

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD

SECOND APPEAL NO. 163 OF 2011
WITH
SECOND APPEAL NO. 164 OF 2011

1. Apparao s/o Namdeo Gorade
Age 56 years, occup. Agril.,
R/o Nillod, Tq. Sillod,
Dist. Aurangabad
2. Kakasaheb s/o Apparao Gorade,
Age 31 years, occup. Agril.,
R/o Nillod, Tq. Sillod,
Dist. Aurangabad
3. Sunil s/o Apparao Gorade,
Age 26 years, occup. Agril.,
R/o Nillod, Tq. Sillod, .. Appellants/original
Dist. Aurangabad Plaintiffs

versus

Ujaliram s/o Kondiba Magar,
Age 63 years, occup. Retd.,
r/o Nillod, Tq. Sillod, .. Respondent/Orig.
Dist. Aurangabad Defendant

Mr. M. K. Deshpande, Advocate for appellants
Mr. D. P. Palodkar, Advocate for respondent

CORAM : SUNIL P. DESHMUKH, J.
DATE : 20th December, 2016

ORAL JUDGMENT:

1. Heard learned counsel for the parties.
2. The appellants are plaintiffs in regular civil suit no. 188 of 2000 instituted against respondent-sole defendant, seeking declaration that registered instrument dated 03-09-1991 executed by plaintiff no. 1 is a transaction by way of security for repayment of amount obtained by him from defendant for purchase of an old tractor and for injunction seeking restraint on the defendant from interfering with their possession over suit property.
3. It is the case of the plaintiffs that the instrument of ostensible sale of an area of 40 *aar* from 70 *aar* land owned by plaintiff no. 1 had been executed without delivery of possession to the defendant. The land owned by plaintiff no. 1 had been partitioned between his two sons Kakasaheb and Sunil equally. It was an understanding between the parties to the instrument that the transaction was not be acted upon and defendant's name would not enter revenue record.

4. Later, the defendant changed his mind and got entered his name in revenue record. Plaintiffs contend, plaintiff no. 1 had paid an amount of Rs.40,000/- to defendant in the presence of Anna Ramrao Borade, Vijaya Prabhakar Narale, Amruta Sayaji Phalke and Bhikan Khandu Aher, Vinayak Sakharam Aher. The Defendant had assured to execute reconveyance deed in favour of the plaintiffs. However, defendant purported to cause obstruction to plaintiffs' peaceful possession over suit land around 03-07-2000. Thus, aforesaid proceeding ensued.

5. In defence, respondent-defendant, denied all the contentions and allegations by plaintiffs against him. It had been specifically denied that there had been a loan transaction and by way of security the instrument had been executed. According to the defendant, it was an out and out sale and that he had been put in possession of 40 *aar* land under said transaction. His name accordingly had entered revenue record and mutation entry has also been caused and confirmed. The defendant contended that since the land is close to Jalgaon-Aurangabad highway and the road has been widened, prices of the lands in the area have escalated and as such, the plaintiffs have turned around and have instituted proceeding with spurious pleas.

6. With reference to aforesaid pleadings on either side, issues were framed by trial court; whether the plaintiffs prove sale deed dated 03-01-1991 to be nominal and executed for security of loan transaction; whether plaintiffs prove their possession over suit land; whether plaintiffs prove legal injury to their right and possession and whether they are entitled to reliefs of declaration and injunction.

7. The trial court had scanned entire evidence and documents placed on record and had come to conclusion that none of the ingredients was established by the plaintiffs with regard to instrument being by way of security for repayment of loan. Regard had been also to that the instrument did not embody a stipulation about re-conveyance, nor it is the case of the plaintiffs that there was any contemporaneous written agreement between the parties to re-convey the land to the plaintiffs. Trial court had also considered contention of the plaintiffs that price of the land around the period of execution of instrument had been more than the one shown under the instrument and found that plaintiffs have not adduced any evidence in support of said contention. Trial court considered that debtor-creditor relationship cannot be said to have been proved.

