(2015) 02 BOM CK 0018

In the Bombay High Court

Case No : Notice of Motion No. 43 of 2015 in Execution Application No. 968 of 2014 in Award Case No. 30700/70712 of 2013

Vijay Dattatray Naik APPELLANT

Vs

Makarand V. Naik and Others RESPONDENT

Date of Decision : 27-02-2015

Acts Referred:
Registration Act, 1908 — Section 17, 49

Citation : (2015) 5 BomCR 72

Hon'ble Judges : R.S. Dalvi, J.

Bench : Single Bench

Advocate : Vishal Kanade i/b Sanjay S. Gawde, for the Appellant

Judgement

R.S. Dalvi, J.—This Notice of Motion is taken out by the applicant, who is the father of the award debtors/respondents, to raise the attachment levied upon flat No. 57 in Mantri Corner, Sayani Road, Mumbai-400 026. The attachment has been levied upon the property of the award debtors where they reside. The applicant would claim that though the award debtors reside there, he is the sole owner of the attached property. It does not belong to the award debtors and hence the attachment must be raised.

2. In para 2 of the affidavit-in-support of the Notice of Motion the applicant has stated that he resides in the attached premises for the last many years as the member of the society. The society has issued share certificate No. 29 in respect of the distinctive shares bearing Nos. 141 to 145 which stand in his name. He also claims to be paying the maintenance for the attached flat and has relied upon other documents to show his possession. In para 5 of the affidavit-in-support he has claimed to be an exclusive owner of the attached premises. In para 6 he has stated that the premises belong to him and the respondents/award debtors have no rights in the said premises.

3. To show that the applicant is the member of Mantri Corner society, the applicant has produced original share certificate issued by the society initially in

the name of Smt. Lilavati D. Naik who is the mother of the applicant. The applicant has been shown as an associate member. After the death of his mother he has been transferred the share certificate. This document, therefore, would evidence the membership of the applicant. Mr. Kanade contended that under Section 41 of the Co-operative Societies Act, 1961 a share certificate is not registrable. Section 41 exempts the compulsory registration of instrument relating to shares and debentures of the society. Under Section 41(a) an instrument relating to the shares of the society is, therefore, not registrable. Consequently his contention that the share certificate evidencing the allotment of shares in the society is not registrable would stand to reason. Indeed a share certificate does not contemplate a transfer of an immovable property worth Rs.100/-or more and, therefore, is not registrable even under Section 17 of the Registration Act, 1908.

4. Mr. Kanade relied upon the case of Usha Arvind Dongre Vs. Suresh Raghunath Kotwal, in which the learned single Judge of this Court, as she then was, considered the case of a tenant co-partnership housing society which is the kind of society in which the applicant has been allotted shares and which has issued the share certificate to the applicant. Para 7 of the judgment shows that the land and the building belong to the society. The flats are allotted for occupation to the members of the society. Consequently simplicitor upon the share certificate showing the allotment of shares by the society which owns the immovable property, the applicant cannot raise the attachment. The applicant can only show the shares allotted to him for occupation as a member of the society.

It has been held in para 10 of the judgment relying upon the Supreme Court''s judgment in the case of Ramesh Himmatlal Shah Vs. Harsukh Jadhavji Joshi, , that a flat in a tenant co-partnership housing society is attachable and saleable in execution of the decree against the allottee and hence the purchaser must obtain the membership of the society before confirmation of the sale. That judgment also does not show how the ownership can be claimed by a member of the tenant co-partnership society and how it can be claimed on an unregistered agreement. Hence the membership of the applicant in the housing society would not entitle the applicant to raise the attachment that is levied.

5. The applicant must show his title if the applicant claims that the attached property belongs to the applicant and he is the owner of the attached property. If he shows his title, he would be entitled to raise the attachment. That is the case of the applicant in paras 5 and 6 of the affidavit-in-support of the application.

6. To show that he is the owner of the attached premises and that the attached premises belongs to him, the applicant has relied upon the agreement of sale executed by his mother with the builders of the building of the society. The agreement executed by the mother is dated 23.02.1979 and has been unregistered. The stamp duty has been paid upon the document on 29.03.2001 under the amnesty scheme. The document is yet unregistered. Consequently the applicant''s case that he is the exclusive owner of the attached premises and the

premises belong to him cannot be shown from the unregistered agreement by the applicant. The unregistered agreement cannot be relied upon by him and the Court cannot look into it. The unregistered document is the only basis for showing the ownership of the property.

7. The applicant has, therefore, only shown that he has been the member of the society. He has not shown how he became the member of the society. He can show that he became the member of the society only upon purchase of the premises of the society and only by payment of consideration. That would be evidenced in agreement of purchase/sale.

