2023 INSC 491

Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal No.930 of 2023
(@ Special Leave Petition (C) No.10747 of 2016)

Damodhar Narayan Sawale (D) through LRs.
...Appellant (s)

Versus

Shri Tejrao Bajirao Mhaske & Ors.

...Respondent (s)

J U D G M E N T

C.T. RAVIKUMAR, J.

1. This appeal filed under Article 136 of the Constitution of India is directed against the judgment and final order dated 30.10.2015 in Second Appeal No.435 of 1995 passed by the High Court of Judicature at Bombay, Nagpur Bench, whereby and whereunder the High Court reversed the judgment and decree of the Court of Additional District Judge, Buldana, in Regular Civil Appeal No.98 of 1987, reversing the judgment and

decree of dismissal passed by the Court of Joint Civil Judge, Junior Division, Chikhli in Regular Civil Suit No.257 of 1985 (originally numbered as Regular Civil Suit No.104 of 1979 on the file of the Court of Civil Judge, Senior Division, Buldana, before its transfer). In short, as per the impugned judgment, the High Court restored the decree of dismissal of the suit by the trial Court. The stated Regular Civil Suit is one for possession of suit land on the strength of title.

2. Shorn of details, the plaint averments for seeking possession of the suit land, which is a field comprised in Khasra No.20/2, having an extent of 3 Acres and 20 guntas in village Gangalgaon, Taluk Chikhli, District Buldana, are as under: -

Original Defendant Nos.1 and 2 viz., Ramakrishna Ganpat Mhaske and Tejra Bajirao Mhaske, have sold the above-described suit field in favour of the plaintiff as per registered sale deed dated 21.04.1979 (Exhibit-128). Soon on its execution the plaintiff was put in possession. On 25.04.1979, the second defendant started disturbing his possession. Suit was then filed on 21.05.1979. In view of the registered sale deed (Exhibit 128) he obtained absolute title over the suit land and in such circumstances, the second defendant who sold the same

for discharging debts and family needs got no right or reason to disturb his peaceful possession. The total sale consideration of Rs.10,000/- was given to defendants for the aforesaid entire extent of 3 acres and 20 guntas as the first defendant obtained title over 2 acres and 20 guntas out of the aforesaid total extent from the second defendant as per registered sale deed dated 04.07.1978 and the second defendant remained as the owner in possession of the balance one acre. It is his case that the second defendant had utilised the sale consideration passed on to him for different purposes, including to pay his debts. It is also relevant to note that the original petitioner in the SLP, from which this appeal arises, viz., the plaintiff, died during pendency of this proceeding and subsequently, his legal representatives got substituted as petitioners. Ergo, they are jointly described hereafter as 'appellants', wherever, such reference is required. On the death of the first defendant/the original second respondent during the pendency of the Second Appeal, his legal representatives were impleaded as additional respondents and they are respondent Nos. 2 to 6 herein. For the non-compliance with the order of the Hon'ble Chamber Judge, the SLP stood dismissed qua

respondent No. 6, as per order dated 22.11.2017. At the stage of second appeal the legal heirs of the deceased son of the second defendant viz., the first respondent herein, were impleaded as respondents therein and they are respondents 7 to 9 herein.

3. The first defendant filed a written statement endorsing the claim and contentions of the plaintiff and he would also state therein that after executing the sale deed, himself and the second defendant (the first respondent herein) parted with the possession of the suit land and then, the second defendant (the first respondent herein) turned dishonest and started disturbing the possession of the plaintiff. However, the second defendant (the first respondent herein) resisted the suit by filing written statement and denying the claims and contentions of the plaintiff. His pleadings revealed from the written statement, in nutshell, read thus:-

The sale deed dated 21.04.1979 (Exhibit 128) is a sham document which was never intended to be acted upon and in fact, it was never been acted upon. His case, while admitting the execution of sale deed (Exhibit 128), is that though it was executed as a sale deed, what had actually transpired was nothing but an execution of sale

deed solely as a collateral security to a money lending transaction viz., for a loan of Rs.1000/- with a promise to re-pay an amount of Rs.1500/- within 12 months. It is to be noted that in the written statement, the second defendant (the first respondent herein) further contended that the registered sale deed executed in favour of the original first defendant was also of the very same nature. He would further plead that in the said transactions also, in fact there was no passing of sale consideration from the purchasers as in the case of Exhibit 128 sale deed so as to constitute a valid sale and the other such sale deeds were also executed without any intention to effect sale of the properties, at the time of borrowing money. To contend that the plaintiff is disentitled to any relief as sought for, he would also raise two other contentions; firstly, based on the provisions of Maharashtra Prevention of Fragmentation and Consolidation of Holdings Act, 1947 (hereinafter referred to as 'Fragmentation Act') and secondly, in the light of the provisions under Section 10 of the Bombay Money Lenders Act, 1946, which get attracted owing to the facts that he is an original farmer owning only less than 2 hectares of land and that his annual income is less than Rs.1200/-.

