

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

908 SECOND APPEAL NO. 257 OF 2016
WITH CA/4103/2016 IN SA/257/2016

CHANDRAKANT NAGNATH VIBHUTE
VERSUS
DEVICHAND RAMCHAND INDE AND ANR

...
Advocate for Appellants : Deshmukh Rajendra S.
...

CORAM : T.V. NALAWADE, J.
DATED : 31st March, 2016.

ORDER :

1. The appeal is filed against judgment and decree of Regular Civil Suit No. 153/1981, which was pending in the Court of Civil Judge, Senior Division, AUSA and also against decision of Regular Civil Appeal No. 36/2012, which was pending in the Court of District Judge - 3, Latur. Heard the learned counsel for appellant.

2. The suit was filed by present respondents, Devichand and Baburao for relief of possession. In the said suit, present appellant filed counter claim. After filing of the counter claim, plaintiff withdrew his suit. In the counter claim, present appellant had prayed the relief of specific performance of agreement dated 25.4.1977. In original written statement, such prayer was not made and by making amendment, such relief was claimed in

the year 1997. It is the case of present appellant that one Gulabchand Inde was the owner of property and Gulabchand had agreed to sell the property to present appellant for consideration of Rs. 4,000/- under agreement dated 25.4.1977. It is the case of present appellant that he had paid earnest money of Rs. 2,000/- to said Gulabchand. It is contended that initially he was in possession of suit property as tenant of Gulabchand and his possession was confirmed under agreement to sell. Defendant, present appellant further contended that he was dispossessed from the property after 1997, but till that year he was in possession of the suit property. It is the case of present appellant that he was always ready and willing to pay the balance amount of consideration, but Gulabchand avoided execution of sale deed and then defendant No. 1, who was elder member of joint family of Gulabchand, had refused to execute the sale deed.

3. It appears that plaintiff had executed sale deed in favour of defendant No. 2 when counter claim was made and so, it was contended against defendant No. 2 that after execution of sale deed by using force defendant No. 1 was dispossessed from the property. He contended that he had never handed over possession of the property to plaintiff or defendant No. 2 and the case of plaintiff, defendant No. 2 in that regard was totally false.

Plaintiff is brother of Gulabchand.

4. Plaintiff filed written statement to the counter claim and he denied everything including execution of agreement dated 25.4.1977 by Gulabchand. He denied that part of consideration was paid to Gulabchand by defendant No. 1. He denied that defendant No. 1 was put in possession as tenant and his possession was confirmed by Gulabchand under agreement of sale. He also denied that defendant No. 1 was ready and willing to perform his part of contract. It is contended by plaintiff that Gulabchand used to take help of defendant No. 1 for cultivation and he is misusing that circumstance. It is contended that Gulabchand died prior to 25.4.1977 and so, there was no question of execution of agreement in favour of defendant by Gulabchand. It is contended that there is possibility that defendant No. 1 had obtained signatures of Gulabchand by misusing the circumstance that Gulabchand was taking help of defendant No. 1 for cultivating the land.

5. It is the case of plaintiff that Gulabchand executed will in his favour and on that basis, he became owner of the property. It is contended that in 1991, there was compromise between plaintiff and defendant No. 1 and then defendant No. 1

handed over the possession of the suit property to plaintiff. It was contended that the relief of specific performance was claimed after more than 20 years of so called agreement and so, the suit is time barred.

6. On the basis of aforesaid pleading, issues were framed. Both the sides gave evidence. The Trial Court decided the suit mainly on the point of limitation. The Trial Court believed the case of plaintiff that Gulabchand was not alive on 25.4.1977 as there is a death certificate prepared by Local Body showing that Gulabchand died on 23.4.1977. The Trial Court held that defendant No. 1 failed to prove that he was forcibly dispossessed by the plaintiff from the suit property. The First Appellate Court has given similar reasoning. The witnesses of the defendant No. 1 are disbelieved by the Trial Court.

7. The learned counsel for defendant No. 1, appellant submitted that in a proceeding like revision filed by the original plaintiff against the order of Trial Court, when he was not allowed to withdraw the suit, this court had touched the point of limitation and so, it was not open to the Trial Court to decide the point again. This submission is not at all acceptable. The purpose behind the revision was totally different and it can be

said that the point of limitation could not have been decided by this Court in respect of the counter claim of the present petitioner, defendant No. 1. This point was not decided by the Trial Court and so, there was no question of consideration of such point in revision by this Court.

8. There are concurrent findings of the Courts below against the present appellant and the Courts below have held that the present appellant has failed to prove that there was the agreement made by deceased Gulabchand in favour of appellant on 25.4.1977 and part of consideration was paid by the appellant to Gulabchand. The issues of readiness and willingness are also decided against the appellant and it is held that the possession was not handed over under the agreement of sale to the present appellant. The witnesses examined by the appellant like the scribe are not believed by the Courts below by giving reasoning. All the persons near and dear to the present appellant like his colleagues were called as witnesses. This is again a finding of fact and there is the power of the Trial Court either to believe or not to believe the witnesses and considering the scope of even the First Appellate Court in that regard this point cannot be reopened.

9. Much was argued by the learned counsel for appellant on the circumstance like the evidence of witnesses which is against the circumstance that Gulabchand had died prior to the date of agreement. It was submitted that when there is the evidence of witnesses, not much importance can be given to the document. This proposition is not at all acceptable. The death certificate has the presumptive value and the witnesses of the present appellant are not believed by the Courts below.

10. Some submissions were made by the learned counsel for the appellant on the circumstance that in appeal filed by present appellant in District Court, cross objections were filed by original defendant No. 2 and they are not decided. He placed reliance on the case reported as **1998 (9) SCC 383 [Jitendra Prasad Nayak Vs. Anant Kumar Sah]** and decision given by this Court in **Second Appeal No. 734/2015 [Prabhawati Rajnikant Sabde Vs. Chitra Shardhanand Yangad]**. The facts of the reported case were altogether different. Only in respect of some finding given as against defendant No. 2, he had filed the cross objections and the decision on those cross objections will not have changed the fate of the matter. The decision could not have come out in favour of present appellant due to decision of those cross objections.

Thus, the observations made by this Court in aforesaid case are of no help to the present appellant and on that basis, it cannot be said that matter needs to be remanded back to the First Appellate Court. No substantial question of law as such is involved in the matter. There are concurrent findings.

11. So, the appeal stands dismissed. Civil Application disposed of.

[T.V. NALAWADE, J.]

ssc/