

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

SECOND APPEAL NO. 537 OF 2016
WITH
CIVIL APPLICATION NO. 11083 OF 2016

Shivaji s/o Madhavrao Suryawanshi,
Age 33 years, Occu. Business,
R/o Rajeshivaji Nagar, Pakharsangavi,
Taluka and District Latur .. Appellant

Versus

1. Savita w/o Vilas Pawar,
Age 41 years, Occu. Household
and Service, R/o Sambhaji Nagar,
Khadgaon road, Latur
2. Machindra s/o Vaijinath Kadam,
Age 43 years, Occu. Business,
R/o Rajeshivaji Nagar,
Pakharsangvi, Taluka and
District Latur .. Respondents

Mr R.D. Biradar, Advocate for appellant
Respondent No.1 served
Mr N.B. Ghute, Advocate for respondent No.2

CORAM : SUNIL P. DESHMUKH, J.

DATE : 14th December, 2016

ORAL JUDGMENT

1. Heard learned counsel for appellant and learned counsel for respondent no. 2. Respondent no. 1 though served, none appears for her.

2. Appellant is plaintiff in Special civil suit no. 183 of 2010 seeking declaration of ownership and injunction against interference by defendants with his possession over plot no.72 (Grampanchayat house no. 22/12) as described in the plaint as well as seeking declaration that decree passed in Regular civil suit no. 412 of 2006 and execution proceedings bearing regular darkhast no. 25/2007 in respect of said dispute are not binding on him, and further seeking declaration that sale-deed executed on 30th July, 2008 through court commissioner on behalf of respondent no.2 in respect of said plot in favour of respondent no. 1 is null and void and not binding on him.

3. The background, as it would emerge, is that suit plot originally had been owned and possessed by Rajendra Pundlikrao Nikam who sold it under a registered sale-deed to respondent no. 2 for a consideration of Rs.17,000/- on 21st October, 2004. Thereafter, respondent no.2 executed an agreement of sale in respect of suit plot in favour of respondent no.1 on 2nd December, 2005, for an agreed consideration of Rs.85,000/- and a sum of Rs.40,000/- had been paid by way of earnest money to respondent no.2 on execution of agreement to sale, further agreeing that respondent no.2 would execute sale-deed in favour of respondent no.1 before 28th February, 2006.

4. It appears to be the case of the plaintiff, since stipulation with regard to payment of balance consideration before 28th February,

2006 had not been complied with, respondent no. 2 had warned respondent no.1 that in case of failure to tender balance consideration before the scheduled date, he would be free to sell the property to others. Accordingly, respondent no. 2 executed a registered sale-deed in favour of plaintiff on 10th March, 2006 for a consideration of Rs.16,000/-. In furtherance of the same, plaintiff got his name recorded in the record of rights in respect of suit plot and also obtained electric connection and had been in possession of the same.

5. Respondent no. 1 had instituted proceedings bearing Regular civil suit no. 412 of 2006 in June, 2006 against respondent no.2 for specific performance of agreement of sale. Respondent no. 2, despite being served with suit summons, did not file his written statement. The suit was decreed and execution proceedings bearing regular darkhast no. 25/2007 were filed by respondent no. 1 and sale-deed was executed in his favour through court commissioner on behalf of respondent no.2 on 30th July, 2008 as referred to earlier. In view of aforesaid developments, sensing trouble to his interest, the plaintiff instituted aforesaid suit seeking the reliefs referred to hereinbefore.

6. Respondent no.1 resisted the suit, denying the case of the plaintiff. Respondent no.1 referred to agreement of sale dated 2nd December, 2005 for an agreed consideration of Rs.85,000/- and payment of Rs.40,000/- as earnest money and execution of sale-

deed before 22nd February, 2006. It is averred that plaintiff and respondent no. 2, in collusion, got executed a registered sale-deed dated 10th March, 2006 in favour of plaintiff without bringing the same to knowledge of respondent no.1. Respondent no. 2 and plaintiff were aware of the litigation initiated by respondent no. 1, however, they avoided appearance in the same.

7. Respondent no. 2 as well filed his written statement, denying that any agreement of sale had been executed in favour of respondent no.1.

