

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**Second Appeal No.143 of 2015
With
Civil Application No. 4016 of 2015**

Ashabai w/o Parmeshwar Panad. .. **Appellant.**

Versus

The Commissioner,
Municipal Corporation, Aurangabad
And Another.

.. **Respondents.**

Shri. Milind K. Deshpande, Advocate, for appellant.

Smt. Manjusha Deshpande, Advocate, for respondent
No.1.

Shri. M.S. Chaudhari, Advocate, for respondent No.2.

CORAM: T.V. NALAWADE, J.

DATE : 9th SEPTEMBER 2015

ORDER:

1) The appeal is filed to challenge the judgment and decree of Regular Civil Suit No.28/2011 which was pending in the Court of the Civil Judge, Senior Division, Aurangabad (Corporation Court) and also the judgment and order of Regular Civil Appeal No.158/2013 which was pending in the District Court Aurangabad. The suit filed

by present appellant for relief of declaration and injunction is dismissed and the counter claim filed by the original defendant No.2 for relief of declaration and possession is decided in her favour. Both the sides are heard.

2) The suit was filed by present appellant in respect of one plot bearing No.34 having area of 600 square feet situated at Durgamata Colony, Nyay Nagar, Aurangabad. It is the case of the plaintiff that she is owner of this plot and she had purchased this plot from defendant No.2, Smt. Indubai under a document dated 4-2-2004 for consideration of Rs.75,000/-. It is her case that she has made construction on this portion and she is in possession of this portion. It is her case that at the instance of defendant No.2, the Corporation has given notice and has informed that the construction will be pulled down. It is her case that she has applied for regularization of Gunthewari, for regularization of construction but the defendant No.2 wants to disturb the possession of the plaintiff by using the powers of the Corporation. She had prayed for relief of declaration that

notice dated 21-2-2011 given by the Corporation is null and void and she had prayed for relief of perpetual injunction against defendant No.2 for protecting the possession.

3) Defendant No.1 Corporation filed written statement and contended that the construction of the plaintiff is made without taking permission of Corporation and it is not as per the rules and regulations. It is contended that the plaintiff could not show that she is owner of the space on which construction is made and so by exercising the power, notice is given and there is nothing illegal in the notice.

4) Defendant No.2 filed written statement and she contended that the plaintiff is the wife of the relative of defendant No.2 and the husband of the plaintiff had approached the husband of defendant under pretext of giving his assistance. It is contended that the husband of the plaintiff is working in the Corporation and so defendant No.2 thought that the husband of the plaintiff will help her in getting necessary permission for making

construction. It is her case that some construction on the plot was already made by her. It is her case that by making false representation that signatures of the defendant No.2 were required on some papers her signatures were obtained on plain papers and also on some stamp paper by the husband of the plaintiff and that record is misused to show that the suit property is purchased by the plaintiff. It is her case that false record is created in respect of the title of the suit plot by the plaintiff.

5) It is the case of defendant No.2 that when she realized that plaintiff and her husband are trying to grab the suit property she approached the Corporation and she gave applications for preventing the construction. It is her case that defendant No.1 was probably helping plaintiff as husband of the plaintiff was working in the Corporation and so she was required to approach the High Court. It is her case that on the basis of some directions given by the High Court the Corporation issued notice against the plaintiff. It is contended that plaintiff then filed present suit only against the Corporation and defendant No.2

joined as defendant to protect her interest. In the counter claim defendant No.2 prayed for removal of the construction made by the plaintiff over the suit property and for possession of the property. She also prayed for declaration that the document of sale made before the Notary dated 4-2-2001 is null and void.

6) Both the sides gave evidence. The trial Court held that no title has passed to the plaintiff under the aforesaid notarized document. The trial Court further held that there was no construction permission. The trial Court held that there was nothing illegal in the notice issued by the Corporation and allowed the counter claim of the defendant No.2. This decision is confirmed by the first appellate Court.

7) The learned counsel for the appellant, original plaintiff, submitted that substantial questions of law need to be formulated on some grounds mentioned in the appeal memo. He submitted that even if it is presumed that there was no compliance of provision of section 54 of the Transfer of Property Act, protection of provision of

section 52A of the Transfer of Property Act can be given and this point needs to be considered for formulation of substantial question of law. He submitted that the point that defendant No.2 did not step into witness box and her son gave evidence as general power of attorney is not properly appreciated and the point that whether the Courts below have committed error in considering the evidence of the general power of attorney needs to be considered for formulation of substantial question of law. He submitted that in the past a suit was filed by the plaintiff for relief of mandatory injunction and that was withdrawn and so the Courts below ought to have considered this circumstance and so substantial question of law can be formulated on the point as to whether the suit was barred in view of provision of Order 23 Rules 1 and 4 of the Civil Procedure Code.

