

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 419 OF 2001

Shri Kripal Singh .. Appellant
vs.
Shri Dilip Singh H. Singh & Ors. .. Respondents

Mr. Ashok G. Toraskar for Appellant.
Mr. Rajendra Sorankar for Respondents.

CORAM : M. S. SONAK, J.

Date of Reserving the Judgment : 24 February 2017
Date of Pronouncing the Judgment : 28 February 2017

JUDGMENT :-

1] This appeal is directed against the judgment and decree dated 29 July 1999 in S.C. Suit No. 6383 of 1997.

2] The appellant is the original plaintiff and the respondents are the original defendants in the suit. In the suit, the appellant applied for the following substantive reliefs :

“(a) That this Hon'ble Court be pleased to declare that the Plaintiff is the absolute owner of the property being Flat / Shop No. 6, admeasuring about 559 sq. ft. of Ashish Co-op. Housing Society situate at Char Bungalow, J. P. Road, Andheri (W), Bombay, and the Agreement dated 27th January, 1967 is legal valid and binding upon the builder and Developer the Defendant No. 1 and the Ashish Co-op. Housing Society Ltd., Defendant No. 2.

(b) That this Hon'ble Court be pleased to declare that Award passed in Co-op. Dispute IV/306/88 dated 16.12.1990 in respect of Flat / Shop No. 6 admeasuring 550

sq. ft. situate at Ashish Co-operative Housing Society, Char Bungalow, J. P. Road, Andheri (W), Bombay is improper and without jurisdiction, therefore nullity and in collusion with Defendant Nos. 1, 3 & 5 and not binding on Plaintiff and the execution if any are also nullity and be declared as null and void and not binding upon the Plaintiff.

(c) That this Hon'ble Court be pleased to appoint Court Receiver, High Court or such other Officer under Order 40, Rule 1 of the C.P.C. in respect of Suit Premises of Flat / Shop No. 6 of Ashish Co-operative Housing Society Ltd. Char Bungalow, J. P. Road, Andheri (West), Mumbai, and the Plaintiff be allowed to continue in possession of the suit premises as agent of the Receiver on such terms and conditions as deem fit.

(d) That this Hon'ble Court be pleased to grant an order of permanent injunction restraining the Defendants 1 to 4 and their agents from entering or disturbing and/or interfering with possession of Flat / Shop No. 6 of Ashish Co-op. Housing Society or taking forcible possession of the Flat / Shop No. 6, situate at Char Bungalow, of Ashish Co-op. Hsg. Society, J. P. Road, Andheri (W), Bombay -58."

3] The appellant contends that by virtue of registered agreement dated 27 January 1967, the appellant is liable to be declared as the absolute owner in possession of the property being flat / shop no. 6 admeasuring 559 sq. ft. in Ashish Co-operative Housing Society, Char Bungalow, J. P. Road, Andheri (suit premises). The respondents deny the case of the appellant. They submit that the appellant has tampered with the document dated 27 January 1967. In any case, the appellant was a trespasser in respect of the suit premises and has been validly evicted in pursuance of orders made by the Co-operative Court on 16 December 1990, which

order, has attained finality right upto the Hon'ble Apex Court. Without prejudice they submit that on basis of agreement dated 27 January 1967, which does not even refer to the suit property, there is no question of the appellant claiming any declaratory or other reliefs.

4] The learned trial Judge, on 5 April 1999, framed the following issues in the suit :

- "1. Whether the plaintiff proves that he is the owner of the suit premises.*
- 2. Whether the decree passes by the Co-op. Court dated 16.12.90 is liable to be set aside.*
- 3. What relief, if any is the plaintiff entitled to .*
- 4. My findings on the above issues are as under :
Issue No. 1 - In the negative.
Issue No. 2 – In the negative.
Issue No. 3 – As per final order."*

5] All the aforesaid issues came to be answered against the appellant. Hence, the present appeal.

6] Mr. Toraskar, learned counsel for the appellant submits that the documents on record clearly establish that the appellant is the owner in respect of the suit premises. Mr. Toraskar submits that in execution of Co-operative court's order dated 16 December 1990, the appellant came to be evicted. However, the order of the Co-

operative court made in purported exercise of powers conferred by section 91 of the Maharashtra Co-operative Societies Act, 1960 (MCS Act) is a nullity, since, it was the case of the respondent no. 3 society, which had raised a dispute under section 91 that the appellant was only a trespasser in respect of the suit premises. Mr. Toraskar submits that a dispute between the society and any alleged trespasser, is not a dispute which is covered under section 91 of the MCS Act. Mr. Toraskar therefore submits that assumption of jurisdiction by the Co-operative court in matter which did not fulfil the predicates of a dispute under section 91 of the MCS Act, was in excess of jurisdiction and consequently, a resultant order dated 16 December 1990 is a nullity. Mr. Toraskar submits that a suit is always maintainable to seek a declaration that a particular order is a nullity, where, on the basis of such particular order, the rights of the plaintiff are sought to be effected. Mr. Toraskar submits that the oral and documentary evidence on record clearly makes out a case that the appellant is the owner in respect of the suit premises and therefore, the suit was required to be decreed.

