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BALWANT VITHAL KADAM

v.

SUNIL BABURAOI KADAM

(Civil Appeal No.6069 of 2008)

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DECEMBER 05, 2017

[ABHAY MANOHAR SAPRE AND NAVIN SINHA, JJ.]

Maharashtra Cooperative Societies Act, 1960 – s.48 – If applicable – Agreement to sell between respondent-plaintiff and appellants-defendants to purchase 1/12th share of appellants in the suit land – Earnest money paid by respondent to the appellants – However, dispute arose between the parties and no sale deed was executed – Suit filed by respondent seeking specific performance, dismissed – First appeal filed by respondent, allowed – Second appeal filed by appellant in High Court was dismissed – Plea of appellant that the agreement to sell in question amounted to an alienation or transfer in contravention of s.48(d) and was void, therefore, specific performance of the agreement could not have been granted – Held: The agreement in question is not hit by s.48 inasmuch it was an agreement to sell, which in itself did not create any interest in the land nor did it amount to sale u/s.54 of the Transfer of Property Act – It only enabled the intending buyer to claim specific performance of such agreement on proving its terms – Further, the defendants agreed to sell only a small portion of the property over which charge was created in favour of the Land Development Bank and since the dues of the Bank were repaid, the question of applicability of s.48 did not arise – Further, the respondent also proved its readiness and willingness as rightly held by the first Appellate Court after appreciating the evidence on record – Order of High Court is just and proper, calling for no interference – Transfer of Property Act, 1882 – s.54 – Specific relief.

Limitation – Plea of – Mixed question of fact and law – Plea of appellant that the suit filed by the respondent was barred by limitation – Held: Plea relating to limitation being a mixed question of law and fact, the same could not have been examined, for the first time, in second appeal by the High Court.

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Bombay Prevention of Fragmentation and Consolidation of Holdings Act – s.31 – Bar under – Plea of appellant that respondent's suit was misconceived as no specific performance in relation to the agreement in question was permissible in view of bar u/s.31 – Held: To raise a challenge to any plea, the party concerned has to first lay foundation in the pleadings which was not done in the present case – It is more so when a plea is a mixed question of law and fact – Appellant cannot be allowed to raise such a plea in Supreme Court being the last Court of appeal, for the first time u/Art.136 – Pleadings – Constitution of India – Art. 136.

Words and Phrases – “Agreement to sell” and “Agreement to sale” – Distinction between – Held: Agreement to sell in itself does not create any interest in the land nor does it amount to sale u/s. 54 of the T.P. Act – It only enables the intending buyer to claim specific performance of such agreement on proving its terms – Agreement to sale creates an interest in the land once accomplished as defined u/s. 54 of the T.P. Act – Transfer of Property Act, 1882 – s.54.

Dismissing the appeal, the Court

HELD: 1. The agreement in question is not hit by Section 48 of the Maharashtra Co-operative Society Act, 1960 inasmuch as the agreement to sell in itself does not create any interest in the land nor does it amount to sale under Section 54 of the Transfer of Property Act, 1882 (T.P. Act). It only enables the intending buyer to claim specific performance of such agreement on proving its terms. In other words, there lies a distinction between an agreement to sell, and sale. The latter creates an interest in the land once accomplished as defined under Section 54 of the T.P. Act. It was also rightly held on facts that since the dues of the Land Development Bank were repaid, the question of applicability of Section 48 did not arise. There is no ground to disagree with this factual finding. [Para 17] [49-G-H; 50-A]

2. The plea relating to readiness and willingness, being a finding of fact, it could not be disturbed in second appeal and was binding on the High Court. It was more so when the first Appellate Court had recorded its finding by appreciating the entire evidence on record. There is, therefore, no ground to disagree with this finding of the High Court. [Para 18] [50-B-C]

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A **3. The plea relating to limitation was neither raised before the Trial Court, nor before the first Appellate Court. It being a mixed question of law and fact, the same could not be examined, for the first time, in second appeal by the High Court. The said finding of the High Court calls for no interference. [Para 19] [50-D]**

B **4. The appellant cannot be permitted to raise the plea relating to applicability of Section 31 of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, to the agreement in question, for the first time, in this appeal. It is for the reason that, firstly, this plea was neither raised by the appellant before the Trial Court and nor before the first Appellate Court and lastly, nor before the High Court. Secondly, in order to enable the appellant to raise any challenge to any plea, the party concerned has to first lay foundation in the pleadings of such plea which, in this case, was not. It is more so when a plea is a mixed question of law and fact. This Court being the last Court of appeal it is, therefore, not proper to allow the appellant to raise such plea, for the first time, under Article 136 of the Constitution in this appeal. [Paras 20-23] [50-E-G]**

E **CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6069 of 2008.**

From the Judgment and Order dated 24.07.2006 of the High Court of Bombay in Second Appeal No. 426 of 2004.

