

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.116 OF 2016
ALONGWITH
CIVIL APPLICATION NO. 185 OF 2016

Moula Hasan Ambekari

..... Appellant

VERSUS

**Smt.Roshanbee Noormahamad Shaikh
(Deceased) & Anr.**

..... Respondents

Mr.Bhushan Walimbe for the Appellant.

Mr.Umesh R.Mankapure for Respondent no.1.

CORAM : R.D. DHANUKA, J.

DATE : 27th SEPTEMBER, 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 decree dated 28th September, 2015 passed by the learned District Judge, Karad dismissing the Regular Civil Appeal No.46 of 2007 filed by the appellant. The appellant had impugned the judgment and decree dated 17th March, 2007 passed by the learned IInd Joint Civil Judge, Junior Division, Karad, District Satara filed by the respondent (original plaintiff) thereby decreeing the said suit and declaring the plaintiff no.2 as an exclusive owner of the suit property and restraining the defendant, his agents, servants or any other person on his behalf by permanent injunction from disturbing and interfering with the peaceful possession of the plaintiff no.2 over the suit property. The appellant was the original defendant whereas Smt.Roshanbee Noormahamad Shaikh was the original plaintiff no.1 and Nisar Shamsuddin Shaikh was the original plaintiff no.2

2. Mrs.Jainab was the owner of the suit property i.e. Municipal House No.284 bearing City Survey No.100A area admeasuring about 96.1 sq.mtrs., City Survey No.102 area admeasuring 25.1 sq.mtrs. and City Survey No. 102 C, area 25.1 sq.mtrs. The said Smt.Jainab had no issue. The mother of Jainab expired in the year 1969 and her father expired prior to 1969. The husband of Jainab expired on 25th June 1991. Mr.Husen, father of the Jainab had issues viz. Amir, Hasmat, Jaitunbee, Mehabubee and Roshanbee. It was the case of the plaintiff that Smt. Roshanbee acquired title and possession of the suit property by inheritance under the Muslim Law. Smt. Roshanbee was maternal aunt of the Smt.Jainab.

3. As far as defendant is concerned, he is step son of Smt.Jainab. It was the case of the plaintiff that the defendant had no right to inherit the suit property as per Mahomedan Law. Since the survey officer recorded the name of the defendant in the city survey extract of the suit property, without issuing any notice to the deceased plaintiff Smt. Roshanbee, the plaintiff filed a suit for declaration and injunction. It was the case of the plaintiffs that the plaintiff no.1 Smt. Roshanbee had intended to gift the suit property in favour of plaintiff no.2 and had orally gived the suit property in his favour as per Islamic Law in presence of three witnesses. It was the case of the plaintiff no.1 that she had delivered possession of the suit property to the plaintiff no.2 and plaintiff no.2 has accepted the possession of the suit property as gift from the plaintiff no.1. The memorandum of oral gift was reduced into writing on stamp paper on 17th March, 2003.

4. The suit was resisted by the defendant on the ground that he had acquired title in respect of the suit property. The defendant placed reliance on the city survey record to show that he had acquired title in respect of the suit property.

5. The learned trial judge framed five issues for determination. The plaintiff no.2 himself entered into the witness box and examined the witness of the gifts viz.Mr.Harun Salim Shaikh and another witness Mr.Salim Bashir Shaikh. The defendant himself entered the witness box.

6. The learned trial judge recorded the finding that the plaintiffs had proved that the plaintiff no.1 had inherited the suit property from Mrs.Jainab and had also proved that the plaintiff no.1 being the owner and possessor of the suit property had gifted the suit property to the plaintiff no.2. It is also held that the plaintiff no.1 was exclusive owner of the suit property and was entitled for decree for lawful possession of the suit property and was entitled to be granted preventive relief.

7. The learned trial judge accordingly declared that the plaintiff no.2 was exclusive owner of the suit property and granted permanent injunction against the defendant, his agents, servants or any other person on his behalf restraining from disturbing and interfering with the peaceful possession of the plaintiff over the suit property.

8. Being aggrieved by the said decree and judgment dated 17th March,2007, the defendant filed an appeal (Regular Civil Appeal No.46 of 2007). The first appellate court framed four points for determination and independently rendered findings regarding the initial ownership of the plaintiff no.1 and thereafter of the plaintiff no.2. The appellate court has also rendered a finding that the defendant had caused obstructions with the possession of the plaintiffs over the suit land and dismissed the civil appeal filed by the defendant.

