

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

**907 SECOND APPEAL NO. 54 OF 2015
WITH
CA/1966/2015
IN
SA/54/2015**

SHAIKH BABU SHAIKH AHMED AND ANR.

VERSUS

SHAIKH MUKTAR SHAIKH HUSAIN

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Mrs. M.A.Kulkarni, Advocate for Appellants.

Mr. S.S.Jadhavar, Advocate for Respondent.

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CORAM : T.V.NALAWADE, J.

DATE : 11th AUGUST, 2016

ORDER :-

. The Appeal is filed against the Judgment and Decree of R.C.S. No. 74/1997 which was pending in the Court of the Civil Judge [Jr.Division], Selu, District Parbhani and also against the Judgment and Decree of R.C.A. No. 127/2011 which was pending in the Court of the Principal

District Judge, Parbhani. Heard both sides.

2. The Suit was filed by the respondent for relief of declaration and for possession of agricultural land bearing S.No. 392/2 (C) admeasuring 1 H. 8 R. situated at village Waloor, Tahsil Selu, District Parbhani. It is the case of the plaintiff that defendant No. 1 was owner of the suit property and under registered sale deed dated 16/04/1981, the property is sold to the plaintiff. It is contended that there was some dispute between the plaintiff on one hand and defendant and his relatives on the other hand and they had filed R.C.S.No. 434/1987 against the plaintiff for injunction, but the Suit was dismissed.

3. It is the case of the plaintiff that behind his back, defendant No. 1 created some record in favour of father of defendant No. 2 and then name of father of defendant No. 2 was entered in the revenue record. It is contended that plaintiff had taken objection to the said entry, but the revenue authority directed the parties to approach the civil Court for getting decision on the dispute. It is contended that on the basis of that entry, defendant No. 2 took possession on 30/10/1996 and cause of action took place for the Suit.

4. Defendant Nos. 1 and 2 filed Written Statements separately. Defendant No. 1 admitted the execution of sale deed in favour of plaintiff, but it was contended that it was not real transaction and it was mortgage transaction. He contended that he had taken loan of ₹ 2,000/- and only by way of security, document was executed in favour of the plaintiff. He also contended that the suit property had come to him under Inam Abolition Act and it was not possible for him to sell the property without taking prior permission of the Collector.

5. Defendant No. 2 contended that there was agreement to sale between defendant No. 1 and father of defendant No. 2 in the year 1980 and since then the father of defendant No. 2 and then defendant No. 2 came in possession of the suit property. They denied that they had forcibly dispossessed plaintiff from the suit property.

6. Issues were framed on the basis of aforesaid pleadings. Both sides gave evidence. The trial Court held that the disputed transaction was an out and out sale transaction and defendant No. 1 failed to prove that it was loan transaction. The trial Court held that defendant No. 2

failed to prove that there was agreement of sale and he had right to keep the possession under agreement of sale. It was held that the Suit was within limitation and decree of possession and also declaration was given. These findings are confirmed by the first appellate Court.

7. Learned counsel for appellants/original defendants submitted that even if it is presumed that there was sale transaction of the year 1981, it can not be said that Suit was filed within limitation as there is no record to show that possession of the suit property was handed over to the plaintiff. It is not disputed that there was recital of handing over possession in the sale deed though entry was not made in the revenue record in ownership column and also in crop cultivation column. One xerox copy of so called agreement of 1980 was produced in the trial Court by the defendants, but the said document was not proved as secondary evidence. 7/12 extract shows that the name of father of defendant No. 2 was entered in crop cultivation column from the year 1987-88. The name of defendant No. 2 came to be entered in the crop cultivation column from the year 1997-98. Even if it is presumed that under one agreement, the possession was given in 1980 to the father of defendant No. 2 by defendant

No. 1, it can be said that the possession of defendant No. 2 and his father was permissive in nature. After the sale of the property to the plaintiff by defendant No. 1, plaintiff had stepped in the shoes of defendant No. 1 and so the possession of defendant No. 2 continued to be the permissive possession. It is not the case of defendant No. 1 that he was in possession though there was revenue record of aforesaid nature in his favour.

8. In the Written Statement, there is no specific pleading to claim ownership due to adverse possession and there is vague pleading that from 1980 onwards, defendant No. 2 and his father were in possession of the suit property on the basis of agreement of sale. In view of these circumstances, the Courts below could not have decided this point in favour of defendant No. 2.

9. On one hand, defendant No. 1 contended that he had agreed to sell the property to the father of defendant No. 2 and on the other hand he tried to contend that the transaction made in favour of the plaintiff was of security nature, mortgage transaction. In view of the aforesaid facts and circumstances, it is not possible to believe that the

transaction was made only by way of security and loan amount was taken by defendant No. 1 from defendant No. 2. The findings of the Courts below are concurrent on this point.

10. If there was agreement of sale executed in favour of the father of defendant No. 2 in the year 1980, it can be said that no readiness and willingness was shown by defendant No. 2 to complete the transaction and defendant No. 2 had never challenged the sale transaction made in favour of the plaintiff. In view of these circumstances, possession of defendant No. 2 could not have been protected by the Courts below. This Court holds that the findings are on question of facts and there is no possibility of formulation of substantial question of law.

11. In the result, Second Appeal stands dismissed. In view of dismissal of Appeal, C.A. No. 1966 of 2015 stands disposed of.

12. At this stage, learned counsel for the appellants requested for grant of stay. It appears that there is no stay of any kind at present in the matter. There is no question of

continuation of stay and in view of the facts and circumstances of the case, stay is refused.

[T.V.NALAWADE, J.]

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