

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

SECOND APPEAL NO.575 OF 2017

Shri Fattekhan Murad Khan .. Appellant

vs.

Smt. Hayatbi Bashir Khan .. Respondent

Mr.Swaraj Jadhav i/b Mr.Vijay Kumar R. Garad for the appellant

Mr.G.H.Keluskar for the respondent

**CORAM : K. K. TATED, J.
DATE : DECEMBER 18, 2017**

P.C.:

1. Heard.
2. By this Second Appeal, appellant original plaintiff is challenging the concurrent finding of facts recorded by both the courts below.
3. In the present proceeding, respondent plaintiff filed Regular Civil Suit No.179 of 2012 in the court of Civil Judge, Junior Division, Karmala, District Solapur for declaration and perpetual injunction in respect of the suit property i.e. Gut No.54 admeasuring 06 H 85R to the extent of $\frac{1}{2}$ share situated at Village Awati Taluka Karmala, District Solapur.
4. The appellant original defendant is a nephew of respondent

plaintiff. The Trial Court at the time of allowing the Suit filed by the plaintiff held that the defendant failed to prove any right, title and interest in respect of the suit property. The mutation entry no.955 was made in the revenue record in respect of the suit property in the name of defendant's father on the basis of will dated 22.3.1974. That will was executed by the plaintiff in favour of defendant's father. During the life time of the plaintiff, the mutation entry was executed in favour of defendant's father. The Trial Court held that will can come into force only after the death of the executor. Therefore, how and on what basis mutation entry was made in respect of the suit property was not explained by the defendant. Before the Trial Court, the defendant also relied on the contract Exhibit-58 executed between plaintiff and father of defendant. That document was being old, having presumptive value under section 90 of the Indian Evidence Act exhibited in Suit. The contents of the same was not proved by the defendant. Not only that the defendant also examined his father Murad as D.W.No.1. Even the defendant's father also did not depose anything about the existence of document in his favour. These facts are recorded by the Trial Court in paragraph 20 of the impugned judgment. On the basis of the facts, the Trial Court passed decree in favour of respondent plaintiff. Operative part of the same reads thus:

“1/- The suit is decreed with costs.

2/- It is hereby declared that the will deed is cancelled, the plaintiff is owner of the suit property as mentioned in the paragraph No.2 of the plaint and mutation entry No.955 is not binding on the plaintiff.

3/- The defendant or anybody on his behalf is perpetually restrained from causing any obstruction

in the peaceful possession of the plaintiff over the suit property.

4/- Prepare the decree accordingly.”

5. Being aggrieved by the said decree dated 1.1.2015 appellant original defendant preferred Regular Civil Appeal No.8 of 2015. The appellate court also held that the appellant defendant failed to produce any documentary evidence to show right in respect of the suit property. Hence, the appellate court by impugned the Judgment and Decree dated 20.10.2016 dismissed the appeal preferred by the defendant.

6. The learned Counsel for the appellant defendant submits that the impugned the Judgment and Decree is required to be set aside. He submits that the Appellate court failed to consider that the plaintiff had not attached the certificate of Doctor to the deed of cancellation of Will dated 23.2.2012. Therefore, there is no question whether the Will executed by plaintiff in favour of defendant's father to be treated as cancelled. He further submits that both the courts below failed to consider the fact that admittedly the property was transferred in the name of defendant's father and to that effect mutation entry no.955 (Exhibit- 31) made by Revenue Department. He submits that on the basis of mutation entry defendant was cultivating the suit land. These facts are not considered by both the courts below and therefore, the the Judgment and Decree passed by both the courts below is required to be set aside.

7. The learned Counsel for the defendant further submits that both the courts below failed to consider the fact that plaintiff in his pleading

no where stated that the defendant obstructed her possession in respect of the suit property. Instead of that, both the courts held against the defendant. Therefore, the the Judgment and Decree passed by both the courts is required to be set aside.

8. On the other hand, the learned Counsel for the plaintiff produced paper book in Civil Appeal No.8 of 2015 containing the deposition of P.W.No.1, 2 and D.W.No.1 to D.W.No.5 along with copy of plaint and written statement. He submits that there is a concurrent finding of fact recorded by both the courts below. He submits that admittedly, the plaintiff is owner of the suit property. He submits that though the will was executed in favour of defendant's father, same was later on cancelled. Therefore, in any case, on the basis of will, defendant cannot claim any right, title and interest and or possession of the suit premises. Therefore, there is no question of entertaining the present Second Appeal and same is required to be dismissed with costs.

9. I have heard both the sides.

10. It is to be noted that main contention of the defendant is in respect of mutation at Exhibit-31 in respect of suit property. It is to be noted that Trial Court specifically recorded in paragraph 19 of the impugned order that how the mutation entry was executed on the basis of will is not proved by the defendant. Trial Court further held that the said will was duly cancelled by the plaintiff during her life time only. Therefore, there is no question of relying on the said mutation entry no.955 in respect of the suit property. There is no contract between

plaintiff and defendant for cultivation of the suit property. Therefore, both the courts rightly held that plaintiff is entitled order of injunction restraining defendant from disturbing her possession being owner of the suit property.

11. Considering these facts and as there is a concurrent finding of fact recorded by both the courts below and as there is no substantial question of law involved, I do not find any reason to entertain the present Second Appeal.

12. Second Appeal is rejected.

13. In view thereof, Civil Application does not survive. The same is also dismissed as infructuous.

14. No order as to costs.

(K.K.TATED, J.)