8. It has been observed by the trial court that just before three months of mutation entry had been taken in the name of defendant, a mutation entry appears to have been taken about partition between two sons of plaintiff no.1. It has further been observed that upon objection by the defendant, the entry regarding partition between the sons has been cancelled. Thus, the trial court has considered that the defendant had been vigilant about his title. The cancellation of entry about partition had taken place in the year 1993. While it was plaintiffs' case that they got knowledge of change of mind of defendant in 1998, the same could not be believed having regard to that the dispute with regard to mutation had taken place around 1993.

9. The trial court has also appreciated evidence led by the plaintiffs in support of their case about repayment of Rs.40,000/- and had found the same to be discrepant and unreliable. While the amount had been contended to be paid back to the defendant in the presence of five witnesses referred to above, only one witness had entered witness box who too had different version so far as return of the amount is concerned. It is the case of the plaintiff that the amount had been paid back in two installment whereas, the witness in his deposition states the same to have been returned in one

stroke. Taking stock of the situation, it had been considered that there is no credible evidence being led by plaintiffs in respect of repayment. The trial court, as such, had refused to grant declaration under judgment and decree dated 11-07-2007.

10. So far as possession is concerned, the trial court has considered that nothing tangible could be brought on record to disbelieve the claim of plaintiffs being in possession. Plaintiff no. 1 to support his case for possession has examined, apart from himself, two other witnesses who have in their examinations supported plaintiffs' case. One of them was found to be relative of the plaintiffs while other had been an adjoining land holder. The court, after observing the witnesses, found their evidence to be natural and inspiring confidence. The trial court has also taken into account that defendant's name had never been entered into cultivation column in the revenue record since the date of purchase of suit property and further that the defendant had candidly accepted the same. The trial court has also noted that the defendant had not adduced any evidence to support his case for possession.

11. The trial court has considered that the plaintiffs have been able to make out a case for injunction as the court found them to be in possession of the suit land.

12. In the circumstances, trial court partly decreed the suit, dismissing plaintiffs' claim for declaration, however, granting injunction against defendant restraining him from disturbing plaintiffs' possession without following due process of law.

13. Against aforesaid judgment and decree of the trial court, two appeals were preferred, one bearing regular civil appeal no. 185 of 2007 by plaintiffs aggrieved by refusal by trial court to grant declaration prayed for, and another bearing no. 204 of 2007 by the defendant challenging injunction clamped on him from causing obstruction to plaintiffs' possession over suit land.

14. The appellate court framed points for consideration in the two appeals, considering the same together, with regard to nature of transaction between the parties; about entitlement to declaration sought by the plaintiffs; disturbance by defendant in plaintiffs' claimed possession and entitlement of the plaintiffs to injunction.

15. The appellate court, under judgment and decree dated 20-01-2011, decided both the appeals under a common judgment and order.

16. The appellate court dealt with all the points simultaneously, considered the evidence adduced and concurred with the findings given by trial court, about plaintiffs being not entitled to relief of declaration prayed for and about that nor have they been able to establish the transaction to be something else than as entered into i.e. for sale.

17. So far as injunction is concerned, the appellate court held the plaintiffs also not to be entitled to the same. The appellate court has considered that in the instrument itself, plaintiffs have referred to delivery of possession of land to the defendant. Further that, there has been a mutation entry in revenue record and an appeal against the same by the plaintiffs had failed. The appellate court considered that although evidence of adjoining land holder on behalf of the plaintiffs has been considered by the trial court, yet the trial court has not taken into account that there is a recital in the instrument itself about delivery of possession and simply because cultivation column shows plaintiffs' name, that

cannot be relied on since an area of 30 aar had been with the plaintiffs and as such, plaintiffs were being naturally shown to be in possession. As such, it would not be proper to rely on such revenue entries. The appellate court further went on to consider that the plaintiffs have not been able to establish their ownership and possession over suit property. An owner cannot be restrained under an order of injunction from enjoyment of the property owned by him. The appellate court, thus, considered that decree of injunction passed by the trial court, as such, is liable to be interfered with and upset and has accordingly allowed appeal filed by defendant, dismissing plaintiffs' appeal.

