

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.867 OF 2015
ALONG WITH
CIVIL APPLICATION NO.1906 OF 2015
AND
CIVIL APPLICATION NO.1907 OF 2015

Indubai Sopan Gurav (Deleted)	
Shobha Dilip Gurav and Ors.	 Appellants-Applicants
V/s.	
Dnyanu Shivanna Gurav	 Respondent

Mr. G.S. Godbole, I/by Mr. Rajaram V. Bansode, for the Appellants-Applicants.

Mr. Bhooshan Walimbe for the Respondent.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 1ST AUGUST, 2018.

P.C. :

1. Heard Mr. Godbole, learned counsel for the Appellants-Applicants, and Mr. Walimbe, learned counsel for the Respondent.

2. This Second Appeal is directed against the 'Judgment and Decree' dated 3rd August 2015, passed by the District Judge-II, Islampur, in Regular Civil Appeal No.37 of 2011, which was preferred against the 'Judgment and Decree' dated 18th February 2011 passed by the Civil Judge, Junior Division, Shirala, Dist. Sangli, in Regular Civil Suit No.1 of 2006.

3. The said Suit was preferred by the Appellants herein seeking the relief of prohibitory and mandatory injunction contending *inter alia* that, they were initially having 2 Anne share in the suit properties; whereas, Respondent was having equal share of 2 Anne. By virtue of the registered 'Sale-Deed' dated 28th March 1970, Respondent has sold his 2 Anne share to the Appellants for the consideration of Rs.300/- and since then, Appellants' predecessor and thereafter Appellants themselves are in possession of totally 4 Anne share in the suit lands. It is further contention of the Appellants that, now the Respondent has started constructing his new house on the said land, which he has sold to the Appellants and, therefore, Respondent be restrained from causing obstruction to the possession of the Appellants and by way of mandatory injunction, Respondent be directed to remove whatever construction he has carried out thereon.

4. This Suit was resisted by the Respondent herein, denying execution of the 'Sale-Deed' and possession of the Appellants over totally 4 Anne share of the land. It was also contended that, the description of the suit land was not given properly. The main contention raised was that, the Respondent has also earlier filed Regular Civil Suit No.607 of 1988 against the Appellants for injunction. In that Suit also, the Appellants had raised a false contention about execution of the 'Sale-Deed' in respect of 2 Anne share and Respondent has denied the same,

as the Respondent has no reason to sell out his 2 Anne share in the suit land. It was further contended that, in the Regular Civil Suit No.607 of 1988, initially, there was temporary injunction granted against the Appellants. Thereafter, Appellants had preferred Miscellaneous Civil Appeal No.209 of 1989 against the said order, which came to be dismissed. Meanwhile, the proceedings were initiated before the Tenancy Authority.

5. In the backdrop of these facts, the Appellants have, to prove their case, approached the Sub-Registrar Office and got the certified copy of the 'Sale-Deed' and also 'Index-II'. Appellants examined themselves and in their cross-examination, they also admitted that, Respondent is in possession of the suit land of 2 Anne share, which he has purchased and his house is standing thereon.

6. In the light of this evidence on record, the Trial Court was pleased to decree the Suit. However, the Respondent approached the first Appellate Court and the first Appellate Court was pleased to reverse the said decree holding that, as no permission was obtained for leading secondary evidence and the original 'Sale-Deed' was not produced before the Court, it cannot be said that the Appellants have proved their ownership over the suit land. Further it was held, as it was admitted by the Appellants themselves, that, the Respondent is in possession of the

suit land; hence, having regard to all these factors, they cannot be held entitled to get the relief of prohibitory and mandatory injunction.

7. While challenging this 'Judgment and Order' of the first Appellate Court, the submission of learned counsel for the Appellants is that, the first Appellate Court has totally ignored or forgotten the provisions of Section 68 of the Indian Evidence Act, 1862, wherein it is clearly laid down that,

“If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence.

However, provided that, it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.”

8. It is submitted by learned counsel for the Appellants that, in this case, even the first Appellate Court has also held that the Respondent has not specifically denied execution of the 'Sale-Deed'. There is merely a vague denial. In such situation, when the 'Sale-Deed' was registered and

its certified copy is produced on record along with the 'Index-II', which is the public document, the 'Sale-Deed' should have been read in evidence, especially when it is further proved by examining the attesting witness. According to learned counsel for the Appellants, therefore, the first Appellate Court has committed an error in not accepting the case of the Appellants about their ownership over the suit land. It is submitted that, once it is held that the Appellants are the owners of the suit land, then directions are required to be given to the Respondent to remove, whatever construction he has carried out on the said 2 Anne share of the suit land. Even if the Appellants had failed to prove their possession over the suit land, at the most, they may not get the relief of prohibitory injunction, but they are entitled to get at-least the relief of mandatory injunction.

9. Learned counsel for the Respondent has, however, controverted all these submissions by pointing out that, it was for the Appellants to prove the original 'Sale-Deed' and if they wanted to bring on record the certified copy of the 'Sale-Deed', then the necessary permission should have been obtained from the Court for leading secondary evidence under Section 65 of the Indian Evidence Act, 1872. However, no such permission was obtained and directly the summons was issued to the Sub-Registrar and the certified copy of the 'Sale-Deed', along with 'Index-II', was produced on record. It is submitted that, when Respondent has

denied execution of the Sale Deed, it was incumbent on the Appellants to prove it properly. The Appellants having failed to do so, the first Appellate Court was justified in reversing the finding recorded by the Trial Court.

10. In my considered opinion also, the provisions of Section 68 of the Indian Evidence Act, 1872, are required to be read in its entirety and meaningful reading of the same make it clear that the said provision deals with the examination of attesting witness for proof of the document and provide that, if the document is a registered document, then examination of attesting witness can be dispensed with, except in case of 'Will'. This Section thus does not dispense with production of original document in the Court like a 'Sale-Deed' in the instant case. If the original 'Sale-Deed' cannot be produced on record, the Appellants wanted to rely on the certified copy of the 'Sale-Deed', then it was necessary for the Appellants to seek the requisite permission from the Court for producing the secondary evidence, as laid down under Section 65 of the Evidence Act. The provisions of Section 65 of the Evidence Act cannot be given go-bye, by directly accepting in evidence the certified copy of the 'Sale-Deed'.

11. It is pertinent to note that, since the year 1988 itself, Respondent is disputing execution of the 'Sale-Deed'. In that view of the matter, when

Respondent has already filed a Suit, even denying execution of the 'Sale-Deed' and also claiming possession of his 2 Anne share in the suit land, then the burden was heavy on the Appellants to produce the original 'Sale-Deed' and to prove it properly. Appellants have, however, failed to prove execution of the 'Sale-Deed', by producing original document on record and also their possession over the suit land.

12. Both the Courts below have categorically held that, the Appellants are not in possession of the suit land, but Respondent still continues to be in possession thereof. In such situation, the Suit simplicitor for prohibitory injunction, which is bound to be dismissed, and for mandatory injunction, only for removal of the construction, cannot serve the purpose. Hence, the first Appellate Court has rightly dismissed the Suit.

13. In the Second Appeal, no substantial question of law is involved. Therefore, the Second Appeal, along with the Civil Applications thereto, stands dismissed.

[DR. SHALINI PHANSALKAR-JOSHI, J.]