9. Mr.Walimbe, learned counsel for the defendant invited my attention to the findings recorded by the two courts below and also the written statement filed by his client and would submit that though none of the plaintiffs were in possession of the suit property, the finding is erroneously rendered by the two courts below of the possession in favour of the plaintiff no.2. He submits that the mutation entries were rightly recorded in the name of the defendant which is not considered by the learned trial judge as well as the first appellate court. He submits that none of the plaintiffs could establish their respective possession in respect of the suit property. He submits that the findings recorded by the two courts below of possession is based on no evidence. He submits that the first appellate court has wrongly cast onus on the defendant to prove his title and possession over the suit property.

10. Mr.Mankapure, learned counsel for the plaintiffs invited my attention to the oral evidence of the plaintiff no.2 and other two witnesses examined by the plaintiffs and also the oral evidence led by the defendant and his written statement.

11. He submits that in the written statement it is nowhere averred by the defendant that he was in possession of the suit property. He also invited my attention to the affidavit in lieu of the examination in chief of the defendant. He submits that since there was no averments in the written statement alleging his possession, the defendant could not have deposed about his alleged possession in respect of the suit property.

12. It is submitted that though there was positive averments in the plaint and deposition in the examination in chief of all the witnesses examined by the plaintiffs about possession of plaintiff no.1 and thereafter the plaintiff no.2, there was no cross examination of witnesses of the plaintiffs on the deposition about the

possession of the plaintiff nos. 1 and 2.

13. It is submitted that both the courts after considering the oral and documentary evidence have rendered findings of fact not only about the title of the plaintiff no.2 but also about his physical possession of the suit property.

14. Since the learned counsel for the defendant vehemently urged that there was no finding of possession rendered by the two courts below or that finding of the possession is based on no evidence, with the assistance of the learned counsel for the parties, I have perused the oral evidence of all the witnesses who were examined by the parties before the learned trial judge.

15. A perusal of the written statement filed by the defendant indicates that there is no averments of possession made in the written statement filed by the defendant. The defendant only placed reliance on the mutation entry in support of his allegation of the title in respect of the suit property. Since there was no averment in the written statement alleging possession of the defendants, no evidence could have been led by the defendant on the issue of possession in the examination in chief. Be that as it may, the defendant did not lead any evidence showing his possession independently in the examination in chief. On the other hand, the plaintiffs had examined three witnesses. Not only an averment was made in the plaint about the possession of plaintiff no.1 initially and thereafter the plaintiff nos. 2, three witnesses examined by the plaintiffs deposed also on the issue of possession. There was no cross examination for witnesses examined by the plaintiffs by the defendant.

16. A perusal of the decree and judgment rendered by the two courts below

clearly indicates that both the courts below have rendered a finding of possession in respect of the suit property initially in favour of the plaintiff no.1 and thereafter in favour of the plaintiff no.2.

17. Insofar as title in respect of the suit property is concerned, a finding of fact is rendered that Smt. Roshanbee had inherited the suit property from the original owner Mrs.Jainab. Smt. Roshanbee in turn had given the said property by oral gift which was subsequently recorded in a separate deed witnessed by two witnesses. Both the witnesses had entered the witness box and had produced oral gift. In my view the findings recorded by the two courts below about the gift of the suit property in favour of the plaintiff no.2 is based on the documentary and oral evidence and the findings being not perverse, cannot be interfered with by this court under section 100 of the Code of Civil Procedure, 1908.

18. Insofar as issue of possession is concerned, the witnesses examined by the plaintiffs have proved physical possession of the suit property initially in favour of the plaintiff no.1 and thereafter in favour of the plaintiff no.2. The defendant could not prove by evidence before the learned trial judge that he was in possession of the suit property in any manner whatsoever. The mutation entry cannot be conclusive proof of title in respect of the suit property of the defendant.

19. Insofar as submission of the learned counsel for the defendant that the first court could not have caused burden of proof on the defendant is concerned, in my view since the defendant had alleged in the written statement that he had title and was in possession in respect of the suit property, the issue was properly framed by the first appellate court in that regard. I do not find any infirmity in the order passed either by the trial court or by the first appellate court or in any of the

findings recorded by the two courts below.

20. Mr.Walimbe, learned counsel for the defendant submits that the gift deed executed by the plaintiff no.1 in favour of the plaintiff no.2 was not valid in accordance with Mahomedan Law. In my view there is no merit in this submission of the learned counsel. Both the courts below have dealt with this issue in detail and after considering the Mahomedan Law and considering the oral and documentary evidence, has rightly rendered a finding in favour of the plaintiffs.

21. The appeal is devoid of merits and is accordingly dismissed. No order as to costs.

22. In view of dismissal of the second appeal, civil application does not survive and is accordingly dismissed.

[R.D. DHANUKA, J.]