
(2010) 02 BOM CK 0003

In the Bombay High Court

Case No : Civil Revision Application No. 45 of 2009

Pushpa Kalantri and Others

APPELLANT

Vs

Purushottam Champalalji Rathi

RESPONDENT

Date of Decision : 15-02-2010

Acts Referred:

Transfer of Property Act, 1882 — Section 58(c)

Citation : (2010) 2 RCR(Civil) 564

Hon'ble Judges : R.P. Sondur Baldota, J

Bench : Single Bench

Advocate : S.R. Deshpande, for the Appellant; A.S. Chandurkar, for the Respondent

Final Decision : Allowed

Judgement

R.P. Sondur Baldota, J.—Rule. Made returnable forthwith by consent of the parties. Heard the learned counsel for final hearing of the application.

2. The civil revision application arises out of the order dated 21st April, 2009, passed by the trial court refusing to reject plaint under Order VII Rule 11 Civil Procedure Code, on the ground that the same does not disclose cause of action and that it is barred by the law of Limitation.

3. Before advertng to the facts of the case it will be convenient to briefly refer to the decisions cited by both the sides as regards the extent of enquiry for the application under Order VII Rule 11 CPC Mr.Chandurkar, the learned counsel for the respondent, submits that while deciding the application for rejection of the plaint under Order VII Rule 11 CPC the court must read only the plaint without any addition or subtraction to it and the plaint must be read in its entirety presuming its contents to be correct. He seeks to draw support for his submission from the decisions of the Apex Court in Kamala and Others Vs. K.T. Eshwara Sa and Others, and C.Natarajan v. Ashimbai and others, reported in 2007 ACJ 721 (S.C.) : 2007(4) CCC 721 (S.C.) : 2007(14) SCC 183.

Mr.Deshpande, the learned counsel for the applicants, concedes to the argument as a general rule but submits that in a given case the court can also look into the documents referred in the plaint which are suppressed by the plaintiff but produced by the defendant. In this connection he relies upon decision of Single Judge of our High Court in *Xavier D'Souza and Another Vs. Luis D'Souza and Another*, . In the facts of that case the learned trial judge being conscious of the fact that the court for rejection of the plaint under order VII Rule 11 CPC was required to look into only the pleadings of the plaintiffs and was not required to look into the documents produced by the defendants had proceeded to hold that the plaintiff had suppressed the material facts of the pleadings and that the documents produced by the defendants supplied the omissions and therefore, the said documents produced by the defendants could be looked into. In the facts of that case, our High Court found that suppressing the dates of various documents referred to by the plaintiff was intentional and it was made to deceive the court and hence dismissed the challenge to the decision of the trial court in rejecting the plaint under Order VII Rule 11(d) Civil Procedure Code. In the case on hand, though there are allegations of suppression of material facts and documents from the court, neither side has produced any document for perusal either of the trial court or this court. Therefore, the submission advanced by Mr.Deshpande as regards the extent of enquiry need not be further dilated upon.

4. By the suit herein, the respondent seeks decree of redemption of mortgage in respect of "suit 8 Acres disputed land out of the suit field" and for it's possession. The facts as set out in the plaint in support of the reliefs as under:-

Para No. 1 of the plaint describes the suit property as land at Gat No.24, admeasuring 12 acres. Paragraph 2 describes the genealogical tree of both the sides. It further states that Champalal, father of the respondent, had looked after both, the person and the property of Khivraj, the ancestor of the applicants, who had allegedly renounced the world. The purpose of these averments is not known. The rest of the plaint contains no statement connecting to the averments.

5. In its subsequent paragraphs the plaint refers to documents of three sale-deeds and the gift-deed dated 22nd June, 1993, all executed in respect of the suit property. By the three sale-deeds, three portions of the suit property are alleged to have been sold to the respondent, his father Champalal and applicant No.3. The land sold to the respondent admeasures 4 Acres, that sold to Champalal admeasures 5 Acres and the balance portion admeasuring 3 Acres is sold to applicant No.3. Neither the dates of the three sale-deeds nor the name of the vendor, nor the boundaries of the three portions have been disclosed in the plaint. The gift-deed referred to above is executed by Champalal in respect of the 5 Acres of land in favour of applicants No. 1 and 2, who are wife and son of applicant No.3. It is alleged that both, the sale-deed in favour of applicant No.3 and the gift-deed in favour of applicants No. 1 and 2 are nominal documents executed only by way of security. They do not confer any right, title or interest in the property upon the applicants. It is further claimed that the applicants were

never put in possession of the land under the documents.

