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

*SECOND APPEAL NO. 839 OF 2015
with
CIVIL APPLICATION NO. 1476 OF 2015*

Mr. Umashankar Malakappa
Lonikar & Ors.

... Appellants/Applicants.

V/s.

Mr. Sharadkumar G. Pailwan & Ors.

... Respondents.

Mr. P.S. Dani, Senior Advocate a/w. Vishwanath Patil i/b. Ketan Joshi for the Appellants/Applicants.

Mr. R.S. Apte, Senior Advocate a/w. Anand Kulkarni for Respondents 3 to 9.

CORAM : N.M. Jamdar, J.

05 July, 2016.

Oral Order :-

The Appellants challenge the judgment and decree passed by the District Judge, Solapur in Regular Civil Appeal No. 15 of 2008 wherein the Appeal filed by the Appellants therein was dismissed and the cross objections filed by the Respondents - Plaintiffs were allowed. The learned District Judge declared that the

Respondents – Plaintiffs are owners of the suit property and they are in actual physical possession and are entitled to an order of permanent injunction to restrain the Appellants from disturbing their possession over the suit property and to remove the tin shades and hoardings.

2. The Respondents – Plaintiffs filed a Regular Civil Suit No. 480 of 1999 in the Court of Civil Judge, Junior Division, Solapur in respect of suit property plot nos. 38 to 44, 46 to 50 and 51 to 58 in final plot no. 94 situated at Village Shelgi, Taluka & District – Solapur. It is the case of the Respondents – Plaintiffs that they are the owners of the property and in lawful possession. Their ownership rights have been recognized by virtue of a judgment and decree in Special Civil Suit No. 102 of 1949 and Execution Proceedings No. 149 of 1950 wherein the Appellants were defendants. It is their case that Defendant Nos. 1 to 4 and their agents Defendant Nos. 5 to 7 were trying to trespass in the suit property and attempted to erect hoardings in the property and therefore, the suit for injunction was necessary. Appellants filed their written statements and contended that the Respondents – Plaintiffs are not the owners. They are not in possession of the property. It was contended that the decree in Special Civil Suit No. 102 of 1949 was never executed. The learned Civil Judge framed issues. The learned Civil Judge partly decreed the suit. It was

declared that the Respondents – Plaintiffs are owners of the suit property and the Appellants are tress-passers, however, the learned Civil Judge did not grant any order of injunction holding that the Appellants are in possession. Regular Civil Appeal No. 15 of 2008 was filed by Appellants in the District Court, Solapur. The Appellant also by way of an amendment placed certain additional material on record. The Respondents – Plaintiffs filed cross-objections alongwith application for condonation of delay, which was allowed. The learned District Judge after hearing both the sides concluded that the Respondents – Plaintiffs proved their ownership as well as possession and accordingly, by the impugned judgment and order decreed the suit in favour of the Respondents – Plaintiffs. Thereafter, the present Appeal is filed.

3. I have heard Mr. P.S. Dani, learned Senior Advocate for the Appellants and Mr. R.S. Apte, learned Senior Advocate for the Respondents.

4. Mr. Dani firstly submitted that the suit is filed by the Respondents – Plaintiffs with a prayer that they should be declared owners by virtue of the compromise decree in Regular Civil Suit No. 102 of 1949. He submitted that therefore the entire basis of the claim of the Respondents – Plaintiffs is the said compromise decree which was never registered. Mr. Dani relying on the provisions of the Registration Act, 1908 and the decision of the Apex Court in the

case of *Phool Patti and Anr. v/s. Ram Singh (dead) through L.Rs. & Anr.* reported in *2015(3) SCC 164*, submitted that since the compromise decree was never registered, the Respondents – Plaintiffs cannot be stated to be the owners thereof. He submitted that the sale deed which was executed in favour of the Appellants by the father of the Respondents – Plaintiffs was never set aside in the compromise decree.

5. This submission cannot be accepted. The Regular Civil Suit No. 102 of 1949 was filed by the mother of the Respondents – Plaintiffs on behalf of them as they were minors. The suit was filed since the father of the Respondent – Plaintiffs had sold the property in favour of the Defendants by virtue of a sale deed in the year 1947. This suit ended in compromise and the suit property was recognized as in the ownership of the Respondents – Plaintiffs. The question that arises is whether the said decree would require registration. In the case of *Bhoop Singh v/s. Ram Singh Major and Ors. reported in (1995) 5 SCC 709*, the Apex Court has summarized the legal proposition. The Apex Court observed that if the compromise decree were to create for the first time right, title or interest in immovable property of the value of Rs.100 or upwards in favour of any party to the suit the decree or order would require registration. Thus if a compromise decree were to create a right for the first time in the immovable property such decree would require registration.

