

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

906 SECOND APPEAL NO. 824 OF 2012
WITH CA/14163/2012 IN SA/824/2012 WITH SA/789/2013

THORAJI RAGHOBHA JUNE
VERSUS
ANANDA BAPUJI UPASE

Shri. A.G. Godhamgaonkar, Advocate, for appellant.

Shri. U.B. Bilolikar, Advocate, for respondent.

CORAM: T.V. NALAWADE, J.

DATE : 3rd AUGUST 2016

ORDER:

1) Second Appeal No.824/2012 is filed against the decision given on counter claim, Exhibit 74, from Regular Civil Suit No.163/1990 (old) which was renumbered as 335/1991 (new) and which was pending in the Court of the Civil Judge, Junior Division, Naigaon (Bz). Counter claim for relief of declaration that the agreement of sale allegedly executed by the defendant is void and for relief of possession is allowed by the trial Court and the decision is confirmed by the District Court Nanded in Regular Civil Appeal No.11/2009.

Second Appeal No.789/2013 is filed against the judgment and decree of Regular Civil Suit No.22/2003 which was pending in the Court of the Civil Judge Junior Division Naigaon and also against the decision of Regular Civil Appeal No.4/2009 in which the decision of the trial Court of dismissal of the suit of the present plaintiff filed for specific performance of contract is confirmed. Heard both the sides.

2) Present respondent is the owner of land Survey No.81/1 (Block No.91) admeasuirng 42 R situated at Palasgaon, Tahsil Biloli. Regular Civil Suit No.163/1990 was filed by present appellant Thoraji for relief of injunction. It was the case of the appellant that he was cultivating the land on *batai* basis for defendant and then defendant agreed to sell the suit property for consideration of Rs.10,000/- under agreement dated 7-6-1985. He contended that even when entire amount of consideration was paid and possession was with plaintiff, the defendant did not execute the sale deed and he was interfering into the possession of the plaintiff over the suit property. Only relief of injunction was claimed by the

plaintiff.

3) Defendant filed written statement and resisted the claim. He filed counter claim. He contended that plaintiff, who is close relative, like nephew of defendant, had created false record during implementation of consolidation scheme and he had got entered his name in the revenue record as the owner. It is contended that one document was executed in favour of one Tekale as the loan was taken by defendant from Tekale. It is contended that Tekale insisted for execution of sale deed or return of the money and then defendant had approached Sheshrao, who was other close relative of defendant. It is contended that Sheshrao had obtained thumb impression on blank paper and as Sheshrao was helping defendant as against Tekale such thumb impression was given and this document is subsequently used by the plaintiff as agreement of sale. It is contended that by misusing that document, plaintiff is claiming that defendant had agreed to sell the property to him.

4) The suit filed by the plaintiff for relief of perpetual injunction was dismissed in default on 17-12-1993. Counter claim of the defendant was tried but the plaintiff did not turn up to contest that counter claim. Only on the basis of the evidence of defendant, the Court decreed the counter claim and held that by deceiving defendant his thumb impression was obtained on the so called agreement of sale. As the defendant is title holder and there was no evidence in rebuttal the trial Court gave decree in the counter claim.

5) Regular Civil Suit No.22/2003 was filed after the dismissal of the suit filed for injunction and in this suit similar contentions were made by the present appellant regarding the agreement of sale. To contest the suit similar written statement was filed by present respondent. It was contended that the claim of the plaintiff was not within period of limitation and he was not entitled to get decree of specific performance of contract. Main defence was however the same viz. no agreement of sale was executed in favour of the plaintiff. This suit came to be dismissed for want of prosecution on 14-12-2005.

6) The District Court has dismissed both appeals of the present appellant by holding that he had created some false record to show that he had become owner of the suit property even when the property was not transferred to him. The District Court considered the circumstance that in the counter claim no written statement was filed by the plaintiff to the counter claim. It is held that there is no case to defend with the plaintiff. It is further held that no sufficient cause is shown by the plaintiff, appellant as to why he did not turn up to contest the counter claim or to prosecute his suit filed for specific performance of contract. The contention of the appellant that brother of the appellant was sick was considered but as no record was produced and no evidence was given to substantiate this contention, the Court held that plaintiff failed to prove that he was prevented due to sufficient cause from attending the Court and from giving evidence in the matter filed by him and also in the matter filed by the defendant as counter claim.

7) Learned counsel for the appellant, plaintiff of two suits submitted that the dispute involved immovable

property and so opportunity needs to be given to the appellant, plaintiff to lead evidence to substantiate his case. Learned counsel for the respondent produced on record copy of sale deed executed by present appellant in favour of one Panchal in the year 2005. This circumstance shows that even after dismissal of the suit filed for relief of specific performance of contract, the plaintiff used the record created by him to show that he was owner and he executed the sale deed. There was no title, ownership with the plaintiff and so he could not have executed such sale deed. Further the counter claim was still pending and it came to be decided in favour of the defendant on 13-7-2006. These circumstances show that plaintiff is not entitled to any discretionary relief. It can be said that plaintiff wanted to create complications and he was not sure about the success in the matter and so he took such steps. Even if the case of the plaintiff about execution of agreement is considered and accepted as it is, the circumstance remains that the first suit was filed in the year 1990 but it was only for relief of perpetual injunction and in that suit he had not shown readiness and willingness to perform his part of the contract for getting

executed the sale deed. He filed suit for such relief in the year 2003 when the so called agreement was executed in his favour in the year 1985. When in the suit of 1990 the defendant had denied everything, there was cause of action for the suit of specific performance of contract but the plaintiff did not take such step. So the suit filed for specific performance could not have been decreed on the ground of limitation. Thus nothing can be achieved by giving opportunity to the plaintiff to lead evidence in the suit and in the counter claim. No substantial question of law as such is involved in the matter. In the result, both the appeals stand dismissed. Civil Applications are disposed of.

Sd/-
(T.V. NALAWADE, J.)

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