7] Mr. Toraskar also submits that the learned trial Judge has incorrectly adverted to certain orders in relation to perjury or tampering with any records, when in fact, such issues have not even attained finality. He submits that criminal prosecution was

launched against the appellant. However, the orders made by the learned Magistrate have been set aside by the Sessions Judge and the matter is remanded for fresh consideration. In the meanwhile, Mr. Toraskar submits that the learned trial Judge was not at all justified in adverting to the observations and findings in relation to the proceedings making reference to prosecution or for that matter orders in the pending criminal proceedings, in order to non suit the appellant. He submits that the civil suit was required to be decided independently applying the principles of preponderance of probabilities. For these reasons also he submits that the impugned judgment and decree is liable to be set aside and the reliefs as applied for by the appellant are liable to be granted.

8] Mr. Sorankar, learned counsel for respondent no. 4 submits that the order of the Co-operative court dated 16 December 1990 was challenged before the Co-operative Tribunal, the learned Single Judge of this Court as well as the Hon'ble Apex Court and all such challenges have failed. He submits that the issue that the Co-operative court lacked jurisdiction was raised in all such proceedings, but, such issue was answered against the appellant, who was himself, claiming to be the member of the society. In such peculiar facts, Mr. Sorankar submitted that there is no question of the civil court sitting in appeal over the decision of the Co-

operative court, which decision, has already been confirmed up to the level of the Hon'ble Apex Court.

9] Without prejudice, Mr. Sarvankar submits that this court need not even go into the issue of the Co-operative Court's order dated 16 December 1990 being a nullity. This is because, the learned trial Judge, upon independent assessment of the material on record, has ruled that the appellant has failed to make out any case that he is the owner of the suit premises. Mr. Sarvankar submits that that the writing dated 27 January 1967 has undoubtedly been tampered with by the appellant. However, even if, it is assumed, without any admission that such writing is untampered, the same, does not confer any rights upon the appellant in respect of the suit premises. Mr. Sarvankar submits that it is impermissible for a party to lead any oral evidence to vary the terms of a written document of this nature. Accordingly, Mr. Sarvankar submits that the appeal is liable to be dismissed.

10] If, the appellant, on basis of the material on record, is in a position to establish that he is the owner of the suit premises, only then, the question would arise as to whether the Co-operative court's order dated 16 December 1990, has made any dent to the appellant's claim of ownership. However, if the appellant, on the

basis of the material on record, is unable to establish that he is the owner of the suit premises, then, the question as to whether the order of the Co-operative court dated 16 December 1990 is a nullity or not, becomes only academic and there would be no necessity to rule upon the same.

11] In this case, upon perusal of the impugned judgment and decree, it cannot be said that the learned trial Judge has either relied upon or permitted himself to be influenced by the Co-operative court's order dated 16 December 1990 in determining the issue as to whether the appellant is or is not the owner of the suit premises. In any case, the issue as to whether the appellant is or is not the owner of the suit premises, can be independently considered at this stage, without, even advertng to the the Co-operative court's order 16 December 1990.

12] In this case, the main document upon which the appellant relies upon is the registered conveyance dated 27 January 1967. It is on basis of this registered document that the appellant claims to be the owner of the suit premises. It is in relation to this document itself that serious allegations of tampering, forgery etc. have been made against the appellant. Initially, the trial court did not deem it appropriate to take any serious action against the appellant.

Further, when the matter was taken up before this court, this court, expressed the opinion that there was prima facie tampering and forgery and therefore, the matter is required to be examined in some detail.

13] Upon remand, prosecution was launched against the appellant. The Magistrate did record adverse findings against the appellant. The appellant was in fact convicted and sentenced. However, the learned Sessions Judge, by order dated 6 January 2016, in appeal no. 384 of 2015 has set aside the order of the Magistrate and remanded the matter to the Magistrate for fresh adjudication. Accordingly, as of today, the conviction of the appellant recorded by the Metropolitan Magistrate in C.C. No. 162 /SW/1991 vide order 18 March 2015 stands set aside. The matter is however pending before the Metropolitan Magistrate, in pursuance of the remand by the Additional Sessions Judge vide order dated 6 January 2016 in an appeal no. 384 of 2015.

