

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***CIVIL APPELLATE JURISDICTION*****SECOND APPEAL NO. 441 OF 2014****Babaji Raoji Pandharkar****..... Appellant****VERSUS****Balu Maruti Bhakare & Ors.****..... Respondents**

Mr.R.D.Soni, a/w. Mr.V.R.Kasle, i/b. M/s.Ram & CO. for the Petitioner/Appellant in Second Appeal.

Ms.Anjali Helekar for the Respondent no.6.

CORAM : R.D. DHANUKA, J.**DATE : 4th OCTOBER, 2016****P.C.**

By this second appeal, the appellant (original plaintiff) has impugned the judgment and decree dated 6th June, 2014 passed by the Extra Joint Ad-hoc District Judge-2 and Additional Sessions Judge, Pune dismissing the Civil Appeal No.682 of 2009 filed by the appellant (original plaintiff).

2. In the said Civil Appeal No.682 of 2009, the plaintiff had impugned the judgment and decree dated 27th November, 2009 passed by the learned Joint Civil Judge Junior Division, Civil Court, Ghodnadi, Shirur partly decreeing the suit to the extent that the defendants were restrained from disturbing the possession of the plaintiff over the suit property, without following the due process of law. However in paras 3 and 4 of the said judgment and decree dated 27th November, 2009, the learned trial judge has decreed the counter claim filed by the defendant no.6 and has held that the defendant no.6 is entitled to recover the possession of the suit property from the plaintiff.

3. The plaintiff had filed a suit for specific performance in respect of the agreement of sale dated 27th June, 1995 alleged to have been entered into between the plaintiff and defendant no.1.

4. It was the case of the plaintiff that under the said agreement for sale dated 27th June, 1995, the plaintiff had paid a sum of Rs.75,000/- to the defendant no.1 against the consideration amount of Rs.85,000/-. According to the plaintiff, the remaining amount of Rs.10,000/- was payable to the defendant no.1 at the time of registration of the sale deed. It was also the case of the plaintiff that under the said agreement for sale, the plaintiff was put in possession of the suit land by the defendant no.1 and the possession receipt was also issued by the defendant nos.1 and 2 on the same day in favour of the plaintiff. According to the plaintiff, since the defendant nos. 1 and 2 did not secure necessary permission for transfer of the suit land from the competent authority and failed to execute the sale deed, the plaintiff filed a suit (Regular Civil Suit.No. 20 of 2001) for specific performance of the said agreement for sale and for other reliefs.

5. On 12th February, 1997, the father of the defendant no.1 executed an agreement for sale in favour of the defendant nos. 3, 4 and 5 for consideration. On 23rd September, 1998 defendant nos. 3 to 5 in turn entered into another agreement for sale in favour of the defendant no.6.

6. It was the case of the defendant no.6 that the plaintiff obtained possession in view of the ad-interim order granted by the trial court in favour of the plaintiff. All the defendants filed their written statement. The defendant no.6 filed a counter claim inter alia praying for possession of the suit property.

7. The learned trial court framed eight issues for determination. The parties led oral as well as documentary evidence before the learned trial judge.

8. By a judgment and decree dated 27th November, 2009, the learned trial judge decreed the said suit partly and restrained the defendants from disturbing the possession of the plaintiff over the suit property, without following due process of law. The learned trial judge decreed the counter claim inter alia praying for recovery of the possession filed by the defendant no.6. It is also held that the defendant no.6 is entitled to recover the possession of the suit property from the plaintiff.

9. Being aggrieved by the said judgment and decree dated 27th November, 2009 passed by the learned trial judge, the plaintiff filed an appeal (Civil Appeal No.682 of 2009) before the learned District Judge. The learned District Judge formulated eight points for determination. The learned District Judge by a judgment and decree dated 6th June, 2014 dismissed the appeal filed by the plaintiff.

10. Being aggrieved by the said judgment and decree passed by the first appellate court, the plaintiff filed this second appeal under section 100 of the Code of Civil Procedure, 1908.

11. Since this court by an order dated 9th September, 2014 has held that there was no reason to interfere with the findings and decree of the two courts below refusing to grant specific performance of the contract in favour of the plaintiff and in view of the dismissal of the review petition (16 of 2016) filed by the appellant (original plaintiff), I am not inclined to re-hear the learned counsel for the original

plaintiff insofar as refusal of the relief for specific performance of agreement for sale is concerned.

12. Mr.Soni, learned counsel for the appellant invited my attention to the written statement and counter claim filed by the defendant no.6 and also the oral evidence of the defendant no.6. He submits that even if the two courts below were presumed to be right in rejecting the relief of specific performance of the agreement for sale, no counter claim filed by the defendant no.6 could be decreed by the learned trial judge and could not have been confirmed by the first appellate court.

