

(1982) 08 BOM CK 0002

In the Bombay High Court

Case No : Second Appeal No's. 118 and 119 of 1969

Keshao Balasa Saoji

APPELLANT

Vs

Shashikar Jankiram Saoji and another

RESPONDENT

Date of Decision : 13-08-1982

Acts Referred:

Contract Act, 1872 — Section 25
Evidence Act, 1872 — Section 91, 92

Citation : (1983) MhLj 462

Hon'ble Judges : D.B. Deshpande, J

Bench : Single Bench

Advocate : G.K. Potey, for the Appellant; G.J. Ghate, for the Respondent

Judgement

D.B. Deshpande, J.—These two appeals are filed by the plaintiff, arising out of two different suits filed by him in the Trial Court and they arose out of the following facts :

Plaintiff filed Regular Civil Suit No. 216 of 1965 against the three defendants, who are members of the joint family. That was a suit for refund of earnest money of Rs. 2,700, plus recovery of Rs. 1,200 by way of damages sustained by the plaintiff on account of the non-performance of the contract of the sale by the defendants. We need not go into the details of the contract, inasmuch as the execution of the contract is admitted by the defendants. The plaintiff alleged that both the defendants accepted Rs. 7 000 from him by agreeing to sell the land to him for the amount of Rs. 13,000 They did not execute the sale-deed and hence instead of filing the suit for specific performance of the contract, the plaintiff filed a suit for refund of earnest money with damages. The document of agreement shows that the consideration is made up as follows:

Rs. 3,000 paid at the time of the agreement and Rs. 4,000 paid earlier.

2. Only the defendant No. 2 appeared in the suit and resisted the plaintiff's claim. He denied that he received Rs. 7,000 under the deed He admitted that he

received only Rs. 3,000 in cash on the date of agreement and according to him an amount of Rs. 2,500 was previously borrowed by him from the plaintiff and it was adjusted towards the consideration of this amount. He contended further that in addition to Rs. 2,500 received by him a further amount of Rs. 1,500 was calculated towards the interest that is how consideration of Rs. 7,000 was made up in Issar Pavati. He denied that the plaintiff suffered damages to the extent of Rs. 1,200 and therefore he denied the plaintiff's claim in that respect.

3. Issues were framed, and this suit and the second suit were tried together. The learned Trial Judge rejected the contention of the defendants that Issar Pavati was nominally executed and was not to be acted upon. Similarly he rejected the contention of the defendant that they did not receive Rs. 7,000 under the Issar Pavati. He held further that the plaintiff was entitled to recover only Rs. 300 by way of damages. He held that the suit was maintainable and he held further that the charge for the amount ought to be kept on the suit property. He rejected defendant's contention that the plaintiff was a money lender. Consequently he passed a decree in favour of the plaintiff for Rs. 7,300 with costs and with future interest at 3 per cent per annum from the date of the filing of the suit till realisation.

4. The plaintiff filed second Regular Civil Suit No. 89 of 1966 against the defendant No. 2 alone, for recovery of loan of Rs. 2,500 advanced by him to defendant No. 2 on the strength of a Chit. He filed that suit for the recovery of Rs. 2,700, i. e., Rs. 2,500 by way of principal amount and Rs. 200 by way of interest. The date of the loan was November, 1964.

5. Defendant No. 2 resisted the plaintiff's claim. He admitted that he had borrowed this amount of Rs. 2,500 for the plaintiff. But he contended further that this amount of Rs. 2,500 was subsequently adjusted towards the amount of consideration mentioned in the agreement of sale, subsequently entered into between the parties.

6. Both the sides led evidence in the Trial Court and after considering that evidence the learned Trial Judge held that the plaintiff proved that the defendant borrowed Rs. 2,500 from him. He rejected the contention of the defendant that the plaintiff was a money lender. Similarly, he rejected the contention of the defendant that this amount was adjusted towards the consideration of the subsequent agreement of sale. Consequently he passed a decree in favour of the plaintiff for Rs. 2,700 with costs of suit and with future interest at 3 per cent per annum on the amount of principal from the date of suit till satisfaction.

7. Now feeling aggrieved by the decision in Regular Civil Suit No. 216 of 1965, the three defendants preferred Regular Civil Appeal No. 42 of 1967 and feeling aggrieved by the decision in Regular Civil Suit No. 89 of 1966 defendant No. 2 filed Regular Civil Appeal No. 52 of 1967. Both these appeals were heard together by the learned District Judge, Buldana. So far as the appeal regarding the amount of Rs. 2,700 is concerned, the learned District Judge accepted the

contention of the defendant that the amount of Rs. 2,500 was adjusted towards the amount of consideration in the subsequent transaction of agreement of sale between the parties. The learned District Judge, therefore, allowed Regular Civil Appeal No. 52/1967 and dismissed the plaintiff's suit in that behalf along with costs. In Regular Civil Appeal No. 42 of 1967 the learned District Judge further held that the consideration of Rs. 7,000 was not proved. He held that Rs. 3,000 were admittedly paid in cash and to this amount he added the amount of Rs. 2,500, which according to him, were already taken on loan by defendant No. 2 and were adjusted towards the consideration of the transaction of this agreement. In addition instead of awarding the damages of Rs. 300 he awarded the damages only of Rs. 200 and, therefore, making a sum of these three amounts i. e. Rs. 3,000, Rs. 2,500 and Rs. 200 he passed a decree in favour of the plaintiff only for Rs. 5,700 with proportionate costs of the suit.

8. Now feeling aggrieved by the dismissal of his suit in Regular Civil Appeal No. 52/1967 arising out of the Regular Civil Suit No. 89 of 1966, the plaintiff filed Second Appeal No. 119 of 1969 and Second Appeal No. 118 of 1969 arises out of the other suit and appeal.

