

(2008) 07 BOM CK 0060

In the Bombay High Court

Case No : Second Appeal No. 796 of 1999

Banderao Kulkarni and Chandrakant Kulkarni

APPELLANT

Vs

Dattu Chandidar and Kailash Dhakne

RESPONDENT

Date of Decision : 04-07-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (2008) 5 ALLMR 16 : (2008) 6 BomCR 412 : (2008) 110 BOMLR 2990 : (2008) 6 MhLj 724

Hon'ble Judges : P.R. Borkar, J

Bench : Single Bench

Advocate : D.K. Kulkarni, for the Appellant; B.A. Darak, for the Respondent

Final Decision : Allowed

Judgement

P.R. Borkar, J.—This Second Appeal is directed against the judgment and decree passed by the learned District Judge, Jalna in Regular Civil Appeal No. 96 of 1992 decided on 10.08.1999 whereby he confirmed the decree passed by the 4th Joint Civil Judge, Junior Division, Jalna in Regular Civil Suit No. 607 of 1988 decided on 31.12.1991.

2. The brief facts giving rise to this appeal may be stated as below:

Block No. 235 of village Wakulni, Tal. Badnapur, Dist. Jalna was previously owned by present respondent No. 1 who is original plaintiff. Respondent No. 2 - Kailash, who was original defendant No. 3 was owner of Matador No. MTB-3951. On 20.04.1987 respondent No. 1 executed a sale-deed in respect of said land block No. 235 in favour of appellant No. 1. The sale-deed is at Exh.25. It is for Rs. 17,000/-.

3. It is case of respondent No. 1/plaintiff as made out in the plaint that he had entered into contract of purchase of the Matador belonging to respondent No. 2 with the appellants. Said Matador was a public carrier and the price was settled at Rs. 25,000/-. Respondent No. 1 was not knowing respondent No. 2 - the

owner of Matador. Hence, contract was made on 20.04.1987 through the appellants. Para 2 of the plaint lays down the following terms of agreement between the parties.

(a) Out of consideration amount of Rs. 25,000/- the earnest amount to the tune of Rs. 17,000/- should be paid by the plaintiff to the defendants and the possession of the Matador should be given to the plaintiff.

(b) After payment of the remaining consideration amount of Rs. 8000/-, the vehicle should be transferred in R.T.O. Office in the name of the plaintiff.

(c) The necessary documents i.e. public carrier permit, tax certificate etc. should be delivered to the plaintiff/respondent No. 1.

It is no more disputed that the Matador was given in possession of respondent No. 1/plaintiff. He was also in possession of R.C. Book, permit, which are documents of the Matador in question. In-fact, those documents are produced by the plaintiff in the Court.

4. It is further case of the plaintiff that he had no cash of Rs. 17,000/- for making payment to the appellants and respondent No. 2 and therefore he executed registered sale-deed in favour of appellant No. 1. It is stated in para 3 of the plaint that it was agreed that the sale-deed would be nominal and possession would be remained with respondent No. 1 and as soon as respondent No. 1/plaintiff pays Rs. 17,000/- to appellant No. 1, appellant No. 1 will cancel the sale-deed and in-case Rs. 17,000/- could not be paid by respondent No. 1 to appellant No. 1 on the date of transferring the Matador in the name of respondent No. 1, in that event, the possession of the land will be delivered to the appellants and the sale shall become absolute. In para 4 of the plaint it is further stated that plaintiff/respondent No. 1 plied the vehicle for six months. He spent money for repairs of the Matador. At the time of Diwali of 1987, respondent No. 2 and the appellants felt that the price of Matador agreed was less and therefore they started quarrelling. Respondent No. 1 was ready to pay the amount of Rs. 8000/-. He was also ready to pay the amount at the time of filing the suit. It is further stated that the appellants and respondent No. 2 took forcible possession of the Matador from Wakulni. They also took possession of the land. It is say of the plaintiff that since the vehicle was not transferred in his name, he should get back his land and therefore he filed suit for getting possession of the land, in the alternative the suit is for the specific performance of contract of sale in respect of the Matador, wherein he offered to pay Rs. 8000/- to get back the Matador.

