

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABA

SECOND APPEAL NO. 322 OF 2017

Machhindranath Fakira Gorde,
age 47 years occupation agriculture
R/o Astagaon Taluka Rahata Dist. Ahmednagar

...APPELLANT
(Original defendant)

VERSUS

1. Ajit S/o Bhimraj Nirmal,
age 23 years occupation education
2. Anita W/o Bhimraj Nirmal,
age 47 years occupation household

Both R/o Astgaon Taluka Rahata Dist. Ahmednagar.

...RESPONDENTS
(Orig. Plaintiffs)

Mr. D.D. Pokharkar and Mr G.V. Wani, Advocates for appellant
Mrs. S.S. Kulkarni, Advocate, holding for Mr K.M. Nagarkar,
Advocate for respondents

CORAM : NITIN W. SAMBRE, J.

DATE : 4th October, 2017

ORAL ORDER :

This appeal is by original defendant.

2. Respondents/plaintiffs filed a Regular Civil Suit No. 749 of

2004 on the file of Civil Judge (Junior Division), Rahata, seeking simplicitor injunction, based on sale deed dated June 19, 2003 Exh.68 executed by Fakira, father of defendant/appellant.

3. The execution of the sale deed is not in dispute. The suit was filed on 02/11/2004 to which the appellant/defendant filed written statement on 20th June 2005. Issues to the suit were framed on 14th July 2005, after which on 13th September 2006 the appellant preferred a counter claim coming out with altogether different case, claiming that sale deed in question is not a sale of necessity and suit property is a joint family property. The defendant claims to be in possession of suit property by virtue of being co-owner of the same and, as such, he sought injunction against present respondents/plaintiffs restraining them from disturbing his possession.

4. As a consequences of filing of the counter claim, issues were recast on September 6, 2010.

5. The suit of the present respondents came to be dismissed by the judgment and decree dated October 31, 2012, passed by the Civil Judge (Junior Division), Rahata, whereas, the counter claim preferred pursuant to the provisions of Order VIII Rule 6(a) & 6(b) came

to be allowed. The present respondent/plaintiff was restrained from disturbing possession of the appellant/defendant over the suit property and sale deed dated 19th June 2003 Exh. 68 came to be set aside.

6. In appeal being Regular Civil Appeal No.11 of 2013, the Appellate Court framed following points for consideration:

- “1. Whether plaintiff-appellant is holding possession of suit land ?
2. Whether defendant/respondent is holding possession of suit land ?
3. Whether judgment and decree dt. 31.10.2012, delivered by Civil Judge J.D. Rahata in RCS No. 749/2004 require interference ?”

7. The appeal came to be allowed by the judgment and decree passed by the District Judge-2, Kopergaon. As such, this Second Appeal by original defendant.

8. Heard Shri Wani, learned Counsel for the appellant/original defendant and learned Counsel Mrs. S.S. Kulkarni, learned Counsel for the respondents.

9. Shri Wani, learned Counsel for the appellant, would make out following grounds for consideration of this Court:

10. In appeal preferred by the respondents under section 96 of the Code of Civil Procedure, no specific ground of challenge was raised to the counter claim and, as such, lower Appellate Court committed an error in upsetting the findings recorded on the counter claim. He would draw support from the provisions of Order XLI Rule 31 so as to claim that Appellate Court should have framed points for consideration and amongst other, point should have been whether the decree passed in counter claim is liable to be set aside or not. He would then urge that since the Trial Court has set aside the sale deed Exh. 68, specific point for reconsideration of the same should have been framed and by appreciating entire evidence, the Court should have recorded a finding.

