
(1998) 10 BOM CK 0014
In the Bombay High Court
Case No : Second Appeal No. 136 of 1983

Shankarlal Ganulal Khandelwal

APPELLANT

Vs

Balmukund Surajmal Bharuka (deceased by LRs)

RESPONDENT

Date of Decision : 16-10-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 18, Order 8 Rule 5, 100
Evidence Act, 1872 — Section 92
Transfer of Property Act, 1882 — Section 54

Citation : AIR 1999 Bom 260 : (1999) 2 ALLMR 85 : (1999) 3 CivCC 75 : (1999) 2 MhLj 569

Hon'ble Judges : S.D. Gundewar, J

Bench : Single Bench

Advocate : V.A. Naik, for the Appellant; S.P. Dharmadhikari, for the Respondent

Final Decision : Allowed

Judgement

S.D. Gundewar, J.—By this second appeal, the appellant/original plaintiff challenges the judgment and decree passed against him by the learned District Judge, Buldana in Regular Civil Appeal No. 271/79. That appeal was filed by the original defendant challenging the judgment and decree passed against him by the learned Civil Judge, Junior Division, Malkapur in Regular Civil Suit No. 50/77. The trial Court found that the sale-deed dated 23-11-1972 was nominal and in the nature of simple mortgage. The trial Court, therefore, cancelled the said sale deed by directing the plaintiff to deposit the amount of Rs. 10,000/-with interest at the rate of 6% per annum. As a result, the suit of the plaintiff came to be decreed. In appeal, the lower appellate Court negatived the aforesaid findings of the trial Court holding that the transaction evidenced by sale deed dated 23-11-1972 was out and out sale. In the result, the appeal came to be allowed and the judgment and decree of the trial Court, were set aside. It is the said finding of the lower appellate Court which is challenged in this appeal.

2. At the outset Smt. V. A. Naik, the learned Counsel for the appellant, submitted

that the averments made by the plaintiff in paragraphs 2, 3 and 4 of his plaint were not specifically denied by the defendant. The denial of the said facts is not specific but evasive and when the denial of any fact is not specific but evasive, the said fact will have to be taken as admitted. For this she placed reliance on a decision in *Badat and Co. Vs. East India Trading Co.*, . It is no doubt true that in the aforesaid case, the Apex Court held that every allegation of fact in the plaint, if not denied specifically or by necessary implication or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted. However, in the said case, the Apex Court has observed as under:--

".....But in mofussil Courts in India, where pleadings were not precisely drawn, it was found in practice that if they were strictly construed in terms of the said provisions, grave injustice would be done to parties with genuine claims. To do justice between those parties, for which Courts are intended, the rigor of R. 5 has been modified by the introduction of the proviso thereto. Under that proviso the Court may, in its discretion, require any fact so admitted to be proved otherwise than by such admission. In the matter of mofussil pleadings, Courts, presumably relying upon the said proviso, tolerated more laxity in the pleadings in the interest of justice....."

In the present case, Shri S. P. Dharmadhikari, the learned Counsel for the respondent, has pointed out from the written statement of the defendant that the defendant has denied the averments made by the plaintiff in each and every paragraph and, therefore, according to him, it cannot be said that there is no specific denial of the facts averred by the plaintiff in his plaint. It is true that the defendant has denied the averments made by the plaintiff in each and every paragraph of his plaint and, therefore, even if there is no specific denial of any particular fact, it cannot be said that the defendant has admitted the same. In this view of the matter, I find no substance in the aforesaid submission made by the learned Counsel for the appellant that as the averments made by the plaintiff in paragraphs 2, 3 and 4 of his plaint were not specifically denied by the defendant the same may be taken as admitted. I, therefore, find that the aforesaid decision of the Apex Court is of no avail to the appellant.

3. Now, the only substantial question of law that arises for consideration in this appeal is whether the plaintiff is barred from leading oral evidence in support of his contention that the sale deed in question was sham and bogus and it was not to be acted upon by the parties?

4. In this respect, it is submitted by Smt. V. A. Naik, the learned Counsel for the appellant, that sub-section (1) of Section 92 of the Evidence Act is not applicable when it is a case of the plaintiff that the transaction recorded in the document in question was never intended to be acted upon by the parties and that the document is a sham. For this, she relied upon the decision of the Apex Court in *Smt. Gangabai Gilda Vs. Smt. Chhabubai Gandhi*, , wherein it is held by the Apex Court as under (at Page 22):--

"The bar imposed by Sub-section (1) of Section 92 applies only when a party seeks to rely upon the document embodying the terms of the transaction. In that event, the law declares that the nature and intent of the transaction must be gathered from the terms of the document itself and no evidence of any oral agreement or statement can be admitted as between the parties to such document for the purpose of contradicting or modifying its terms. The sub-section is not attracted when the case of a party is that the transaction recorded in the document was never intended to be acted upon at all between the parties and that the document is a sham. Such a question arises when the party asserts that there was a different transaction altogether and what is recorded in the document was intended to be of no consequence whatever. For that purpose oral evidence is admissible to show that the document executed was never intended to operate as an agreement but that some other agreement altogether, not recorded in the document, was entered into between the parties."