14] For the purposes of this appeal, we can proceed on the basis that the registered document dated 27 January 1967 has not been tampered with or forged. The description of the premises which forms subject matter of agreement dated 27 January 1967 is contained in one of the recitals, which reads thus :

“AND WHEREAS the Vendor has agreed to sell and the Purchaser has agreed to purchase from the Vendor the Flat / Shop No. 25 sq.mt on the ground floor in Building No. 21 consisting of three rooms and shown on the Plan annexed hereto and marked 'B' collectively on the following terms and conditions. NOW THIS INDENTURE WITNESSETH as follows :-”

15] In the original document, which is at Exhibit 'A' in the records and proceedings, from out of the expression flat / shop, the word 'flat' has been slashed / cancelled. Similarly, the numbers '25 sq. mt' and the word 'ground' and the no. '21' have been stated in ink (hand written and not printed). Further, number '25 sq.mt.' is not very clear, in the sense, whether, it refers to 'sq. mts. or sq. ft.' However, from the context, it does appear that the reference is to 'sq. meters'.

16] Similarly, in clause 2 of the agreement dated 27 January 1967 there is reference to Flat / Shop No. 2505. Again, the word 'Flat' is slashed / cancelled. Apart from this, there is no further description of the premises which were to form subject matter of the agreement dated 27 January 1967. Admittedly, in pursuance of the agreement dated 27 January 1967, there is no further conveyance actually conveying any property to the appellant. It is however the appellant's case that the agreement dated 27 January 1967 is itself, his title document.

17] It is further the case of the appellant that though, the

agreement dated 27 January 1967 does not specifically make any reference to flat having area of 559 sq. ft. or 520 sq. ft., there is other material on record which establishes that in pursuance of agreement dated 27 January 1967, what was really sold to the appellant was the suit premises i.e. Flat No. 6, Building No. 21 admeasuring about 559 sq. ft. or at least 520 sq. ft. Mr. Toraskar, learned counsel for the appellant has drawn my attention to the electricity bills (Exhibit 'D' Collectively), the licence under the Shops and Establishment Act (Exhibit 'G') and some correspondence, to submit that the appellant was put in possession of the suit premises in pursuance of the agreement dated 27 January 1967 (Exhibit A). Mr. Toraskar, learned counsel for the appellant also adverts to the oral evidence, including, in particular, the oral evidence of the builder, in which the builder admits what was sold to the appellant is the suit premises. On these basis, Mr. Toraskar submits that the suit is required to be decreed.

18] The electricity bills unfortunately, making no reference to any flat number or area. The licence under the Shops and Establishment Act or the correspondence at the highest refer to the possession of the appellant in the suit premises. However, there is nothing to link such position with the agreement dated 27 January 1967. It is the case of the respondents that the appellant was a

carpenter who was concerned with the construction activity. The appellant, trespassed into the suit premises and intends to falsely and fraudulently claim ownership in respect of the suit premises by relying upon the agreement dated 27 January 1967, which has nothing to do with the suit premises. At this stage, even if we are not to examine the defence of the respondents, there is really nothing in the documents relied upon by the appellant, which establishes that the appellant is the owner in respect of the suit premises.

19] The agreement, dated 27 January 1967, as noted earlier, makes no reference either to flat no. 6 or to the area of 559 sq. ft. or 520 sq. ft. In fact, the agreement makes no reference to any flat at all, rather, the reference is to shop admeasuring 25 sq. meters. This is a case where the words 'Flat / Shop' appear in the agreement dated 27 January 1967. The word '*Flat*' has been slashed / cancelled and only the word '*Shop*' has been retained. Mr. Toraskar submits that the appellant was illiterate and therefore could not understand the import behind the slash / cancellation of the word '*Flat*'. Obviously, it is not possible to accept such a contention. Moreover, the area of the shop is referred to as 25 sq. meter which was corresponds to approximately 250 sq. ft. In this case, the appellant lays claim to area which is more than double this area i.e. 559 sq. ft. or 520 sq. ft. Again, a discrepancy of such a nature,

cannot simply be wished away by pleading ignorance or illiteracy. For all these years, the appellant has taken no steps to rectify the document. The other documentary evidence relied upon by the appellant also does not support the case of the appellant that the agreement dated 27 January 1967 was indeed in relation to the suit premises.

20] The oral evidence in this case, in the first place, is not at all reliable. That apart, in terms of section 91 of the Evidence Act where the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions.