4. Based on the rival pleadings, the trial Court formulated the following issues and answered them in the following manner, as can be seen from paragraph 6 of its judgment:-

ISSUES	***FINDINGS.***
1. Does the Plaintiff proves that he purchased the suit field from Defendants as alleged?	*In the negative.*
2. Does he further proves that the suit sale deed is for legal necessity?	*In the negative.*
3. If the Plaintiff entitled to the possession of the suit field along with enquiry into mesne.	*In the negative.*
4. Does the Defendant No.2 proves that the suit sale deed is bogus, sham and nominal as alleged?	*In the affirmative.*
5. Does the further proves that the Plaintiff deals in money landing without licence?	*In the affirmative.*
6. Does he further proves	*In the affirmative.*

that the sale deed in suit was made as per the agreement given in para 9 of the Written Statement?	
7. Does he further prove that the suit field is owned by other persons?	*In the affirmative.*
8. Does he further proves that the permission of the District Judge, is required for the suit sale deed as alleged?	*In the affirmative.*
9. Does he further proves that he is a marginal owner as alleged in para 14 of the Written Statement.	*In the affirmative.*
10. Reliefs and costs?	*As per final order.*

5. On the basis of the findings returned on the issues thus formulated, the trial Court came to the conclusions that the plaintiff had not purchased the suit field as claimed, that he had failed to prove that the execution of the sale deed was for a legal necessity of the second defendant. Further, it came to the conclusion that the sale

deed was a sham document and it was executed only as a security for a money lending transaction and consequently, the original suit was dismissed with costs.

6. In Regular Civil Appeal No.98 of 1987, filed by the unsuccessful plaintiff, the First Appellate Court framed the following points for consideration based on the rival submissions and returned the following findings: -

POINTS	***FINDINGS***
1. Whether it is proved by the plaintiff that defendant No.2 had executed sale deed in his favour under Ex. 128 and he has become owner of the property?	*Yes*
2. Whether it is proved by the defendant No.2 that the sale deed Ex. 128 was a nominal document and was executed by way of collateral security for money lending transaction?	*No*
3. Whether Plaintiff is entitled to the possession of suit property?	*Yes*
4. What order?	*As per final order.*

7. Thus, it is evident that upon finding that the trial Court had virtually ignored the legal impact and effect of

registered sale deed (Exhibit 128), in respect of suit land executed in favour of the appellant therein viz., the plaintiff, the First Appellate Court considered the issues formulated by focusing that aspect. True that for upholding the sale deed viz. (Exhibit 128), the First Appellate Court had given due weight to the notice dated 27.04.1979 (Exhibit 113), virtually lawyer notice issued by the second defendant immediately after the transaction, in the name of the plaintiff and held that it would lend support to the factum of sale effected through sale deed (Exhibit 128). The First Appellate Court on such consideration and on appreciation of the materials on record held that the second defendant had failed to prove that the sale transaction was an outcome of money lending transaction and that the sale deed was nominal in nature. Consequently, the appeal was allowed, the judgment and decree of the Trial Court was set aside and the suit for possession on the strength of title was decreed in favour of the plaintiff (the appellant therein).

8. It is feeling aggrieved and dissatisfied with the said judgment and decree that the Second Appeal No.435 of 1995 was filed by the original second defendant viz., the first respondent herein, which ultimately culminated in the impugned judgment.

9. A perusal of the impugned judgment would reveal that the High Court re-framed the substantial questions of law on 15.10.2015 as hereinunder: -

> *[1] Whether the plaintiff has established his entitlement for a decree of possession of the suit property on the basis of the sale deed dated 21.04.1979 at Exh.128 executed by the defendant Nos.1 and 2?*
>
> *[2] Whether the defendant No.2 has established that the sale deed at Exh.128 was nominal and by way of collateral security and the said transaction was hit by the provisions of Section 8 of the Maharashtra Prevention of Fragmentation and Consolidation of Holdings Act?*
>
> *[3] While reversing the findings recorded by the trial Court, whether the lower appellate Court has ignored the findings recorded by the trial Court on the material facts in the light of undisputed factual position?"*

10. Even though the powers under Article 136 of the Constitution of India must be exercised sparingly, yet there is absolutely nothing in the said Article which prohibits the Supreme Court from reversing even concurrent findings of the fact by courts below, if it is of the opinion on the basis of the evidence on record, that

affirming the findings of the courts below would result in a grave miscarriage of justice. It was so held by this Court in ***Charanjit & Ors. v. State of Punjab & Anr.***[1] as also in ***Adambai Sulemanbhai Ajmeri & Ors. v. State of Gujarat***[2]. Therefore, if a relevant material legally brought on record and the question of law arising out of its existence were not considered by the High Court, despite its due consideration by the First Appellate Court, while reversing the judgment founded on such consideration this Court has necessarily to consider the same in invocation of the power under Article 136. While considering this appeal, in that view of the matter, it is only proper and profitable to refer to the following crucial and relevant facts obtained in the case:

(i) Exhibit 128 is a registered sale deed.