Question is whether right of the Respondents – Plaintiffs can be stated to be have accrued for the first time by the compromise decree. Admittedly, the suit property is an ancestral property. The Respondents – Plaintiffs, being coparceners acquired right in the suit property at birth. The father of the Respondents – Plaintiffs who sought to dispose of the property could do so only for legal necessity. There is no finding in this compromise decree that the sale deed was for legal necessity. Once the Respondents - Plaintiffs had acquired right in the property at birth, the compromise decree only recognized such right and did not confer the right for the first time. Therefore, the contention of Mr. Dani based on Section 17 of the Registration Act and the decision of the Apex Court in the case of *Bhoop Singh*, cannot be accepted. As regard the contention that the prayer in the present Suit indicates that the Suit is filed for declaration that compromise decree made the Respondents – Plaintiffs owners is concerned, the plaint will have to be seen in totality. The Suit was filed and the Appellants who were party to the compromise decree were not recognizing the same and were acting contrary to it. Therefore, the present suit had to be filed for a declaration to the effect that inspite of the compromise decree recognizing a pre-existing right, the Appellants were not acknowledging it and therefore, declaration was necessary that the compromise decree is binding of them. Therefore, the learned District Judge has rightly concluded that the Suit was filed to remove

the cloud on the title and the compromise decree only recognized the right of the Respondents – Plaintiffs.

6. Mr. Dani then submitted that the learned District Judge has erroneously reversed the finding as to the possession of the Appellants. He submitted that voluminous documentary evidence by way of an amendment was produced in the District Court. He submitted that inspite additional evidence being permitted by this Court, the learned District Judge discarded the same. He submitted that the documents and evidence would show that the Appellants had taken various permissions and got the plans for the suit property sanctioned and made substantial investments. He also submitted that the Respondents – Plaintiffs in clear terms have admitted that after the Appellants came in possession, the Suit is filed. He submitted that in view of the fact that the Appellants were in possession, the Suit for injunction could not have been filed and at the most the suit for recovery of possession ought to be filed which was not maintainable in the Court of Civil Judge, Junior Division, considering the valuation of the property. Mr. Apte on the other hand contended that the documentary evidence has been considered and there are various admissions by the Appellants in their cross-examination which would show that the Appellants are not in possession of the property.

7. As regard the issue of possession of the property is concerned, it has to be kept in mind the property is a open piece of land admeasuring approximately 75,000 sq.ft. After the compromise decree was entered into, the possession receipt was executed on 6 February 2015 in Execution Proceedings No. 149 of 1950. Pursuant to this execution proceedings, the Respondents – Plaintiffs were put in possession. The Appellant in the cross-examination has admitted that he has no document to show that the possession, which was lawfully received by the Respondents – Plaintiffs by way of execution proceedings, lost through legitimate means. In view of this admission, it is clear that the possession was received by the Respondent – Plaintiffs through the execution proceedings. There is no document or instrument by which the possession was restored to the Appellants.

8. As regard the physical possession of the property is concerned, as stated earlier, the property is around 75,000/- sq.ft. The Appellants put up few tin shades on location in the suit property. It is admitted by the Appellants that nobody staying in these tin shades. By merely putting up a few tin huts, it cannot be said that the actual physical possession of the entire 75,000 sq. ft. was with the Appellants.

9. These shades are put up only to create a case of possession. Mr. Dani placed heavy reliance in the statement made in the cross-examination by the Respondents – Plaintiffs, it has to be seen in context. He submitted that the admission that after the Appellants took possession of the suit property, the suit is filed and that the Respondents – Plaintiffs are in possession is clinching enough. He further submitted that even the statement that the suit was filed after taking possession is also incorrect as the amendment was carried out to the plaint after the Suit was filed. This submission has no merit. If the cross-examination is carefully perused, the Respondents – Plaintiffs has denied that the Appellants are in possession of the entire property. He had stated that a hoarding and few tin shades were put up. He also states that these hoardings and tin shades are of the Appellants. Thereafter, the statement follows that it is after the Appellants have taken possession that the Suit is filed. Thereafter, again the Respondents – Plaintiffs denied that the Appellants do not have any possession or have any ownership rights in the suit property. So called admission therefore will have to be read in the context of the tin shades and the hoardings put up. There is no such admission but this is the very case of the Respondents – Plaintiffs that in an attempt to show possession, the Appellants put up few tin shades and a hoarding. From this conclusion cannot follow that the Respondents – Plaintiffs have accepted the case that the Appellants are in possession of the entire

75,000 sq.ft. property. To accept the contention of Mr. Dani would be completely perverting the cross-examination of the Respondents – Plaintiffs. After the Respondents – Plaintiffs were put in possession pursuant to execution, some part of the property received was sold by the Respondents – Plaintiffs and the buyer also mortgaged it to a bank. Therefore, the Respondents – Plaintiffs also asserted this right.