13. It is submitted by the learned counsel for the plaintiff that there was no prejudicial evidence of the defendant no.6 for seeking possession of the suit property. He submits that the plaintiff was placed in possession of the suit property at the time of execution of the agreement for sale in favour of the plaintiff by defendant nos. 1 and 2 and did not come in possession by virtue of ad-interim order passed by the trial court.

14. Mr.Soni, learned counsel for the plaintiff invited my attention to the judgment and decree dated 27th November, 2009 passed by the learned trial judge and would submit that the defendant no.6 cannot get possession of the suit property without filing a separate suit against the plaintiff for recovery of the possession. He submits that the execution application filed by the defendant no.6 cannot be considered as a due process of law for the purpose of recovery of possession by establishing her independent rights for recovery of possession.

15. It is submitted by the learned counsel that the findings of both the courts

below insofar as counter claim is concerned, are perverse and based on no evidence and thus requires interference by this court under section 100 of the Code of Civil Procedure, 1908.

16. Mrs.Helekar, learned counsel for the respondent no.6 on the other hand invited my attention to the pleadings filed by both the parties and also the evidence led by the parties. He also led emphasis on some of the findings recorded by the two courts below insofar as execution of the alleged agreement in favour of the plaintiff by the defendant nos. 1 and 2 is concerned. She submits that the plaintiff had failed to prove that any such alleged agreement for sale was entered into in his favour by the defendant nos. 1 and 2. She submits that defendant nos. 1 and 2 could not have entered into any such alleged agreement for sale in favour of the plaintiff. She submits that the plaintiff had obtained possession of the suit property after obtaining the ad-interim order passed by the learned trial judge.

17. Insofar as alleged possession of the plaintiff is concerned, learned counsel invited my attention to the findings recorded by the first appellate court and would submit that it is apparently held by the first appellate court that the plaintiff had tempered the date on the possession receipt and has accordingly committed a fraud. She submits that since the two courts below have rejected the relief of specific performance in favour of the plaintiff and since the defendant no.6 had established the agreement in her favour entered into by the defendant nos. 3 to 5, counter claim was rightly allowed by the trial court and the plaintiff had been rightly directed to handover the possession of the suit property to the defendant no.6. She submits that the findings of fact recorded by the two courts below being not perverse cannot be interfered with by this court under section 100 of the Code of Civil Procedure, 1908.

18. Insofar as submission of Mr.Soni, learned counsel for the plaintiff that the execution proceedings cannot be construed as a proceeding of due process of law is concerned, she submits that the two courts below have rightly directed the plaintiff to handover the possession of the suit property by allowing the counter claim filed by the defendant no.6 and thus the defendant no.6 was not required to file any separate suit for recovery of possession.

19. Insofar as the observations made by this court for refund of the amount alleged to have been made by the plaintiff to the defendant nos. 1 and 2 under the alleged agreement for sale is concerned, it is submitted by the learned counsel that since the plaintiff had failed to prove the payment of any consideration amount to the defendant nos. 1 and 2, the question of refund of any amount to the plaintiff did not arise. No such order could have been passed for refund of the amount even by the first appellate court by exercising the power under Order 41 Rule 33 of the Code of Civil Procedure.

20. Mr.Soni, learned counsel for the plaintiff in rejoinder submits that this court shall remand the matter for clarification whether defendant no.6 shall be directed to file a separate suit for recovery of the possession or counter claim filed by the defendant no.6 was valid for recovery of the possession.

21. A perusal of the record to which my attention is invited by the learned counsel of both the parties clearly indicates that both the courts below have recorded the findings of fact insofar as execution of the alleged agreement for sale by the defendant nos. 1 and 2 in favour of the plaintiff is concerned. The plaintiff has failed to prove before both the courts below that the defendant nos. 1 and 2 had

agreed to sell the suit property to the plaintiff for a sum of Rs.85,000/- or for any other amount. The plaintiff also failed to prove that the defendant nos. 1 and 2 had accepted Rs.75,000/- and executed the agreement in his favour. It is not in dispute that the plaintiff had amended the plaint and had applied for declaration that the sale dated 23rd September, 1998 executed by the defendant nos. 3, 4 and 5 in favour of defendant no.6 is void on the principles of lis-pendence.

22. Learned trial judge has held that the defendant nos. 3, 4 and 5 had entered into an agreement for sale in favour of the defendant no.6. The defendant no.1 had entered into an agreement with defendant nos. 3, 4 and 5. The plaintiff was fully aware of the execution of the agreement by defendant no.1 in favour of some of the other defendants.