Sudhanshu Chaudhari, Ms. Surabhi Guleria, Advs for the Appellant.

F Varun Mathur, Ms. Anagha S. Desai, Venkateswara Rao Anumolu, Advs for the Respondent.

The Judgment of the Court was delivered by

G **ABHAY MANOHAR SAPRE, J. 1.** This appeal is filed by the defendants against the final judgment and order dated 24.07.2006 passed by the High Court of Bombay in Second Appeal No. 426 of 2004 whereby the High Court dismissed the second appeal filed by the appellants herein and affirmed the judgment and order dated 03.10.2002 passed by the 8th Additional District Judge, Satara in R.C.A. No.9/1996, which arose out of judgment/decreed dated 29.11.1995 passed by the 2nd Joint Civil Judge, Satara in R.C.S. No. 265 of 1989.

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2. In order to appreciate the controversy, which lies in a narrow compass, few relevant facts need mention hereinbelow. A

3. The appellants are the defendants whereas the respondent is the plaintiff in a suit out of which this appeal arises.

4. The respondent filed a suit being Civil Suit No. 265/89 in the Court of 2nd Joint Civil Judge, Satara against the appellants for specific performance of the two agreements, dated 11.10.1982(Ex.48) and 11.04.1983(Ex.68) to purchase 1/12th share of the appellants in the land which belonged to them situated at Eastern portion of Gat. No.594/1 admeasuring 2 hectares 18 Acre situated at Malegaon Taluka and District Satara(hereinafter referred to as "suit land"). B C

5. The sale consideration was fixed at Rs.10,000/-. The respondent had paid Rs.3,000/- by way of earnest money to the appellants. The sale deed was to be executed within 6 months. Since the dispute arose between the parties and no sale deed was executed, the respondent filed a suit to seek specific performance of the said agreement against the appellants in relation to the suit land. D

6. The appellants contested the suit by filing their written statement. Parties adduced evidence. The Trial Court, by judgment/decree dated 29.11.1995 in R.C.S. No.265/1989, dismissed the suit. E

7. The respondent (plaintiff) felt aggrieved and filed first appeal being Regular Civil Appeal No. 9/1996 in the Court of VIIIth Additional District Judge, Satara. By judgment/decree dated 03.10.2002, the VIIIth Additional District Judge, allowed the appeal, set aside the judgment/decree of the Trial Court and decreed the respondent's suit. F

8. Felt aggrieved, the appellants (defendants) filed second appeal in the High Court of Bombay being S.A. No. 426/2004. By impugned judgment/decree, the High Court dismissed the defendants' second appeal, which has given rise to filing of the present appeal by way of special leave in this Court by the defendants. G

9. Initially, there were two appellants. By order dated 28.10.2013 passed by this Court, the appeal against appellant No.1 was held abated.

10. Heard Mr. Sudhanshu Chaudhari, learned counsel for the appellant and Mr. Varun Mathur, learned counsel for the respondent. H

A 11. Learned counsel for the appellant (defendant No.2) while
assailing the legality and correctness of the impugned judgment argued
that, firstly, the respondent's suit was misconceived inasmuch as no
specific performance in relation to the agreement in question was
permissible in the light of bar created by Section 31 of the Bombay
Prevention of Fragmentation and Consolidation of Holdings Act
B (hereinafter referred to as "the Act") which, according to learned
counsel, prohibited any transfer of holding and, more particularly, a
fragment such as the one in the case at hand.

C 12. In the second place, learned counsel attacked the findings of
the High Court recorded on three pleas raised by the appellant in the
second appeal and contended that all the three pleas deserve to be upheld
in appellant's favour.

D 13. Learned counsel for the respondent, in reply, supported the
reasoning and the conclusion of the High Court and contended that the
impugned judgment does not call for any interference and hence deserves
to be upheld.

14. Having heard the learned counsel for the parties and on perusal
of the record of the case, we are inclined to dismiss the appeal finding
no merit therein.

