

ingale

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 130 OF 2015
WITH
CIVIL APPLICATION NO. 255 OF 2015

Hemant Jain and others .. Appellants

Vs.

Vidya Harishchandra Patwardhan and others .. Respondents

Mr.S.M.Gorwadkar i/b Mr.Ravi G.Shinde, Advocate for the Appellants.

Mr.A.V.Anturkar, Senior Advocate a/w Mr.Amol Ghatne i/b Mr.Sugandh B.Deshmukh, Advocates for the Respondents No.1 & 8.

CORAM : R. G. KETKAR, J.

DATE : 08th APRIL, 2015

P.C. :

. Heard Mr.S.M.Gorwadkar, learned Counsel for the appellants and Mr.A.V.Anturkar, learned Senior Counsel for respondents No. 1 & 8 at length.

2. By this appeal under section 100 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), the appellants, hereinafter referred to as obstructionists, have challenged the judgment and decree dated 02/08/2013 passed by the learned 3rd Joint Civil Judge, Junior Division, Pune in the Objection Petition Exhibit 106 as amended vide Exhibit 169 filed under Order 21 Rule 99 of C.P.C. in Regular Darkhast No. 5 of 2007 as also the judgment and decree

dated 10/07/2014 passed by the learned District Judge-4, Pune in Civil Appeal No. 602 of 2013. By these orders, the Courts below dismissed the Objection Petition filed by the appellants under Order 21 Rule 99 of C.P.C.

3. In support of this appeal, Mr.Gorwadkar submitted that survey Nos. 71 & 72 situate at Baner were originally owned by Dhankude family. On 01/07/1983, Dhankudes executed agreement of sale in respect of 18 gunthas (1800 sq.meters) out of survey No. 71 in favour of respondent No.1, hereinafter referred to as Decree Holder, instituted Special Civil Suit No. 794 of 1985 for specific performance of contract. That suit was re-numbered as Regular Civil Suit No. 3880 of 2000. During the pendency of that suit, on 08/09/1994, one Mr.Ramchandra Mate purchased survey Nos. 71/3 to survey No.71/9. On 18/06/1997, Mr.Mate, in turn, sold that property to Sneh-Park Co-operative Housing Society (for short 'Society'). The Society submitted layout plan and amalgamated survey Nos. 71/1 and 71/3 to 71/9 except survey No. 71/2 and some part of survey No. 72. Some time in the year 1997-98, layout was sanctioned. The Society allotted plot No.2 to one Ms.Chhaya Kamble and plot No.3 to one Mr.Sunil Mahale. Appellants No. 1 & 2 herein are concerned with plot No.2 and appellants No. 3 to 7 are concerned with plot No.3.

4. Mr.Gorwadkar submitted that on 23/01/2003, the suit

instituted by the Decree Holder was decreed. On or about 08/01/2007, she filed Regular Darkhast No. 5 of 2007. On 09/08/2007, appellants No. 3 to 7 gave public notice about taking over of plot No. 3 from Sunil Mahale. No objections were received in response to the public notice. On 28/09/2007, appellants No. 3 to 7 took over plot No. 3.

5. Mr.Gorwadkar submitted that on 22/01/2008, appellants No. 1 & 2 gave public notice about taking over of plot No. 2 from Ms.Chhaya Kamble. No objections were received in response to the public notice. On 28/02/2008, appellants No. 1 & 2 took over plot No.2.

6. Mr.Gorwadkar submitted that none of the parties including Society was aware of the litigation between the Decree Holder and Dhankudes, namely suit for specific performance. On 06/02/2009, the Society became aware of that litigation and filed application for intervention. The application of intervention was rejected on 04/10/2000. On 20/04/2011, sale deed in respect of 18 gunthas from survey No. 71/1 was executed in favour of the Decree Holder. Decree Holder tried to execute the decree. On 15/05/2011, bailiff reported that property was locked, namely, it was fenced. On 05/07/2011, with the police aid, the Decree Holder obtained possession of plots No. 1, 2 & 3 of survey No. 71/1 He submitted that while executing decree obtained in Regular Civil Suit No. 3880

of 2000, the appellants who were in possession of plots No. 2 & 3 were dispossessed. The appellants, therefore, filed application on 25/07/2011 under Order 21 Rule 99 of C.P.C. (Exhibit 106) in respect of plots No. 2 & 3. He also filed application dated 23/08/2011 (Exhibit 125) claiming injunction against the Decree Holder in respect of plot No. 2 and application dated 23/08/2011 (Exhibit 127) claiming injunction against the Decree Holder in respect of plot No.3.

7. By judgment and decree dated 02/08/2013, the learned trial Judge dismissed the application made under Order 21 Rule 99 of C.P.C. The appeal preferred by the appellants was dismissed on 10/07/2014. It is against these decisions, the obstructionists have instituted present Second Appeal.