8. The trial court framed issues as to whether the plaintiff proves that he possesses the suit plot legally, whether the plaintiff had become owner under registered sale-deed dated 10th March, 2006 and whether the decree in regular civil suit no. 412 of 2006 dated 6th January, 2007 to be not binding on him and the darkhast proceedings are not binding on him and had found that the plaintiff to be in possession of property, however, the same was not legal and had negatived the case of the plaintiff about him being owner of the suit plot under sale-deed dated 10th March, 2006 and had further refused declaration about judgment and decree in regular civil suit no. 412 of 2006 and regular darkhast no. 25 of 2007 being not binding on plaintiff and further refused to declare the sale-deed dated 30th July 2008 in favour of respondent no.1 to be null and void.

9. The court thus partly decreed the suit finding plaintiff to be in possession, had restrained respondent no. 1 from interfering with the plaintiff's possession except in due course of law. Rest of the prayers were refused.

10. The plaintiff, as such, had carried appeal therefrom bearing regular civil appeal no. 191 of 2011 whereunder appellate court had framed points viz. as to whether the plaintiff proves that he has become absolute owner of the suit plot by virtue of the sale-deed dated 10th March, 2006; whether sale-deed dated 30th July, 2008 executed by court commissioner is null and void; and whether appellant is entitled to declaration as sought.

11. The appellate court has also referred to that in regular civil suit no. 412 of 2006 against respondent no.2 by respondent no. 1, respondent no.2 had failed to file written statement and the suit had been partly decreed and execution proceedings had been pending and further to that the trial court did not grant relief of declaration in view of sale-deed dated 30th July, 2008 executed in favour of respondent no.1. The appeal was dismissed and thus this second appeal.

12. After hearing the counsel for the parties and scanning the evidence and its appreciation, appellate court found that it cannot be said that any consideration in the transaction dated 10th March 2006 between plaintiff and respondent no.2 had gone to respondent no.2. Considering the pleadings and evidence, appellate

court found that plaintiff had been aware about the agreement of sale executed by respondent no. 2 in favour of respondent no.1 and has accordingly pleaded in the plaint. The defence of time being essence of contract under agreement of sale between respondent no. 1 and 2 was available to respondent no. 2 who had not raised such a plea and would not be available to plaintiff present appellant to be raised. Though respondent no. 2 had resisted the regular civil suit no. 412 of 2006 filed by respondent no. 1 for specific performance of agreement of sale, denying agreement of sale, yet in its complete reversal in the present proceedings had admitted fact of agreement of sale asserted by the plaintiff in favour of respondent no. 1 by respondent no. 2 for a consideration of Rs.85,000/- and Rs. 40,000/- having been paid as earnest money. The appellate court has further observed that respondent no. 2 in the present proceedings has come up with plea of loan transaction between him and respondent no.1 and contention that copy of agreement of sale had been demanded back by respondent no.2 and respondent no. 1 avoided the same. The court has disbelieved the plaintiff's case having regard to the wide disparity in the consideration for transfer of property agreed upon between the plaintiff and respondent no. 2 and that agreed between respondent no. 1 and respondent no. 2. The court has also referred to the variance in evidence in respect of payment of consideration by plaintiff to respondent no. 2.

13. The appellate court has observed that four conditions under Section 19 (b) of Specific Reliefs Act cannot be said to have been satisfied in the purported transaction between plaintiff and respondent no. 2. The appellate court has further found that plaintiff had been aware of regular civil suit no. 412 of 2006 and that without seeking the setting aside of decree of specific performance, and without adjudicating the claim of *bona fide* purchaser of the same, the plaintiff cannot seek the declaration that the sale deed dated 30th July 2008 is not binding on him. The appellate court thus had dismissed the appeal.

14. The appellate court, in paragraphs no. 24 to 37 of its judgment has referred to and discussed the evidence as has been appearing in the judgment, as also referred to the submissions made on behalf of the parties.

15. Thus, it appears that the trial as well as appellate court have scanned the pleadings, submissions and evidence on behalf of the parties and appreciated the same. It is difficult to say that such an appreciation is away from the evidence on record and it is not the case that it tends to be perverse.

16. In view of the concurrent findings of facts rendered by the trial court as well as appellate court, it does not appear that the second appeal raises any substantial question of law and as such, the same stands dismissed.

17. Civil application stands disposed of.

SUNIL P. DESHMUKH,
JUDGE

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