

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD
SECOND APPEAL NO. 584 OF 1991

Shankar s/o Bhujanga,
age 20 years, occup. Agril.,
R/o Dugaon, Tq. Biloli,
Dist. Nanded.

.. Appellant / Orig.
Plaintiff

versus

1. Sheshabai w/o Maroti
Age 25 years, occup. Agril
and Household
2. Parubai w/o Hausaji,
Age 54 years,
3. Madhovrao s/o Hausaji Shinde, .. Respondents/orig.
Age 26 years, Defendants
all : occupation Agriculturist and
resident of Dugaon, Tq. Biloli,
District Nanded.

Mr. Rajendraa. S. Deshmukkh, Advocate for appellant
Mr. A. G. Godhamgaonkar, Advocate for respondent no. 1

CORAM : SUNIL P. DESHMUKH, J.
17TH NOVEMBER, 2015

ORAL JUDGMENT:

1. This is plaintiff's second appeal against the decision rendered by the learned Additional District Judge, Nanded, in regular civil appeal No. 202 of 1985 on 06-07-1991 overturning the judgment delivered by the joint civil judge, junior division, Biloli dated 22-07-1985 decreeing regular civil suit no. 203 of 1981.

2. Facts in nutshell can be referred to as, one Hausaji Rama was the owner of land bearing survey number 35/2 admeasuring 98 aar situated at village Dugaon, Taluka Biloli, District Nanded. During his life time, Hausaji had sold 71 aar portion from said land through two registered sale deeds to the plaintiff. Hausaji died leaving his wife Parubai, son Madhav and daughter Sheshabai – the defendants no. 1 to 3 respectively, as his legal heirs. Sheshabai happens to be married daughter of Hausaji and Parubai.

3. After death of Hausaji, Parubai purportedly entered into agreement for sale with plaintiff on 08-01-1981 for balance 28 aar portion of said survey number left behind by Hausaji for stated consideration of Rs.2,000/- and out of the same, plaintiff had parted with amount of Rs.1,500/- to Parubai. Remaining amount of Rs.500/- was agreed to be paid on *Gudi Padv*a and around the same time, execution of sale deed was agreed. According to the plaintiff, while request for execution of sale deed had been made by him, the same had been refused by defendant no. 1 - Parubai in collusion with defendants No. 2 and 3 - Madhav and Sheshabai.

4. When the suit had been initially instituted on 14-04-1981, it was simplicitor for injunction, contending that the suit land admeasuring 28 aar forming eastern portion of survey number 35/2 was agreed to be parted with in plaintiff's favour by defendant No.1 Parubai purporting to be '*Karta*' and manager of the joint family consisting of herself and defendants no. 2 and 3 for legal necessity and benefit of the family and actual possession was delivered by her to the plaintiff. It has been referred to in the plaint that the plaintiff is ready and willing to pay remainder of the consideration and accordingly had offered the same and requested defendants no. 1 and 2 for execution of sale deed but, they avoided. It has also been referred to in paragraph number 11 of the plaint that defendants no. 1 and 2 were intending to part with suit land to Sheshabai-defendant no. 3 and thus plaintiff claimed preferential right of pre-emption to purchase the land called '*uddaan*' admeasuring 28 aar which is a part of land bearing survey no. 35/2 adjoining the area of 71 aar out of said survey number previously purchased by him and as such would not cause fragment of land agreed to be sold by virtue of Maharashtra Prevention of Fragmentation and Consolidation of Holdings Act, 1947 ("The Fragmentation Act"). It has

further been averred that, in fact, such fragment would be caused if said land is sold to defendant no. 3 since she had no land adjoining the disputed land. Despite aforesaid, around 06-04-1981 defendants had caused obstruction to plaintiff's possession over suit land, as such he had sought perpetual injunction against the defendants.

5. It will have to be noted here that the suit had been instituted by plaintiff originally through his real father as his guardian claiming himself to be minor then. It appears that a sale deed came to be executed by defendants no. 1 and 2 in favour of defendant no. 3 on 23-01-1981 in respect of said portion of 28 aar which is the subject-matter of suit. According to plaintiff, while the suit was lingering on, the plaintiff had attained majority and had, in fact, applied for amendments to plaint, claiming specific performance pursuant to agreement of sale dated 08-01-1981 and also a declaration that sale deed in favour of defendant no. 3 executed on 23-01-1981 to be ineffective and not binding on him as well as for possession claiming that in interregnum he had been dispossessed.