8. Of course, if the applicant''s mother purchased the premises and the applicant showed how the premises was purchased by his mother upon payment of consideration and how the premises came to be transferred to his name after the death of his mother he would also be entitled to be the owner and consequently to raise the attachment. This the applicant can do only upon the registered document of transfer being the agreement of purchase/sale. Such a document of transfer is, therefore, the seminal document to be relied upon by the applicant to prove his title and to prove his claim of exclusive ownership and to show that the attached premises belongs to him. That document being unregistered, the claim cannot be proved. If the claim of the applicant of ownership of the attached premises can be proved by production of the share certificate simplicitor showing the flat being transferred to his name from the name of his mother, it would imply that though his mother would not be able to prove her ownership without her document of title, her successors can successfully prove their ownership without such document of title.

9. Mr. Kanade on behalf of the applicant argued that the agreement of sale is a document used by the applicant for the collateral purpose and is hence not required to be registered under the proviso to Section 49 of the Registration Act, 1908.

10. The document which is exempted under the proviso to Section 49 is the document used in a suit for specific performance and the document which is used as evidence of any collateral transaction not required to be effected by a registered instrument.

11. What is a collateral transaction is, therefore, required to be seen. The dictionary meaning of the word "collateral" in Concise Oxford English Dictionary, Indian Edition at page 280 is "additional but subordinate; secondary; situated side by side; parallel".

The definition of word "Collateral" in Black''s Law Dictionary, Eighth Edition at page 278 is "supplementary; accompanying, but secondary and subordinate to".

The definition in Advanced Law Lexicon by P. Ramanatha Aiyar, 3rd Edition Reprint 2007 shows the meaning of the term "collateral" at page 855 to be "by the side; at the side; attached upon the side."

12. This would require and enunciation of the illustrations of what has been considered by various Courts to be a collateral transaction not required to be effected by a registered instrument. When a document which is required to be registered such as an agreement for sale/purchase, sale deed, lease deed, gift deed, mortgage deed, partition deed etc. and is not registered it cannot be admissible in evidence to prove the sale, mortgage, gift, partition etc. [See. K. Mahammad Ghouse Sahib Vs. Jamila Bi and Others, . It may yet be received in evidence to prove various other subsidiary and ancillary aspects such as the question of notice in an unregistered lease which would evidence only a monthly tenancy which is not required to be registered, the nature of possession from any of these documents, a kabuliyat executed by a lessee [as in Ram Abatar Mahato Vs. Sm. Shanta Bala Dasi and Others, but not the terms of lease in an unregistered lease, the purpose for which the premises was let, it cannot show who was the tenant, cannot prove the covenants thereunder, cannot prove the terms of lease, duration of the lease, the date on which the tenancy began, what was the rent etc.

It has also been held to be admissible to show whether the lease was residential or not which would be collateral purpose [See. Rai Chand Jain Vs. Miss Chandra Kanta Khosla, .

Similarly it has been held in a number of judgments that though a partition is required to be registered to show the partition by division of the property by metes and bounds which would imply a transfer from the joint status to a separate status, the fact of the severance of the joint status by effecting a division in the status, and that the fact that the joint family ceased to exist by the parties taking possession of the premises allotted to them can be shown by an unregistered partition deed [See. C.S. Kumaraswami Gounder Vs. Aravagiri Gounder and Another, .

A memorandum of gift following an oral gift of a part of the premises for residence has been held not to be registrable [See. A.N. Pareekh Vs. N.H. Naqvi, .

For a deposit to be recovered being a money debt under an unregistered lease, the unregistered document was made admissible to that extent [See. Ardesir Bejonji Surti Vs. Syed Sirdar Ali Khan and Others, .

The evidence of receipt of consideration or payment, which is independent of the right to enforce the mortgage can also be seen from an unregistered mortgage deed or an agreement of sale [See. Habib Dar Vs. Mst. Zoona Bibi--> , Choyyan Narayani Vs. Ibrahim Kunhi and Others, and Lingaiah Vs. Chikkahonnalagaiah and Others, .

A relationship of a party can be seen from an unregistered gift deed otherwise compulsorily registrable [See. Ali Bakhsh Vs. Raushan (1900) PLR 481].

The evidence of handwriting in an unregistered document stated to be a forgery could be received by comparing the handwriting with an admitted handwriting [See. Govind Vs. Dharam (1881) 1 All WN 138].

