

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

SECOND APPEAL NO.329 OF 2014

1. Abaji s/o Sampatrao Shambharkar & Anr.
Aged about 80 years, Occ. Cultivator.
2. Sau. Ramjana w/o Tulshiram Shambharkar
Aged about 50 years, Occ. Cultivator. ... Appellants

-vs-

1. Shankar Lahanuji Kamble
Aged about 55 years, Occ. Medical Practitioner
R/o Hamdapur, Tah. Seloo, Dist. Wardha.
2. Tulshiram S/o Abaji Shambharkar
Aged about 55 years, Occ. Cultivator
R/o Hamdapur, Tah. Seloo, Dist. Wardha. Respondents

Office notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.

Court's or Judge's Orders.

Shri V. N. Morande, Advocate for appellants.
Shri S. V. Sohoni, Advocate for respondent No.1.

CORAM : A.S.CHANDURKAR J.

DATE : MARCH 04, 2015.

This appeal filed by the original defendant Nos.1 and 3 challenges the decree passed by the first appellate Court allowing the appeal filed by the original plaintiff and restraining the defendants from interfering with the plaintiff's possession.

The respondent No.1-plaintiff claims to have purchased area admeasuring about 10,000 sq. ft from field Survey No.559 from defendant No.2 on 02/11/1999. He was thereafter put in possession. On obstruction being caused by defendant No.1-father of defendant No.2 and defendant No.3-wife of defendant No.2, suit for

permanent injunction was filed against the defendants.

The defendant Nos.1 and 3 opposed the suit as filed. They also filed a counterclaim for cancellation of sale deed dated 02/11/1999 and also for possession of aforesaid property. No written statement was filed by defendant No.2. The trial Court held that the defendant No.2 had authority to execute sale deed on the basis of partition deed dated 16/01/1970. It further held that as the land was a fragment, the sale deed was void and *ab initio*. It therefore dismissed the suit for permanent injunction. The counterclaim was partly allowed and sale deed dated 02/11/1999 was declared to be null and void. Rest of the counterclaim seeking relief of possession was dismissed.

The original plaintiff filed appeal under Section 96 of the Code of Civil Procedure challenging the dismissal of the suit. The defendant Nos.1 and 3 however did not challenge that part of the decree passed by the trial Court refusing relief of possession as sought in the counterclaim. The first appellate Court after re-appreciating the evidence, held that the sale deed executed in favour of the plaintiff was a valid document. It held that defendant No.2 who had executed the sale deed had not objected to the claim as made by the plaintiff. It therefore allowed the appeal and passed decree for perpetual injunction.

Shri V. N. Morande, learned counsel appearing for defendant Nos.1 and 3 submitted that defendant No.2 used to remain under influence of liquor and he had no authority to execute any sale deed. He further submitted that the execution of sale deed was not preceded by any agreement in favour of the plaintiff. Within a short

span, aforesaid sale deed came to be executed. He therefore submitted that the first appellate Court erred in setting aside the decree passed by the trial Court.

Shri S.V. Sohoni, learned counsel appearing for the original plaintiff supported the impugned decree. He submitted that defendant Nos.1 and 3 had no authority to challenge the sale deed as executed. He submitted that defendant No.2 was absolute owner of the suit property. He also submitted that said part of the decree passed by the trial Court refusing relief of possession had not been challenged by defendant Nos.1 and 3.

I have carefully considered aforesaid submissions. While the plaintiff filed suit for permanent injunction, the defendant Nos.1 and 3 filed counterclaim seeking declaration that sale deed dated 02/11/1999 was null and void. The trial Court dismissed the suit for perpetual injunction. It partly allowed the counterclaim and declared the sale deed to be null and void. The relief of possession was however refused. The effect of aforesaid decree was that the plaintiff continued in possession though sale deed dated 02/11/1999 was declared null and void. The plaintiff alone filed appeal against the decree dismissing the suit. The defendant Nos.1 and 3 neither filed any appeal nor raised any cross objection against refusal of said part of the decree by the trial Court. It is therefore clear that the decree refusing relief of possession to defendant Nos.1 and 3 had become final in so far as said defendants were concerned.

Perusal of judgment of the first appellate Court indicates that the sale deed (Exhibit-55) was scribed by one Bhagat and attested by two attesting witnesses who were the brother-in-laws of

defendant No.2. Said defendant No.2 did not challenge execution of aforesaid sale deed. The document in question being duly registered, submission that consideration amount was not received by defendant No.2 cannot be accepted. It was therefore held that as defendant No.2 was the owner of the suit property, he was entitled to execute the sale deed. As regards possession of the plaintiff, the evidence on record was found sufficient especially when the vendor-defendant No.2 had not objected to aforesaid sale deed. It is therefore clear that the decree passed by the first appellate Court is on the basis of evidence available on record.

Thus, the Second Appeal as filed does not give rise to any substantial question of law. Same is therefore dismissed with no order as to costs.

In view of dismissal of appeal, Civil Application No.766 of 2014 does not survive and the same is disposed of accordingly.

JUDGE