(ii) Its execution is admitted by both the original defendants. (True that the second defendant (first respondent herein) contends that it was executed as a collateral security at the time of a money lending transaction).

(iii) The second defendant (first respondent herein) has also admitted execution of registered

[1] (2013) 11 SCC 163
[2] (2014) 7 SCC 716

sale deed in favour of defendant No. 1 (earlier in point of time than Exhibit 128) in respect of 2 acres and 20 guntas. (Here also, the second defendant claimed that the sale deed was executed as a collateral security for the money borrowed and therefore repayable to him along with the quantified fixed interest thereon).

11. We have already referred to the issues/points formulated by the courts below and the findings returned by the respective courts which formed the basis for their respective judgments. Bearing in mind the decisions referred supra and also the relevant facts available, as noted above and also the relevant provisions under the relevant enactments, to be referred to hereafter, we may proceed to consider this appeal.

12. As noted earlier, after reversing the judgment and decree of the First Appellate Court, the High Court restored the decree of the trial Court. In this context, it is apt to note the re-framed substantial question of law No. 3 by the High Court, extracted above, that carries the query whether, while reversing the findings recorded by the trial Court, the lower appellate Court had ignored the findings recorded by it on the material facts in the

light of undisputed factual position. We may hasten to add here that a bare perusal of the impugned judgment would reveal that after framing such a question of law the High Court did the very seemingly attributed act inasmuch as it did not consider the legal impact and effect of Ext. 128, registered sale deed, which was taken into consideration by the First Appellate Court, while reversing the judgment and decree of the First Appellate Court.

13. A scanning of the trial Court judgment would reveal indubitably that despite the admission of the execution and registration of Exhibit 128 sale deed dated 21.04.1979 by the second defendant in favour of the plaintiff and also that of the sale deed dated 04.07.1978 by him to the first defendant, it had failed to consider the legal effect and impact of execution and registration of such a sale deed in view of the provisions under the Transfer of Property Act, 1882, as also the Registration Act, 1908, and sans such consideration accepted the second defendant's contention that it is a sham document. Paragraph 7 of the judgment of the trial Court would reveal that despite the admission of execution and registration of Ext. 128 sale deed dated 21.04.1979 by the second defendant as also by the first defendant, the trial

Court held that the burden of proving the factum of execution of sale deed and passing of the consideration amount was on the plaintiff. The trial Court had also failed to consider the relevance and application of Section 92 of the Indian Evidence Act, 1872 while appreciating the oral evidence against Ext. 128. Evidently, the trial Court accepted the case of the second defendant that the said sale deed was one executed as a collateral security to a money lending transaction and that it was never intended to be acted upon. The trial Court has also held the sale deed virtually invalid by accepting the contention that the transaction violated the provision under Section 8 of the Fragmentation Act and in that regard the sale deed dated 04.07.1978 executed between defendant Nos. 1 and 2 was held as one creating a 'fragment' and therefore, violating the prohibition. This was done without looking into the question as to its jurisdiction to entertain and adjudicate upon such a plea in view of the statutory bar of jurisdiction under Section 36A of the Fragmentation Act. In that regard it is noteworthy that nothing was specifically mentioned in paragraph 14 or anywhere else in the written statement filed by the second defendant regarding the violation of the provisions under the Fragmentation Act and, in fact,

only vague reference was made on that aspect in paragraph 16 reproduced as under: -

> *"16. …In event, according to provision of Consolidation of Act and Prevention of Fragmentation Act, the plaintiff not entitled to any relief."*

14. In view of the aforementioned facts as also taking note of the contentions raised on behalf of the contesting respondents, in support of the impugned judgment, that the First Appellate Court failed to consider at all the voidness of the sale transaction of 2 acres and 20 guntas between original defendants 1 and 2, its impact on the sale of consequentially created 'fragmentation' of one acre by the second defendant and the whole sale transaction effected under Exhibit 128 sale deed by operation of the Fragmentation Act and further that the said aspect was rightly considered by the High Court, we think it only proper to deal with that matter appropriately.

15. At the outset, we may say that there is dichotomy between the contention of the first respondent/ the second defendant founded on the Fragmentation Act as mentioned above and also his contention of absolute

absence of a transaction partaking the real nature of sale. This is because Section 9 (1) of the Fragmentation Act makes void only the transfer or partition of any land contrary to the provisions of the said Act. The word 'transfer' is not defined under the Fragmentation Act though the expression 'land' has been defined thereunder. As per Section 2 (5) of the Fragmentation Act, the term 'land' means, 'agricultural land whether alienated or unalienated'. In the said circumstances, to know the meaning of the words 'transfer of any land' used in Section 9 (1) of the Fragmentation Act, one may have to see the definition of 'transfer of property' under Section 5 of the 'Transfer of Property Act, 1882, (hereinafter referred to as, the TP Act'), which reads thus:-

> ***5. "Transfer of property" defined****. —In the following sections "transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, [or it himself] and one or more other living persons; and "to transfer property" is to perform such act.*
>
> *[in this section "living person" includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained*

shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals.]

