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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL No. 141 OF 1998

Hira Kalu Mhatre (since deceased
represented through LRs.) & Ors. ... Appellants
Vs.
Anant Kachru Patil & Ors. ... Respondents

Mr. A. S. Rao a/w Prashant Kamble, for the Appellants.
Mr. S. G. Deshmukh I/b D. S. Mhaispurkar, for Respondent
Nos.1 to 3.

CORAM : A. M. DHAVALA, J.

RESERVED FOR JUDGMENT ON : OCTOBER 10, 2018

JUDGMENT PRONOUNCED ON : OCTOBER 17, 2018

JUDGMENT :-

1. This is plaintiff's second appeal. Regular Civil Suit No. 283 of 1989 filed by the appellants for perpetual injunction was decreed by the learned Civil Judge, J. D. Kalyan and declaration and perpetual injunction was granted. In appeal, being Civil Appeal No. 225 of 1996 learned 2nd Additional District Judge, Kalyan reversed the said finding and dismissed

the suit. The appeal has been admitted on the ground Nos. 3 to 6 of the appeal memo, which relate to interpretation of documents, viz. agreement to sale (Exhibit 43), Mutation Entry Nos. 594 and 602 and reliability of unregistered sale-deed and mortgage-deed and reversal of findings of trial court by the first appellate court.

2. The facts relevant for deciding the appeal may be stated as follows:

(i) Admittedly, the suit land Survey No. 34/5/1 situated at Mauze Kole, taluka Kalyan, admeasuring 29.9 R was belonging to Kalu Khatre. The plaintiffs are sons and legal heirs of Kalu Mhatre. The plaintiffs claimed that Kalu Mhatre died in 1981. The suit properties were mutated in the name of their mother Jankibai and themselves. In November 1988, mother Jankibai died and thereafter they have become owners. They were cultivating crop of rice in the suit land.

(ii) The defendants having no concern with the suit land and

still on 19th June, 1989 tried to forcibly dispossess the plaintiffs. The plaintiffs lodged a report against them at Nagpada Police Station, but the police refused to record the crime. Hence, they claimed declaration that the defendants have no right to enter the suit land, and for perpetual injunction to restrain them from disturbing possession of the plaintiffs.

3. The defendants by their written statement Exhibit 12 raised following defences:

(i) The suit land was in cultivating possession of defendant No. 1's father since 1944. It was sold by deceased Kalu Mhatre to Janardan Krishnaji Bhide in 1944, and defendant No. 1 and the plaintiffs' father were jointly cultivating it. In 1965, Kalu Mhatre mortgaged the suit land to Bedkya Patil. Defendant No. 1 paid the mortgage money and defendant No. 1 was in possession of the suit land since then. The cause of action shown is concocted. The suit should have been filed for possession. Thereafter written-statement was amended and it was claimed that the suit land was sold by father of the plaintiffs

to Janardan Bhide. Kalu Mhatre and Bhide were jointly cultivating it. Thereafter, Kalu Mhatre mortgaged it to Bedkya Patil. In 1970 Kalu Mhatre agreed to sell the suit land to the defendants and defendants paid him entire agreed consideration Rs. 2,950/-. Out of the same, Rs. 750/- was paid to Bhide and reconveyance was obtained from him; Rs. 700 was paid to Bedkya and the mortgage was got redeemed, and thereafter possession was given to the defendants. It is in possession of defendant No. 1 since 1970. During pendency of the suit, application for temporary injunction was granted in favour of the plaintiff.

(ii) Learned Civil Judge framed issues and after recording the evidence, the suit was decreed with costs. Though there was no specific prayer of declaration of ownership, learned Civil Judge granted a declaration of ownership and consequential perpetual injunction.

(iii) The aggrieved defendants filed Civil Appeal No. 225

of 1996. The learned first appellate court allowed the appeal and dismissed the suit.