21] Further, section 92 of the Evidence Act also provides that where the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted, as

between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms.

22] From the combined effect of the provisions contained in sections 91 and 92 of the Evidence Act, no credence can be given to the oral evidence on record, which, even otherwise, is quite inconclusive, when it comes to the interpretation of the agreement dated 27 January 1967 (Exhibit 'A'). The document itself makes no reference to the suit premises. On basis of oral evidence, it is impermissible for the plaintiff to substitute a different description or to add to the description already stated in the document. Illustration (c) to section 92 of the Evidence Act, reads thus :

“(c) An estate called “the Rampure tea estate” is sold by a deed which contains a map of the property sold. The fact that land not included in the map had always been regarded as part of the estate and was meant to pass by the deed, cannot be proved.”

23] The oral and documentary evidence on record does not establish that the appellant had any agreement for sale in respect of the suit premises as described in the plaint. The issue as to whether a mere agreement for sale can itself confer any title, has not been gone into. In terms of section 54 of the Transfer of Property Act, a mere agreement for sale of the property, obviously, does not create any interest in or charge on such property. In this

case further, even if the concept '*title*' is to be referred to liberally or in its widest sense, the document dated 27 January 1967, does not, make any reference to the suit premises as described by the appellant in the plaint. The other evidence, in the form of some correspondence, electricity bills, licence under the Shops and Establishment Act, is also not sufficient, by the test of preponderance of probabilities, to connect the suit premises with the document dated 27 January 1967. The oral evidence is also not credit worthy. If such oral evidence is allowed to prevail in the facts and circumstances of the present case, then, the same would be in breach of sections 91 and 92 of the Evidence Act.

24] It is also not a case where the learned trial Judge has placed any excessive reliance upon the Co-operative court's order dated 16 December 1990 for determining the first issue as to whether, the appellant proves ownership in respect of the suit premises. The reference to the Co-operative court's order, cannot, in the facts and circumstances of the present case, be regarded as excessive reliance upon the same. In any case, upon independent assessment of the material on record, both oral as well as documentary, it cannot be said that the appellant has succeeded in proving that he is the owner in respect of the suit premises. In such circumstances, the issue no. 1 was required to be answered against

the appellant and there is no infirmity in the impugned judgment and decree, when it answers such issue against the appellant.

25] Since, the issue no. 1 is required to be independently answered against the appellant, any discussion on issue no. 2, in the facts and circumstances of the present case can only be academic. However, there is some merit in the submission of Mr. Toraskar that a society cannot raise a dispute under section 91 of the MCS Act before the Co-operative court by alleging that the opponent is a *'trespasser'*. However, such an issue need not be decided in the facts and circumstances of the present case. This is because, even without any reference whatsoever to the Co-operative court's order dated 16 December 1990, the appellant, has failed to independently establish that he is the owner of the suit premises on the basis of the agreement dated 27 January 1967 or for that matter the other documentary and oral evidence on record. In such circumstances, the appellant was clearly not entitled to any of the reliefs applied for in the suit and there is no infirmity in the dismissal of the suit by the impugned judgment and decree.

26] This is also not a case where it could be said that the learned trial Judge has been unduly influenced by certain evidence with regard to forgery and tampering any agreement dated 27 January

1967 by the appellant or at the appellant's behest. There are *prima facie* findings to this effect and the Metropolitan Magistrate, in fact, had convicted the appellant of such charge. The Additional Sessions Judge has set aside the conviction and remanded the matter not after appreciation of the material on merits but because, evidence on behalf of the prosecution was recorded in the absence of the advocates for the appellant. There is no necessity to rely upon or even refer to the findings on basis of which criminal prosecution was launched against the appellant or the findings recorded in the course of the criminal prosecution. The civil suit has to be decided on the basis of the evidence led by the parties at the trial of the suit and further, such evidence has to be assessed on the touch stone of preponderance of probabilities. Upon perusal of the material on record, as noted earlier, it is clear that the appellant has failed to establish that he is the owner of the suit premises. This is sufficient to confirm the impugned judgment and decree.

27] Accordingly, this appeal is dismissed. Interim order, if any, stands vacated. There shall be no order as to costs.

(M. S. SONAK, J.)

28] At this stage, learned counsel for the appellant requests for continuance of interim relief granted by this court on 27 July 2006

for further period of eight weeks from today. Since, this ad-interim relief had restrained the respondents from creating third party interest in respect of the suit premises, the same is continued for the period of eight weeks from today.

(M. S. SONAK, J.)

Chandka