6. Defendant no.1 though served had not appeared in the suit. However, her son Madhav and daughter Sheshabai-

defendants no. 2 and 3 had jointly filed written statement on 05-12-1981, denying claims in the plaint. They have denied agreement of sale by defendant no. 1 in favour of the plaintiff as also receipt by defendant no. 1 of Rs.1,500/- in furtherance of the same. They also denied that plaintiff had ever been put in possession of the suit property. It has been specifically averred that the suit simplicitor for injunction without praying for specific performance is not maintainable. It has also been averred in paragraphs no. 11 and 18 of the written statement that plaintiff was very much aware of transfer in favour of defendant no. 3 by way of registered sale deed of suit land. It was denied that suit portion would form a fragment since it was part of irrigated land.

7. While, on plaintiff attaining majority, plaint had undergone amendments, the same was resisted by defendants by filing amended written statement on 21-12-1984, specifically referring to that defendant no.1 had not been the exclusive owner of suit land and that her actions would not bind defendants no. 2 and 3. It has further been averred in amended written statement that defendant no. 1 was not competent to enter into contract with plaintiff alleged to be dated 08-01-1981 and same was against public policy.

8. The trial court had framed issues, (1) whether plaintiff proved that agreement for sale dated 08-01-1981 was executed in his favour by defendant no. 1, (2) whether the plaintiff proved that he was put in possession of the suit land, (3) whether the plaintiff proved that defendant no. 1 sold out suit land for legal necessity and (4) whether the plaintiff proved that defendant no. 3 purchased suit land in spite of being aware of the agreement entered into between defendant no. 1 and the plaintiff.

9. The trial court answered all these issues in affirmative and thus decreed the suit in favour of the plaintiff. It may also be pertinent to note that declaration in respect of sale deed in defendant no. 3's favour had not been granted by the trial court as had been prayed for under the amended plaint. (It appears that said issue does not appear to have been pressed into service nor argued and thus not being referred to in the judgment).

10. It further appears that during pendency of the suit, defendants no. 1 and 2 purportedly entered into settlement on or about 15-07-1985 with plaintiff accepting his claim under the plaint and that the transaction by defendant no. 1

with plaintiff was for legal necessity and that entire amount of the transaction has been received by them.

11. Since parties were residing in the same village, the court presumed that, defendant no. 3 was aware of the agreement entered into between the plaintiff and defendant no. 1 having regard to close relationship among the defendants. The trial court had also considered that the objection with regard to suit being not within limitation is unsustainable and held that sale deed executed in favour of defendant no. 3 by defendants no. 1 and 2 is hit by provisions of the Fragmentation Act.

12. The trial court considered that the agreement for sale has been duly proved and having regard to the kind of settlement between defendants no. 1 and 2 and the plaintiff, also considered that point deserves to be decided in favour of plaintiff.

13. The appellate court as well, held that the agreement of sale has been proved, however, has further considered on the basis of material and on appreciation of evidence produced on record that the plaintiff cannot be said to have been put in possession with reference to agreement of sale dated 08-01-

1981, for, defendant no. 1 alone was not holding the suit land after death of her husband Hausaji as she had jointly held the land along with defendants no. 2 and 3 - other heirs of Hausaji.

14. The appellate court held that story by plaintiff of him being dispossessed after execution of purported sale deed in favour of defendant no. 3 does not have efficacy more than creation of mountain out of mole hill, for, no argument had been advanced and all along revenue record of the suit land after death of Hausaji continued in his name upto execution of sale in favour of defendant no.3 - Sheshabai Thus, plaintiff's claim about possession is unsustainable. Solitary statement uncorroborated, so called admission by defendant no. 3 - Sheshabai cannot be made use of by plaintiff to claim to be in possession when the documentary evidence does not suggest so.

15. The appellate court further considered that the finding by trial court with regard to agreement of sale in favour of the plaintiff for legal necessity is unsustainable, for, same appears to be vacuous in substance as no details of legal necessity were given, such as what was the debt, etcetera.