6. The reason made out in the plaint for execution of the sale-deed and the gift-deed is the alleged transaction of loan between the respondent and applicant No.3. It is stated that when the respondent entered into the contract for purchase of the suit property for the consideration of Rs.90,000/- he could raise only Rs.30,000/- with the help of his father Champalal. Therefore, for the balance consideration he took loan of Rs.60,000/- from applicant No.3 repayable with interest at the rate of 10% p.a. At that time applicant No.3 compelled the respondent for execution of sale-deed in respect of a portion of suit property admeasuring 1 Hect. 21 Ares to him. Then in June, 1993 applicant No.3 made a demand upon Champalal to repay the entire loan at once and as Champalal was not in good financial position, applicant No.3 compelled him to execute gift-deed in respect of 5 Acres of land owned by him in the names of applicants No.1 and 2 by way of security for the loan amount.

7. On the basis of the nominal and ostensible sale-deed and the gift-deed the applicants procured mutations in the record of right and crop statement in respect of 8 Acres of land out of the suit property by colluding with the Revenue Authorities. In the meanwhile, the respondent repaid the entire loan together with the interest thereon to applicant No.3 and requested the applicants to execute document of reconveyance of 8 Acres of land which was avoided by the applicants on some pretext or the other. The plaint is, however absolutely silent about the date of mutation of revenue records as well as repayment of loan.

8. The only place in the plaint where same reference, howsoever brief and vague, made to a transaction of mortgage is para 7. The reference made therein is required to be reproduced in verbatim: "That, as per the provisions of Transfer of Property Act the transaction of mortgage will remain a mortgage for ever and it cannot be converted into transfer of ownership by illegal activities on the part of mortgages. That, in the present case there is a relation of mortgagor and mortgage between the plaintiff and defendant and the right of plaintiff redeem his mortgage will prevail over the right of foreclosure of the defendant. That, till today the defendants being the mortgages have not exercised the right for closure on the contrary they have misrepresented to the plaintiff that, they are ready and willing to release the suit property." It is alleged in the same para further that despite promise given on 24th of September, 1999 in a meeting between the parties, the applicants failed to redeem the mortgage and hand over possession of 8 Acres of land. Therefore, the respondent filed the suit in the month of April, 2008 for redemption of the mortgage.

9. Mr.Deshpande, submits that bare reading of the plaint is sufficient to see that it does not disclose any cause of action for the relief of redemption of mortgage. Every claim made in the plaint, be it in respect of the sale-deed or gift-deed or mortgage transaction, is vague and without material particulars. In the absence of the material particulars the suit filed by the respondent is bound to fail and therefore, the plaint is liable to be rejected under Order VII Rule 11 Code of Civil

Procedure. Mr.Chandurkar submits in reply that the finer particulars of the case of the respondent are not required to be pleaded and in any case cannot be looked into at this preliminary stage. He argues further that the respondent may be non-suited finally on merits at the trial of the suit for want of the particulars. However, that cannot affect the maintainability of the suit on the ground of nondisclosure of cause of action.

10. The Apex court in its decision in Popat and Kotecha Property Vs. State Bank of India Staff Association, has held

22. There is distinction between "material facts" and "particulars". The words "material facts" show that the facts necessary to formulate a complete cause of action must be stated. Omission of a single material fact leads to an incomplete cause of action and the statement or plaint becomes bad. The distinction which has been made between "material facts" and "particulars" was brought by Scott, L.J. in Bruce v. Odhams Press Ltd.

It is, therefore, to be seen whether the various missing particulars from the plaint are material facts or finer particulars as described by Mr.Chandurkar.