18. Second appeal no. 163 of 2011 is preferred by plaintiff against judgment and order of appellate court in regular civil appeal no. 185 of 2007 and second appeal no. 164 of 2011 is preferred by plaintiff against judgment and decree in regular civil appeal no. 204 of 2007.

19. Learned counsel Mr. M. K. Deshpande draws attention to that, while admitting second appeals following two substantial questions of law on 21-03-2013, have been framed;

(i) Whether the appellate court below has committed patent error while holding that the appellants are not in possession of suit land though the entries are taken in the revenue record regarding

the continuous possession of the appellants in respect of the suit field, in absence of any evidence from the side of the respondent in this regard ?

(ii) Whether the courts below committed patent error as regards the proof of title regarding the suit land upon failure to consider the continuous possession of the appellants over the suit land as one of the factors in this regard ?

20. Learned counsel Mr. Deshpande contends that a large chunk of land under the instrument is shown to be dealt with but it is for a meagre sum of Rs.11,500/- as, in fact, intention had not been as is depicted under the same. Having regard to the attending circumstances and taking into account the prevailing prices then, it is easily discernible that the document albeit ostensibly appears to be of conveyance, but in fact it is not so. He submits, it ought to have been taken into account that a larger piece of land would not have been dealt with for purchase of old tractor for cultivation of a smaller portion of land of 30 *aar* from ownership of only 70 *aar* of the plaintiffs and that too for a too meagre amount. He submits, besides, plaintiffs have been truthful in their version about the transaction since they have referred to that more than the amount shown in the instrument had been received by them under the transaction. This aspect has been lost sight of by both the courts. He submits that these are a

few of the instances which indicate that true nature of the transaction is of security and not sale.

21. Mr. Deshpande contends, the appellate court has been in gross error in considering that since there is recital in instrument about delivery of possession, the defendant who is considered to be lawful owner could not be restrained from interfering with possession of the plaintiffs. He submits, it has emerged on record that the plaintiffs are in possession of entire land owned by them despite instrument having been executed. Entry into ownership column of revenue record pursuant to the instrument has no bearing on their rights. The defendant had not asserted his possession over suit land pursuant to the alleged sale deed, after alleged purchase of suit property and/or despite revenue proceeding. He submits that the plaintiffs have adduced more than sufficient evidence, documentary and oral, showing them to be in possession whereas, the defendant besides relying on alleged sale deed, has not placed any credible evidence on record. He, therefore, submits that the plaintiffs being in possession, in fact, on the date of the suit, injunction would issue against the defendant. According to him, the appellate court has got drifted away by recitals in the instrument rather than factual position as on the date of the suit.

22. Mr. M. K. Deshpande, learned advocate purports to take support of a decision of this Court in case of *Maroti Jairam Kadam Vs. Madhu Govind Kadam and Others* reported in 2010 (4) Mh.L.J. 990 to his submission that a person in settled possession of land in question as on the date of the suit, is entitled to injunction.

In said case, defendants were owners of 2 Hectare, 8 Are portion of land which had been given by them on crop sharing basis for a period of five years to the plaintiff and the plaintiff had been accordingly in possession of the suit property. As the defendants obstructed the plaintiff's possession, suit was filed. The trial court, in that case, had decreed the suit holding that the plaintiff was in lawful possession and there was obstruction by the defendants. The appellate court, however, disbelieved theory of *batainama* and held that the plaintiff is not entitled to possession and as such, suit was dismissed. In second appeal arising therefrom, while answering substantial question of law whether plaintiff proves that he had been in settled possession of suit property, and as such entitled to injunction, court found that revenue record shows plaintiff's possession and considering certain other aspects and further referring to that there had been continual injunction operating against defendants through the litigation,

relying on decision of the Supreme Court in the case of *Rame Gawda Vs. M. Varadappa Naidu and Another* reported in (2004) 1 SCC 769, had allowed the second appeal setting aside appellate court's judgment.

23. He, therefore, urges to allow second appeal no. 163 of 2011 by granting declaration and to set aside judgment and order in regular civil appeal no. 185 of 2007 and to allow second appeal no. 164 of 2011 and set aside decision in regular civil appeal no. 204 of 2007, given by District Judge-6, Aurangabad.