4. Mr. A. S. Rao, learned advocate for the Appellants argued that the suit property was belonging to Kalu Mhatre. Though he had sold it to Janardan Bhide in 1944 vide sale-deed (Exhibit 41), there is no dispute that the suit land was reconveyed in his name. The consistent 7-12 extracts disclose that Kalu Mhatre and after his death, his legal heirs i.e. the plaintiffs are in cultivating possession of the suit land. The learned first appellate court erred in reversing a well reasoned finding of the learned trial court. The first appellate court relied on the alleged mortgage-deed in favour of Bedkya Patil (Exhibit 42), which was not proved. He also submitted that the learned first appellate court erred in relying on agreement to sell (Exhibit 43) purportedly executed by deceased Kalu Mhatre in favour of defendant No.1. It was washed away and major part of the same was not legible. The same has not been proved as the attesting witness has not supported the defendant. No

attempt was made to obtain the sale-deed. Therefore, there was no material to reverse the well reasoned finding of the trial court, which was supported with the entries in the 7-12 extracts.

5. Per contra, learned advocate Mr. S. G. Deshmukh vehemently supported the judgment of the trial court. He argued that the plaintiffs have suppressed the material facts and have not examined plaintiff No. 2 Narayan, who was signatory to the material document (Exhibit 43). They have suppressed the fact about the sell of suit land to Janardan Bhide and mortgage to Bedkya Patil. Defendant No. 1 has paid dues of Bhide and Bedkya and got the land reconveyed from Janardan Bhide and obtained mortgage document (Exhibit 42) from Bedkya Patil. Defendant No. 1 has produced these documents from his custody and was also paying the land revenue and produced receipts (Exhibits 50, 50A and 50B). He argued that the plaintiffs are not entitled to discretionary relief, in view of suppression of material facts. He argued that as the defendants are in possession of the suit land, the plaintiffs should have filed

suit for possession. The learned trial judge erred in granting a decree for declaration of ownership when there was no prayer to that effect. He argued that the learned first appellate court has properly considered these aspects and has rightly dismissed the suit. No interference is called for in the said judgment.

6. The substantial questions of law formulated as per ground Nos. 3 to 6, with my findings thereon are as follows:

1. Whether the learned first appellate judge has rightly interpreted the documents dated 6.2.1970, which is purported to be an agreement for sale of the suit lands in dispute? In the negative.
2. Whether the learned appellate judge has properly interpreted the documents i.e. the extract of Mutation Entry No. 594 and 602 and 7-12 extracts which go to show that the appellants are in possession of the premises? In the negative.
3. Whether the learned appellate judge has jurisdiction to rely on documents, admittedly, The sale-deed is registered and the mortgage-deed was not

which are not properly valued, nor adequate stamp is paid for the same? admissible, as it is not registered and not on due stamp paper.

4. Whether the learned judge is right in disturbing the well founded finding on the point of possession given by the trial court after the evidence on record?

In the negative.

5. What order?

The second appeal is allowed. The judgment of the first appellate court is set aside that of the trial court is restored to the extent of perpetual injunction only.

Reasons

7. The Plaintiffs have examined plaintiff No. 3 Pandurang, who deposed his age as 38 years. He deposed in 1994. It means he was born somewhere in 1956. They have relied on 7-12 extracts (Exhibits 40 and 40/1), which show that the plaintiffs' predecessors were in cultivating possession of the suit land from 1949-50 to 1977 and 1982-83 to 1989-90.

8. Per contra, the defendants have relied on evidence of defendant No. 1. He has deposed about execution of agreement to sell (Exhibit 43) by deceased Kalu Mhatre in his favour on payment of Rs. 2,950/ the entire purchase price. He also deposed that out of said amount Rs.750/- was paid to Bhide to obtain reconveyance from him and Rs. 700 paid to Bedkya Patil to get back the mortgage document (Exhibit 42) from him. He produced the sale-deed (Exhibit 41) and the the mortgage (?) agreement (Exhibit 42).