E 15. This is how the High Court dealt with three pleas in the
impugned judgment:

F **"2. Shri Thorat appearing for the Appellants submitted that
as the suit agreement for sale was executed in contravention
of section 48(d) of the Maharashtra Cooperative Societies
Act, 1960 the agreement itself was void and therefore,
specific performance of the agreement could not have been
granted. He submitted that the finding of the trial Court on
the issue of readiness and willingness of the original Plaintiff
has been upset by the Appellate Court without dealing with
the reasoning of the trial Court. Lastly he submitted that
G the suit filed by the original Plaintiff was barred by limitation.**

H **3. I have considered the submissions. In my view section
48(d) of the said Act of 1960 will not affect the legality of
the suit agreement. In view of section 54 of the Transfer of
Property Act, 1882 agreement for sale does not create any**

interest in favour of the purchaser in respect of the immovable property. Therefore, agreement for sale cannot be treated as alienation or transfer within the meaning of clause (d) of section 48 of the said Act of 1960. Apart from this fact, the Appellate court has observed that the original Defendant Nos. 1 and 2 have agreed to sell only a small portion of the property over which charge has been created in favour of the Land Development Bank and part of the loan has been repaid.

4. So far as the second submission regarding readiness and willingness is concerned, I find that the Appellate Court has discussed the entire evidence. The Appellate Court after considering the pleadings and oral and documentary evidence on record has come to the conclusion that the Plaintiff has established his readiness and willingness to perform his part of the contract. The Appellate Court has observed that if at all any permission for transfer was to be obtained, the same was the obligation of the Defendants. So far as the bar of limitation is concerned, I find that in the Appellate Court the said issue was not specifically raised. The same was the case with the trial Court. The issue of limitation is a mixed question of law and fact considering the relevant provisions of the Limitation Act, 1963 which deal with the limitation for suit for specific performance.”

16. In our considered opinion, no fault could be found in the three findings of the High Court recorded on three pleas as the reasoning and the conclusion arrived at by the High Court is just and proper calling for no interference by this Court in the appeal.

17. So far as the plea relating to validity and enforceability of the agreement in question is concerned, it was rightly held by the High Court to which we concur that the agreement in question is not hit by Section 48 of the Maharashtra Co-operative Society Act inasmuch as the agreement to sell in itself does not create any interest in the land nor does it amount to sale under Section 54 of the T.P. Act. It only enables the intending buyer to claim specific performance of such agreement on proving its terms. In other words, there lies a distinction between an agreement to sell, and sale. The latter creates an interest in the land

A once accomplished as defined under Section 54 of the T.P. Act. It was also rightly held on facts to which we concur that since the dues of the Land Development Bank were repaid, the question of applicability of Section 48 did not arise. We, therefore, find no ground to disagree with this factual finding.

B 18. So far as the plea relating to readiness and willingness is concerned, it was again rightly held by the High Court to which we concur that this being a finding of fact, it could not be disturbed in second appeal and was binding on the High Court. It was more so when the first Appellate Court had recorded its finding by appreciating the entire evidence on record. We, therefore, find no ground to disagree with this
C finding of the High Court.

19. So far as the plea relating to limitation is concerned, it was rightly held by the High Court to which we again concur that, firstly, it was neither raised before the Trial Court and nor before the first Appellate Court; and secondly, it being a mixed question of law and fact, the same
D could not be examined, for the first time, in second appeal by the High Court. We agree with the finding of the High Court calling for no interference.

20. Now, so far as the plea relating to applicability of Section 31 of the Act to the agreement in question is concerned, the appellant, in
E our view, cannot be permitted to raise such plea, for the first time, in this appeal.

21. It is for the reason that, firstly, this plea was neither raised by the appellant before the Trial Court and nor before the first Appellate Court and lastly, nor before the High Court.

F 22. Secondly, in order to enable the appellant to raise any challenge to any plea, the party concerned has to first lay foundation in the pleadings of such plea which, in this case, was not. It is more so when a plea is a mixed question of law and fact.

G 23. This Court being the last Court of appeal does not, therefore, consider it proper to allow the appellant to raise such plea, for the first time, under Article 136 of the Constitution in this appeal.

24. Learned counsel for the appellant, however, contended that the appellant had raised this point in the arguments before the High Court but the same was not considered. We do not find it to be so.
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When we read the impugned judgment, we find that the High Court has specifically noted in Para 2 the three pleas raised by the appellant, which did not include this plea. A

25. Learned counsel for the appellant next contended that the agreements in question were not meant for sale of the land but were in the nature of security for the loan transaction entered between the parties. We are afraid we can go into this question in this appeal. It is again for the reason that firstly, it is a question of fact and secondly, it was not urged before the High Court. B

26. In the light of foregoing discussion, we find no merit in any of the submissions urged by the learned counsel for the appellant dealt with supra. C

27. As a result, the appeal is found to be devoid of any merit and thus it fails and is accordingly dismissed.

Divya Pandey

Appeal dismissed. D