24. Mr. Palodkar, learned counsel for sole respondent, countering aforesaid submissions, contends that it is the case of the plaintiffs that the instrument is executed by way of security, however, the plaintiffs have not been able to bring on record even by semblance any material in support of such contention. He submits, basic requirement about debtor-creditor relationship has not been established to show that the instrument executed is by way of mortgage and not sale. He further refers to that although as many as five persons are stated to have witnessed the repayment, only one person had entered witness box and he has, according to learned counsel, drifted away from the case. The two witnesses-

plaintiff no. 1 and him were at variance. It is further submitted that no evidence as to where and how the money had been repaid had come on record. The courts had rightly considered that the instrument was out and out sale and not by way of security and thus were right in dismissing claim of the plaintiffs for declaration.

25. Mr. Palodkar further contends that so far as grant of injunction by trial court against defendant is concerned, the same was erroneous. He submits, the courts having found the instrument to be out and out sale, the defendant is the true owner and no injunction could have been issued against him.

26. Mr. Palodkar, to buttress his submissions, refers to a decision in the case of *Sopan Sukhdeo Sable vs. Assistant Charity Commissioner*, reported in (2004) 3 SCC 137, and particularly relies on paragraphs no. 23, 24, 25 and 26 which are reproduced herein-below and submits that it is settled position that no injunction can be granted against true owner.

" 23. Another plea which has been raised with some amount of vehemence by the appellant is the alleged forcible possession. This plea is strongly disputed by learned counsel for the respondent Trust who says that the possession was taken in accordance with law and as noted above, by voluntary surrendering by most of the tenants. Much of this controversy revolves from the date till the date of injunction passed by the trial court operated.

24. *There are two different sets of principles which have to be borne in mind regarding course to be adopted in case of forcible dispossession. Taking up the first aspect, it is true that where a person is in settled possession of property, even on the assumption that he has no right to remain in property, he cannot be dispossessed by the owner except by recourse to law. This principle is laid down in Section 6 of the Specific Relief Act, 1963. That section says that*

" If any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be set up in such suit. "

That a person without title but in "settled" possession – as against mere fugitive possession – can get back possession if forcibly dispossessed or rather, if dispossessed otherwise than by due process of law, has been laid down in several cases. It was so held by this Court in Lallu Yeshwant Singh v. Rao Jagdish Singh, Krishna Ram Mahale v. Shobha Venkat Rao (SCC at p. 136), Ram Rattan v. State of U.P. And State of U.P. v. Maharaja Dharmander Prasad Singh. The leading decision quoted in these rulings is the decision of the Bombay High Court in K.K. Verma v. Union of India.

25. *Now the other aspect of the matter needs to be noted. Assuming a trespasser ousted can seek restoration of possession under Section 6 of the Specific Relief Act, 1963, can the trespasser seek injunction against the true owner ? This question does not entirely depend upon Section 6 of the Specific Relief Act, but mainly depends upon certain general principles applicable to the law of injunctions and as to the scope of the exercise of discretion while granting injunction. In Mahadeo Savlaram Shelke v. Pune Municipal Corp., it was held, after referring to Woodroffe : Law Relating to Injunctions;*

Goyle, L. C.; Law of Injunctions; Bean, David : Injunctions; Joyce : Injunctions and other leading articles on the subject that the appellant who was a trespasser in possession could not seek injunction against the true owner. In that context this Court quoted Shiv Kumar Chadha v. Municipal Corp.of Delhi wherein it was observed that injunction is discretionary and that : (SCC p. 175, para 31)

" [Judicial proceedings cannot be used to protect or to perpetuate a wrong committed by a person who approaches the court. "]

26. *Reference was also made to Dalpat Kumar v. Pralhad Singh in regard to the meaning of the words " prima facie case " and " balance of convenience " and observed in Mahadeo case that : (SCC p. 39, para 9)*

" 9. It is settled law that no injunction could be granted against the true owner at the instance of persons in unlawful possession. "

27. Learned counsel, in addition to aforesaid judgment, refers to and relies on the judgment in the case of *Puran Singh vs. The State of Punjab*, reported in (1975) 4 SCC 518.

