular Appeal the Lower Appellate Court had reversed the judgment and decree dated 17.04.1982 passed by the Trial Court and consequently decreed the suit of the plaintiff declaring him to have right over half share of the suit schedule property. The appellants herein who had purchased plots formed in the layout in a portion of the property were thus aggrieved by the judgment dated 07.11.2012 and decree dated 03.12.2012 passed by the Lower Appellate Court and preferred the Second Appeal No.12 of 2014 under Section 100 of the Civil Procedure Code before the High Court. As noted above, the said Second Appeal was disposed without relief to the appellants and the appellants are, therefore, before this Court.

5. Heard Shri Rakesh Dwivedi, learned Senior Counsel for the appellants, Shri Siddharth Bhatnagar, learned Senior Counsel for the respondents and perused the appeal papers.

6. It is to be taken note that even though a brief reference is made to the nature of the claim put forth in the suit and the conclusion reached by the Trial Court, as also the Lower Appellate Court and the contentions on merits as urged before the High Court was also urged in this appeal. The learned Senior Counsel for the appellants would at the outset refer to the apparent error committed by the High Court while disposing of the Second Appeal contrary to the established position of law. In that regard, it is contended that in an appeal under Section 100 of the Civil Procedure Code the established position is that an appeal would arise for consideration only if substantial question of law is made out. In that light, it is pointed out that in the instant facts the High Court having taken note of the contentions had framed as many as six substantial questions of law for consideration through the order dated 20.02.2014 while admitting the appeal, but while disposing of the

appeal through the impugned judgment dated 19.10.2016 the High Court has failed to consider and answer the said substantial questions of law which had been framed for consideration.

7. It is further contended by the learned Senior Counsel for the appellants that even though the reasoning is in favour of the appellants the conclusion to nonsuit the appellants as being subsequent purchasers would be unmerited. The learned Senior Counsel would contend that apart from the claim of the plaintiff not being sustainable either for a share during the lifetime of his father or under the oral gift as claimed, the plaintiff had executed Confirmation Deeds dated 28.06.2012 bearing 6523, 6525 and the Confirmation Deed dated 29.06.2011 bearing Registration No.6195 whereunder the Sale Deed dated 29.07.1975 which was executed by the father of the plaintiff had been ratified. If that be the position, the plaintiff in any event could not have claimed right to the extent indicated in the said documents and the appellants being purchasers from such parties in whose favour the Confirmation Deed was executed would have a right over the property and the plaintiff cannot make out a right over the said properties. As such the claim for half share would not subsist. These were the aspects which were required to be taken note by the First Appellate Court and High Court in the Second Appeal but there was failure in that regard. In that light, the learned Senior Counsel would contend that consideration is required to be made by the High Court on all these aspects which would call for a remand of the matter without this Court going into the factual aspects herein.

8. The learned Senior Counsel for the respondents would, however, seek to sustain the judgment passed by the High Court in the Second Appeal. It is contended that the Sale Deeds relied on is not placed on record. It is further contended that the original purchasers who were parties to the suit are held to be not bonafide purchasers in the suit itself and, therefore, the appellants even if they could establish that they had purchased plots from such of those purchasers, they cannot be held as bonafide purchasers and as such no right is made out. It is contended that the respondent, namely, the plaintiff is interested in the property bearing Survey No.36/4 and the appellants having no claim over the same cannot make out any grievance. The learned Senior Counsel would further point out that the High Court has taken note that the main grievance of the appellants was that the decree travels beyond the judgment and to that extent the High Court having taken note of the same, as also the legal position and has in that regard indicated that the decree would be in conformity with the judgment. It is further contended that the sale made was under two Sale Deeds dated 29.07.1975 to the extent of 12 Acres and Sale Deed dated 01.02.1978 to the extent of 11 Acres 27 Guntas. The confirmation claimed by the appellants would not relate to the entire extent and as such the appellants cannot attempt to defeat the claim of the plaintiff. It is contended that the High Court taking note that the purchase was made by the appellants during the pendency of the proceedings before the Court has indicated that they would be governed by Section 52 of the Transfer of Property Act which is in accordance with law. Insofar as the contention relating to the substantial questions of law, it is contended that reference to that effect is available in the judgment of the High Court and therefore the questions stand answered.

9. As noticed the issue for consideration is limited at this stage to notice whether the substantial questions of law as framed by the Court has been dealt with appropriately. If the conclusion is in the negative, the matter would require reconsideration by the High Court and this appeal will stand disposed in terms thereof. However, if our conclusion is that the substantial questions have been adverted to in an appropriate manner, in such event a further consideration will be required on the other aspects in this appeal itself for which the parties will have to be provided an opportunity to argue on merits. In that background, we have adverted to the appeal papers in the light of the limited contentions on that aspect.

