

(2011) 02 BOM CK 0075
In the Bombay High Court
Case No : Second Appeal No. 168 of 1995

Ananda Sonji Wakode

APPELLANT

Vs

Pandurang Shamrao Varilal

RESPONDENT

Date of Decision : 08-02-2011

Acts Referred:

Specific Relief Act, 1963 — Section 31, 38

Citation : (2011) 3 ALLMR 39 : (2011) 3 BomCR 637 : (2011) 113 BOMLR 803 : (2011) 3 MhLj 61

Hon'ble Judges : R.M. Savant, J

Bench : Single Bench

Advocate : S.A. Mohta, for the Appellant; V.R. Chaudhary, for the Respondent

Final Decision : Dismissed

Judgement

R.M. Savant, J.—This appeal challenges the judgment and decree dated 28th February 1995 passed in Regular Civil Appeal No. 65 of 1994 by which the judgment and decree passed by the Trial Court in Regular Civil Suit No. 64 of 1993 came to be confirmed.

2. The above appeal has been admitted on the following substantial question of law which is mentioned in the order dated 24th February 1997:

Whether the suit filed by the Plaintiff could be said to be a tenable suit, in view of the fact that the Plaintiff had not claimed therein the setting aside of the sale deed which he had executed in favour of the Defendant and as such what is the real scope of Section 31 of the Specific Relief Act?

3. The facts in brief can be stated thus:

The Plaintiff claims to be the owner and in possession of the 3 land bearing Survey No. 31/1 Gat No. 151 admeasuring 1 Hectre 21 Ares out of the larger portion of 2 Hectre and 93 Ares situate at village Gunj, Taluka Sindhkhed Raja. It was the case of the Plaintiff that he was in need of Rs. 5000/in January 1989 and

he therefore approached the Defendant who is a money lender. The Defendant insisted for the execution of a nominal sale deed and so on his insistence the document of sale deed came to be executed on 23.01.1989. It was the case of the Plaintiff that he did not part with the possession of the suit property in favour of the Defendant. It was further his case that he also paid interest to the Defendant from time to time. It was his case that since there was a dispute between the Plaintiff and Defendant in the year 1992 as regards interest, the Defendant started obstructing the possession of the Plaintiff in respect of the suit property. The Plaintiff was therefore constrained to file the said suit for declaration that the said sale deed dated 23.01.1989 be declared as sham and nominal and the Defendant be restrained from obstructing or interfering with the possession of the Plaintiff.

4. Defendant in his Written Statement contended that the transaction in question was an out and out sale deed which was executed by the Plaintiff in favour of the Defendant. It was the case of the Defendant that as Plaintiff was in need of money for purchasing some other land, mutation was not carried out in pursuance of the said sale deed. It was his case that Plaintiff taking disadvantage of the same had filed the instant suit. It was the case of the Defendant that pursuant to the sale deed he was put in possession of the suit property. The trial Court on the basis of the pleadings of the parties framed the relevant issues. In so far as the present appeal is concerned issue Nos. 1, 2,, 3, 5 and 7 are material and are reproduced herein as under:

Issues and Findings 1. Does Plaintiff prove that he obtained hand loan of Rs. 5000/by executing nominal sale deed in favour of Defendant on 23.01.1989?

Yes proved.

2. Does he prove that the Defendant had agreed to execute reconveyance deed by accepting a cash of Rs. 5000/and interest 5 thereon @ 12% per annum? Yes proved.

3. Does he prove that he is in possession of suit land since beginning? Yes proved.

5. Is suit claim barred by limitation? No.

7. Is Plaintiff entitled to get declaration that sale transaction dated 23.01.1989 was nominal and sham and not binding upon him?

Yes.

The above issues were therefore answered by the trial Court in favour of the Plaintiff. The Trial Court recorded a finding that the sale deed dated 23.01.1989 was nominal, as well as recorded a finding that Plaintiff continued in possession of the suit property. Trial Court also held that the suit as filed was within limitation.