28. He refers to yet another decision of the supreme court in the case of *Vimal Chand Ghevarchand Jain vs. Ramakant Eknath Jadoo*, reported in (2009) 5 SCC 713, to contend that the pleadings of the parties would be required to be read as a whole, so is the case with regard to contents of the instrument. He, therefore, submits that while the courts have come to the conclusion

that the document is not by way of security, the recital which is showing the defendant to be in possession should also receive its due while considering the matter. According to Mr. Palodkar, the document is not only registered one but, it is a title deed showing delivery of possession. It has further been contended that the same has been acted on and accordingly revenue record shows defendant's name. He, therefore, submits that the position emerges that the defendant shall have to be deemed to be in possession.

29. Mr. Palodkar, learned advocate, vehemently submits that the plaintiff is estopped from going back on the recital, which depicts delivery of suit property to defendant, in the absence of any evidence with regard to dispossession of the defendant at the hands of the plaintiff at subsequent point of time.

30. He further refers to section 38 of the Specific Relief Act contending that in the facts of the present case, it is not the case of the plaintiff that the suit has been instituted to prevent a breach of an obligation existing in his favour. Referring to sub section (3) of section 38 of the Act, he submits, it cannot be said that the defendant can be said to invade the plaintiff's right to or enjoyment of property.

According to him none of the requirements under sub section (3) referred to particularly under clauses (a), (b), (c) and (d) were available for grant of perpetual injunction. He submits that an obligation, as a matter of fact, arises for plaintiffs to let defendant be in possession, which in this particular case had not been looked into by the trial court. The appellate court has considered the matter in its proper perspective and set aside order of the trial court.

31. While, it is being submitted so, one will have to consider the position that in the first place it is the plaintiff, who has been in litigation contending that the registered instrument had been intended for an altogether different purpose, rather than the one apparently depicted under the instrument and two courts hitherto have declined to accept plaintiff's case about declaration that the instrument was by way of security.

32. The plaintiff has specifically pleaded that the instrument had been executed without delivery of possession. Revenue record, in the cultivation column position as had been subsisting while the instrument had been registered, continued to show plaintiff to be in possession even after execution of instrument. It further appears that the defendant did not insist upon entering his name in the cultivation column

despite some dispute having ensued before revenue authorities in respect of entries with reference to suit land. Apart from revenue record, plaintiff has adduced evidence to show his possession, whereas defendant has not produced any other evidence save relying on recital in the instrument of transfer.

33. Although there is record bearing that defendant's name has been mutated in ownership column, yet correspondingly, his name had not entered the cultivation column. There is no corroboration to that the defendant had entered into possession of the suit property

34. The appellate court considered that cultivation column may indicate plaintiffs' possession over balance area of land which had remained with them after sale deed had been executed. However, at the same time one will have to take into account that, had the defendant been in possession of suit land, the cultivation column would have shown defendant's name along side in respect of area of land purchased. The appellate court has not given any reasons as to why upon registration of the instrument and delivery of possession, for sufficiently long period, until suit had been filed, name of the defendant had not entered cultivation

column of revenue record, as had been case while same had been entered the ownership column. Even otherwise, the observations with regard to appearance of plaintiff's name in the cultivation column in revenue record had been an assumption beyond pleadings of the parties.

35. Reliance is placed by the defendant exclusively on recital in the sale deed. Continuous revenue record shows plaintiffs to be in possession of the suit property. Besides, the same is supported by oral evidence. Whereas, the defendant has not been able to dislodge the position emerging therefrom. Although it is being contended on defendant's behalf that the plaintiffs are disentitled to claim possession, them having not shown to have come in possession subsequent to date of sale deed, one will have to go according to the evidence. Also, ponderance of probability throws sufficient weight in favour of plaintiff. Evidence and preponderance, to a large extent, show that the plaintiffs would be in possession of suit property as on the date of the suit.