8. Mr.Gorwadkar submitted that the Courts below committed serious error in dismissing the application. He submitted that identity of the property covered by the decree is not established by the Decree Holder. He submitted that the property under the decree is not in existence and consequently, the Courts below committed error in dismissing the application. In the process of executing the decree in respect of non existent property, the appellants were dispossessed. He further submitted that the property covered under the decree is agricultural property. Without following the procedure prescribed under C.P.C. for execution of

decree and obtaining possession of the agricultural land, the Decree Holder obtained possession on 05/07/2011 with police aid. In other words, he also faulted with the manner in which the decree was executed. He submitted that appeal requires consideration as it involves substantial question of law. In support of his submissions, he relied upon the decision of the Apex Court in the case of *Piarey Lal Vs. Hori Lal*, (1977) 2 Supreme Court Cases 221.

9. On the other hand, Mr. Anturkar supported the impugned orders. He submitted that identity of the property is not a substantial question of law. The Courts below, after appreciating the evidence on record, have concurrently dismissed the application under Order 21 Rule 99 of C.P.C. on the ground that obstructionists have failed to establish that they were dispossessed from the property other than the property covered by the decree.

10. I have considered the rival submissions made by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, the obstructionists have filed application on 25/07/2011 under Order 21 Rule 99 of C.P.C. Order 21 Rule 99 of C.P.C. reads as under :

99. Dispossession by decree-holder or purchaser.- (1) Where any person other than the judgment debtor is dispossessed of immovable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the court complaining of such dispossession.

(2) Where any such application is made, the court shall proceed to adjudicate upon the application in accordance with the provisions herein contained.

11. Perusal of above extracted provision shows that where any person other than the judgment-debtor is dispossessed from immovable property by the holder of a decree **for the possession of such property**, he can make application to the Court complaining of such dispossession. To put it differently, the person complaining of dispossession must establish that he was dispossessed from the property which is not covered by the decree. In the present case, the Decree Holder had instituted suit for possession of 18 gunthas out of survey No. 71/2 and 71/1 of Village Baner. The boundaries given in the agreement of sale dated 01/07/1983 and the plaint are to the following effect :

On or towards the East : S.No.71/2
 On or towards the **South** : **ZP (Baner) road**
 On or towards the **West** : **S.No.70**
 On or towards the North : S.No.71/6

12. As far as appellants No. 3 to 7 are concerned, they have entered into lease deed with the Society on 28/09/2007 in respect of plot No.3. The boundaries of plot No.3 are to the following effect.

On or towards East : Road
 On or towards **South** : Plot No.2.
 On or towards **West** :Compound Wall of Sneha Co-op Hsg.Society.
 On or towards North : Plot No.4.

13. As far as appellants No.1 & 2 are concerned, they entered into deed of assignment on 28/02/2008 with Ms.Chhaya Parshuram Kamble and Ms.Varsha Hemant Jain and the Society in respect of plot No.2. The boundaries of plot No.2 are as follows.

On or towards East	: Internal Road
On or towards South	: Plot No.1.
On or towards West	: Survey No. 70.
On or towards North	: Plot No.3.

14. Comparison of description of the property covered by the decree obtained by the Decree Holder as also the properties of appellants (plots No. 2 & 3) clearly shows that these boundaries do not match. In other words, the properties are different.

15. The Court below and in particular, learned District Judge has considered this aspect from paragraphs 25 to 37. In paragraph 25, the learned District Judge noted that the obstructionists are contending that plots No. 2 & 3 are carved out out of survey No. 71/9. As against this, according to the Decree Holder, the property in suit is out of survey No. 71/1.

16. In paragraph 26, the learned District Judge considered the map at Exhibit 218, power of attorney at Exhibit 229 and oral evidence on record. The learned District Judge observed that the documents on record executed by the Society in favour of Ms.Chhaya Kamble and Mr.Sunil Mahale as well as documents executed by these persons in favour of the obstructionists show that there is only

reference of plot number. These documents do not indicate plots were carved out out of survey No. 71/9. In paragraph 27, the learned District Judge considered the cross examination of Deepak Laxmichand Mehta wherein he stated that on the basis of the information received from the members of the Society, he is deposing that plot No. 3 is situate in survey No. 71/9. In paragraph 28, the learned District Judge dealt with map at Exhibit 218 and observed that the said map is neither prepared by the Central Government nor by the State Government. Hence, presumption of correctness or accuracy under section 83 of the Indian Evidence Act, 1872 is not available. It is, therefore, necessary for the obstructionists to prove the authenticity of the map by examining the person who prepared that map. However, the obstructionists did not examine the person who prepared map at Exhibit 218. The learned trial Judge and the learned District Judge, therefore, excluded the said map from consideration.

17. In paragraph 29, the learned District Judge considered layout maps at Exhibits 221 and 215 and observed that there is no record to show that while submitting the proposal for layout sanction, the Society had carried out sub-division. He, therefore, held that layout maps at Exhibits 215, 220 and commencement certificate at Exhibit 221 cannot lead to the conclusion that plots No. 2 & 3 are part and parcel of survey No. 71/9.