It is true that the question as to whether the transaction recorded in the document was never intended to be acted upon by the parties and that the document was sham and bogus arises when the party asserts that there was a different transaction altogether and what is recorded in the document was intended to be of no consequence whatever. For that purpose, oral evidence is admissible to show that the document executed was never intended to operate as an agreement but that some other agreement altogether not recorded in the document was entered into between the parties. Similar view has been taken by the Apex Court in the aforesaid decision. In the present case, it is specifically pleaded by the plaintiff that the transaction evidenced by the sale deed in question was nominal and it was executed by him in favour of the defendant by way of security for the amount of Rs. 10,000/-secured by him from the defendant. It is also pleaded by him that on refund of the said amount with interest at the rate of 6% per annum, the defendant was to reconvey the suit plot to him. According to her, the said document was sham and it was not to be acted upon by the parties. As such, in my opinion, in the light of the observations made by the Apex Court in the aforesaid case, the plaintiff was entitled to lead oral evidence in support of his aforesaid averments and, therefore, the evidence led by the plaintiff in this behalf cannot be said to be inadmissible in view of provisions of Sections 91 and 92 of the Indian Evidence Act.

5. Here it is argued by Shri S. P. Dharmadhikari, the learned Counsel for the respondent, that the lower appellate Court has considered every piece of evidence in minute details and, therefore, interference by this Court is not warranted. For this, he placed reliance on the decisions of Supreme Court in *Dr. Ranbir Singh Vs. Asharfi Lal*, and in *Shyam Sunder Dutta v. Baikuntha Nath Banerjee (dead) by L.Rs.*, reported in . In *Dr. Ranbir Singh's* case (cited supra), the Apex Court in paragraph 14 of its judgment held as under ;--

"Sub-section (1) of Section 100 of the CPC contemplates that an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate

to the High Court, if the High Court is satisfied that the case involves a substantial question of law. Sub-section (4) of Section 100 further provides that when the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question. But it may be pointed out that the High Court formulated no such question of law on basis of which it proposed to interfere with the findings of facts. It has been the consistent view of this Court that there is no jurisdiction to entertain a second appeal on the ground of erroneous finding of fact, based upon an appreciation of the relevant evidence. There is a plethora of case-law in support of this view. To quote a few, references may be made to the decision in *R. Ramachandran Ayyar Vs. Ramalingam Chettiar*, wherein this Court took the view that even if the appreciation of evidence made by the lower appellate Court is patently erroneous and the finding of fact recorded in consequence is grossly erroneous, that cannot be said to introduce a substantial error or defect in the procedure and the High Court cannot interfere with the conclusions of fact recorded by the lower appellate Court. This view has been reiterated by this Court in *Bhagwan Das Vs. Smt. Jiley Kaur* and another, . This being the position, the High Court was not justified in reappreciating the evidence and substituting its own conclusions for the well-reasoned findings recorded by the Courts of facts."

In the aforesaid case, as the substantial question of law as contemplated u/s 100(4) of CPC was not formulated by the High Court, the Supreme Court found that the High Court was not justified in reappreciating the evidence and substituting its own conclusions but here it is not so. In the case at hand, this Court has formulated a substantial question of law as indicated in paragraph No. 3 above and, therefore, in my view, the aforesaid" decision does not help the respondent in this regard.

6. In *Shyam Sunder Dutta's* case (cited supra), the Apex Court in paragraph 5 of its judgment held as below (at Page 968 of AIR SCW) :--

"The question of the respondents to have remained in possession cannot be gone into by the High Court, since the District Court on consideration of the entire evidence had Categorically recorded a finding of fact that the appellant and his co-sharers remained in possession from August, 1945 and that the respondents were not continuing in possession from that time. This being a finding of fact, the High Court would not have gone into the question. However, it would appear" that on the question of limitation under the Bengal Tenancy Act when the arguments were addressed, in consideration of that question, the High Court has gone into the question whether the respondents were not dispossessed from suit lands and recorded a finding that they remained in possession. That finding does not appear to be warranted in view of the fact that the evidence was not discussed and as rightly contended the only evidence the High Court had considered was that of PW 1 but the first appellate Court had considered the evidence of PWs 2 to 5 and the documentary evidence and that evidence was found to be in support of the evidence given by PW 1 that the respondents did

not continue in possession from August 1945. Therefore, the finding recorded by the High Court, in fact was not necessary. Even otherwise, that finding was recorded without advertent to all the material evidence and that, therefore, the finding of possession recorded by the High Court is clearly illegal."