16. In the contextual situation it is also relevant to refer to the definition of 'sale' given under Section 54 of the TP Act, which reads thus:-

> ***54. "Sale" defined.—"****Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.*

17. The term 'transfer' is a word in a broader sense and the word 'sale' is a specific word. Sale, going by the definition under T.P. Act, presupposes transfer from one person to another of the right in property and in other words, in sale, the ownership of the property is transferred. A conjoint reading of Section 54 of the TP Act and Section 17 of the Indian Registration Act, 1908, mandates that transfer of ownership of any land worth more than Rs.100/- shall be effected by a registered deed. Therefore, transfer of a land worth more than Rs.100/- by a registered deed implies transmutation of all rights as the vendor possessed in the property concerned. We are not oblivious of the fact the mere registration of a document is no proof of its execution.

We will deal with this aspect a little later. It will not be inappropriate to look into the object of the Fragmentation Act, in the context of the contentions. It runs as under:-

> "*Whereas it is expedient to prevent the fragmentation of agricultural holdings and to provide for the consolidation of agricultural holdings for the purpose of the better cultivation thereof;"*

18. Thus, obviously, it is not the object or purpose of the Fragmentation Act to totally prohibit or prevent transfer of land within any notified 'local area', but it is only aimed at preventing the fragmentation of agricultural holdings and to provide for the consolidation of agricultural holdings for the purpose of the better cultivation thereof.

19. In the context of the above mentioned rival pleadings, contentions and the position revealed from the facts and the provisions, the question to be considered is whether the second defendant herein had made out any case for attracting the provisions of the Fragmentation Act /or in other words, whether the trial Court was right in applying the provisions under the said Act and the High Court was legally correct in restoring

the decree of the trial Court after reversing the judgment and decree of the First Appellate Court, in view of the mutually annihilative pleas taken up by the second defendant viz., the first respondent herein and accepted by the trial Court and the High Court. Contextually, it is apposite to state that though in a suit a defendant is entitled to raise alternative inconsistent plea he could not be permitted to raise pleas which are mutually destructive of each other and raising such pleas would only work out to his detriment.

20. Evidently, while entertaining the contentions founded on the Fragmentation Act raised by the second defendant, the trial Court as also the High Court have not bestowed attention to the statutory bar of jurisdiction under Section 36A of the Fragmentation Act which reads thus:-

> *[36A. (1) No Civil Court or Mamlatdar's Court shall have jurisdiction to settle, decide or deal with any question which is by or under this Act required to be settled, decided or dealt with by the State Government or any officer or authority.*

21. In the above context, it is also relevant to refer to Section 36 B (1) of the Fragmentation Act. It reads as under:

> *[36B. (1) If any suit instituted in any Civil Court or Mamlatdar's Court involves any issues which are required to be settled, decided or dealt with by any authority competent to settle, decide or deal with such issues under this Act (hereinafter referred to as the 'competent authority') the Civil Court or Mamlatdar's Court shall stay the suit and refer such issues to such competent authority for determination.*

22. It is also worthwhile in the contextual situation to refer to Section 9 of the Code of Civil Procedure, 1908 (hereinafter referred to as, 'the CPC'), which confers jurisdiction upon the Civil Courts to determine all disputes of civil nature, unless the same is barred under a statute, either expressly or by necessary implication. We shall not be oblivious of the fact that the second defendant had not so far approached the competent authority under the Fragmentation Act to nullify the action undertaken under the conveyance, resorting to the remedy contemplated under the Fragmentation Act, going by the materials on record. At any rate, there is no such case for him. We made this statement because the

first proviso to Section 9(3) of the Fragmentation Act would reveal that the automatic voidness would not be attracted to a transfer of land contrary to the provisions of the Fragmentation Act, if it was made on or after 15th day of November, 1965 and before the date of commencement of Maharashtra Prevention of Fragmentation and Consolidation of Holdings (Amendment) Act, 2017 and that apart, Section 31, referred therein, which puts bar for sale, makes it clear under clause (iii) Sub-section (3) thereof, that the said bar would not apply to any land which is to be transferred to an agriculturist, in its entirety provided such transfer is not creating a fragment. We may hasten to add here that we shall not be understood to have held that the subject suit involves any issue(s) which is required to be settled, decided or dealt with any authority competent to settle, decide or deal with such issue under the Fragmentation Act. As a matter of fact, the very applicability of the Fragmentation Act itself on sale transactions would depend upon the question whether the area in question falls under a Municipal Council or not and if it does not, then on the further question as to whether it falls within a 'local area' notified under the Fragmentation Act. Above all, the case

attempted to be projected and proved by the second respondent is that in regard to sale deed dated 04.07.1978 and the sale deed dated 21.04.1979 (Ext.128) they were never intended to be acted upon and in fact, they were never been acted upon. If that is accepted, then, there is absolutely no question of applicability of the provisions of 'the Fragmentation Act' as they would apply only in the eventuality of an actual transfer of land or partition of land subject to the satisfaction of other conditions.