11. Since the suit is for redemption of mortgage, the first scrutiny of the plaint will have to be in respect of the pleadings for transaction of mortgage. The only averments found in the plaint as regards the mortgage have been reproduced at para 8 above. The averments therein are seen to be conspicuous in the absence of every material particular relating to the transaction of mortgage. The plaint is silent about type of mortgage, the document creating mortgage, the date of transaction of mortgage, the parties to the transaction of mortgage and the terms and conditions of the mortgage. These particulars can hardly be classified as "finer particulars". They are actually material facts required to be pleaded in the plaint to enable the court to arrive at a conclusion, on bare reading of plaint of existence of transaction of mortgage between the parties. Omission of these material facts lead to an incomplete cause of action. In fact, the plaint does not even contain a categorical statement that there was any transaction of mortgage between the parties. What is there is an illusion of cause of action. The Apex Court has held in T. Arivandandam Vs. T.V. Satyapal and Another, that clever drafting creating illusion of cause of action is not permitted in law and a clear right to sue should be shown in the plaint. Though the respondent refers to sale-deed in favour of applicant No.3 and gift-deed in favour of applicants No. 1 and 2 it is not his case that these documents, in fact, reflect transaction of mortgage and not the transactions of sale or gift. He has also nowhere in the plaint even disclosed the contents of any of the documents referred by him.

12. Mr.Deshpande submits that even if for the sake of arguments it is to be considered that the sale-deed in favour of applicant No.3 is mortgage by conditional sale it must satisfy the requirement of Section 58(c) of the Transfer of Property Act, in particular, the proviso thereto. As per the proviso, no such transaction shall be deemed to be a mortgage, unless the condition is embodied

in the document which effects or purports to effect the sale. Relying upon decision of this court in *Hasan Nurani Malak v. Mohansingh & Anr.* reported in 1974 Mh.L.J. 120, Mr.Deshpande submits that there cannot be any contemporaneous document agreeing to reconvey the property on payment of consideration with interest and in such case the transaction cannot amount to mortgage by conditional sale. Mr.Chandurkar submits in reply that in order to find out whether the condition is so embodied in the document, one must read the document which is not permissible at this stage. Even if the document is not read at this stage, what is important is a pleading in the plaint that the document contains such a condition. In the absence of the pleading the question of verifying the claim by looking into the contents of the document does not arise. In any case, as already observed above it is not the case of the respondent that the sale-deed in favour of applicant No.3 in fact reflects the transaction of mortgage. Another interesting aspect of the matter is that at para 9 of the plaint the respondent states that the cause of action for the suit arose on 22nd of June, 1993 i.e. the date of execution of gift-deed. If that is so, since the suit is only for redemption of mortgage, any transaction of mortgage could not have come into existence prior to the date of 22nd of June, 1993. The sale deed is undisputedly of a date prior to the date of gift-deed because unless Champalal became owner of the land admeasuring 5 Acres out of the suit property vide the sale-deed in his favour, he could not have executed the gift-deed. In that circumstance, the sale-deed in favour of applicant No.3 must go out of consideration for the transaction of the mortgage.

13. Analysis of the plaint shows that the other averments made therein are as vague, if not worse, as the averments relating to the transaction of mortgage. There are also several inconsistencies and contradictions as regards the facts, whatever, pleaded therein. The respondent refers to three sale-deeds in respect of the suit property without specifying their dates and name of the vendor. It is not the case of the respondent that the sale-deed in favour of applicant No.3 was executed either by him or by Champalal. Taken the averments made at their face value, the same would mean that the original vendor had executed three sale-deeds in respect of three portions of the suit property in favour of the respondent, Champalal and applicant No.3. If that is so and if the respondent wants to contend that the sale-deed in favour of applicant No.3 is nominal and ostensible, it was necessary for the respondent to implead the original vendor to the suit. In his absence, no inference as desired by the respondent can be drawn.

14. It is obvious from the plaint that the respondent, in fact, seeks to avoid the sale-deed and the gift-deed in favour of the applicants on the ground that the same are nominal documents and do not reflect the real transaction between the parties. It has been stated at several places in the plaint that the documents are executed only by way of collateral security and the same are only nominal and ostensible. He, however, does not seek any relief of avoiding the transactions for the reasons best known to him. Considering the nature of averments made as regards these two transactions, the same cannot help the respondent in any way

in showing the alleged transaction of mortgage which is sought to be redeemed by the suit.