11. Per contra, the learned Counsel for the respondent/original plaintiff would urge that once the document Exh. 68 is admitted viz. sale deed, possession of the plaintiff/respondent pursuant to the recitals in the sale deed is also admitted by the present appellant. According to her, in absence of specific pleadings in relation to the validity of the sale deed, trial Court proceeded to evaluate the same by framing an issue in absence of any prayer to that effect. According to her, the counter claim, that is alleged, was preferred on 13th September 2006 after the issues were framed in the suit on 14th April 2005, which has prompted Court below to re-frame entire issues on September 6, 2010. She would

submit that written statement was filed on 20th June 2005. As such, the trial Court has given complete go-by to the provision of Order VIII Rule 6(a) and 6(b) as counter claim after filing of the written statement ought not to have been permitted.

12. According to her, lower Appellate Court re-appreciated entire claim and rightly decreed the suit of the present respondents and dismissed the counter claim. She sought dismissal of the Second Appeal.

13. Though the lower Appellate Court in compliance with Order XLI Rule 31 of the Code of Civil Procedure has in detail not framed points for consideration, however, has framed in all three points for consideration, which govern entire gamut that was before it. While considering the plea for injunction, what is required to be considered by the Court is who is in settled possession of the suit property, particularly, in the backdrop of title to the suit property.

14. Once the sale deed Exh. 68 dated June 19, 2003, executed by Fakira, father of present appellant, is not denied, the fact remains that pursuant to the recitals therein and since the said document was proved, the present respondent established its lawful possession over the suit property.

15. In the wake of above, the lower Appellate Court, in my opinion, has made a correct approach in setting aside the judgment of the Trial Court, thereby refusing injunction to the present appellant having lost title to the suit property and granted injunction in favour of the respondent/plaintiff, who has established his title to the suit property. So far as aforesaid proposition is concerned, appropriate support can be drawn from the judgment of the Apex Court in the matter of **Maria Margarida Sequeria Fernandes and others Vs. Erasmo Jack de Sequeria (dead) through L.Rs.** reported in **A.I.R. 2012 Supreme Court 1727**, particularly paragraph 101.

16. This takes me to the next submission as to whether counter claim of the present respondent is maintainable or not. Suit in question was initiated by the present respondent simplicitor for injunction, based on his title on 2nd November 2004. The present appellant filed his written statement under Order VIII Rule 1 on June 20, 2005, and thereafter issues were framed.

17. The appellant thereafter filed his counter claim on 13th September 2006 pursuant to the provisions of Order VIII Rules 6(a)&(b) of the Code of Civil Procedure. Upon plain reading of the provision of Order 8 rule 6(a), it is amply clear that such counter claim is required to

be filed either before written statement is tendered or alongwith written statement, which does not appear to be case in hand. Appellant has proceeded to file counter claim after a period of almost 15 months from the date of filing written statement and the Trial Court proceeded to evaluate the same contrary to the scheme or Order VIII rule 6(a) & 6(b) of the Code of Civil Procedure. The counter claim as could be inferred from the conduct of the appellant is by way of after thought so as to kill the time, however, without any plea for setting aside the sale deed Exh. 68, the Trial Court proceeded to set aside the same though a prayer only to the extent of injunction protecting the possession was made through counter claim.

18. The learned Appellae Court, as such, rightly observed that the Trial Court not only committed an error of law but also exceeded its jurisdiction for granting the relief, which was never claimed.

19. Apart from above, the ground of not framing of issue, as is sought to be canvassed by the learned Counsel for the appellant is concerned, particularly, in the background of provision of Order 41 Rule 31 needless to mention that the Appellate Court framed three points for consideration. The Appellate Court went on appreciating documentary and oral evidence in the backdrop of pleadings of either party. If filing of appeal against judgment of Trial Court, particularly, dismissing the suit

and allowing counter claim, if appreciated, the respondent, in my opinion, was right in preferring only one appeal having regard to provision of Order XX Rule 19(2) of C.P.C.

20. Apart from above, it is to be noted that the grant of injunction by the lower Appellate Court is based on title established by the present respondents to the suit property.

21. In the aforesaid backdrop, no case for interference, in my opinion, is made out. Appeal, as sch, fails and stands dismissed.

(NITIN W. SAMBRE, J.)

pjm