5. Being aggrieved by the decree of the said Regular Civil Suit No. 64 of 1993 the

Defendant filed Regular Civil Appeal No. 65 of 1994. The First Appellate Court confirmed the findings of the trial Court as regards the sale deed dated 23.01.1989 being nominal and as regards the possession of the Plaintiff. The First Appellate Court inter alia took into consideration the fact that even after the sale deed 6 was executed the Plaintiff's name continued to appear as owner and possessor in the revenue record which was seen upto 1992-93. The First Appellate Court was of the view that if the theory of the Defendant that it was an out and out sale is to be accepted then in the normal course the Defendant would have immediately moved the Talathi in pursuance of the said registered sale deed to get his name mutated in the revenue record. The First Appellate Court was of the view that there is no explanation from the Defendant for the said lapse. In so far as the aspect of possession was concerned the First Appellate Court recorded a finding that the Defendant had not produced an iota of evidence to show that he had enjoyed the property in question during the preceding period. Factum of the entire consideration being paid at the residence of the Plaintiff, according to First Appellate Court also casts a suspicion as regards the theory sought to be put up by Defendant for it being an out and out sale. First Appellate Court was therefore of the view that the said fact would only lead to a conclusion that a nominal sale deed was get executed by the Defendant from the Plaintiff.

6. As can be seen, both the Courts below have concurrently held as regards the sale deed being nominal and also as regards the continued possession of the Plaintiff even after the sale deed was executed.

7. I have heard the learned Counsel for the parties in the contest of the substantial question of law which has been referred to in the earlier part of this order. Learned Counsel appearing for the Appellant Shri Mohta contended that the suit as filed simplicitor for declaration that sale deed in question dated 23.01.1989 being nominal and sham was not maintainable without the Plaintiff seeking cancellation of the sale deed. The learned Counsel contended that since the Plaintiff had reasonable apprehension that if the sale deed is left outstanding it may cause harm and injury and therefore he had filed the said suit. The said suit was not maintainable in the absence of the Plaintiff claiming its cancellation. Learned Counsel in support of his said submission relied upon the judgment of a learned Single Judge of the Karnataka in AIR 1977 Kar 99 Chikkathamaiah 8 and Ors. v. Chikkahutchiah and others. Paragraph 1 and 2 of the said judgment are material and are reproduced hereunder:

This revision petition is filed against the order of the learned Munsiff at Mandya, while deciding Issue No. 5, holding that the suit was not maintainable unless the Petitioners Plaintiffs sought for the relief for cancellation of a previous sale deed executed by their father in favour of the Defendant 2. The petition arises in the following circumstances. A Civil Suit was filed by Chikkathamaiah and two others who are sons of one Chikkegowda for declaration of title and permanent injunction relating to a house site. It was stated that Chikkegowda executed a

sale deed in 1954 in favour of his son-in-law K.L. Mallegowda and that sale deed was obtained by undue influence and fraud inasmuch as Chikkegowda was an old man and he was sick and feeble on the date of the execution of the date of the execution of the sale deed. The Plaintiffs based their claim stating that the property was the joint family property and after the death of Chikkegowda the Plaintiffs being the sons got the title and the sale deed of 1954 was not binding upon them. The Defendants raised a preliminary objection that the suit was not maintainable unless a relief was asked for the cancellation of the sale deed of 1954 and thereafter court fee paid on that relief. The learned Munsiff agreed with the Defendants and he has held 9 that the suit is not maintainable unless the sale deed of 1954 is sought to be cancelled. Against that order of the learned Munsiff, the present revision is filed.

2. The learned Counsel for the Respondents rightly contended that under the very allegations made in the plaint, the property was ancestral and the Plaintiff claimed title from their father Chikkegowda with whom they constituted a joint Hindu family, Chikkegowda being the father of the Plaintiffs could alienate the property for legal necessity and in exercise of his power of management as "Karta" of the family. Unless the sale deed is not sought to be cancelled by the Plaintiffs they can only get whatever share could be assigned to them in 1954 as a partition between the father and the sons. Chikkegowda could always alienate his share in the property and the other members of the family could claim a partition from the purchaser. In the face of this legal position, the argument of the learned Counsel for the Petitioners that the Plaintiffs not being a party to the sale deed need not ask for cancellation of that sale deed, does not appear to be correct. Until and unless the sale deed of 1954 is cancelled, the Plaintiffs cannot get the relief. In other words, the Plaintiffs cannot ignore the sale deed and must seek for cancellation of that sale deed. Otherwise the suit may not be maintainable.