10. In that regard, a perusal of the judgment passed by the High Court would indicate that the substantial questions of law framed at the time of admission of the appeal on 20.02.2014 is taken note in para 5 of the judgment. The questions of law as framed for consideration reads as hereunder:

1. “Whether the Lower Appellate Court has not erred in overlooking the principles of Mohamedan Law while holding that the plaintiff was entitled to a half share in the ancestral property even during the lifetime of his father?”

2. Whether the Lower Appellate Court has not erred in considering the evidence adduced by the plaintiff to establish that he had been gifted a half share in the suit property by this grandfather, when the same was clearly beyond the pleadings in the plaint?

3. Whether the finding of the Lower Appellate Court that there was a valid gift of half share in the suit property in his favour by this grandfather is not perverse and unsupported by any evidence whatsoever?

4. Whether the Lower Appellate Court has not erred in overlooking the fact that the two findings regarding ownership of the plaintiff of half share in the suit property by gift and by share in the ancestral property are mutually inconsistent and cannot stand together?

5. Whether the decree drawn up by the Lower Appellate Court is in accordance with the judgment passed by the Court and in accordance with law?

6. Whether the Lower Appellate Court was justified in drawing up the decree on the basis of a compromise entered into by the plaintiff with third parties, particularly in the absence of partition of the property by metes and bounds pursuant to the judgment and in the absence of any challenge to the sale deeds executed by the original defendant no.1 pending the suit?”

11. The High Court after taking note of the substantial questions has only recorded the contentions of both sides from para 6 to para 19. Thereafter, a reference has been made to the requirement of answering the questions keeping in view Section 100 of the Civil Procedure Code. Having noted so, the substantial questions of law are answered only in the

manner as recorded in para 27, as hereunder:

“Therefore, it is clear that the Second Appeal is based on the substantial questions of law. The answers of such questions based on the same, this Court vide order dated 20.02.2014, admitted the Appeal, are as under:

1. So far as question No.1 is concerned, the Lower Appellate Court held the plaintiffs entitlement for half share in the ancestral property as per Mohamedan Law. The question is not required to be dealt herewith because this Court has jurisdiction under Section 100 of the Code of Civil Procedure and here this Court is not required to reappreciate the evidence about half share of the plaintiff as per Mohamedan law. So far as the facts of the present case is concerned, the original plaintiff never claimed the ownership of the suit land and at the first time, said fact came to be in knowledge by way of oral evidence of the original plaintiff. Therefore, this Court is not inclined to deal with this question.

2. With regard to question No.2, the plaintiff had been gifted a half share in the suit property by his grandfather and it is also matter of evidence and looking to the facts of this case, there is only pleadings but no evidence in that regard is produced by the plaintiff.

3. The question No.3 pertains to the valid gift of half share in the suit property of the original plaintiff by his grandfather. It is also a matter of evidence and the same is required to be determined by the lower Appellate Court. Therefore, this question is not required to be dealt with by this Court.

4. So far as question No.4 is concerned, the two findings regarding ownership of the plaintiff of half share in the suit property by gift and by share in the ancestral property are mutually inconsistent and cannot stand to be rejected. Further, this question is not required to be dealt with by this Court so far to exercise powers under Section 100 of the Code of Civil Procedure.

5. This question No.5 pertains to the decree drawn up by the lower Appellate Court is in accordance with the judgment passed by this Court and in accordance with law. Here the submissions of the appellants is that decree travels beyond the judgment because on 07.11.2012, the judgment was declared by the lower Appellate Court holding that the plaintiff has half share in the suit land and directed to draw preliminary decree. In the decree dated 3.12.2012, the lower Appellate Court decreed that (1) the sale deed dated 29.7.1975 is illegal along with other directions. In this regard, Order 20 Rule 6 of the Code of Civil Procedure is required to be quoted herein:

6. Contents of decree

(1) The decree shall agree with the judgment; it shall contain the number of the suit,

the [names and descriptions of the parties, their registered addresses,] and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit.

(2) The decree shall also state the amount of costs incurred in the suit, and by whom or out of what properly and in what proportions such costs are to be paid.

(3) The Court may direct that the costs payable to one party by the other shall be set off against any sum which is admitted or found to be due from the former to the latter.”