23. A perusal of the impugned judgment and decree passed by the first appellate court indicates that the first appellate court has independently considered the oral and documentary evidence led by both parties and has held that in the recital in the agreement for sale, it was made clear that the possession was to be delivered in favour of the plaintiff at the time of execution of the sale deed on payment of amount of consideration of Rs.10,000/-. The execution of the agreement in favour of the plaintiff itself was disputed by the defendant nos. 1 and 2. The plaintiff in his cross examination admitted that in the recital of the agreement for sale it was provided that the possession of the suit land would be delivered by the defendant no.1 in his favour at the time of execution of the said deed after receipt of the balance consideration. Insofar as possession receipt relied upon by the plaintiff is concerned, the first appellate court held that for the reasons best known to the plaintiff, the possession receipt was executed on the day showing that the possession was delivered by the defendant no.1 in favour of the plaintiff. The said

possession receipt was prepared on the stamp paper of Rs.20/- which was purchased on 7th June, 1996 but the date was altered to 27th June, 1995 by adding digit '2' before the digit '7' and altering last digit '6' to digit '5'. The plaintiff could not explain in the evidence as to why the date appearing on possession receipt was altered and when it was altered.

24. The first appellate court also considered the oral evidence of the plaintiff who admitted that he was aware of the execution of the sale deed in respect of the suit property by the father of the defendant no.1 in favour of the defendant nos. 3 to 5 at the time of execution of the sale in question.

25. The first appellate court has held that if the plaintiff has suit land on the basis of the order of the court, the defendant no.6 shall have to be handed over possession of the suit land. The learned trial judge has rightly decreed the counter claim filed by the defendant no.6.

26. In my view, the findings recorded by the two courts below insofar as counter claim is concerned, is based on the oral and documentary evidence and cannot be interfered with by this court under section 100 of the Code of Civil Procedure.

27. Be that as it may, since the findings rendered that the plaintiff came in possession of the suit property by virtue of the interim order passed by the learned trial judge and since the plaintiff failed to establish that the agreement for sale was entered into by the defendant nos. 1 and 2 in favour of the plaintiff or that he had paid any consideration amount to the defendant nos. 1 and 2 or was placed in possession in part performance of the alleged agreement for sale under section 53(A) of the Transfer of Property Act and in view of the fact that the defendant

no.6 had established that the defendant nos. 2, 3 and 4 had sold the property in her favour, the trial court was right in passing the decree for possession of the suit property in her favour.

28. Insofar as observations made by this court for payment of the refund of the earnest money alleged to have been paid by the plaintiff to the defendant nos. 1 and 2 is concerned, since the two courts below have rendered the finding that the plaintiff has failed to prove the payment of any amount, in my view the first appellate court could not have even otherwise passed any order for refund of the amount alleged to have been paid by exercising the power under Order 41 Rule 33 of the Code of civil Procedure.

29. Insofar as last submission of Mr.Soni, learned counsel for the plaintiff that in view of the learned trial judge in paragraph (2) of the trial judgment and decree clarifying that the defendants are restrained from disturbing the possession of the plaintiff over the suit property, without following due process of law and thus the defendant no.6 cannot get the possession of the suit property without filing a separate suit by establishing right is concerned, in my view there is no merit in this submission of the learned counsel for the plaintiff. The defendant no.6 in her counter claim had already claimed her right, title and interest in the suit property and had prayed for possession of the suit property from the plaintiff. The plaintiff had amended his plaint and had challenged the agreement for sale entered into by defendant nos. 2 to 4 in favour of the defendant no.6. There is no dispute that the learned trial judge decided the claim for specific performance made by the plaintiff and also the counter claim filed by the defendant no.6 in the judgment and decree dated 27th November, 2009.

30. A perusal of the order passed by the learned trial judge as well as the judgment and decree delivered by the first appellate court clearly indicates that both the courts below have passed an order for possession in favour of the defendant no.6 and against the plaintiff. In my view the court has to read the entire judgment and decree in right perspective to ascertain the relief granted by the two courts below. In view of the specific order of entitlement of the possession by the defendant no.6 against the plaintiff in respect of the suit property after dismissing the suit filed by the plaintiff, I am not inclined to accept the submission of the learned counsel for the plaintiff that the defendant no.6 was required to file a separate suit for recovery of the possession. This submission of the learned counsel is totally without merits and is rejected.

31. In my view the appeal is totally devoid of merits. I, therefore, pass the following order :-

- (a) Second Appeal No.441 of 2014 is dismissed.
- (b) In view of the dismissal of the second appeal, civil application does not survive and is accordingly dismissed.

32. Mr.Soni, learned counsel for the plaintiff at this stage seeks continuation of the ad-interim protection granted by this court which is in force since 15th March, 2015 which is vehemently opposed by Ms.Helekar, learned counsel for the respondent no.6. In view of the fact that three courts have found no substance in the case of the plaintiff, I am not inclined to accept the request of the learned counsel for the continuation of the said ad-interim order. The application for stay is accordingly rejected.

(R.D.DHANUKA, J)