RAMDAS WAYDHAN GADLINGE (SINCE DECEASED) THR LRS. VATSALABAI RAMDAS GADLINGE & ORS.

v.

GYANCHAND NANURAM KRIPLANI (DEAD) THR LRS. DHRUPADABAI & ORS.

(Civil Appeal No. 4479 of 2021)

July 28, 2021

[VINEET SARAN AND DINESH MAHESHWARI, JJ.]

Code of Civil Procedure, 1908 – Order XLII and XLI and s.100 – Suit for recovery of possession and damages – Dismissed by trial court – First Appellate Court reversed the decision, and decreed the suit – Second appeal dismissed by High Court – Challenge to – Held: The High Court, after having admitted the second appeal and having formulated substantial questions of law, could not have disposed of the same by only stating its satisfaction on the findings of the First Appellate Court without examining the relevant points arising from the submissions of the parties and without examining as to whether the First Appellate Court was justified in reversing the findings of the Trial Court – The judgment of High Court was akin to that of a summary disposal of the second appeal and that cannot be approved, because the second appeal had been admitted on specific questions – Once a second appeal is admitted, on the High Court being satisfied that a substantial question of law is involved in the case and with formulation of that question, the appeal is required to be heard in terms of Order XLII CPC – A look at Order XLII CPC makes it clear that except for the limitations envisaged by r.2 thereof read with s.100, the rules of Order XLI do apply, so far as may be, for the purpose of hearing of the second appeal, i.e., an appeal from appellate decree – A second appeal, after its admission with formulation of substantial question of law, cannot be disposed of summarily – The Court has further power to hear the appeal on any other substantial question of law if not formulated earlier for reasons to be recorded – Of course, at the time of hearing, the respondent is entitled to argue that the case does not involve the question or questions so formulated but, in the present case, there is no indication in the judgment of the High Court if the respondent even argued that the case did not involve

the formulated questions or any of them – It has also not been the conclusion by the High Court that the questions so formulated were not involved in the case – That being the position, it was required of the High Court to examine the matter in necessary details and then, to determine the substantial questions of law formulated in the case – In this view of the matter, the matter is remanded for reconsideration by the High Court on the questions of law already formulated by it.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 4479 of 2021

From the Judgment and Order dated 08.03.2016 of the High Court of Judicature at Bombay Bench at Nagpur, Nagpur in Second Appeal No. 275 of 2001.

Manoj Gorkela, Ms. Shashi Kiran, Advs. for the Appellants.

Garvesh Kabra, Adv. for the Respondents.

The following Order of the Court was passed :

ORDER

1. Leave granted.

2. The legal representatives of defendant in a suit for recovery of possession and damages have preferred this appeal against the judgment and order dated 08.03.2016, as passed by the High Court of Judicature at Bombay, Bench at Nagpur in Second Appeal No. 275 of 2001.

2. The predecessor of the present respondents filed the suit for possession and damages (CS No. 189 of 1995) in the Court of Civil Judge (Senior Division), Akola against the predecessor of the present appellants, essentially with the claim that he (the plaintiff) had purchased the suit property from the defendant under a registered sale deed dated 01.10.1992 for a consideration of Rs. 27,500/- and the defendant had put the plaintiff in possession of the suit property. The plaintiff asserted that later on, the defendant put his lock over the property and thereafter inducted tenants therein; whereupon he filed a police complaint and then filed the present suit on 03.08.1995, seeking recovery of possession as also damages.

3. The defendant, while resisting the claim so made by the plaintiff, contended that he had never sold the property to the plaintiff; rather he had taken a loan of Rs. 27,500/- for which, a nominal sale deed was executed. The defendant also submitted that he had repaid an amount of Rs. 19,750/- by way of cash and cheque to the plaintiff and had also given his refrigerator worth Rs. 7,500/-.

4. After taking evidence and examining the material placed on record, the Trial Court found that the plaintiff had failed to establish the factum of his having been put in possession and that the municipal taxes, electricity bills etc. were also paid by the defendant, leading to the inference that the sale deed was not an outright sale but was executed only as security. The Trial Court also observed that the property was encumbered against the loan taken by the defendant from a society and same could not have been sold before being released from such encumbrance.