15. It has already been observed above that the plaint suffers from inconsistencies and contradictions. They are demonstrably material in nature and cannot be ignored. The suit property at places is claimed by the respondent as the self acquired property of both he and his father. In the same paragraph however towards the end and in the next paragraph he describes it as joint family property and claims to have one half share in it to challenge the right of Champalal to gift the portion standing in his name to applicants No. 1 and 2. The other material contradiction is in respect of possession of the suit property. At paras 4 and 5, it has been contended that even after execution of the sale-deed in favour of applicant No.3 and the gift deed in favour of applicants No. 1 and 2, the possession of the suit property continued to be with the respondent and his father Champalal. They continued to cultivate the land as owners thereof. The respondent, however, seeks a direction to the applicants to deliver possession of 8 Acres of land out of the suit property to him. It is a different matter that the direction as sought is also vague because the 8 Acres out of the suit property is no where identified in the plaint.

16. All the above circumstances lead to only one conclusion and that is no real cause of action has been set out in the plaint and therefore the plaint is liable to be rejected under Order VII Rule 11(a) Civil Procedure Code. The learned trial judge has surprisingly misread the plaint. He describes the documents mentioned in the plaint as "collateral security/mortgage documents" when it is nowhere contended in the plaint that documents of sale-deed and gift-deed are in fact documents of mortgage. He has held that "whether the documents herein have been mortgage or sale or executed towards security of money lending transaction would be decided after giving a long rope of trial and after due appreciation of evidence." This shows that the import of the provision of Order VII Rule 11 CPC is lost upon him. It was necessary for him to analyze the plaint to find out whether it discloses cause of action. This exercise is not done by him. He has also been in error to hold that the omissions in the plaint are mere evidentiary facts.

17. This brings me to the second argument of the applicants for rejection of the plaint and that is the suit is barred by the law of Limitation. The averments as regards limitation are found at para 9 of the plaint. The same read as follows:

9. The cause of action for this suit arose on 22.06.1993 at mouza Hiwarkhed. Tq.Telhara, within territorial jurisdiction of this Hon"ble Court and as the provisions of Article 61 of Limitation Act the suit for redemption of mortgage can be filed within a period of 30 years and hence present suit is within limitation

Mr.Deshpande submits that when the suit was filed in April, 2008 the respondent was fully aware that any suit to avoid sale would be barred by law of Limitation. Hence, the plaint has been very clearly drafted with a view to get over the bar of

Limitation by making a vague reference to nonexistent transaction of mortgage. He also submits that the respondent has deliberately not disclosed the date of sale-deed in favour of applicant No.3 which is dated 19th of March, 1980. According to him, the suit is nothing but an attempt on the part of the respondent to avoid the transaction of sale and gift under the guise of redemption of mortgage. Therefore, the court ought to have applied Article 59 of the Limitation Act which prescribes period of limitation of three years for filing suit to cancel or set aside an instrument for which the time begins to run when the facts entitling the plaintiff to have the instrument cancelled first become known to him and held that the suit is barred by the law of Limitation and rejected the plaint under Order VII Rule 11 (d) Civil Procedure Code.

18. Reliance, however, is placed on behalf of the respondent upon decision of this court in Civil Revision Application No. 111 of 2008 (Western Coalfields Ltd. & Anr. v. Chandraprakash Krishnalal Khare), dated 10th of December, 2009 to submit that the plaint cannot be rejected on the ground that the suit is barred by law of Limitation. In that decision our High court after making references to the decision of the Supreme Court in N.V. Srinivasa Murthy and Others Vs. Mariyamma (dead) by Proposed LRs. and Others, , Popat and Kotecha Property Vs. State Bank of India Staff Association, and Balasaria Construction (P) Ltd v. Hanuman Seva Trust & Ors., reported in 2006(5) SCC 658 observed as follows:

The Supreme Court in Balasara Construction (P) Ltd. referred to above, says that the plaint can not be rejected since limitation is a question of fact and law. I too find that the plaint cannot be rejected on the ground that the suit is barred by limitation and I give my own reasons in addition to the reasons given by the Supreme Court in Balasara Construction (P) Ltd. case.

In the decision, it has further been observed "If law of Limitation, which is a substantive law (emphasis supplied), speaks as to how a suit barred by limitation should be dealt with then the mandate in the substantive law has to be followed. The legislation in its wisdom has mandated the dismissal of the suit. It could have also said that in such case the plaint be rejected. The fact that it makes use of the word dismiss is by itself eloquent necessarily therefore if the suit is apparently barred by limitation the suit has to be dismissed."

