

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.33 OF 2015

Roopchand s/o Deoji Wagh,
Age : 63 yrs., Occ. Cobbler,
R/o Hiwar Kheda Road,
Kannad, Dist. Aurangabad

..APPELLANT
(Original Defendant)

VERSUS

Maltibai D/o Nathu Gaikwad,
Age : 50 Yrs., Occ. Service
R/o Borgaon Bazar, Tq. Sillod,
Dist. Aurangabad

..RESPONDENT
(Original Plaintiff)

Mr Ajay S. Deshpande, Advocate for appellant;
Mr P.K.Nikam, Advocate for respondent

CORAM : N.W. SAMBRE, J.

**(Date of reserving the
order : 16th January, 2015**

**Date of pronouncing the
order : 30th January, 2015)**

ORDER

The present Second Appeal is by original defendant.

2. The respondent claimed to have purchased the suit property, which consists of plot No.44, ad measuring 320 Sq. Mtrs, part of survey Nos.36 and 37, located at Kannad.

3. The respondent/plaintiff claimed that the said plot was purchased by her from the previous owner Prataprao Shinde, who had secured his title by sale deed executed in his favour by Laxman Chaudhari, who had transferred the title in favour of Shinde by sale deed dated 21st November, 1996.

4. It is claimed by the plaintiff that the appellant/defendant, who is a cobbler, has entered on the said property of the respondent/plaintiff, which has prompted her to file suit for perpetual injunction.

5. The respondent/defendant resisted the suit by filing written statement at Exh.18 and admitted the description of the property. According to her, the plaintiff was never put in possession of the suit property, as according to him, he is in possession of the property in question since last twenty years as the property was originally owned by Sarjerao Kale and Deelip_Deshpande. He further claimed that it is by consent of Deelip Deshpande and Sarjerao Kale, he was residing in the suit plot which was agreed to be purchased by him in the year 1990 for Rs.20,000/-, out of which he has already paid Rs.18,750/- and the balance amount of Rs.1,250/- remained to be paid. He claimed that his possession over the suit property, by virtue of the above referred agreement, is legalized.

6. Having regard to the above referred background, the learned Trial Court dismissed the suit by judgment dated 10th August, 2004, which was subject-matter of Regular Civil Appeal No.224 of 2004 at the behest of respondent/plaintiff. The said appeal was heard and finally allowed by the 2nd Additional District Judge, Aurangabad, by judgment dated 21st December, 2005, whereby a decree for perpetual injunction was passed against the appellant herein. As such, present Second Appeal.

7. In the backdrop of above, Mr Deshpande, learned Counsel appearing on behalf of the appellant has raised two grounds; namely, (i) that in the report (Exh.19) of the Court Commissioner, who was appointed for the purpose of inspection of the disputed property, according to the appellant, has given report in his favour, i.e. defendant, which in the respectful submission of the appellant, is ignored by the learned Lower Appellate Court and (ii) in addition to above, learned Counsel for the appellant has invited my attention to the complaint lodged by the husband of the respondent/plaintiff to police station (Exh.67) on 2nd April, 2001, from which, according to him, it could be inferred that the possession of the suit property was never with the plaintiff.

8. According to the learned Counsel, both these grounds could be termed as substantial questions of law.

9. I have perused both the judgments, i.e. judgment delivered by the learned Trial Court dismissing Regular Civil Suit No.149 of 2001 and the judgment delivered in appeal by the learned 2nd Ad hoc Additional District Judge, whereby the suit was decreed, which is the subject-matter of present appeal. It is noticed that having regard to the rival pleadings of the parties to the suit, the learned Trial Court framed issues at Exh.21 and recorded findings thereon, which read thus :-

Sr.No.	ISSUES	FINDINGS
1	Whether plaintiff is in possession over suit plot referable to her title ?	Negative
2	Whether defendant is making obstruction as alleged ?	Negative
3	Is plaintiff entitle for perpetual injunction ?	Negative
4	What order and decree ?	As per final order

10. So far as the claim of the plaintiff that she was in possession of the suit property is concerned, she sought to establish the same by examining herself at Exh.29, Deelip Deshpande at Exh.35 and executant of the sale deed Prataprao Shinde at Exh.37. In addition to above oral evidence, the plaintiff has brought documentary evidence on record, such as, 7/12 extract at Exh.28, extract of mutation entry No.8185 at Exh.27, receipt of payment of non-agricultural charges Exh.30, copy of sale deed (Exh.36)

executed by Laxman Chaudhari in favour of Prataprao Shinde, dated 31st November, 1996 and copy of the sale deed executed by Prataprao Shinde in favour of the plaintiff on 22nd September, 1988 at Exh.48. Learned Trial Court has noted that the above said documents are proved after the permission was granted to lead secondary evidence.