5. The Trial Court also noticed that no payment of consideration was made at the time of registration of the sale deed and no other evidence was adduced by the plaintiff as to how did he make payment of the alleged sale consideration. Though the evidence in regard to the fact of defendant having repaid a sum of Rs. 20,000/- to the plaintiff through cheques was found to be unconvincing but, in view of other findings, the Trial Court proceeded to dismiss the suit.

6. The First Appellate Court, however, did not agree with the findings and conclusion of the Trial Court on the material issues involved in the matter. The First Appellate Court disbelieved the story of making repayment by the defendant by way of cheques, particularly after noticing that though the defendant stated that the cheques Exhibits 44 to 47 were returned by the plaintiff whenever the payment was made but, there was no such endorsement on the said cheques. The Appellate Court observed that the defendant probably applied a trick by embodying the name of the plaintiff on all those cheques. The First Appellate Court also referred to the fact that admittedly, the sale deed was executed and got registered before the Sub-Registrar and found that the defendant had failed to establish it to be a loan transaction. Accordingly, the First Appellate Court allowed the appeal and decreed the suit.

7. Being aggrieved by the decree so passed by the First Appellate Court, the defendant approached the High Court in second appeal.

The second appeal so preferred by the defendant (substituted by his legal representatives) was admitted by the High Court on the following substantial questions of law: -

"(1) Is the judgment of appellate court erroneous being based on erroneous formulation of points for determination since the question relating to nature of transaction was not framed?

(2) Is the judgment of appellate court sustainable in the background that findings of fact as recorded by trial court are set aside without holding that those are illegal erroneous and unsustainable?

(3) Are findings recorded by first appellate Court liable to be regarded as perverse?"

8. In the impugned judgment and order dated 08.03.2016, the learned Single Judge of the High Court, after reproducing the aforesaid questions, has observed that though specific point regarding the nature of transaction was not formulated by the First Appellate Court but the other point formulated by it covered the said issue; and the First Appellate Court had considered the arguments of both sides and did consider the plea regarding money lending and issuance of cheque etc. and then returned the finding that the sale deed was not executed by way of security for a loan. The learned Single Judge was of the opinion that there was no reason to differ with the First Appellate Court on this point. As regards question No. 2, the learned Single Judge again made a reference to the conclusion of the First Appellate Court and found that the alleged possession of defendant or his agents was of no consequence or relevance when the plaintiff's possession was legal and he was having a valid title by way of sale deed. The learned Single Judge further observed that the findings of fact recorded by the First Appellate Court were in accordance with the facts and evidence and question No. 3 could not be answered in affirmative. With these observations, the learned Judge proceeded to dismiss the second appeal.

9. Several grounds have been urged on behalf of the appellants seeking to question the impugned judgment and order dated 08.03.2016 of the High Court. One of the fundamental submissions is that the High Court, after having admitted the second appeal and having formulated substantial questions of law, was not justified in deciding the same in a summary manner by merely observing that the findings of the

First Appellate Court called for no interference. It is submitted that the Trial Court had dismissed the suit on relevant considerations and on cogent findings; and such a decision could not have been reversed by the First Appellate Court without dealing with the reasoning and findings of the Trial Court. It is also submitted that the substantial pieces of evidence, establishing that the transaction in question was merely a loan transaction, required due consideration and the High Court has erred in not examining the relevant questions arising in the matter.

10. *Per contra*, it is submitted on behalf of the respondents that the First Appellate Court has meticulously examined the matter in sufficient detail and the findings of fact recorded by the First Appellate Court were not calling for any interference and hence, the High Court was justified in dismissing the second appeal even if admitted on a few questions, which all essentially related to the matters of fact.

11. Having heard learned counsel for the parties and having examined the record, we are clearly of the view that the High Court, after having admitted the second appeal and having formulated substantial questions of law, could not have disposed of the same by only stating its satisfaction on the findings of the First Appellate Court without examining the relevant points arising from the submissions of the parties and without examining as to whether the First Appellate Court was justified in reversing the findings of the Trial Court.