18. The learned District Judge thereafter proceeded to consider whether the Decree Holder has obtained possession of plots No. 1, 2 & 3 (part) from survey No. 71/1. The learned District Judge in paragraph 37 observed that four boundaries mentioned in the decree are, on the southern side of survey No. 71/1, there is Sus-Baner road and to the west, it is survey No. 70. The said boundaries cannot be changed. As against this, as far as the plot No.2 is concerned, the southern boundary is plot No.1 and western boundary is survey No. 70. As far as plot No.3 is concerned, southern boundary is plot No.2 and western boundary is compound wall of Sneh-Park Co-operative Housing Society. In view thereof, the learned District Judge dismissed the appeal. I have already extracted boundaries given in the agreement of sale dated 01/07/1983 and the plaint as also the boundaries of plots No. 2 & 3. I have also held that description of boundaries of the properties covered by the decree obtained by the Decree Holder as also properties of the appellants do not match. The properties are different. In view thereof, the Courts below rightly dismissed the application filed by the obstructionists under Order 21 Rule 99 of C.P.C. I do not find that the Courts below committed any error in that regard. I do not find that the obstructionists were dispossessed from the property which is not covered by the decree.

19. Mr.Gorwadkar relied upon the decision of the Apex Court in the case of **Piarey Lal** (*supra*) to contend that the Courts below committed serious error in dismissing the application filed by the obstructionists under Order 21 Rule 99 of C.P.C. as the property covered by the decree had lost identity. In the case of **Piarey Lal** (*supra*), respondent had instituted suit for specific performance of an agreement dated 06/03/1966 for the sale of 6 plots of land admeasuring nine bighas and six biswas in village Hathiawali, Tehsil Gunnaur. The trial Court decreed the suit for specific performance. The District Court upheld the decree and the High Court dismissed the Second Appeal. In paragraph 3, the Apex Court considered the limited question whether appellant-defendant was liable to specifically perform the contract for sale of his **old holding** even after its consolidation and the **allotment of a 'chak'**. The Apex Court considered clauses (a) & (b) of section 30 of U.P. Consolidation of Holdings Act, 1953 as also sections 54 & 55(1)(d) of the Transfer of Property Act, 1882 and section 56 of the Indian Contract Act, 1872. In paragraphs 6 & 7 of the report, it was observed thus :

A cross-reference to section 54 of the Transfer of Property Act shows that a contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties. It has however been specifically provided in the section that such a contract "does not, of itself, create any interest in or charge on such property." It would therefore follow that the agreement for sale in the present case did not give rise to any interest "in" the original holding of the defendant as the tenure-holder.

That being so, there could be no occasion for the transfer of any such liability "in" the new land or 'chak' of the defendant so as to attract clause (b) of section 30 of the Act. In fact what the defendant, was bound to do under section 55(1)(d) of the 'Transfer' of Property Act was to execute a proper conveyance of "the property" which was the subject matter of the contract for sale, and not of any other property. So when he lost that property as a result of the scheme of consolidation and his rights, title, interests ceased in that property by virtue of clause (a) of section 30 of the Act, the agreement for sale became void within the meaning of section 56 of the Contract Act, and it is futile to urge that they were saved by clause (a) or clause (b) of section 30 of the Act. We have gone through the decision in Shanti Prasad's case (*supra*), but we find that while the High Court took note of the fact that the rights, title, interests and liabilities of the tenure-holder "in" his original holdings ceased, and he acquired the same rights, title, interests and liabilities "in" the 'chak' allotted to him, it lost sight of the significance of the word "in", and the aforesaid provisions of section 54 of the Transfer of Property Act, and disposed of the controversy before it by raising the other question whether "the tenure-holder" was subject to any liability "in respect of" his old holding. That was why it fell into the error of holding that a liability was created in the original holding of the defendant, and was transferred his 'chak' on his entering into its possession. As has been shown, that was an erroneous view which has to be rectified.

20. In the present case, the Courts below have concurrently held that the Decree Holder had obtained possession of properties covered by the decree. The boundaries of plots No. 2 & 3 and the boundaries of properties covered by the decree obtained by the Decree Holder do not match. It, therefore, cannot be said that the properties covered by the decree had lost identity. In view thereof, the decision in the case of **Piarey Lal** (*supra*) does not assist the obstructionists.

21. In the light of the aforesaid discussion, I do not find that appeal raises any question of law, much less, any substantial question of law. It cannot be said that the findings recorded by the Courts below are perverse, being based upon no evidence or that they are contrary to the evidence on record. In the result, appeal fails and the same is dismissed.

22. In view of dismissal of the appeal, Civil Application No. 255 of 2015 does not survive and the same is disposed of accordingly.

(R. G. KETKAR, J.)