

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO.371 OF 2014
along with
CIVIL APPLICATION NO.866 OF 2014
in
SECOND APPEAL NO.371 OF 2014**

Amrut Vitthalrao Jagtap & Anr. .. Appellants
Vs.
Appaji Dagdu Beldar & Ors. .. Respondents

Mr.Vijay Patil for the appellants.
Mr.Manmath S. Athalye for the respondents.

CORAM : R.D. DHANUKA, J.
DATE : 18th November 2015

P.C.

. By this appeal, the appellants have impugned the order and judgment dated 23rd January 2014 passed by the Principal District Judge, Satara allowing the appeal filed by the original defendant nos.1 and 4.

2. By the said order and judgment dated 23rd January 2014, the learned Principal District Judge had set aside the judgment and decree dated 2nd May 2008 passed by the learned Joint Civil Judge, Junior Division, Phaltan granting part relief in favour of the appellants. The entire judgment and decree has been set aside by the impugned order and judgment dated 23rd January 2014. Some of the relevant facts for the purpose of deciding this appeal are as under :-

3. It is the case of the appellants that one Sadashiv Beldar agreed to sell the suit property to the appellants (original plaintiffs) in the

year 1974 for consideration of Rs.14,000/- and were put in possession of the suit property. The appellants have alleged that half amount of the consideration was already paid by the appellants to said Sadashiv Beldar and balance amount was to be paid at the time of execution of the sale deed. It is the case of the appellants that the appellants asked the said Sadashiv Beldar to execute a sale deed. However, as he did not get permission from the Collector, the sale deed was not executed. Thereafter, the said Sadashiv Beldar expired in the year 1980. Since Mrs.Girijabai who was his legal heir did not execute the sale deed in favour of the original plaintiffs, the plaintiffs filed a suit for specific performance before the learned Civil Judge, Junior Division, Phaltan. The defendant no.1 in the meanwhile executed the sale deed in favour of the defendant no.4. The defendant no.4 was impleaded as party-defendant to the said suit.

4. The suit was resisted by all four defendants by filing written statement. Oral evidence was also led before the trial Court by the parties. By an order and decree dated 2nd May 2008, the learned Civil Judge partly decreed the said suit in favour of the plaintiffs and declared that the sale deed dated 27th June 2005 which was executed by the defendant no.1 in favour of the defendant no.4 was illegal and not binding on the plaintiffs. The trial Court also granted injunction against the defendant no.4 from causing illegal interference and obstruction to the peaceful possession of the plaintiffs over the suit property by himself or through anybody. The trial Court, however, dismissed the suit in so far as the prayer for specific performance of contract and in the alternative, refund of earnest money is concerned. The appellants herein did not challenge the rejection of the relief in so far as grant of specific

performance is concerned. The original defendant nos. 1 and 4, however, filed an appeal (282 of 2008) in the Court of Principal District Judge, Satara in so far as the reliefs granted in favour of the plaintiffs in paragraphs 2 and 3 of the operative part of the order dated 2nd May 2008 is concerned.

5. The appeal Court by an order and judgment dated 23rd January 2014 allowed the said appeal filed by the defendant nos.1 and 4 and has set aside the entire judgment and decree passed by the trial Court including the relief granted in favour of the plaintiffs partly. This order and judgment of the appeal Court has been impugned by the appellants in the present second appeal.

6. Mr.Patil, learned counsel appearing for the appellants invited my attention to the findings recorded by the trial Court in favour of the appellants and also some of the findings recorded by the learned Principal District Judge. He submits that admittedly, the sale deed dated 27th June 2005 executed by the defendant no.1 in favour of the defendant no.4 was in breach of the undertaking (Exhibit-83) rendered by the defendant no.1 before the trial Court and thus the said transaction was illegal. Learned counsel invited my attention to the observation made by the learned District Judge and more particularly paragraph 17 of the impugned order and would submit that the observations of the learned District Judge that at the most, the defendant no.1 had committed breach of the undertaking and the transaction on that ground would not be held illegal, is perverse. He submits that even today, the appellants are in possession. Learned counsel for the appellants also

submits that even the finding of the appeal Court in so far as the possession of the respondent no.4 is concerned, is perverse.

