

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

**SECOND APPEAL NO.646 OF 2014
WITH
CIVIL APPLICATION NO.1533 OF 2014**

Shri. Shamrao @ Shama Ishwara Appellants
Kamble and others

Vs.

Shri. Ganpati Gunda Mane since Respondents
deceased, through legal heirs & Ors.

Mr. P.M. Arjunwadkar, Advocate for the Appellants.

Mr. Abhaysingh Shinde h/for Mr. Rahul S. Kulkarni, Advocate for the Respondents.

Coram : Smt. R.P. SondurBaldota, J.

Date : 25th February, 2015.

P.C.

1 This Second Appeal is filed by original plaintiffs No.6, 7 and 8 to challenge the judgment and order dtd. 30th September, 2014 passed by the District Court, allowing the appeal and dismissing Regular Civil Suit No.190 of 1997. The suit as filed originally was by 14 plaintiffs. Out of them, 11 plaintiffs have accepted the order of the District Court and not joined the appellants in the present appeal. In other words, they have given up their claim made in the suit.

2 The brief statement of the facts alleged, leading to the present appeal is that the 14 plaintiffs alongwith defendants no.2, 4, 5 and 10 were members of the proposed co-operative society by name “Niyojit Shramik Sahakari Grihnirman Sanstha Limited, Datta Nagar, Shirol”. One Ningappa Bhaskar Sutar, as the promoter of the co-operative society, purchased land at gat No.125, admeasuring 98 R from original defendant no.1, Ganpati Gunda Mane by sale-deed dtd.31st January, 1983. Thereafter the property was sub-divided into the plots of land and by the agreement dtd. 8th November, 1991, allotment of the plots was made. According to the appellants, plots no. 8, 9 and 10 were allotted to them respectively. On 5th May, 1993, sale-deed was executed between the appellants and the chief promoter for sale of individual plots of land to them. Since then all the 18 members were in possession of their respective plots. When defendants no.1 to 5 started obstructing plaintiffs' possession of their respective plots of land, the suit herein for injunction came to be filed. Defendants no.6 to 10 are the formal parties to the suit.

3 Defendants no.1 to 5 contested the suit alleging that the land sold to Ningappa Sutar was not the entire land at Gat No.125 but only a portion thereof. But erroneously the registered sale-deed in favour of Sutar mentioned the entire land. When the mistake was realised, it was agreed that correction be carried out by Ningappa Sutar executing sale-deed for the portion admeasuring 44 Are in

favour of original defendant no.1. Accordingly Sutar executed registered sale-deed dtd. 6th June, 1996 in favour of original defendant no.1 for re-sale of land admeasuring 44 Are. On 24th May, 1996, original defendant no.1 had already sold land admeasuring 9 Are to defendants no.2, 4 and 5. These defendants no.1 to 5 have been in possession of land admeasuring 53 Are, which is adjacent to the land sold to Sutar.

4 The relief sought by the 14 plaintiffs was of an injunction simplicitor to restrain original defendants no.1 to 5 from disturbing their possession of individual plots of land bearing Nos. 2,3, 4,5, 6,7, 8,9, 15,17 and 18. In the alternative, they sought the relief that the defendants should not disturb the common possession of plaintiffs no.1 to 14 over the entire land. The trial court decreed the suit holding that though the plaintiffs had failed to establish the individual possession of their respective plots of land as claimed in the plaint. They could be said to be in joint occupation of the entire land. Being aggrieved by the judgment and decree, original defendants no.1 to 5 preferred Regular Civil Appeal No. 69 of 2009, which was decided by the judgment and order dtd.30th September, 2014. The appellate court held that the plaintiffs had failed to establish that they were in actual possession of their respective plots and identify the plots with specific description. As such they were not entitled to the relief of injunction. It appreciated the evidence of the plaintiffs and found that though the plaintiffs had examined the Engineer, who had prepared the map of

division of the property into plots of land, there was no identification of the plots of land claimed by the plaintiffs. The witness had in his cross-examination admitted that he was unable to state as to which plot of land was sold to which plaintiff. On the basis of this, the appellate court held that it was very difficult to hold that any particular plaintiff actually possesses any particular plot of land. The evidence of this witness further showed that at the relevant time he was not even furnished with any documentary evidence to show as to who were the members of the society. The trial court also in its judgment at paragraph 28 has held that the map prepared by the witness was not admissible in evidence and because of its inadmissibility the exact location of each of the plots was not established. Thus the concurrent findings of the courts below that the appellants have failed to establish their possession of individual plot of land is supported by the record.

5 Mr. Arjunwadkar, the learned advocate for the appellants then submits that it was necessary for the lower appellate court to consider the case of the appellants pleaded in the plaint. He draws attention to paragraph 11 of the plaint, where the alternate contention of the plaintiffs was pleaded. It was contended that by the documents dtd. 7th August, 1992, 5th July, 1993 and 6th June, 1996, the plaintiffs and the defendants had purchased the land, which was in joint occupation. Therefore, original defendants no.1 to 5 became the co-owners of the plaintiffs in respect of the suit land, and as such they

could not have disturbed the appellants' possession. Mr. Shinde, the learned advocate for the respondents points out that the alternate plea by the appellants is rejected by the trial court by the reasoning at paragraph 33 of it's judgment, which reads as follows:

“33 As regards to this alternative case, in the beginning, it is necessary to mention that it is for the plaintiffs to come with a specific case and that alternative case is not available to them. Further as mentioned earlier, it is proved that interest of the contesting parties in the suit land is specified and separated from each others and due to that, the issues of their co-ownership as pleaded does not survive.”

It is to be noted that if the appellants did not challenge this finding before the lower appellate court, it would only mean that they have accepted the finding on the alternate claim, which cannot now be revived in the Second Appeal before this court. In any case, it was necessary for the plaintiffs to elect their case at the time of going in for trial and they could not have gone to the trial with inconsistent alternate cases. The Second Appeal is therefore dismissed.

6 In view of dismissal of the Second Appeal, the Civil Application does not survive, the same is accordingly disposed off.

(Smt. R.P. SondurBaldota, J.)