23. A conjoint reading of Section 36A and 36B of the Fragmentation Act would reveal that when a suit is instituted in a Civil Court, the Court concerned has to consider if the suit involves any issue(s) which is/are required to be settled, decided or dealt with by any competent authority to settle, decide or dealt with, such issues under the said Act. If it does, then after staying the suit the said issue(s) is to be referred to such competent authority for determination. Apparently, no such consideration had been made by the trial Court as also by the High Court.

24. Taking note of the fact that the regular civil suit is of the year 1979, at this distance of time and also for the reasons stated hereinabove and to be unfolded

hereinafter, we are not inclined to remand the matter to decide the question whether the second defendant/ the first respondent herein had succeeded in establishing that the subject suit involves any issue required to be settled, decided or dealt with by any competent authority under the said Act and therefore the subject suit was to be stayed as mandated under Section 36B of the Fragmentation Act and such issue was to be referred to such competent authority for determination. The well-nigh settled position is that the jurisdiction of the Court has to be determined based on the averments in the plaint and it cannot be determined only on the basis of the uncorroborated averments made in the written statement. This position is unquestionably applicable in the case on hand in view of the specific wordings under Section 36B of the Fragmentation Act viz., if any suit instituted in any Civil Court or Mamlatdar's Court involves any issues which are required to be settled, decided or dealt with by any authority competent to settle, decide or dealt with under this Act. The words 'if any suit, instituted in Civil Court' and 'involves any issues' employed in Section 36B of the Fragmentation Act would undoubtedly point to the fact that involvement or otherwise of such issues mentioned under the section in

'the suit instituted in a Civil Court' is the factor deciding the applicability of the procedures prescribed under Section 36B, of the Fragmentation Act. Therefore, the question whether such issue(s) falling under Section 36B of the Fragmentation Act is involved or not was to be decided with reference to the averments in the plaint. On their own the plaint averments did not disclose involvement of any such issue(s) requiring a reference to a competent authority under the Fragmentation Act. Since the issue is whether the suit involves such issue(s), we will refer to the written statement as well. We have already referred to the sole, vague averment in the written statement filed by the second defendant in the suit referring to the Fragmentation Act, which in no way could construe as a counter-claim capable of treating as a plaint and governed by the rules applicable to plaints in terms of Order VIII Rule 6 A, CPC and enabling the court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim. That apart, we have also already noted the case projected and proved by the second defendant that Ext.128 sale deed and sale deed dated 04.07.1978 were never intended to be acted upon. Thus, going by his mutually destructive pleas as well, no case for attracting the provisions of 'the

Fragmentation Act' was made out by the second defendant.

25. In the above context the decision of this court in ***Jag Mohan Chawla and Anr. v. Dera Radha Swami Satsang & Ors.***[3] is noteworthy. It was held therein that in sub-rule (1) of Rule 6A, CPC the language is so couched with words of wide width as to enable the parties to bring his own independent cause of action in respect of any claim that would be subject matter of an independent suit. It is no longer confined to money claim or to cause of action of the same nature as original cause of action of the plaintiff and it need not relate to or be connected with the original cause of action or matter pleaded by the plaintiff. It was further held that the words "any right or claim in respect of a cause of action accruing with the defendant" would show that the cause of action from which the counter claim arises need not necessarily arise from or have any nexus with the cause of action of the plaintiff.

26. The decision of this court in ***Rohit Singh and Ors. v. State of Bihar***[4] also assumes relevance in the above context. This court held that a defendant could not be

[3] (1996) 4 SCC 699
[4] (2006) 12 SCC 734

permitted to raise counter-claim against co-defendant because by virtue of Order VIII Rule 6A, CPC, it could be raised by defendant against the claim of the plaintiff.

27. Now, it is required to be noted that despite the lack of foundational facts attracting the applicability of the 'Fragmentation Act' (in fact, there is no serious consideration of such aspects by the trial Court and the High Court) and the position revealed from the aforesaid decisions and the provisions and on the question of raising of any right or claim by way of counter-claims, we are at a loss to understand as to how the trial Court and the High Court came to frame issues and consider such issue(s), that too, ignoring the statutory bar of jurisdiction to go into and decide, issue No.9 framed by the trial Court, as extracted in paragraph 4 hereinabove and issue No. 2 re-framed by the High Court, as extracted in paragraph 9 hereinabove.