12. We have extracted the substantial questions of law and the manner in which it has been dealt by the Court to only to indicate that apart from the consideration in para 27 extracted (supra), the substantial questions of law have not been considered in the light of the contention and answered with reference to the questions raised therein. Through the order dated 20.02.2014 when the substantial questions of law were formulated on admission, those were required to be answered one way or the other by providing High Court's reasonings and to arrive at a conclusion on that basis. On the other hand, if the Court was of the opinion that any of the substantial questions of law framed was to be modified, altered or deleted, a hearing was required to be provided on the same and thereafter, appropriate substantial questions of law could have been framed and answered. Without resorting to any such procedure, on taking note of the substantial questions of law as it existed, a brief reference is made thereto and the same is disposed of without answering the same, which would not be justified.

13. That apart, the Second Appeal had been filed before the High Court by the appellants herein on seeking leave to file the same as they were not parties before the Courts below but have interest in the subject matter and such of those parties who had been arrayed in the said proceedings did not have any interest in the subject matter due to sale of the property. In that view, the appellants were seeking to protect their interest. The learned Senior Counsel for the appellants would point out that an application bearing Civil Application No.4927 of 2013 (Annexure A17) was filed along with the appeal, a copy of which is filed along with an application for additional documents. The said application was filed in the Second Appeal before the High Court seeking leave to file the Second Appeal and challenge the impugned judgment dated 07.11.2012 and the decree dated 03.12.2012 passed in Appeal No.130 of 2005. Though no order is brought to our notice about the said application being formally allowed, the fact remains that the Second Appeal had been admitted by the High Court on 20.02.2014 and the substantial questions were framed in the appeal filed by the appellant herein. In such situation when the appeal was considered after admission and to that extent when certain observations are also made to the extent of modifying the decree to bring it in conformity with the judgment, the nature of right claimed by the appellants was also to be adverted and a decision be taken in that regard instead of merely stating that the appellants would be governed by Section 52 of Transfer of Property Act.

14. Such exercise was required for the reason that in the application seeking leave, the appellants while claiming right to the property had also referred to the Deed of Confirmation dated 28.06.2012 and 29.06.2011 whereunder the Sale Deed dated 29.07.1975 executed by the father of the plaintiff had been confirmed by the plaintiff and if that be the position, the effect of the same was also required to be examined and determined. This is for the reason that even if the Trial Court had held the defendants No.6 to 9 in the suit were not bonafide purchasers, the said Confirmation Deeds dated 28.06.2012 and 29.06.2011 had come into existence subsequent to disposal of the suit on 17.04.1982 and prior to disposal of the Regular Appeal on 07.11.2012. In that regard, even if the contention on behalf of the plaintiff that there was another Sale Deed dated 01.02.1978 for the extent of 11 Acres 27 Guntas regarding which there is no confirmation is taken note, the existing Confirmation Deeds would in any event exclude the extent of 12 Acres sold under the Sale Deed dated 29.07.1975. Further the question would also arise as to whether the plaintiff could still claim a share in the property after having confirmed the sale to the extent of half of the property by ratifying the sale.

15. In that circumstance, if the said documents which had come into existence at the fag end of the Regular Appeal was to alter the right of the parties and the purchase made by the appellants is in the extent to which the Confirmation Deed relates, the effect thereto was also to be examined. The said consideration would be necessary in that circumstance since even if the appellants are considered to be the purchasers during the pendency of the suit which was still a subject matter of the suit, whether Section 52 of the Transfer of Property Act will come into play if it stood excluded in view of confirmation. Even otherwise the working out of the equities in the final decree proceedings in the manner of allotment of shares thereto despite purchase during pendency of suit is also an issue which will arise after a proper consideration is made by the High Court, while answering the substantial questions of law and if need be by framing additional substantial questions in that background.

16. Needless to mention, in the course of such consideration, keeping in view the subsequent developments, if any additional evidence is required, in order to meet the ends of justice certainly it would also be open for the High Court to remit the matter either to the Trial Court or the Lower Appellate Court. In that view, since we are of the opinion that the substantial questions raised have not been appropriately dealt with and answered the matter would require reconsideration by the High Court.

17. To enable the same, the judgment dated 19.10.2016 passed in Second Appeal No.12 of 2014 passed by the High Court of Gujarat at Ahmedabad in Second Appeal No.12 of 2014 is set aside. The matter is remitted to the High Court of Gujarat at Ahmedabad to restore Second Appeal No.12 of 2014 on file and reconsider the same in the light of the above observation and in accordance with law.

18. The appeal stands disposed of accordingly. In the facts and circumstances of the case, the parties to bear their own costs. All pending applications shall stand disposed of.

