

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

SECOND APPEAL NO.206 OF 1988

Shri Nana Appa Ghure
since deceased, through his legal heirs:
1A. Shri Vaijnath Nana Ghure & Ors. ... Appellants

Vs.

Shri Pandu Appa Bagadi
since deceased, through his legal heirs:
1A. Ganapat P. Bagadi
since deceased, through his legal heirs:
1A-i) Gangubai ganapati Bagadi & Ors. ... Respondents

Mr.S.P. Thorat for the Appellants
Mr.G.N. Salunke with Umesh Kurund with Smita Solwat for
Respondents

**CORAM: Mrs.MRIDULA BHATKAR, J.
DATED: MAY 2, 2018**

P.C. :

1. This Second Appeal is directed against the concurrent finding of facts of the trial Court so also the first Appellate court. The plaintiff i.e., the present respondent, has filed Suit being RCS No.82 of 1981 for possession and mesne profits from the defendants i.e., the present appellants. It is the case of the plaintiff (for the sake of brevity, the parties will hereafter be referred to by their original status as 'plaintiff' and 'defendants') that he

purchased the suit land in the year 1948 from one Desai and subsequently, in the year 1960, it was regranted in his favour and thus, he was the owner of the suit land. In the year 1974, as he was in financial difficulty, took loan of Rs.2,000/- from the appellant and thereafter, the appellant by taking advantage of his age and illiteracy, the appellant/defendant got an agreement of sale executed in respect of the suit land from the plaintiff on 18.4.1974. At that time, he was paid Rs.2,600/- and thus, out of total consideration which was fixed at Rs.11,500/-, he was paid Rs.4,600/-. It is the case of the plaintiff that he never intended to sell the land to the defendant and as per the terms of that agreement, the sale deed was to be executed after the payment of the different loan amounts and clearing all the encumbrances. It is the case of the plaintiff that he never handed over possession of the suit land to the defendant, but the defendant by taking advantage of his age and illiteracy, had dispossessed him illegally in the year 1974. So, the plaintiff filed Suit in the year 1981 for possession and *mesne* profits. The defendant/appellant contested the suit on the ground that possession was handed over to him by the plaintiff as the defendant had satisfied the all the bank and society loans and cleared all the encumbrances. It is the case of

the defendant that possession was peacefully handed over to him by the plaintiff. The trial Court i.e., the Civil Judge, Junior Division, Chandwad, decreed the suit on 28.1.1987 by directing the defendant to deliver possession of the suit land to the plaintiff within two months from the date of the order and other consequential orders. The defendant being aggrieved by the said judgment and order filed appeal being Regular Civil Appeal No.52 of 1987 which was dismissed by judgment and order dated 19.1.1988 passed by the learned II Additional District judge, Kolhapur. Hence, this Second Appeal.

2. Learned Counsel for the appellant has submitted that the trial Court and the first appellate court has committed an error of law in decreeing the suit. It is submitted that without the prayer of declaration that the defendant is trespasser, the suit for possession should not have been filed and entertained and muchless, to be decreed. The learned Counsel has submitted that the respondent/plaintiff has admitted the agreement of sale dated 18.4.1974 at exhibit 111 and once that agreement of sale is admitted and so also receipts of the payment of loan which is marked at exhibits 92 to 98 are produced and admitted by the

plaintiff, then, the Courts below ought not to have held that the plaintiff was dispossessed forcibly by the defendant. He has further submitted that the Courts below have failed to appreciate the admissions given by the plaintiff and also the evidence tendered by the defendant.

3. Per contra, the learned Counsel for the respondent/original plaintiff, while supporting the judgments of the Courts below, has submitted that the Second Appeal is filed against the concurrent findings which is based on facts and hence, not to be disturbed by the appellate Court in the Second Appeal. He further submitted that he has filed the suit for possession based on title and therefore, the suit is filed within limitation i.e., within 12 years from the date or time when the plaintiff was dispossessed. He submitted that the plaintiff was dispossessed in 1974 and the suit is filed in 1981. He relied on Article 65 of the Limitation Act. He has further submitted that the defendant has taken contrary stand in the written statement. He submitted that the defendant has filed tenancy proceedings No.35 of 1979 before the Tehsildar u/s 70B of the Bombay Tenancy and Agricultural Lands Act. However, the claim of the tenancy of the appellant was rejected by order dated

1.3.1980 by the Tehsildar and, therefore, the plaintiff filed the suit for possession as he was illegally dispossessed by the defendant.

4. Heard the submissions. I have gone through the pleadings, the orders and the relevant documents especially exhibit 111. The possession is claimed by the appellant on the basis of the agreement of sale dated 18.4.1974. The possession is not claimed in the capacity of a tenant. There is no sale deed in favour of the appellant till today and, therefore, he is not an owner. So, naturally, the possession is claimed on the basis of the agreement at exhibit 111. The trial Court as well as the first appellate Court have dismissed the contents of this document threadbare and the fact that the insertion of words 'handing over of the possession by the plaintiff to the defendant; is visible with naked eye'. This submission of the learned Counsel that this document ought to have been sent to the handwriting expert, is not convincing as both the Courts below have rightly dealt with this issue. The respondent/original plaintiff has filed the suit for possession on the ground that he was illegally dispossessed. He has not confined his pleading to forcible dispossession but he pleads illegal dispossession. Illegal dispossession is different than forcible

dispossession. The plaintiff has also stated in the evidence that he being illiterate and old, the defendant has taken the advantage and put himself in possession of the land illegally. The plaintiff can file a suit for possession and other relief without seeking any declaration if the suit is filed on the basis of the title. The title of the plaintiff is not disputed till today as the defendant has filed the suit for specific performance in the year 1987 being suit No.106 of 1987 and, therefore, there is no substantial question of law made out. The appeal is therefore, dismissed. Decree to be drawn up accordingly.

5. I am informed that the Suit for specific performance filed by the appellant is stayed by the Court, however, as this appeal is dismissed, the trial Court to proceed with the matter and the suit is hereby expedited.

6. Civil Application No.1832 of 1988 also stands dismissed.

(MRIDULA BHATKAR, J.)