28. As relates issue No. 9, framed by the trial Court, at the risk of repetition, we will state that in regard to 'the Fragmentation Act' only a very vague plea was taken in the written statement by the second defendant viz., ''In event, according to the provisions of Consolidation of Act and Prevention of Fragmentation Act, the plaintiff is not entitled to any relief.'' Thus, when the indisputable

position is that no counter-claim, within the meaning of Order VIII Rule 6A, CPC was made by the second defendant and no averment whatsoever was made specifically in the written statement filed by him how such an issue as to whether 'he had proved to be a marginal owner' in the light of the 'Fragmentation Act' arise for consideration. This is because the well-nigh settled position of law is that one could be permitted to let in evidence only in tune with his pleadings. We shall not also be oblivious of the basic rule of law of pleadings, founded on the principle of *secundum allegata et probate*, that a party is not allowed to succeed where he has not set up the case which he wants to substantiate. Whether the area in question is a 'local area' notified under the 'Fragmentation Act' so as to have application of the provisions of the said Act, even if it is so, whether the sale transaction of one acre by the second defendant is legally permissible or could be regularized etc., were not raised or considered, as is evident from the judgment of the trial Court. This issue was considered by the trial Court in paragraph 26 thereof thus: -

> *"26. So far as issue no. 2 (sic.no.9) is concerned, admittedly, the Defendant No. 2 is marginal owner of the suit property. So,*

under the section 8A of the fragmentation Act, the sale deed on Exh-128 in regard to the suit property executed by the Defendant No. 2 in respect of 1 acre of land as per Plaintiff's case is barred by this section. So, section of fragmentation A it also is applicable to the legality of the sale deed Exh. 128. Therefore, issue No. 9 is required to be decided in favour of the Defendant No. 2 and I therefore, answer issue No. 9 in the affirmative."

29. Now, we will refer to issue No. 2 re-framed by the High Court in regard to the application of the 'Fragmentation Act'. Before dealing with the matter any further, it is only appropriate to refer to the following recital from paragraph 24 of the impugned judgment of the High Court:-

"24. The defendant No. 2 does not dispute that he had sold one acre of land to the plaintiff by the sale deed at Ext. 128 for the consideration of Rs. 3,000/- and he has shown his readiness and willingness to deliver the possession of it to the plaintiff."

Obviously, the First Appellate Court also arrived at the same finding in respect of the said extent of land and this fact has been duly taken care of by the High Court in paragraph 15 of its judgment. Even after, finding as such the High Court interfered with that part of Ext. 128 sale deed and held it as void under sub-section (1) of Section 9 of the 'Fragmentation Act' as if a claim by way of counter-claim was made by the second defendant. The High Court, in paragraph 24 of the impugned judgment held thus:-

> *"24. …However, the sale or transfer of one acre of land out of Survey No. 20/2 by the registered sale-deed at Exhibit 128 is the sale of fragment, which is hit by Section 8 of the said Act, and such sale becomes, therefore, void under sub-section (1) of the Section 9 therein. The second portion of the substantial question of law at Serial No. [2] is answered accordingly. The plaintiff cannot, therefore, seek possession on the basis of such sale-deed.*

30. Thus, a careful scanning of the impugned judgment would reveal that virtually, the High Court considered the validity of the sale deed dated 04.07.1978 executed by the second defendant in favour of the first defendant

under 'the Fragmentation Act', without directly framing an issue precisely on the same and then, decided the validity of the sale deed dated 21.04.1979 executed by the second defendant in favour of the plaintiff. We have already taken note of the decision of this Court in Rohit Singh's case (supra), wherein it is observed that a defendant could not be permitted to raise counter-claim against co-defendant because by virtue of Order VIII Rule 6A, CPC it could be raised by a defendant against the claim of the plaintiff. Be that as it may, in the instant case, no such counter-claim, which can be treated as a plaint in terms of the said provision and thereby, enabling the court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim, was filed by the second defendant. That apart, indisputably, the second defendant did not dispute the execution of the registered sale deed dated 04.07.1978 by him in favour of the first defendant and in his written statement the second defendant had only stated that according to the provisions of the Fragmentation Act the plaintiff was not entitled to any relief. When that be so, legally how can the High Court hold the sale deed dated 04.07.1978 executed by the second defendant in favour of the first defendant, void under the provisions of the

Fragmentation Act without precisely framing an issue and then, based on it, going on to consider the validity of Ext. 128 sale deed dated 21.04.1979 executed by the second defendant in favour of the plaintiff, even-after noting the finding of the First Appellate Court that as relates the sale of one acre of land under Ext.128 sale deed the second defendant did not have any grievance and then, observing, in tune with the same, that the second defendant did not dispute that he sold one acre of land to the plaintiff as per Ext.128 sale deed for the consideration of Rs. 3000/- and had shown readiness and willingness to deliver the possession of it to the plaintiff. To make matters worse, the High Court has failed to consider the crucial issue whether the plaintiff is entitled to possession of the suit land on the strength of the registered Ext.128 sale deed executed by the defendants.