11. The appellant/defendant, at the stage of hearing of the suit, filed certified copy of the complaint (Exh.67), dated 2nd April, 2001. The husband of the plaintiff deposed at Exh.68.

12. It is worth to mention here that the appellant/defendant has not entered into witness box.

13. After assessing and appreciating the evidence brought on record, the learned Trial Court noticed that there is no uniformity in the version of the plaintiff's witnesses as regards handing over possession of the suit property to the plaintiff after execution of the sale deed dated 22nd September, 1988 (Exh.48) and as such, has drawn an inference that the plaintiff was never put in possession of the property in question. As such, the learned Trial Court dismissed the suit by judgment dated 10th August, 2004.

14. Perusal of the judgment of the Lower Appellate Court reflects that in view of provisions of Order XLI, Rule 31 of the Code of Civil Procedure, it determined points for consideration and recorded findings thereon, as under :-

Sr. No.	POINTS	FINDINGS
1	Is it shown by appellant that he was in lawful possession over the suit plot on the date of suit ?	Yes
2	Whether it is shown by the appellant that the defendant had obstructed his possession over the suit plot ?	Yes
3	What order ?	As per order

15. Learned Lower Appellate Court has taken into account the evidence of the plaintiff, whereby the sale deed in her favour was proved. The suggestion given to the plaintiff's witness was, that the defendant is in possession of the suit property on the basis of the sale of the same by one Sarjerao Patil, however, the said fact was not established. Be that as it may, the plaintiff has also examined witness Deelip Deshpande (P.W.2), who was a witness to the transaction of sale between Laxman Chaudhari and Prataprao Shinde. So far as Sarjerao Kale is concerned, the matter of the sale deed was typed by him. The said sale deed was proved at Exh.36 in favour of Shinde, which was executed by Laxman Chaudhari. The said Shinde has entered into the witness box and has deposed that the plot which was owned by him, which was purchased from Chaudhari,

was sold to the plaintiff vide sale deed Exh.49 and had delivered possession of the suit plot to the plaintiff. The learned Lower Appellate Court has taken into account the documentary evidence in support of the claim of the plaintiff, i.e. mutation entry No.8185 at Exh.27 in the name of the plaintiff, 7/12 extract in the name of the plaintiff at Exh.28, Exh.7 assessment list of 2001-02 in favour of the plaintiff.

16. The Learned Lower Appellate Court has rejected the stand of the defendant that he was in possession of the property having purchased the plot from Sarjerao Kale, as neither Sarjerao Kale nor the defendant has entered into the witness box, nor the alleged sale deed was placed on record and proved.

17. Even if the claim of the defendant was to be considered as that of oral agreement, still no witness was examined in support thereof.

18. The learned Lower Appellate Court has taken note of the fact that the defendant has not led any evidence. In view thereof, just because the complaint to the police station (Exh.67) was placed on record, wherein according to the defendant, the husband of the plaintiff had claimed that the defendant was in possession of the property as he had unauthorizedly arranged bricks and covered the roof with tin, it cannot be inferred that the defendant was in possession of the suit property. As such, the

contention of the appellant that the complaint to the police station should have been read and interpreted to his benefit, in my opinion, is rightly rejected by the Lower Appellate Court. So far as the second contention as regards report of the Court Commissioner is concerned, he was appointed by the Trial Court and he had submitted his report (Exh.19), dated 17th January, 2002 along with the map of the said property. An important aspect is that the Court Commissioner was not examined. However, the Trial Court has taken into account the report of the Court Commissioner as it is. It is basic principle of the Indian Evidence Act that unless the Court Commissioner is examined, his evidence cannot be accepted for the purpose of determining the issue raised before the Court. The learned Lower Appellate Court, as such, was right in discarding the report of the Court Commissioner, which was taken into account by the Trial Court for dismissing the suit.

19. In that view of the matter, in my opinion, no case for interference is made out. No substantial question of law is involved in the instant Second Appeal. Thus, the Second Appeal fails and stands rejected with no order as to costs.

(N.W. SAMBRE, J.)

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