

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
APPELLATE SIDE
NAGPUR BENCH, NAGPUR

SECOND APPEAL NO. 454 OF 2014

Dhanraj Kashinath Kumbhare Vs. Purushottam Mahadeorao Ambatkar & Ors.

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Office Notes, Office Memoranda of Coram,
appearances, Court orders or directions
and Registrar's orders
.....

Court's or Judge's Order

Shri N. A. Gaikwad Adv for appellant.
Shri M. P. Karia Adv for respondent no. 1.

CORAM: A. S. CHANDURKAR J.

DATED: 29th APRIL, 2016.

The appellants are original defendants who are aggrieved by the decree for possession in the suit filed by the plaintiff for possession of the suit property pursuant to sale deed dated 23.03.2001.

It is the case of the original plaintiff that on 23.03.2001 the defendant nos. 1 and 2 executed a sale deed of a portion of a plot from city Survey No. 713. Though the possession was handed over to the plaintiff on 14.02.2002, the defendant no.2 illegally encroached upon the suit property. On that basis the plaintiff filed suit for declaration of his title, possession and permanent injunction. The defendants filed their written statement at Ex. 13.

During pendency of the suit the defendant no.1 expired and his legal representatives though served did not contest the appeal. The plaintiff led his evidence but he was not cross examined. The trial Court held the sale deed at Ex. 36 to be duly proved. It accordingly decreed the suit and directed the defendants to handover possession. Before the appellate Court the aspect of absence of the defendants before the trial Court was considered and it was found that there was no sufficient reason for their absence. The appellate Court thereafter considered the evidence on record and dismissed the appeal.

Shri N. A. Gaikwad, the learned counsel for the appellant who is the original defendant no.2 submitted that both the Courts erred in holding against the defendants. He submitted that the sale deed was not duly proved and in fact the said document was executed by way of security for an amount of Rs. 30,000/- which was advanced to the plaintiff. He further submitted that as no proper opportunity was available to the defendants, the plaintiff could not be cross-examined nor could the defendants lead evidence. He, therefore, submitted that an opportunity deserves to be granted to the defendant no. 2 to contest the proceedings a fresh.

Shri M. P. Karia, the learned counsel for the plaintiff supported the impugned judgment. According to him the sale deed dated 23.03.2001 was duly proved. The defendant was served with notice but had chosen not to participate in the trial. This fact was considered by the appellate Court while dismissing the appeal. He therefore submitted that there was no reason to interfere with the impugned judgment.

On the aspect of the validity of the sale deed dated 23.03.2001 it is to be noted that the defendants had filed Regular Civil Suit No. 202 of 2002 for cancellation of aforesaid sale deed. The said suit however came to be dismissed on 16.03.2009. Thereafter on 01.02.2006 another sale deed for the remaining portion of the suit property came to be executed. The trial Court has considered the evidence of the plaintiffs to come to the conclusion that the sale deed dated 23.03.2001 was valid document. In absence of any challenge to the same the trial Court decreed the suit.

The Appellate Court in paragraph 12 of its judgment has considered the record of the trial Court and has found that despite grant of sufficient opportunity to the defendants they had not chosen to contest the appeal. It is also to be noted that against the

judgment of the appellate Court in the appeal filed by all the defendants, it is only the defendant no.2 who has filed the present appeal. The decree has thus become final against the original defendant no. 1 and his legal representatives. The appellate Court after considering the aspect of absence of the defendants has considered the evidence on record and has upheld the decree passed by the trial Court.

In the light of the aforesaid it cannot be said that sufficient opportunity was not given to the defendants to defend the proceedings. They have chosen to remain absent at their own risk. The second appeal therefore does not give rise to any substantial question of law. The same is therefore dismissed. No costs.

JUDGE

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