10. As regard the additional evidence produced by the Appellants in the Appeal, grievance was made by Mr. Dani it has not been considered by the learned District Judge. This submission also has no merit. The learned District Judge though states that the Appellants could have produced the evidence earlier has gone to consider the evidence. What is relied upon by the Appellants are permissions and certain plans and payments made to Contractor/Architect. It is a finding of fact though these documents are obtained, actual work pursuant to these documents was not carried out. The Contractor/Architect has stated that he does not have the accounts for the payment right now available with him since it is destroyed. In the cross-examination he has accepted that he cannot give details of the various accounts that have been stated to have been kept. He has also accepted that no permissions was granted by the Municipal Corporation for road work. The learned District Judge has taken these documentary evidence in

consideration and has concluded that merely because said paper-work is carried out does not mean actual physical possession is with the Appellant. It is not possible to term this approach as a perverse one. A party can, without being in possession execute various documents and enter into transactions, but that they does not lead to the conclusion that actual physical possession is with such a party. To hold that the Appellants are in possession in view of such evidence would be re-appreciating the evidence which is not permissible under Section 100 of the Code of Civil Procedure. The grievance made by Mr. Dani that none of these documents have been considered is not correct as they have been considered as stated above.

11. Neither the Appellants have any ownership rights nor are in the physical possession of the Suit property, therefore the learned District Judge was right in holding against the Appellants.

12. Mr. Dani then submitted that the Suit is not within limitation. He submitted that the Suit is based for a declaration that the Appellants are owners by virtue of a decree rendered in the year 1950 and therefore, the Suit filed in the year 1999 is beyond limitation. This submission has no substance, The Suit had to be filed in view of the steps taken by the Appellants of putting up tin shades and hoardings and trying to rely on a compromise decree

passed in the Court of Dharwad. The Suit was filed for a declaration that, inspite of a compromise decree recognizing the right of the Respondents – Plaintiffs to the property, the Appellants are not acknowledging it. As I have concluded earlier the Suit was not filed to declare that the Respondents – Plaintiffs have become owners by virtue of the compromise decree but that because the compromise decree was not being acknowledged. The period of limitation therefore commenced from the acts of the Appellants and not from the date of the compromise decree. The contention of Mr. Dani on the basis of limitation cannot therefore be accepted.

13. Mr. Dani then submitted that cross objections filed by the Respondents – Plaintiffs were after period of seven years and the delay in filing the cross objections was not properly condoned. Though this point is not taken in the Appeal memo, it was argued during the course of the hearing, I have permitted the Appellants to take up this ground in the oral argument. While the Appeal was pending, the cross objections with a delay of six years was filed. Prior to that filing of the cross objections, the matter had reached thus in the earlier round of litigation which was remanded to the Appellate Court on 4 April 2014. Cross objections were filed on 10 June 2014. The learned District Judge has taken note of the order passed in the earlier round of litigation by this Court, wherein all issues were kept open and has used the discretion to condone the

delay in filing the cross objections. After the cross objections were filed, both the parties have addressed the Appellate Court on merits and at this stage, I am not inclined to disturb the positive use of discretion by the learned District Judge in permitting one party to put forth its case on merits.

14. Mr. Dani submitted that the suit property has been sold by the Original Plaintiff to the Respondent Nos.3 to 9. He submitted that even the cross objections have been signed by this subsequent procedure. Mr. Dani submitted that since the Respondents – Plaintiffs have sold the property, they have no interest left in the suit property and merely by adding the subsequent procedures as the Respondents in the Appeal will not suffice as they ought to be made the Plaintiffs in the Suit if they are to get benefit in the decree. Mr. Apte submitted that both, the subsequent purchasers as well as the Plaintiffs, are parties in the proceedings and therefore, it is not necessary that subsequent purchasers should be made Plaintiffs in the Suit.

15. As regard the signing of the cross objections are concerned, the cross objections have been signed by both on behalf of the Respondents, which included both the Respondents – Plaintiffs as well as the subsequent purchasers. This is not a case where the Original Plaintiff is not prosecuting the litigation at all and

only the purchasers are prosecuting the litigation. In the present case the Appeal before the District Court as well as the present Second Appeal is contested by both the Original Plaintiff as well as the subsequent purchasers. After the decree is passed in favour of the Original Plaintiff, the purchasers would step the shoes of the Original Plaintiff, for which course of action the Original Plaintiff has no objection. Therefore, on this ground alone I am not inclined to set aside the order of the learned District Judge.

16. In conclusion therefore, the learned District Judge was right in holding that the Respondents – Plaintiffs have proved their title to the Suit property and that the Appellants cannot be stated to be in physical possession of the Suit property. Suit has been rightly decreed. There is no error in this conclusion. No substantial question of law arises. Second Appeal is dismissed. Civil Application stands disposed of accordingly.

(N.M. Jamdar, J.)