Similarly whether a decree passed is satisfied or a debt is acknowledged or a fair amount is charged as compensation for a lease or a waiver of a right is made against the attachment and sale of property or the fact whether there is an admission on receipt of money or a proof of the debt have all been held to be collateral purposes. If these purposes are to be shown from an unregistered document and if they do not pertain to creation and extinguishment of any right in an immovable property, they could be seen from an unregistered document. That would be a transaction, quite apart from the transaction creating, declaring, assigning, limiting, extinguishing any right to immovable property. The use of the agreement in this case is not for a collateral purpose. It is for the purpose of showing the ownership of the party who is the purchaser being the mother of the applicant. That is the main, dominant purpose of the agreement of purchase/ sale. The right of ownership is the most fundamental right in an agreement for sale/purchase or a sale deed. If an ownership right can be seen from an unregistered agreement of purchase or sale, there would be nothing which is not collateral.

13. In the case of Bhaiya Ramanuj Pratap Deo Vs. Lalu Maheshanuj Pratap Deo and Others, relied upon by Mr. Kanade the party relied upon a maintenance deed. He was claiming possession of the suit property. To show his possession in the suit property he relied upon a maintenance deed. The reliance upon the maintenance deed is, therefore, for the collateral purpose of ascertaining the nature of possession. To prove the possession a document which is otherwise not registrable was used. Such a document falls within the provisions of Section 49 being a document evidencing a collateral transaction, in that case the maintenance deed which would not require to be effected by a registered instrument.

14. An agreement of sale or purchase would always be required to be a registered document as it contemplates a transfer of an immovable property. In this case the transfer of property is from the builder to the mother of the applicant. It is, therefore, not a document which is an evidence of a collateral transaction which is not to be effected by a registered instrument.

15. The allotment of the shares can be evidenced only by an agreement of sale/ purchase. Such an agreement is a compulsorily registrable document and must be shown to be registered, failing which though the allotment of the shares may be seen, the ownership of the property cannot be seen.

16. The reliance upon the case of S. Kaladevi Vs. V.R. Somasundaram and Others, is of no consequence to the applicant in this case. Mr. Kanade drew the Court''s attention to para 12 of the judgment in which the proviso to Section 49 of the Registration Act has been considered. What is observed in the said para is that in a suit for specific performance or in case of an evidence of any collateral

transaction not required to be effected by a registered instrument (such as a share certificate) the document does not require registration. That was a case of specific performance. An unregistered sale deed was tendered in evidence. It was not taken as the evidence of completed sale but only as a proof of oral agreement of sale. A suit for specific performance can be filed upon an oral agreement of sale.

A suit for specific performance is, therefore, specifically exempted under the proviso of Section 49 of the Registration Act. That is because only in a suit of specific performance when an oral agreement is relied upon can a party call upon the Court to direct specific performance of the oral agreement by the execution of a written agreement.

A draft sale deed prepared between the parties but not executed can even be specifically enforced. Hence an unregistered sale deed relied upon by the plaintiff in the suit for specific performance would be received in evidence of the oral transaction between the parties under which they agreed to transfer the suit property from one party to another.

This is not one such case. This is a case not of oral transaction. It is a case of ownership of an immovable property which can be evidenced only by a registered deed of sale. Consequently there is no question of receiving the unregistered agreement of sale as evidence of oral agreement of sale. That is not even the applicant''s case.

17. Mr. Kanade has relied upon the judgment of this Court in another similar matter where the applicant claimed independent title to the attached premises. The document of title relied upon by the applicant in that case also was sufficiently stamped but not registered. It was held that under the unregistered agreement title could not be claimed by the applicant who has to prove the claim of title. It is further held that even upon an agreement of sale itself bonafide title cannot be seen and the absolute right, title and interest in the attached premises cannot be shown until the payment of consideration of the price, which is the seminal requirement, is also shown. It is, therefore, not known how that judgment would take the case of the applicant any further.

Mr. Kanade argues that in that case the share certificate was not relied upon and an unregistered agreement of sale was relied upon but in this case the applicant having relied upon the share certificate, has shown better title. The argument is wholly erroneous.

The reliance upon para 16 of the judgment which cites the case of Usha Arvind Dongre Vs. Suresh Raghunath Kotwal, is only because if relates to tenant co-partnership housing society where the entire building belongs to the society and the occupants are only members.

18. Mr. Kanade would argue that the production of a share certificate evidences the transfer of shares and would, therefore, show complete title of the applicant.

The applicant has not shown that he is the exclusive owner of the suit premises and the premises belong to him as claimed by him since the only document that is shown to Court is the share certificate.

19. Consequently the attachment cannot be raised and the Notice of Motion is dismissed.

