

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO.778 OF 2016
along with
CIVIL APPLICATION NO.1550 OF 2016**

Subhash Janardhan Vinchu .. Appellant
Vs.
Suresh Janardhan Vinchu & Anr. .. Respondents

Mr.Dilip Bodake for the Appellant.
Mr.NWadikar i/by Mr.Nandu Pawar for the Respondent no.1.

CORAM : R.D. DHANUKA, J.
DATE : 6th December 2016

P.C.

. By this appeal filed under Section 100 of the Code of Civil Procedure, 1908, the appellant (original defendant) has impugned the judgment and order dated 11th February 2016 passed by the learned District Judge-1, Satara dismissing the Regular Civil Appeal No.304 of 2008 filed by the appellant. In the said appeal, the appellants had impugned the judgment and decree dated 31st July 2008 passed by the learned trial Judge allowing the suit filed by the respondents (original plaintiffs) inter alia praying for possession of the suit property bearing CTS No.35 admeasuring 94.5 sq.mtrs.

2. The plaintiff no.1 and the defendant are brothers. It was the case of the plaintiffs that the suit property was sold by mother Krishnabai of the plaintiff no.1 and the defendant in favour of the plaintiff no.1 by sale deed dated 9th February 1995. It was the case of the plaintiffs that the said property was, however, in possession of the defendant

unauthorisedly. The plaintiffs had accordingly filed a suit for possession. The suit was resisted by the defendant on the ground that the said suit property which was sold to the plaintiff no.1 was though purchased by the father of the plaintiff no.1 and the defendant in the name of Krishnabai, it was with intention to acquire for the joint family.

3. Learned trial Judge framed eight issues. Both the parties led oral and documentary evidence before the learned trial Judge.

4. The learned trial Judge after considering the oral and documentary evidence rendered a finding that the defendant had failed to prove that the suit property purchased in the name of Krishnabai was for and on behalf of the joint family. It was held that the defendant had failed to prove that the sale deed dated 9th February 1995 executed by Krishnabai in favour of the plaintiff no.1 was void ab initio for want of consideration as well as want of free consent as alleged.

5. It was the case of the plaintiffs before the learned trial Judge that the suit property was allotted to the share of the plaintiff no.1 in the year 1994. The defendant, however, failed to prove such alleged oral partition before the learned trial Judge. The trial Court accordingly directed the defendant to hand over possession of the suit property to the plaintiffs.

6. Being aggrieved by the judgment and decree dated 31st July 2008, the defendant filed an appeal (Regular Civil Appeal No.304 of 2008) in the Court of the learned District Judge-1, Satara.

7. The learned District Judge formulated seven points for determination. After considering the oral and documentary evidence, the learned District Judge rendered a finding that the suit property was not purchased by the father in the name of Krishnabai for and on behalf of the joint family. The defendant also failed to prove that the suit property was allotted to his share in the year 1994 as per the oral partition. The plaintiffs had established their exclusive ownership over the suit property in view of sale deed dated 9th February 1995 and established that the defendant was in unauthorised possession of the suit property.

8. Mr.Bodake, learned counsel appearing for the appellant (original defendant) submits that father of the plaintiff no.1 and the defendant had purchased two more properties in the names of other family members as the joint family properties. He submits that the plaintiffs had not included those two properties as the suit properties.

9. The next submission of the learned counsel is that the plaintiffs had failed to produce the original of the alleged sale deed dated 9th February 1995. He submits that the certified copy of the alleged sale deed could not have marked by the learned trial Judge as exhibit. He submits that the findings rendered by the two Courts below are contrary to the evidence led by the parties and warrants interference by this Court under Section 100 of the Code of Civil Procedure, 1908.

10. In so far as the first submission of the learned counsel for the defendant that the other two properties ought to have been included as the suit properties is concerned, in my view, there is no merit in this submission of the learned counsel for the appellant. The suit was filed by

the plaintiffs simplicitor for possession of the suit property based on the sale deed dated 9th February 1995 executed by mother Krishnabai in favour of the plaintiff no.1. The plaintiffs had applied for possession of the suit property and was thus not required to include any other properties which were allegedly purchased in the names of other family members by the father. In my view, if according to the defendant, all the properties belonged to the joint family and not a party in whose favour the properties were purchased by father, the defendant ought to have filed a suit for declaration to the effect and ought to have applied for partition. Admittedly no such suit was filed by the defendant for such declaration.

11. In so far as the submission of the learned counsel for the defendant that there was an oral partition and the suit property was allotted to his share in the year 1994 is concerned, the defendant could not prove such allegation though led oral evidence before the learned trial Judge. The defendant had not filed any counter claim for seeking such declaration.

12. In so far as the submission of the learned counsel for the defendant that the learned trial Judge could not have exhibited the certified copy of the sale deed dated 9th February 1995 is concerned, it is not in dispute that in the cross-examination of the defendant, he had admitted the execution of such sale deed in favour of the plaintiff no.1 by mother Krishnabai. The two Courts below have considered the oral evidence of the defendant who admitted the execution of the sale deed. In my view, there is thus no substance in this submission of the learned counsel for the defendant.

13. In so far as the submission of the learned counsel for the defendant that the two Courts below have rendered various findings contrary to evidence led by the defendant is concerned, a perusal of the judgments and decrees passed by the learned trial Judge as well as the first appellate Court clearly indicates that both the Courts below have considered the oral and documentary evidence at a great length in the impugned judgments and decrees and the findings being concurrent and being not perverse, cannot be interfered with by this Court under Section 100 of the Code of Civil Procedure, 1908. In my view, the appeal is devoid of merit. No substantial question of law arises in this second appeal. Both the judgments and decrees passed by the two Courts below are well reasoned judgments and decrees. I do not find any infirmity with the findings rendered by the two Courts below.

14. Second appeal is accordingly dismissed. In view of dismissal of the second appeal, civil application does not survive and is accordingly dismissed. No order as to costs.

15. Oral application of Mr.Bodake, learned counsel appearing for the defendant which is vehemently opposed by the learned counsel appearing for the plaintiffs, execution and implementation of the judgments and decrees passed by the learned trial Judge as well as the first appellate Court is stayed for a period of four weeks from today. It is made clear that during this period, the defendant shall not create any third party rights or shall not part with possession in favour of the third party. If any Special Leave Petition is filed by the defendant, the papers

and proceedings in the said petition along with notice shall be served upon the plaintiffs in advance.

R.D. DHANUKA, J.