9. Shri G. K. Potey, the learned counsel appearing on behalf of the appellant contended that the lower Appellate Court committed a clear error of law. First of all I shall confine myself to Second Appeal No. 119 of 1969. It is an undisputed fact that the defendant No. 2 received a loan of Rs. 2,500 from the plaintiff as alleged by the plaintiff. Now the only question is whether this amount was adjusted towards the amount of consideration in the subsequent transaction of agreement of sale dated 4th May, 1965. On an appreciation of the evidence on the record, the learned District Judge has held that this amount was adjusted towards the amount of consideration of Rs. 4,000 out of the amount of Rs. 7,000 in the subsequent transaction of agreement of sale. When I questioned Mr. Potey as to whether it would not be a finding of fact, he had no answer. Mr. G. J. Ghate, the learned counsel appearing on behalf of the respondent asserted that it was a finding of fact and as such it could not be reopened in this Court in second appeal. It all depends upon whether it is a finding of fact or not. It is apparent that it is nothing but a finding of fact and hence it cannot be reopened in the second appeal by this Court. The finding of facts of the first Appellate Court is binding upon this Court and in this view of the matter Second Appeal No. 112 of 1969 will have to be dismissed.

10. This takes me to the other appeal i.e. Second Appeal No. 118 of 1969. The agreement of sale is admitted by the defendants. It is mentioned in the agreement of sale that it is made up of two amounts, namely, Rs. 4,000 paid earlier and Rs. 3,000 paid on the date of the agreement. Now there is no dispute between the parties that Rs. 3,000 were received in cash by the defendants on the date of the agreement. The dispute now centres round the remaining amount of Rs. 4,000. Mr. G. K. Potey, appearing on behalf of the appellant contended that in this case the document having been admitted the defendants cannot

plead the partial failure of consideration. To this there was a rejoinder by Mr. G. J. Ghate, contending that section 92 of the Indian Evidence Act is not applicable to the facts of this case. According to Mr. Ghate, section 92 will apply only if a document is required by law to be in writing. According to him an oral agreement of sale can take place and, therefore, section 92 of the Indian Evidence Act is not applicable. I am unable to agree with the interpretation put by Mr. Ghate. Section 92 runs as follows:

When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or Subtracting from, its terms.

Replying upon the words "when terms of any such contract have been proved according to the last section" Mr. Ghate wanted to contend that the words "any such contract" are governed by the words "Required by law to be reduced to the form of document". It is significant to note that there is no coma after the words "any matter". If the interpretation of Mr. Ghate is to be accepted, something which is not intended to be incorporated in the section has got to be imported it. If the Legislature wanted this interpretation to be accepted then a coma would have been inserted after the words "any matter". I do not think that the words "any such contract" are governed by the words "required by law to be reduced to the form of a document". Mr. Ghate tried to rely upon the difference between section 91 and section 92 of the Indian Evidence Act. These two sections are different but the interpretation of the Indian Evidence Act by Mr. Ghate cannot be accepted.

11. Then the second question is about the partial failure of consideration. Section 92 prohibits proof of partial failure of consideration. Of Course the defendants could prove total failure of consideration, because such total failure invalidates the document in view of section 25 of the Indian Contract Act. There is a clear authority of this Court in Keshavrao Bhagvant v. Bava Pandu 8 B L R 287 (295). It is clearly observed by this Court as follows:

Then with regard to want or failure of consideration under Proviso 1 of section 92, it is also to be noted that no consequence invalidating the document could follow save from a complete want or failure of consideration. For section 25 of the Contract Act renders an agreement void in respect of consideration only when it is made without consideration, which necessarily means the entire absence of all consideration.

This will, therefore, clearly show that the defendants cannot plead partial failure of consideration, when the consideration is clearly mentioned in the document.

12. Assuming that the defendants can raise such a contention, I am unable to hold that the defendants have proved this fact. The defendants have admitted in

writing that they have received Rs. 2,000 prior to the date of agreement. On their own admission Rs. 2,500 were taken on loan by defendant No. 2 previously. According to defendant No. 2, the remaining amount of Rs. 1,500 is made of interest. There is absolutely no record to hold that this amount is made of interest. Besides bare words of defendant No. 2, there is no evidence and hence this is a case of no evidence in the matter of non-receipt of consideration of Rs. 1,500. I am satisfied that the learned District Judge clearly committed an error of law, firstly by accepting plea of partial failure of consideration and in basing his decision on no evidence at all. If a decision is given on no evidence, that also amounts to an error of law. I am, therefore, satisfied that the plaintiff has proved that he had paid Rs. 4,000 by way of consideration to the defendants.

13. This will, therefore, mean that the defendants have received Rs. 7,000 under this document. I have already pointed out that the trial Court awarded damages at Rs. 300 but on a consideration of the evidence, the learned District Judge has reduced the amount to Rs. 200 and it is a finding of fact and it cannot be disturbed in the second appeal by this Court. Hence the plaintiff is entitled for Rs. 200 by way of damages. Thus the plaintiff will be entitled to Rs. 7,200 instead of Rs. 5,700 as awarded by the lower appellate Court. Hence to this extent this Second Appeal No. 118 of 1969 will have to be allowed.

14. The result is that Second Appeal No. 119 of 1969 is dismissed with costs throughout. Second Appeal No. 118 of 1969 is partially allowed and following decree is substituted for the decrees of the Courts below.

The plaintiff do recover from the defendants Rs. 7,200 with proportionate costs of the suit and future interest as awarded by the Courts below from the date of suit till satisfaction.

In view of the peculiar circumstances of this case, there will be no order as to costs of this second appeal. Charge of this amount will remain on the property as directed by the Courts below.