16. The appellate court also considered that there is no substance in the contention in respect of that defendant no. 3 was aware of the agreement of sale by defendant no. 1 in favour of the plaintiff while sale deed was executed in her favour by defendants no. 1 and 2.

17. Looking at the time span between 08-01-1981 and 23-01-1981, there appears to be a lot of substance in the finding recorded by the appellate court, for, document dated 08-01-1981 is an unregistered document. The suit has been filed on 14-04-1981 i.e. well after sale deed which is dated 23-01-1981, yet referring to that defendants no. 1 and 2 are in the process of executing sale deed in favour of defendant no. 3. Even after amendments to the plaint on 09-10-1984, it does not appear to be the case of the plaintiff that defendant no. 3 had ever been aware of transaction dated 08-01-1981 by defendant no. 1 with the plaintiff. Assumption on this, by trial court appears to be unsustainable.

18. Defendant no. 3 appears to be in possession of the property all along on execution of sale deed in her favour on 23-01-1981 and before that in the capacity as heir of Hausaji along with defendants no. 1 and 2. In the circumstances, it

cannot be said that defendant no. 1 alone could have parted with possession of suit land in favour of the plaintiff while defendants no. 2 and 3 would also be said to be in possession of suit property along with her. It is not the case that defendant no. 1 Parubai alone had been in physical possession of the property.

19. One will have to have regard to that defendant no. 1 Parubai cannot be said to be Karta or manager of the joint family to enter into agreement for sale with the plaintiff on behalf of other defendants. That apart, defendants no. 2 and 3 all along had denied said transaction. In the circumstances, specific performance in respect of unpartitioned land forming joint property by defendant no. 1 alone is not possible nor it can be said that the transaction by her in plaintiff's favour in respect of shares of other persons in undivided land was by a competent person. The compromise between defendants no. 1 and 2 on one hand and the plaintiff on the other, does not appear to be accepted by the court except endorsing, ' read and recorded ' and in the circumstances would have no legal efficacy. It does not appear to have been verified as required under Order XXIII, rule 3 of the Code of Civil Procedure, 1908 and it has no evidentiary value and deserved to be ignored.

It is rather queer how the trial court has considered the same. It has not been considered that there is no the material supporting the claims mentioned in the compromise except making vacuous reference to the same. Parubai being mother cannot be said to be Karta of joint family. She, as such, had no capacity and competence to enter into transaction with the plaintiff.

20. It is pertinent to note that there was no discussion by trial court as to what would form a fragment in area of the land under dispute, yet the court purported to consider the same could not have been purchased by defendant no.3.

21. The appellate court, however, has considered that the transaction in favour of defendant no. 3 cannot be said to be hit by the Fragmentation Act, for, fragment cannot be said to have been proved in respect of 28 aar and that would not be covered by the prohibitions under the Fragmentation Act.

22. The appellate court also overturned trial court's finding on limitation holding the suit to be not in limitation. However, it will have to be adverted to that the finding by appellate court with regard to suit not being in limitation may not be in

consonance with legal provisions, for, the written statement had been filed on 05-12-1981 and the suit for specific performance had been brought under amended plaint on 09-10-1984 which would indicate that it was within limitation under article 54 of the Limitation Act, 1963. Thus, said finding by appellate court is not sustainable in law.

23. In view of aforesaid, there does not appear to be any substance in the second appeal although various questions are sought to be raised in respect of factual aspects which are referred to in grounds no. 2, 3, 4, 5 and 6 in the appeal. So called admission about possession in the face of documentary evidence carries little persuading capacity and as such ground no. 3 does not carry any substance. Having regard to the observations made hereinabove, ground no. 4 with regard to the unregistered document, namely, agreement for sale getting precedence over the sale deed does not arise. In any case, it appears that said ground was not pressed into service at all before the trial court and while the appeal was being prosecuted.

24. In the circumstances, the appellate court correctly held that the plaintiff was not entitled to specific performance. It,

would, however, be difficult to refund the amount for not having specifically claimed.

25. Under the circumstances, second appeal stands dismissed.

SUNIL P. DESHMUKH, J.

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