In the said case, the High Court had gone into a question of fact regarding possession and hence, the Apex Court held that the High Court was wrong in interfering with the said finding of fact. In the present case, as the substantial question of law as indicated above is involved and, therefore, it cannot be said that no interference with the finding of the Court below by this Court in second appeal is necessary. This decision also in my view is of no avail to the respondent.

7. Now, if we look at the evidence of the plaintiff, we find that the plaintiff has deposed that in the year 1972 he was in need of money and, therefore, they approached the defendant and demanded the amount of Rs. 10,000/- from him. According to him, the defendant agreed to pay the said amount to him on executing a nominal sale deed in his (defendant's) favour as defendant had no money-lending licence. It is also deposed by him that at the time of the execution of the sale deed in question the defendant promised to reconvey the suit plot to him on his (plaintiff's) repaying the amount of Rs. 10,000/- with interest at the rate of 6% per annum. According to the plaintiff, though he had executed the sale deed in question in favour of the defendant, the possession of the suit plot remained with him. This version of the plaintiff finds support from the evidence of Ramdas and Gulabchand who are the attesting witnesses of the sale deed (Exh. 58) in question. Both of them have in very clear terms told the Court that at the time of the execution of the sale deed the defendant agreed to reconvey the suit plot to the plaintiff on his repaying the amount of Rs. 10,000/-. The learned Counsel for the respondent has not shown any reason as to why the evidence of these two independent witnesses should be discarded. The lower appellate Court has also not given due weight to the evidence of these independent witnesses.

8. Besides the aforesaid oral evidence, there is documentary evidence such as the extract of Hak Nondini Register (Exh. 24/1) notices for demand of tax (Exhs. 24/2 and 24/3), extract of assessment list (Exh.59), Dakhla -- a certificate issued by the Municipal Council, Malkapur (Exh.60) and tax receipt (Exh.61) on record to support the plaintiff's version that though the sale deed in question was executed by him in favour of the defendant, the possession of the suit plot remained with him. It is no doubt true that Exh.68 shows that the Town Planning Authority granted permission to the defendant u/s 45 of the Maharashtra Regional and Town Planning Act, 1966 for the construction of temporary tin shed on the suit plot on 5-3-1977 just prior to the institution of the present suit and Exh.69 shows that the defendant had paid charges for tap connection. However, it is not known as to how the Town Planning Authority granted such permission to the defendant particularly when the suit plot does not stand in his name in Municipal record. There is no explanation put forth by the defendant in this

behalf and, therefore, in the absence of any explanation in this regard, I find that the said documents (Exhs.68 and 69) do not help the defendant in establishing his possession over the suit plot. The finding recorded by the lower appellate Court in this behalf appears to be perverse because the lower appellate Court erred in relying upon the explanation given by the defendant that he felt that his name would be mutated in Municipal record automatically. This explanation given by the defendant itself appears to be absurd. How can the name of a person be mutated in Municipal record unless he moves the Municipality by making an application to that effect. So the finding of lower appellate Court on this count also cannot be upheld.

9. Not only that, there are certain circumstances which favour the plaintiff in this behalf and go against the defendant. Firstly, though the defendant purchased the suit plot from the plaintiff in the year 1972, he did not take any steps to get his name, mutated in the Municipal record till today nor he paid the tax of the suit plot at any time. Secondly, the evidence of the plaintiff if read along with the evidence of P.W. Ghanshamdas goes to show that the market value of the suit plot in the year 1972 was much more than Rs. 10,000/- which finds support from the fact that when the plaintiff offered the amount of Rs. 21,000/- for reconveyance of the suit plot, the defendant refused for the same. Thirdly, though the defendant contended that he had raised some construction over the suit plot by spending amount of Rs. 2,000/-, nothing was found there at the time of spot inspection by the trial Judge. From these circumstances, it can be gathered that the intention of the parties was to treat the document (Exh.58) as nominal and not to act upon it. Had the parties really intended to act upon the same, the defendant could have certainly got mutated his name in Municipal record. The fact that he did not take any step in this behalf Clearly goes to support the plaintiffs version that the parties had agreed not to act upon the said document.