19. Mr.Deshpande submits that the observation in the judgment that law of Limitation is a substantive law is per incuriam, since the Apex court in C.Beepathuma & Ors. v. Yelasari Shankaranarayana Kadambolithaya & Ors. reported in AIR 1965 SCC 241 has categorically held at its para 14 that the law of Limitation is a procedural law and the provisions existing on the date of the suit apply to it. Mr.Deshpande also submits that the Apex court in its decision in the case of Balasaria (supra) has not held that where a plea of limitation is raised, the court cannot reject the plaint under Order VII Rule 11 CPC but may dismiss it on framing a preliminary issue. He also points out that there was no conflict of opinion in the case of N.V.Srinivasa and Popat and Kotecha (supra).

20. In the case of N.V.Srinivasa the Apex court held that in the proceedings before it by clever drafting of the plaint, the civil suit which was hopelessly barred for seeking avoidance of registered sale-deed had been instituted by taking recourse to orders passed in mutation proceedings by the revenue courts and hence rejected the plaint under Order VII Rule 11 (d) Civil Procedure Code. In the case of Popat and Kotecha (supra) after observing that disputed question cannot be decided at the time of considering the application filed under Order VII Rule 11 Civil Procedure Code, it held that Clause (d) of Rule 11 of Order VII applies for those cases only where the statement made by the plaintiff in the plaint, without any doubt or dispute, shows that the suit is barred by any law in force. This will apply to every bar under law, including the bar of Limitation. There was no categorical decision that bar of limitation is not covered by Rule 11 (d) of Order VII Civil Procedure Code.

21. In case of Balasaria (supra), the Apex court taking note of two decisions of the Andhra Pradesh High Court, one decision of Rajasthan High Court and a decision of Delhi High Court holding that the plaint under Order VII Rule 11 (d) CPC cannot be rejected on the ground that it is barred by limitation, and contrary view taken by Calcutta High Court in its four decisions, had, in fact, referred the matter to a larger Bench for consideration of the following question of law:

Whether the words "barred by law" under Order VII Rule 11 (d) CPC would also include the ground that it is barred by the law of Limitation.

When the matter was taken up by the larger Bench, both the parties stated that it was not the case of either side that as an absolute proposition an application under Order VII Rule 11 (d) CPC can never be based on the law of Limitation. Therefore, the larger Bench declined to decide the question and returned the case for disposal on merits. Thereafter, the Apex court held that the question of limitation was a mixed question of law and fact and ex facie in the case before it on reading of the plaint it could not be held that the suit was barred by time.

22. In the case on hand, there is no need for this court to dilate further into the question despite the decision of this court in the case of Western Coaldfields Ltd. & Anr. v. Chandraprakash Krishnalal Khare in Civil Revision Application No. 111/2008 (supra) because neither side has done any research into the conflicting decisions of the various High Courts mentioned above and made the necessary submissions on the question by referring to the decisions of various High Courts taking contrary views. It would be sufficient for this court to note that there is no direct decision of the Apex court holding that the provisions of Order VII Rule 11(d) CPC is not extended to the bar under the law of Limitation. Looking to the reliefs claimed in the suit for which limitation provided under Article 61 of the Limitation Act is of 30 years, in the facts of the present suit taken at their face value Order VII Rule 11(d) CPC would not be attracted. The applicant needs to agitate the bar by raising it as a preliminary issue.

23. It has been lastly submitted by Mr.Deshpande that the learned trial court has

not considered the second prayer in the application (Exh.9) filed by the applicants. The second prayer is for direction to the respondent to pay the court fees as required by law for challenging the documents. He submits that even for the relief as sought of redemption of mortgage and for possession, the respondent has not valued the same properly. He points out that a suit for redemption, as per Section 6(x) is required to be valued according to the principal money expressed to be secured by instrument of mortgage and the suit for possession is required to be valued u/s 6(v) at the value of the land as on the date of filing of the suit. I find substance in the submission of Mr.Deshpande. The trial court ought to have considered the submissions and issued the necessary directions, since it had rejected the application (Exh.9). However, since this court has held that the plaint does not disclose cause of action and that it is liable to be rejected under Order VII Rule 11(a) Civil Procedure Code, no further directions in that regard are being given. The Civil Revision Application is allowed. The impugned order dated 21st April,2009 is set aside and the plaint in Reg.C.S.No.26 of 2008 is rejected.