5. The appellants filed written statement at Exh.16 and they denied that there is any nexus between sale of the Matador and sale of the land. According to the appellants, they have nothing to do with the agreement of sale of the Matador entered into by respondent No. 1 with respondent No. 2. They further stated that they paid Rs. 17000/- and purchased the land and in the circumstances they have become owner of the land and respondent No. 1/plaintiff is not entitled to

any relief. Respondent No. 2 - original defendant No. 3 adopted said written statement by pursis (Exh.17). The learned Civil Judge Junior Division so also the District Judge accepted the version of the plaintiff and decreed the suit so far as possession of the suit land is concerned and refused the alternate prayer for specific performance of agreement of sale of the Matador.

6. The Second Appeal is admitted by order dated 16.10.2002 on the following substantial questions of law:

(i) Whether there is any connection between the transaction to purchase Matador and the agricultural land?

(ii) Whether the consideration paid by defendant No. 1 to the plaintiff towards price of the land can be considered as earnest money paid by the plaintiff to defendant No. 3 and agreed to sell the land and the Matador?

(iii) Whether the contract is frustrated?

(iv) Whether the agreement of sale of Matador belong to defendant in view of consideration of sale of agricultural land belongs to the plaintiff and purchased by defendant No. 1 would amount to reciprocal contract?

7. The learned advocate Shri B.A. Darak for respondent No. 1 cited some authorities and stated that this Court cannot now enter into question of fact. He relied upon case of Gurdev Kaur and Ors. v. Kaki and Ors. AIR 2006 SCW 2404. In that case the Supreme Court has observed that the High Court is bound to formulate substantial questions of law and then only the High Court is permitted to proceed with the case to decide those substantial questions of law.

8. In the case of Navaneethammal v. Arjuna Chetty AIR 1996 S.C.3521 it is laid down that merely because another view is possible on reappraisal of evidence, the High Court cannot reappraise evidence to reach another view. The entire law on the point is summarised in para 24 of Boodireddy Chandraiah and Others Vs. Arigela Laxmi and Another, . It is as follows:

24. The principles relating to Section 100 CPC relevant for this case may be summarised thus:

(i) An inference of fact from the recitals or contents of a document is a question of fact. But the legal effect of the terms of a document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.

(ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging

from binding precedents, and, involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law.

(iii) The general rule is that the High Court will not interfere with the concurrent findings of the courts below. But it is not an absolute rule. Some of the well-recognised exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inference from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to "decision based on no evidence", it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding.

I may particularly rely on para 24 (iii) of the above cited case.

9. Now it is well settled that perverse findings of facts are held to involve substantive question of law. I rely on *State of Rajasthan Vs. Harphool Singh (Dead) Through His L.Rs., and Rajappa Hanamantha Ranoji Vs. Sri Mahadev Channabasappa and Others*, . It is argued by the learned advocate for the appellant that the view taken is perverse and therefore it is necessary for this Court to reappraise the evidence. There is no proper appreciation of facts on record and injustice has been caused.

10. In this case there are certain admitted facts. This, it is admitted position that all the documents including R.C. book, goods permit, public carrier's permit, which are main documents of Matador have been produced by the plaintiff/respondent No. 1. He admits in the plaint that for six months he has plied the Matador. In notice Exh.26 respondent No. 1 has stated that since respondent No. 1 was not knowing respondent No. 2, an agreement was made between respondent Nos. 1 and 2 on the guarantee given by the appellants.