8) The suit was filed by the plaintiff for perpetual injunction as against defendant No.2 and on the other hand defendant No.2 had filed counter claim for getting possession of the suit property. When the plaintiff is admitting that defendant No.2 was owner of the suit

property, it was upto plaintiff to prove that she is in lawful possession of the suit property. Plaintiff is relying on one so called document of sale executed on general stamp of Rs.100/- denomination which is notarized document and oral evidence is given for proof of this document. In the document at Exhibit 52 the description is given as part of Sy. No.16/4 bearing Plot No.34. Though the document is given exhibit, it can be said that in view of provision of section 54 of the Transfer of Property Act this document could not have been considered in evidence. No stamp duty was paid on the transaction and the document was not registered. Even if this document is considered for collateral purpose, ascertaining the legality of possession, it can be said that many things are doubtful about it. The stamp was shown to be purchased by husband of the plaintiff on 4-2-2009. Though there is signature of defendant No.2 on this document the evidence of the witness on execution shows the document was ready including typing of names of the witnesses when the document was brought to him for signature. One name of the witness Tejrao was written in handwriting but other names were typed. The Courts below have considered the

circumstance that plaintiff is saying that consideration was handed over to defendant No.2 but the witness has stated that consideration was accepted by husband of defendant No.2. The source of money which was given as consideration could not be satisfactorily given by the plaintiff. No member of the family of defendant No.2 including her husband put signature on the document as witness. Husband of the defendant No.2 was in police force. The evidence on the record shows that after starting of dispute, the parties had approached police and before police a copy of aforesaid document, Exhibit 52, was produced and in that document plot number was shown as 36. When on Exhibit 52 the plot number is shown as 34. The record of police station is admitted by the plaintiff and it shows that she had given statement that she was in possession of plot No.36. The suit is in respect of plot No.34. There is nothing on record to show that the aforesaid survey number was developed, some lay out plan was prepared or even some private map was prepared and on that basis allotment was made and from that property can be identified by giving plot number. Thus, it can be said that there was no correct information

with the plaintiff when copy of document was produced in police station in the year 2009. On Exhibit 52 the number of the plot is appearing as 34. It is very easy to see and to infer that initially number '4' was not there and by erasing previous number No."4" was typed. There is clear possibility that typewriter was also different when the number "4' was typed after number "3" to type plot number as 34. The plaintiff was expected to prove her case and these circumstances appearing in evidence of the plaintiff show that she has no record to prove that the possession was given to her by defendant No.2 and she is in lawful possession of plot No.34.

9) In the evidence, plaintiff has admitted that she had not obtained permission of construction from the local body. There is such evidence of employee of the Corporation also who is examined by defendant No.2. It can be said that defendant No.1 did not contest the matter effectively and defendant No.2 was required to call witness from the office of the defendant No.1.

10) The evidence on the record shows that there was dispute in the year 2009 when the hand pump was

there on the disputed plot and the hand pump was destroyed. Report was given against the plaintiff in respect of that incident. There is oral evidence also on that point. Thus, there was hand pump on the suit property but after starting of the construction by the plaintiff it was destroyed. These circumstances go against the plaintiff as it is against the case of the plaintiff that the property was purchased by her. There was no reason for the plaintiff to destroy the hand pump. Before police, plaintiff had contended that hand pump was taken away by the defendant No.2. This version was not at all probable in view of nature of report given to the police.

11) As admittedly the construction was made without taking permission and there is no record with the plaintiff to prove that she is owner of the suit property it cannot be said that the Corporation's notice was illegal. Under provision of section 478 of the Municipal Corporations Act power is vested with the Corporation to pull down unauthorized construction. No specific illegality or irregularity is contended in respect of this notice.

12) The General Power of Attorney examined by defendant No.2 is her son. Much was argued in respect of evidence given by the general power of attorney and it was submitted that his evidence cannot be considered. Even if his entire evidence is not considered in respect of the transaction, other evidence with regard to possession etc. can be considered. It is he who had given application against the plaintiff to various authorities to stop the activities started by the plaintiff. And to that extent it can be said that he has personal knowledge.

13) The aforesaid evidence shows that there was nothing with the plaintiff to show that her possession was lawful or the notice given to her by the Corporation was illegal. Due to her admission it can be said that the defendant No.2 has better title and she is entitled to recover possession. The Courts below have not committed any error and the findings are based on finding of facts.

14) The learned counsel for the appellant produced copies of some orders made by this Court and placed reliance on following reported cases.

- (1) **(2003) 4 SCC 161 (Bondar Singh v. Nihal Singh);**
- (2) **(2005) 2 SCC 217 (Janki Vashdeo Bhojwani v. Indusind Bank Ltd.);**
- (3) **(2010) 10 SCC 512 (Man Kaur v. Hartar Singh Sangha).**

15) The facts and circumstances of each and every case are always different. This Court has considered the relevant record which could have been considered. The document itself could not have been considered as proper stamp duty was not paid.

16) No interference is possible and so this Court holds that no substantial question of law as contended by the learned counsel for the appellant is involved in the matter. In the result, the appeal stands dismissed. No order as to costs. The learned counsel for the appellant requested for stay to protect the possession. Stay is refused. Civil Application No.4016/2015 stands rejected.

Sd/-
(T.V. NALAWADE, J.)

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