36. Although it is being submitted by learned advocate Mr. Palodkar, referring to section 38 (3) (a), (b), (c) and (d), of the Specific Relief Act, one would have to take into account that

section 38 of the Specific Relief Act is subject to other provisions contained and particularly considers granting of perpetual injunction to the plaintiff to prevent breach of an obligation existing in his favour, whether express or implied and further that it would have to be considered that said relief is granted at the discretion of the court by injunction, temporary or perpetual. Having regard to facts and circumstances involved in the case, it may not be said that the defendant has been able to ascertain and show that there is any standard to ascertain the damage or for the money would be an adequate relief or for that matter it is necessary to prevent multiplicity of proceedings. As such, it appears that the submissions so advanced carry little substance. Injunction in this case appears to have been granted by trial court in exercise of its discretion available.

37. Contention of learned advocate Mr. Palodkar that injunction cannot be issued against true owner at the hands of a trespasser is concerned, in the present case, it would not be said that the plaintiffs can be dubbed as trespassers. So far as land in question is concerned, as a matter of fact, rights to the property are being claimed by the defendants through instrument with plaintiff no. 1 - *inter vivos*. It will have to be considered that the plaintiff as owner had been in possession

of the property, which is contended to have been delivered by the defendant to him under the instrument. From the evidence as is emerging it would not be a case that the plaintiffs can either said to be trespassers or would not be men who would not claim to be in settled possession, and the plaintiffs proceed on the footing that no possession pursuant to the instrument had ever been given, since intention of the parties had been different. In the circumstances, this pleading coupled with the evidence on record, to quite long extent even by preponderance shows plaintiff would be in possession of the suit property on the date of the suit. Whereas the burden having discharged by the plaintiff, it was for the defendant to show that he had been put in possession pursuant to the instrument of transfer. This burden does not appear to have been discharged by any credible evidence.

38. The trial court has appreciated that the plaintiffs are not alien to suit property but, they are the erstwhile owners of the same and have claimed to be in possession and have adduced evidence supporting the claim. The citation in the case of Sopan (*supra*) referred to above relied on by defendant would under its paragraph no. 24 support the plaintiffs' case. Rest of the observations in the quoted excerpts would not govern and cover the circumstances of the present case. The proposition

as is canvassed on behalf of the defendant, as such, has no bearing in present facts and circumstances of the case. Prevailing position appears to be that a person in settled possession can seldom be ousted without due process of law.

39. In the circumstances, as has been appreciated by the trial court that there has been sufficient indication of possession of the plaintiff on the date of the suit over the suit land, in documentary evidence as well as testimony of the witnesses, which went unrebutted, learned advocate Mr. Deshpande, to that extent would be said to be right in adverting to that it is not the case that appellate court has reached out to the reasons given by trial court and got over the same and has reversed findings recorded by trial court.

40. The plaintiffs have not been able to adduce evidence on record to substantiate their contentions about their intention underlying transaction being different and was of security by any material much less credible. Evidence by the two witnesses on behalf of plaintiffs has been discrepant and inconsistent . There is no iota of evidence lending substance to claim of plaintiffs for declaration. The so called evidence by the two witnesses in this respect of behalf of plaintiffs is too scanty and feeble and does not inspire confidence at all.

Appreciation of the two court on this count is not liable to be faulted with.

41. In the circumstances, so far as question No.1 is concerned, it will have to be considered that the appellate court had fallen in error in holding appellants are not in possession of the suit land. So far as title to the suit property is concerned, as covered by question No.2 is concerned, the same would be required to be decided in favour of the defendant and that it would not be said that the plaintiffs continued to hold title to the suit property.

42. In the circumstances, interference with the discretion which has been exercised by the trial court in favour of the plaintiff by issuing injunction, appears to have been dabbled with, going by a presumptive assumption rather than state of facts emerging on evidence. The appellate court may not be justified in interfering with the discretion, which has been exercised by the trial court by following judicial principles and keeping in mind principles of justice, equity and good conscious.

43. In the circumstances, second appeal No.163 of 2011 is dismissed and second appeal No.164 of 2011 is allowed with no order as to costs, setting aside judgment and decree in

regular civil appeal no. 204 of 2007 passed by District Judge-6, Aurangabad.

44. In view of disposal of the second appeals, pending civil applications do not survive and stand disposed of.

SUNIL P. DESHMUKH,
JUDGE

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