31. The long and short of this long discussion is that for all the reasons mentioned above, the decision of the High Court on the validity of the sale transaction covered under the sale deed dated 04.07.1978 executed by the second defendant in favour of the first defendant, in terms of the provisions under the Fragmentation Act (when that question was not legally available to be

considered in the subject suit) and the virtual declaration of the said sale as void, are absolutely unsustainable. It is the product of erroneous assumption of jurisdiction and also erroneous and perverse appreciation of evidence. It being the foundation for holding the registered sale deed dated 21.04.1979 (Ext.128) as void under Sub-section (1) of Section 9 of the Fragmentation Act, it is unsustainable. The various reasons mentioned above would support our conclusion as above.

32. Having held as above, we will now proceed to consider the question whether the upturning of the judgment and decree of the First Appellate Court, which held the sale deed dated 21.04.1979 (Ext.128) as one transferring ownership of the suit land by the plaintiff, by the High Court can be sustained. There can be no doubt with respect to the position that where a deed of sale had been duly executed and registered, its delivery and payment of consideration have been endorsed thereon it would amount to a full transfer of ownership so as to entitle its purchaser to maintain a suit for possession of the property sold. The very object of the mandate for registration of transfer of an immovable property worth more than Rs. 100/- under Section 54 of the Transfer of Property Act, 1882, read with Section 17 of the Indian

Registration Act, is primarily to give certainty to title. When execution is challenged, registration by itself is no proof of execution and proof of complying with Section 67 of the Evidence Act is necessary. There can be no reason to disbelieve a recital contained in a registered sale deed regarding payment of consideration, executed by the vendor. Hence, if it is said to have already been paid, going by the registered sale deed, certainly it is for the vendor asserting non-passing of consideration to prove the said asserted fact. Bearing in mind the aforesaid aspects the aforesaid question has to be approached.

33. It is common case that the sale deed dated 21.04.1979 (Ext.128) is registered and its executants viz., the first defendant endorsed its execution and fully endorsed its contents and the second executant viz., the second defendant also endorsed its execution, but depose differently on its intention. Thus, the admitted position is that its execution and registration is not in dispute. Since it is a registered sale deed and its execution is not in dispute it must carry a presumption that the transaction was a genuine one. Thus, evidently, the dispute is only in regard to the nature of transaction. Being a registered one and apparently containing the

stipulations of transfer of right, title and interest in favour of the vendee on the land involved therein and described therein and also recital regarding receipt of sale consideration the burden was entirely on the second defendant to establish otherwise and to prove that it did not reflect the true nature of transaction. A perusal of Ext.128 would reveal that the extent of property is recorded therein as an area of '1 Hector, 42 R (3.20)' in Survey No. 20/2 of village – Gangalgaon, Taluk – Chikhli of Buldana District. Before delving further into the matter, it is relevant to note that the First Appellate Court observed and held, after appreciating the evidence on record, that as relates one acre out of the total extent of 3 acres 20 guntas sold by the second defendant comprised in Survey No. 20/2 as per Ext.128, the second defendant did not have any grievance. In other words, what was found was that the grievance was only relating the balance extent of 2 acres and 20 guntas comprised in Survey No. 20/2 which, as per records, sold earlier by the second defendant, as per sale deed dated 04.07.1978, to the first defendant. In this context, it is also pertinent to note that in paragraph 24 of the impugned judgment the Hon'ble High Court itself observed and held, as extracted hereinabove, that the defendant No. 2

did not dispute that he had sold one acre of land to the plaintiff as per the sale deed (Ext.128) for the consideration of Rs. 3000/- and that he had shown his readiness and willingness to deliver the possession of it to the plaintiff. Paragraph 26 of the impugned judgment would show that while rejecting the finding of the First Appellate Court on the inconsistency of the stand of the second defendant the High Court held thus:-

> *"There is no inconsistency in the stand taken by the defendant No. 2 either in the written statement or in the notice at Exhibit 113. The defendant No. 2 is consistent in his stand that he has sold one acre of land by the sale-deed at Exhibit 128 for a total consideration of Rs. 3000/-, but has denied to have sold 2 acres and 20 guntas of land to the plaintiff."*

When that be the indisputable factual position all the other contentions raised by the second respondent against the plaintiff, including money lending, non-passing of sale consideration in respect of the said extent of one acre would all become inconsequential and unsustainable and unnecessary to be gone into. Even otherwise, in view of the factum of registration of Ext.128 and admission of its execution and the recording of payment of consideration thereon, the second

respondent was not justified in raising grievance, initially, even against the sale of the aforesaid extent of one acre.