Nowhere it is mentioned that Rs. 17,000/- were not paid to respondent No. 2. It is specifically stated that the Matador was in the custody of respondent No. 1 for six months and considering the income derived by respondent No. 1 from the Matador, the appellants and respondent No. 2 felt that they had sold the Matador for lesser amount. Therefore, they starting demanding more price than Rs. 25,000/- agreed. Thus the contents of Exh.44 which is notice issued on 20.06.1988 clearly shows that as per agreement, Rs. 17000/- must have been paid to respondent No. 2 who was admittedly owner of the Matador. It is not

possible to believe that without such payment of advance money, for six months defendant No. 3 who is respondent No. 2, would allow respondent No. 1/plaintiff to run the Matador and earn income so much so that respondent No. 2 and the appellant should feel that they had agreed to sell the Matador for very low price. This aspect was completely ignored by both the Courts below. It is worth nothing that if Rs. 17,000/- as earnest money was not paid, respondent No. 2 who was not knowing respondent No. 1 would not have allowed him to take even custody of the Matador. So, in my opinion, the finding of the Trial Court and the Appellate Court that Rs. 17,000/- were not paid by the appellants to respondent No. 1 is perverse finding and does not stand to scrutiny.

11. It is worth nothing that respondent No. 1 and 2 have changed their theory during oral evidence. Respondent No. 1 is examined at Exh.30 and it is his case that he did not enter into agreement with all the defendants i.e. appellants and respondent No. 2, but his agreement was only with the appellants. Both respondent No. 1 Dattu examined at Exh.30 and his witness Kishan Kolkar examined at Exh.31 have stated that whatever agreement took place was between appellants and respondent No. 1. It is most strange thing to accept that respondent No. 2 should not be in picture when the Matador was belonging to him. It is possible, as stated in the notice that respondent No. 1 might not be knowing respondent No. 2 & vice-versa and therefore the appellants might have acted as mediators. For the sake of arguments even if it is assumed that the guarantee was given by the appellants, but still it is difficult to believe that respondent No. 1 was not present at the time of talks and settlement of agreement.

12. Absolutely there is no evidence to show that the possession of the land was taken by the appellants not at the time of sale-deed but subsequently in November, 1987 when the dispute arose. It may be noted that the land was entered in the name of appellant No. 1 by mutation. It will be presumed that notice of change sought by the mutation had been given to respondent No. 1/plaintiff. It is not case of respondent No. 1/plaintiff that he resisted the mutation or filed any appeal. In my considered opinion, these two transactions of the land and the Matador are separate. It is nowhere case of the plaintiff/respondent No. 1 that the price of the land in April 1987 was more than Rs. 17,000/-. In-fact, his offer to pay balance Rs. 8000/- and get back the Matador and leave the land with the appellant itself shows that the transaction of land was for proper price. It is not a case of reciprocal contracts. Moreover it is difficult to say how there could be reciprocal contract when not the appellants, but respondent No. 2 was the owner of the Matador. Respondent No. 2 was not any way related to the appellants. It was another case if the Matador was belonging to appellant Nos. 1 and 2, who are brothers, then theory of reciprocal contracts could have been accepted. It can be believed that respondent No. 2 might have felt that price of Rs. 25,000/- for the Matador may be less and he might have demanded more than Rs. 8000/- which was balance, but that could have been a cause of action against respondent No. 2 only.

13. It is worth nothing that even though it is stated that the possession of the land was forcibly taken, so also custody of the Matador was forcibly taken in October/November, 1987, there was no action for almost one year after the alleged forcibly taking possession of the land and forcibly taking custody of the Matador. The notice through advocate prior to the suit was given on 20.06.1988 and the suit was filed on 26.10.1988. This conduct of inaction for long time on the part of respondent No. 1/plaintiff is very material and it was not considered by both the Courts below. This falsifies case of taking forcible possession of land. There is no evidence on record other than word of respondent No. 1/plaintiff to show that he went and offered Rs. 8000/- to respondent No. 2 as agreed in between them. So, considering the probabilities of the case in my opinion, findings of both the Courts below are perverse and needs to be corrected in this Second Appeal. this Court is aware that generally when there are concurrent findings of facts, this Court should not interfere, but the inferences drawn by both Courts are not reasonable or natural. All aspects of the case are not considered. Human probabilities are ignored.