7. Learned counsel for the respondents, on the other hand, supported the findings rendered by the appeal Court and submits that even the trial Court had recorded a positive finding against the plaintiffs in so far as the possession claimed by the plaintiffs on the basis of the Kabjepatti dated 19th March 1974 is concerned. He submits that the appellants have not challenged the finding by filing any cross-objection. The said finding has achieved finality.

8. Learned counsel also invited my attention to the finding of the possession rendered by the appeal Court in favour of the original defendant no.4. He submits that the said finding rendered by the appeal Court is not perverse and is rightly arrived at on the basis of the contents of the sale deed dated 27th June 2005 entered into between the defendant no.1 and the defendant no.4, the contents thereof were proved.

9. It is submitted by the learned counsel for the respondent nos. 1 and 4 that since the relief for specific performance claimed by the plaintiffs has been rejected and since the appellants were claiming possession under Section 53-A of the Transfer of Property Act, by virtue of the alleged transaction between the appellants and the predecessor of the defendant no.1, the appellants have lost their claim before the trial Court for specific performance. The appellants cannot be allowed to retain the possession with them. He submits that as a matter of record, the appellants were never in possession. On the contrary, the respondent no.4 is in possession of the property.

10. In so far as the submission of Mr.Patil, learned counsel for the appellants that the transaction between the respondent no.1 and the respondent no.4 dated 27th June 2005 is illegal in view of the alleged breach of undertaking is concerned, he submits that the appellants having lost before the trial Court in so far as the specific performance claimed by the appellants is concerned, they cannot make any grievance in respect of the transaction dated 27th June 2005. The finding of fact rendered by the appeal Court cannot be held to be perverse and this Court cannot interfere with such finding of fact in the second appeal.

11. In so far as the submission of the learned counsel for the respondents that the finding of possession based on the revenue entry is concerned, he submits that the revenue entry in favour of the respondent no.4 was based on the sale deed. Even if the revenue entry is not conclusive in so far as the title is concerned, the revenue entry cannot be ignored which would indicate that on the date of recording such revenue entry, the respondent no.4 was in possession of the property. In support of this submission, learned counsel placed reliance on the judgment of the Supreme Court in the case of **Narasamma & Ors. Vs. State of Karnataka & Ors.** reported in (2009) 5 SCC 591 and in particular paragraph 27 thereof.

12. A perusal of the record indicates that the trial Court had recorded a finding in favour of the plaintiffs in so far as the possession is concerned not on the basis of the documentary evidence. On one hand, the trial Court has held that the plaintiffs had failed to prove Kabjepatti dated 19th March 1974 and its contents and on the other

hand, rendered a finding of possession. The trial Court though rejected the relief for specific performance of the contract and in alternative refund of earnest money deposit, admittedly the appellants have not impugned either refusal of the relief in so far as the specific performance is concerned or other findings of fact including on the proof of the Kabjepatti dated 19th March 1974 and its contents.

13. In so far as the challenge to the reliefs granted in paragraphs 2 and 3 of the impugned order and decree dated 2nd May 2008 passed by the learned trial judge against the respondent nos.1 and 4 is concerned, a perusal of the order passed by the learned District Judge indicates that the learned District Judge rendered a finding of fact in so far as the possession of the defendant no.4 is concerned based on the sale deed dated 27th June 2005 and also on appreciation of the oral evidence led by the parties. Though the appellants had claimed to be in possession in the year 1974, the appellants could not produce any evidence before the trial Court or before the appeal Court in support of their plea of possession. The respondent nos.1 and 4 on the contrary led positive evidence and had produced documentary evidence in support of such plea which has been found by the learned District Judge. In my view, the finding rendered by the learned District Judge in so far as the possession is concerned is not perverse and thus does not require any interference by this Court under Section 100 of the Code of Civil Procedure, 1908.

14. In so far as the submission of the learned counsel for the appellants that the transaction between the respondent nos.1 and 4 i.e.

the sale deed dated 27th June 2005 being in breach of the undertaking is illegal and thus the appeal Court could not have set aside the finding in favour of the appellants is concerned, in my view, since the appellants have not challenged the decree passed by the learned trial Judge in so far as the refusal of prayer for specific performance is concerned, it does not lie in the mouth of the appellants to raise such plea before this Court.

15. In my view, there is thus no merit in the submission of the learned counsel for the appellants. Appeal is devoid of merits and is accordingly dismissed. In view of the dismissal of the appeal, civil application does not survive and is accordingly dismissed. No order as to costs.

R.D. DHANUKA, J.