

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 7371 OF 2013

SURESH MAHADEO MAHADIK	...Petitioner
<i>Versus</i>	
KUSUM KISAN ALIAS KRISHNA YADAV	...Respondent

....
Mr. Amol P. Mhatre, for the Petitioner.
Mr. Balasaheb Deshmukh, Advocate for the Respondent.
....

CORAM : R. G. KETKAR, J.

DATE : 29th JANUARY, 2016

P.C.

1. Heard Mr. Amol Mhatre, learned Counsel for the petitioner and Mr. Balasaheb Deshmukh, learned Counsel for the respondent, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the judgment and order dated 6.4.2013 passed by learned District Judge No.11, Pune in Misc. Civil Appeal No.53 of 2013. By that order, learned District Judge allowed the appeal preferred by the respondent, hereinafter referred to as the 'plaintiff' and issued injunction restraining the petitioner, hereinafter referred to as the

'defendant' from taking possession in pursuance to the decree passed in Regular Civil Suit No.19/1985 (Darkhast No.24/1998) till disposal of the Suit instituted by the plaintiff.

3. Mr. Mhatre submitted that the petitioner herein has instituted Regular Civil Suit No.19/1985 against (1) Dattatraya Maruti Yadav (since deceased through L.Rs.), (2) Krishnabai Prabhakar Bodke and (3) Arjun Yadav for specific performance of the agreement of sale dated 11.11.1975. He submitted that Maruti Yadav had three sons, namely, defendant No.1 Dattatraya, defendant No.3 Arjun and Kisan. Said Kisan was not found since the year 1986. Maruti has executed an agreement to sale on 11.11.1975 in favour of the plaintiff in that suit, defendant herein. During pendency of that Suit, defendant No.1 Dattatray expired leaving behind his LR's defendant Nos.1a to 1c. Despite several attempts made by the defendant herein, the suit summons were not served on the defendants therein. A public notice was issued in daily newspapers. Despite that the defendants therein did not appear in the trial Court and the suit proceeded ex parte. The suit filed by defendant herein was decreed on 24.4.1997.

4. The defendant herein filed Regular Darkhast No.24 of 1998. In that Darkhast, the plaintiff herein filed application under Section 47 of Code of Civil Procedure, 1908 (for short, 'CPC') for declaration that the decree dated 24.4.1997 passed in Regular Civil Suit No.19/1985 is not binding on her and for possession of her undivided share in the suit property. By order dated 13.4.2007, learned trial Judge rejected the application by observing that the plaintiff has to institute separate suit for agitating her grievances and the executing Court cannot go behind the decree. In pursuance thereof, the plaintiff instituted Regular Civil Suit No.85/2007 for declaration that the decree passed in Regular Civil Suit No.19/1985 is not binding on her and for separate possession of her undivided share in the suit property and for perpetual injunction restraining the defendants from obstructing her peaceful possession.

5. During pendency of the suit, the plaintiff moved application for temporary injunction. By order dated 30.1.2013, learned trial Judge rejected the application. Aggrieved by that decision, the plaintiff preferred Misc. Civil Appeal which is allowed by learned District Judge. It is against this decision,

the defendant has instituted the present Writ Petition.

6. Mr. Mhatre submitted that the defendant herein had instituted Regular Civil Suit No.19 of 1985 for specific performance of the agreement for sale dated 11.11.1975. Despite several attempts made by him, the suit summons were not served on the defendants. A public notice was issued and despite that the defendants did not appear in the Suit. He further submitted that in fact in reply dated 19.10.2007 filed by the defendant while opposing the application for interim relief, it was specifically asserted that the defendant No.3 Arjun was duly served with the suit summons. Order for suit to proceed ex parte, was passed before his death. However, the legal representatives of defendant No.3 did not appear and contest the suit instituted by him. He submitted that learned District Judge while allowing the appeal observed that the decree in the previous suit is obtained fraudulently. The plaint also shows that the plaintiff's husband was not arrayed in the suit. He submitted that while deciding the interlocutory proceedings, learned District Judge was not justified in holding that the decree obtained by the defendant herein is obtained

fraudulently.

7. On the other hand Mr. Deshmukh supported the impugned order. He, however, fairly stated that the observations made in paragraph-9 of the impugned order that “The decree is obtained fraudulently” may be set aside and learned trial Judge may be directed to decide the Suit on the basis of the evidence on record and in accordance with law uninfluenced by the observations made in the impugned order.

8. I have considered the rival submissions advanced by learned Counsel for the parties. I have also perused the material on record.

9. The defendant herein had instituted Regular Civil Suit No.19 of 1985 for specific performance of the contract. Suit was decreed on 24.4.1997. Clause (5) of the operative part of said order shows that the defendants are directed to hand over actual possession of the suit property to the plaintiff therein (defendant herein). In other words the defendant herein is not in possession of the suit property. The plaintiff had earlier filed an application under Section 47 of CPC in Darkhast filed by the

defendant herein for execution of the decree passed in the Suit. Learned trial Judge rejected the application by observing that the plaintiff has to adopt appropriate proceedings. In pursuance thereof, she has instituted the present Suit for declaration and perpetual injunction. Learned trial Judge rejected the application and learned District Judge allowed the appeal. At this stage if the injunction granted by learned District Judge is vacated, suit instituted by the plaintiff will become infructuous. Mr. Mhatre submitted that the defendant has instituted suit in the year 1985 and if the Court is not inclined to interfere with the impugned order, learned trial Judge may be directed to dispose of the Suit in a time bound manner.

10. While deciding the appeal against the interlocutory order, learned District Judge in paragraph-9 has observed that "the decree is obtained fraudulently". In my opinion, said finding was not called for. Hence that finding recorded in paragraph-9 of the impugned order, stands deleted. Subject to that, no case is made out for interfering with the impugned order. Needless to observe that the defendant is at liberty to

apply to the trial Court for expeditious disposal of the Suit in a time bound manner. If such an application is made, the learned trial Judge will have due regard to the fact that the earlier Suit instituted by the defendant in the year 1985 was decreed in the year 1997 and said decree is challenged in 2007 by the plaintiff. Learned trial Judge will pass appropriate order. Subject to this, the Petition fails and the same is dismissed. Learned trial Judge will decide the Suit on the basis of the evidence of record and in accordance with law uninfluenced by the observations made in the impugned order and in this order. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)