14. this Court would have considered alternate relief of refund of Rs. 17,000/- by respondent No. 2 to respondent No. 1. But, there is no prayer to that effect in the plaint. No such issue was framed. this Court in Second Appeal cannot grant that relief. Moreover, we will have to see equities for such relief, because in-case remaining Rs. 8000/- was not offered in time, some rights would have accrued to respondent No. 2 as the owner of the Matador.

15. Respondent No. 2 is examined on oath at Exh.38. His evidence shows that he has made out new case which was not made out even by the plaintiff in his plaint or in the notice sent before filing of the suit. In the examination-in-chief respondent No. 2 - Kailash stated that he handed over the plaintiff the Matador on hire purchase, on the term of payment of Rs. 100/- per day and he handed over the Matador for three months. He also handed over the documents to the plaintiff. Thereafter, the plaintiff/respondent No. 1 did not pay hire charges for about and half months. So, he went to demand the amount of hire charges. Initially respondent No. 1 promised to pay it after 1-2 months. Respondent No. 2 again went after 2-3 months to demand the amount of hire charges to respondent No. 1, but he refused to pay the hire charges and sent message to respondent No. 2 that the Matador was not in proper condition and he is unable to run the same and therefore he should come and take possession. Accordingly, respondent No. 2 went and took possession of the Matador. He demanded the documents, but respondent No. 1 said that the documents were with his son and he was unable to hand-over the same. So, this hire purchase theory putforth by respondent No. 2 is entirely new to pleadings. It raises serious question regarding truth of the story made out in the plaint. The evidence of respondent No. 2 shows that the appellants were nowhere involved in the transaction of the Matador.

16. In para 2 of his statement at Exh.38 respondent No. 2 has further stated that

it was also agreed between both respondents that if tempo ran properly and earned income, the respondent No. 1 would purchase it. Nowhere respondent No. 2 has referred to agreement of selling matador for Rs. 25,000/- and payment of Rs. 17,000/- as earnest money to him. In cross-examination, his attention was drawn to his pursis (Exh.17) adopting written statement filed by the appellants at Exh.16 and then he admitted the portion marked "A" as true, wherein it is stated that "no agreement of Matador took place in between the plaintiff and defendants". However, since it was written statement of defendant Nos.1 & 2 i.e. appellants, the statement means that there was no agreement regarding the Matador between respondent No. 1/plaintiff and the appellants. Thereafter, respondent No. 2 admitted that he intended to sell the Matador to respondent No. 1. Respondent No. 1 had agreed to purchase the same. However, no consideration was fixed. The transaction regarding sale of tempo took place at the house of appellant No. 1 - Banderao. He was present along with appellant and respondent No. 1 and one Arvind, the nephew of appellant No. 1. He stated that prior to this transaction, he was not knowing respondent No. 1. At that time he handed over the documents pertaining to tempo and delivered possession of the tempo to respondent No. 1. The transaction had taken place in April, 1987. Then he admitted that the agreement of hire purchase was not reduced into writing. According to him respondent No. 1 was in possession of the tempo for 8 months and it was returned to him in November, 1987. He further stated that he did not issue notice for demand of hire charges.

17. If we have regard to all these circumstances, this Second Appeal deserves to be allowed, as the appellants were not personally responsible for the transaction of the Matador. There was no nexus between the transaction of the tempo and the transaction of sale of the land. Both respondent No. 1 and his witness Kishan have concealed that respondent No. 2 was present when talks and settlement of agreement regarding the Matador took place.

18. In the circumstances, I answer the substantial questions of law No. (i) in the negative (ii) in the negative, however, it is made clear that respondent No. 2 had received earnest money. Issue No. (iii) does not arise in view of answer to issue No. (i) and so far as No. (iv) is concerned, it is held that the sale transactions of the land and the Matador were different. They were no reciprocal contracts. The two transactions were separate. In the circumstances, the decrees passed by both the Trial Court and the Appellate Court cannot be sustained and the same are set aside.

19. In the result the Second Appeal is allowed. The judgments and decrees of both the Courts below are hereby set aside and the suit is dismissed.