10. On going through the judgment of the lower appellate Court, I find that there is a gross misappreciation of evidence which goes to the root of the matter and that the learned District Judge had not considered the aforesaid oral and documentary evidence in its proper perspective. So also he has not considered the aforesaid circumstances in a way in which they ought to have been considered. The impugned judgment and decree of lower appellate Court, therefore, need to be set aside.

11. It is then submitted by Shri Dharmadhikari, the learned Counsel for the respondent, that question of valuation of property is one of fact and the High Court is not entitled to go into it in second appeal. For this, he relied upon a decision in P.L. Bapuswami Vs. N. Pattay Gounder, . No doubt, this criticism of the learned Counsel for the respondent is justified in view of the aforesaid decision of the Supreme Court. However, besides the question of valuation, there is aforesaid substantial question of law involved in this appeal and, therefore, if the High Court in second appeal finds that the lower appellate Court has not

considered the relevant documentary and oral evidence in its proper perspective and the effect of the said evidence on the rights of the parties, the High Court is certainly entitled to reconsider the evidence by drawing inferences from the admitted position. I am fortified in this view by a decision in *Kochukakkada Aboobacker (Dead) by L.Rs. and others Vs. Attah Kasim and others*, . In this behalf, Smt. Naik, the learned Counsel for the appellant, relying upon the decisions of Supreme Court in *Jagdish Singh Vs. Natthu Singh*, and in *Mohd. Yunus v. Gurubux Singh*, 1995 Supp. (1) SCC 418 , submitted that where there is a gross misappreciation of evidence which goes to the root of the matter, the High Court in second appeal can certainly exercise its jurisdiction. In view of the ratio laid down by the Apex Court in this behalf in the aforesaid decisions, I find much force in the aforesaid submission made by the learned Counsel for the appellant. In the present case, I have held above that there is a gross misappreciation of the evidence by the lower appellate Court which goes to the root of the matter and, therefore, in my view, interference by the High Court in second appeal is necessary. In this view of the matter, I find no force in the contention of Shri Dharmadhikari, the learned Counsel for the respondent, that the lower appellate Court has considered each and every aspect of the matter in minute details and hence interference by this Court is not necessary.

12. Lastly, Shri S. P. Dharmadhikari; the learned Counsel for the respondents, submitted that the findings of the trial Court are vitiated because the trial Judge decided the matter on what he found on the spot at the time of spot inspection. According to him, the observations of a Judge at the time of the inspection can only be used for the purpose of better following and understanding the evidence adduced in the case or to test its accuracy and it is not the purpose of such inspection to be substituted as evidence in the case or to contradict the evidence placed before the Court and make it the foundation of the judgment. For this, he relied upon the decision of Mysore High Court in *T. Krishnaswami Rao v. Dundappa*, reported in AIR 1962 Mys 17 and of Supreme Court in *Ugamsingh and Mishrimal Vs. Kesrimal and Others*, . On considering the aforesaid decisions, I find much force in the aforesaid submission made by the learned Counsel for the respondent that the observations of a Judge at the time of inspection can be used only for the purpose of better following and understanding the evidence adduced in the case or to test its accuracy. It is true that such inspection cannot be substituted as evidence in the case nor the Judge can make it the foundation of his judgment. In the present case, if the observations made by the trial Court in this behalf are considered in its proper perspective, we find that the learned trial Judge had neither substituted his notes of inspection as evidence nor made the same the foundation of his judgment. On careful scrutiny of the judgment of the trial Court, one can find that the trial Court has considered the entire oral and documentary evidence. It also took into consideration all the circumstances of the case and thereafter took into consideration his own notes of inspection. In fact, the trial Court ought not to have mentioned the observations about the inspection in its judgment because the observations of a Judge at the time of

inspection can be used only for appreciation of the evidence. The trial Court had, therefore, committed an error in giving evidentiary value to the observations made by him at the time of inspection. However, it is crystal-clear from the judgment of trial Judge that he did not base his conclusions solely on the result of his personal inspection and it is well-settled that when the judgment is not based solely on the result of personal inspection, it is not vitiated as observed by the Apex Court in the decision in the case of Ugam Singh (*supra*). Therefore, I do not find any substance in the aforesaid submission made on behalf of the respondent.

13. In this view of the matter I find that the judgment and decree passed by the lower appellate Court need to be set aside and that of the trial Court restored.

14. In the result, the appeal is allowed. The judgment and decree passed by the lower appellate Court are hereby set aside and that of the trial Court restored. In the circumstances of the case, there shall be no order as to the costs.