10. As can be seen that in the said case the sons had filed a suit against documents executed by their father in favour of one A on the ground that the same was got executed by undue influence and fraud and was therefore not binding on them. It was in the said context that the learned Single Judge had held that the suit was not maintainable unless the Plaintiff sought for cancellation of the sale deed even though they were not parties. Pertinently there is no reference to Section 31 of the Specific Relief Act in the said judgment. Learned Counsel for the Appellant next relied upon the judgment of the Apex Court reported in *Meharchand Das Vs. Lal Babu Siddique and Others*, . Paragraphs 11 and 12 of the said report are material and are reproduced herein under:

11. The Defendant Appellant ,therefore, had been in possession of the suit property. In that view of the matter the Plaintiffs Respondents could seek for further relief other than for a decree of mere declaration of title.

12. The High Court, in our opinion, committed a manifest error in not relying upon the decision of this Court in *Vinay Krishna (supra)*. The said decision

categorically lays down the law that if the Plaintiff had been in possession, then a suit for mere declaration would be maintainable; the logical corollary whereof would be that if the Plaintiff is not in possession, a suit for mere declaration would not be maintainable.

In the said case the Landlord had filed a suit questioning the "Parcha granted by the Collector under the local Act known as the Bihar Privileged Persons Homestead Tenancy Act 1947, in favour of Appellant therein. Plaintiff was the landlord of the Appellant who was the tenant. The Plaintiff, landlord had filed the suit for possession and in the said context the Apex Court had held that mere declaration of the Parcha being illegal would not suffice and the landlord had to file a suit claiming possession.

8. Per contra it is submitted on behalf of the Respondent by his learned Counsel that the suit as filed claiming a declaration that the sale deed was sham and nominal was maintainable u/s 31 of the Specific Relief Act. The learned Counsel for the Respondent contended that since the document was got executed on misrepresentation as regards its character the transaction in question 12 was void. The learned Counsel contended that since both the Courts below have held that the Plaintiff was in possession, the suit filed only for declaration that the said sale deed was sham and nominal was maintainable. Learned Counsel in support of his submission relied upon the judgment of the Apex Court reported in Prem Singh and Others Vs. Birbal and Others, . Paragraphs 15, 16 and 20 of the said report are material and are reproduced hereunder:

15. Section 31 of the Specific Relief Act, 1963 thus, refers to both void and voidable documents. It provides for a discretionary relief.

16. When a document is valid, no question arises of its cancellation. When a document is void ab initio, a decree for setting aside the same would not be necessary as the same is non est in the eye of the law, as it would be a nullity.

20. If the Plaintiff is in possession of a property, he may file a suit for declaration that the deed is not binding upon him but if he is not in possession thereof, even under a void transaction, the right by way of adverse possession may be claimed. Thus, it is not correct to contend that the provisions of the Limitation Act would have no application at all 13 in the event the transaction is held to be void.

Learned Counsel also relied upon the judgment of a learned Single Judge of the Andhra Pradesh High Court reported in 2000(3) CLJ 214 in the matter of Seera Simhachalam and Anr. v. Pediredla Simhachalam and others. Para 6 of the said report is material and is reproduced hereunder:

6. Now coming to the legal contentions advanced by the learned Counsel for the Appellants regarding the maintainability of the suit for mere injunction without seeking cancellation of Ex. B1 and without claiming the relief of specific performance of Ex. A5, it may be mentioned that these contentions were not

raised in the Courts below and they are sought to be raised for the first time in the second appeal. However, as they are pure questions of law, which arise on the facts, admitted or proved, I do not find any valid objection for allowing the same to be raised for the first time in the second appeal. It is the settled legal position that a suit for injunction based on possession without title can also be maintained. Section 38 of the Specific Relief Act 1968 (sic. 1963) deals with the grant of perpetual injunction. According to Sub-section (2) (sic. Sub-section (3)) of the said Section a perpetual injunction may be granted to the Plaintiff when the Defendant invades or 14 threatens to invade the Plaintiff's right to or enjoyment of property where the invasion is such that compensation in money would not afford adequate relief and where the injunction is necessary to prevent a multiplicity of judicial proceedings. It is well settled that in a suit for injunction the primary question to be considered relates to possession though the question of title also may be gone into incidentally. A person in possession, though without title, can resist interference from another who has no better title than him and get injunction (See *M. Kallappa Setty Vs. M.V. Lakshminarayana Rao*,). In *Muthayyan Swaminatha Sastrial and Others Vs. S. Narayanaswami Sastrial and Others*, , it is held that where the allegations of the plaintiff are that he, is in lawful possession of the properties and that his possession is threatened to be interfered with by the defendants, he is entitled to sue for a mere injunction without adding prayer for a declaration of his rights. To the same effect is the decision in *Fakirbhai Bhagwandas and Another Vs. Maganlal Haribhai and Another*, . Following the said judgments this Court in *Chepana Peda Appalaswamy Vs. Chepana Appalanaidu and Others*, , held that a suit for mere injunction without a prayer for declaration of title is maintainable.

9. The facts before the learned Single Judge of the Andhra Pradesh High Court were closer to the facts of the instant case. The learned Single Judge of the Andhra Pradesh High Court was of the 15 view that the suit filed was on the basis of the lawful possession and enjoyment of the Defendant.. In the said context the learned Single Judge held that it was not necessary for the Plaintiff to seek declaration of his title or for cancellation of the sale deed.

10. Having heard the learned Counsel for the parties I have bestowed my anxious consideration to the rival contentions. In the context of the question of law which has been framed in the above Second Appeal it is required to be noted that both the Courts below have concurrently held that the sale deed dated 23.01.1989 was sham and nominal. Both the Courts below have also concurrently held that Plaintiff was in possession and continued to be in possession post execution of the sale deed. Both the Courts below have recorded the said finding on the basis of the evidence which was recorded as also the attendant circumstances. In so far as the sale deed dated 23.01.1989 was concerned in the teeth of the rival contentions the said document can be said to be suffering from a mis representation as regard its character. The Plaintiff has executed a said document on 16 the premise that it was to be a security for the loan which he has taken from the Defendant of Rs. 4000/. Since it was the case

of the Defendant that it was an out and out sale the Defendant got the said document executed from the Plaintiff on the basis of a misrepresentation and therefore the said document can be said to be void, as the parties were not *ad idem* as regards the character of the said document. As can be seen from the judgments of the Courts below both the Courts below have concurrently held that the Plaintiff has continued to be in possession of the property in question. The Plaintiff was therefore entitled to file a suit for declaration, in view of the fact that the Defendant was trying to interfere with the Plaintiff's possession on the basis of the said sale deed it was therefore not necessary for the Plaintiff to seek declaration of his title or for cancellation of the said sale deed dated 23.01.1989. A sham or nominal sale deed need not be set aside or canceled, only if it is a real transaction it has to be set aside or canceled. The Plaintiff was not claiming any relief on the basis of the said sale deed but was only seeking a declaration that the same was nominal and sham. As held 17 by the Apex Court in *Prem Singh and Ors.* (*supra*) Plaintiff was entitled to file a suit for declaration that the sale deed was sham and nominal and such a suit is still maintainable u/s 31 of the said Act. The question of law therefore would have to stand answered accordingly.

11. The learned Counsel for the Appellant sought to raise an issue as regards the suit being barred by limitation. The trial Court on the basis of the relevant provisions of the Limitation Act and considering that the document in question was void has held that the suit was maintainable in the year 1989. The said issue would therefore have to be answered against the Defendant. In my view therefore there is no merit in the above Second Appeal, which is accordingly dismissed.