34. Now, what remains to be looked into is the grievance of the second respondent with respect to the balance extent of 2 acres and 20 guntas involved in the transaction. In the context of the contentions raised by the second defendant viz., the first respondent in this appeal, what is relevant and crucial is not only the factum of registration of Ext.128 and its execution by the second defendant but also the admission of execution of sale deed dated 04.07.1978 by him in favour of the first defendant. True that the second defendant contended that it was executed as a collateral security for a money lending transaction. We have noted earlier, by referring to the decision in ***Rohit Singh's*** Case (supra) that a defendant could not be permitted to raise counter-claim against a co-defendant as by virtue of Order VIII Rule 6A, CPC, it could be raised by a defendant only against the claim of the plaintiff. Evidently, the High Court did not frame the validity of the sale deed dated 04.07.1978 executed by the second defendant in favour of the first defendant as a question of law though the trial Court also arrived at a finding on this issue without framing it as a

specific issue. The indisputable fact is that the said sale deed dated 04.07.1978 was admittedly, executed and registered about nine (9) months prior to the execution and registration of Ext. 128 sale deed. Ext. 128 would reveal that it involves the entire extent of 3 acres 20 guntas in Survey No. 20/2 of Gangalgaon village and the first defendant is also an executant of the same. The observation and finding of the High Court in the first limb of paragraph 24 of the impugned judgment that the second defendant did not dispute the sale of one acre of land to the plaintiff as per Ext. 128 for the consideration of Rs. 3000/- would indicate that the balance amount of Rs. 7000/- was the consideration for the balance extent of land covered under Ext. 128. Since the validity of the sale deed dated 04.07.1978 was not an issue/question that could be raised by the second defendant against the first defendant in the subject suit and was rightly, not raised as an issue, the first defendant not only did not dispute the sale of such extent to the plaintiff but admitted the joint execution of Ext. 128 and receipt of sale consideration, as incorporated in Ext. 128 and since the second defendant got no case that he had assailed the validity of the sale deed dated 04.07.1978 either before any competent authority or competent Civil Court

this question needs no further elaboration. An inter-se dispute on the validity of the sale deed dated 04.07.1978, if at all between the second and first defendants, could not have been considered in the subject-suit, for the reasons already mentioned as it would amount to adjudication of right or a claim, by way of counter-claim by one defendant against his co-defendant. Finding on its voidness under the Fragmentation Act was already held as unsustainable by us.

35. In the context of the contentions of the second defendant/the first respondent herein against Ext. 128, taking note of its registration and the admission of its execution it is only proper to refer to Sections 91 and 92 of the Evidence Act. Certainly, parol evidence is admissible to show that a contract embodied in a document was never intended to be acted upon but was made for some collateral purpose. But, in view of the specific finding in the judgment of the High Court, which is in favour of the second defendant, that the consistent stand of the second defendant is that he has sold one acre of land by the sale deed at Ext.128 for a total consideration of Rs. 3000/- and admission of execution of sale deed dated 04.07.1978 in favour of the first defendant and in the absence of anything on record

establishing annulment of the said sale deed and also in view of the fact that the first defendant is also a co-executant. We do not think it proper or necessary to enter into the extrinsic evidence relating sale transaction covered by sale deed dated 04.07.1978. It is to be noted that here, by virtue of Section 54, of the Transfer of Property Act and Section 17 of the Registration Act and since the immovable property was worth more than Rs. 100/- Ext.128 was reduced in writing and registered. The intention of the parties are also reflected specifically in Ext.128 and at the same, nothing reflecting a contra-intention not to pass the title and ownership in present even impliedly therein. In other words, the need to take into consideration the surrounding circumstances and the conduct of parties in deciding the passing of title would arise only if the recitals in the document are indecisive and ambiguous. The oral evidence of the second defendant could not override the registered Ext. 128 sale deed, as held by the First Appellate Court in the facts, circumstances and evidence on record in this case. In such circumstances, no other question(s) need be considered. The upshot of our consideration as above, is that the High Court has committed a serious error based on perverse appreciation of evidence, in setting

aside the judgment and decree of the First Appellate Court decreeing the subject suit and in restoring the decree of dismissal of the suit of the trial Court.

36. In the result, we allow the appeal with costs and set aside the judgment and final order dated 30.10.2015 in Second Appeal No. 435 of 1995 passed by the High Court of Judicature at Bombay, Nagpur Bench restoring the decree of the court of Joint Civil Judge, Junior Division, Chikhli in Regular Civil Suit No. 257 of 1985. Consequently, we restore the judgment and decree of the Court of Additional District Judge, Buldana in Regular Civil Appeal No. 98 of 1987 arising from the judgment and decree in Regular Civil Suit No. 257 of 1985.

.....,J.
(M.R. Shah)

.....,J.
(C.T. Ravikumar)

New Delhi;
May 04, 2023