12. As the matter is proposed to be remanded for reconsideration, we shall not be recording any finding on merits and would leave the entire matter for consideration by the High Court in accordance with law but, we may indicate by way of illustration a fact that the defendant, in order to show that he had a loan transaction with the plaintiff, apart from producing various other cheques which were allegedly returned to him, indeed adduced the evidence in the form of DW-4, an employee of Akola Urban Co-operative Bank, to establish that a cheque dated 07.12.1992 for a sum of Rs. 600/- was issued by the defendant in favour of plaintiff and it was encashed. The relevant statement of account was also produced by this employee of the bank. We are not commenting on the ultimate value and worth of this piece of evidence as the same has to be examined with reference to the other evidence on record and an overall view is required to be taken. However, it remains a fact that in paragraph 13 of the written statement, the

defendant took the specific plea of having made payment towards interest to the plaintiff and gave out the details of various cheques commencing from 13.07.1992 and it included the aforesaid cheque dated 07.12.1992 for a sum of Rs. 600/-. These aspects, coupled with the other findings of the Trial Court vis-à-vis the findings of the First Appellate Court do deserve appropriate consideration on the questions formulated by the High Court. Those questions could not have been decided with mere observations of endorsement of the findings of the First Appellate Court. With respect, the impugned judgment and order dated 08.03.2016 is akin to that of a summary disposal of the second appeal and that cannot be approved, because the second appeal had been admitted on specific questions.

13. It needs hardly any emphasis that under Section 100 of the Code of Civil Procedure, 1908 ('CPC'), admission of a second appeal while formulating substantial questions of law for consideration is a matter entirely different because at that threshold stage, the High Court would be examining as to whether the case involves any substantial question of law or not. However, once a second appeal is admitted, on the High Court being satisfied that a substantial question of law is involved in the case and with formulation of that question, the appeal is required to be heard in terms of Order XLII CPC.

14. A look at Order XLII CPC makes it clear that except for the limitations envisaged by Rule 2 thereof read with Section 100, the rules of Order XLI do apply, so far as may be, for the purpose of hearing of the second appeal, i.e., an appeal from appellate decree.

Section 100 CPC reads as under: -

"100. Second appeal.—(1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, 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.

(2) An appeal may lie under this section from an appellate decree passed *ex parte*.

(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question."

Rules 1 and 2 of XLII CPC read as under: -

"1. Procedure.—The rules of Order XLI shall apply, so far as may be, to appeals from appellate decrees.

2. Power of Court to direct that the appeal be heard on the question formulated by it.—At the time of making an order under Rule 11 of Order XLI for the hearing of a second appeal, the Court shall formulate the substantial question of law as required by Section 100, and in doing so, the Court may direct that the second appeal be heard on the question so formulated and it shall not be open to the appellant to urge any other ground in the appeal without the leave of the Court, given in accordance with the provision of Section 100."

15. Obviously, a second appeal, after its admission with formulation of substantial question of law, cannot be disposed of summarily. The Court has further power to hear the appeal on any other substantial question of law if not formulated earlier for reasons to be recorded. Of course, at the time of hearing, the respondent is entitled to argue that the case does not involve the question or questions so formulated but, interestingly, in the present case, we do not find any indication in the impugned judgment and order of the High Court if the respondent even argued that the case did not involve the formulated questions or any of them. It has also not been the conclusion by the High Court that the questions so formulated were not involved in the case. That being the position, in our view, it was required of the High Court to examine the matter in necessary details and then, to determine the substantial questions of law formulated in the case. In this view of the matter, we have no option but to set aside the impugned judgment and order dated 08.03.2016 and to remand the matter for reconsideration by the High Court on the questions of law already formulated by it.

16. We would hasten to reiterate that we are not commenting on the merits of the case either way and all the aspects are left open for determination by the High Court with reference to the relevant contentions of the parties.

17. Accordingly, this appeal is allowed; the impugned judgment and order dated 08.03.2016 is set aside; and Second Appeal No. 275 of 2001 is restored for reconsideration by the High Court on the substantial questions of law already formulated by it. The civil suit in question having been filed way back in the year 1995, we would request the High Court to assign a reasonable priority to the matter and take a final decision in the appeal expeditiously.

Headnotes prepared by: Devika Gujral

Result of the case: Appeal allowed.