9. The agreement to sell (Exhibit 43) is not legible in material part as it is washed away substantially. It is not disputed that this agreement does not disclose delivery of possession by Kalu Mhatre to defendant No. 1. The defendants have also examined DW 2 Babu, son of Bedkya Patil; DW 3 Hari Patil, attesting witness to Exhibit 43; and DW 4 Fulchand Patil to show that a meeting was arranged for settlement of the dispute between the plaintiffs and defendant No. 1.

10. The trial judge while decreeing the suit observed that the plaintiffs have filed 7-12 extracts at Exhibits 40 and 40/1 which show their possession from 1982 to 1990. The plaintiffs' father was in possession since 1949-1977. The land was sold to Janardan Bhide, who executed reconveyance and his name was deleted and the plaintiffs are owners of the suit property. He observed that the document purportedly executed by Kalu Mhatre in favour of Bedkya (Exhibit 42) is unregistered document on stamp of Rs. 1.50 only. The witness to the document Babu, son of Bedkya was not witness to that document, as his signature is not there. The delivery of possession under Exhibit 42 is not proved.

11. With reference to agreement to sell (Exhibit 43), the trial court observed that it required compulsory registration, but it is not registered. This was not correct legal position at the relevant time. He observed that DW 3 Hari Patil was attesting witness to the document, but he has given admission that Kalu

Mhatre was not present when he put his signature on Exhibit 43 after three days. This document was not acted upon as the 7-12 extracts did not disclose Bedkya's name as cultivator. The revenue receipt produced by defendant No. 1 are in the name of Kalu Mhatre, but the amounts are paid by defendant No. 1. The plaintiffs led evidence that the suit land was already exempted from payment of land revenue, therefore, these documents are not significant.

12. The duties of the first appellate court, if he feels that judgment of the trial court deserves to be reversed, as held in **Laliteshwar Prasad Singh Vs. S. P. Srivastava : [(2017) 2 SCC 415]** are laid down as follows:

“11. As per Order XLI Rule 31 Code of Civil Procedure, the judgment of the first appellate court must explicitly set out the points for determination, record its reasons thereon and to give its reasonings based on evidence. ”

“12. An appellate court is the final court of facts. The judgment of the appellate court must therefore reflect court's application of mind and record its findings supported by reasons. The law relating to powers and duties of the first appellate court is well fortified by

the legal provisions and judicial pronouncements. ...

12. In Santosh Hazari v. Purushottam Tiwari : (2001) 3 SCC 179, this Court held as under: (SCC pp. 188-89, para 15)

15. ... The appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. ... while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it. ”

“13. In H.K.N. Swami v. Irshad Basith (2005) 10 SCC 243, this Court stated as under: (SCC p. 244, para 3)

3. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard both on questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. Unfortunately, the High Court, in the present case has not recorded

any finding either on facts or on law. Sitting as the first appellate court it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording the finding regarding title. ”

13. The first appellate court reversed the findings of the trial court with following reasoning:

- (i) The plaintiffs did not examine any other witness whereas the defendants have examined three witnesses besides him;
- (ii) The plaintiffs have suppressed the material documents of 1970 and 1944, and the mortgage with Bedkya of 1961;
- (iii) Though the documents were denied, there were implied admissions of execution of document;
- (iv) There were variances between pleadings and proof;
- (v) There is no denial of the transaction but only statement that PW 1 was not aware, he has faigned innocence / ignorance. It is suppression on material facts;
- (vi) The documents (Exhibits 41, 42 and 43) produced by him disclose that the plaintiffs have failed to prove their possession. (The agreement (Exhibit 43 does not disclose delivery of possession.)
- (vii) He has relied on doctrine of part performance under S.53-A and held that defendant No. 1 has taken steps for part performance of contract. (But there was no satisfactory evidence to show their readiness and

willingness.)

- (viii) He has held that the Appellant can take benefit of the agreement as what is lost is remedy and not the right until dispossessed by due process of law. He, therefore, allowed the appeal.

14. In second appeal, this court cannot reappreciate the evidence led by both parties. But when once different findings are recorded by the first appellate court, than those recorded by the trial court i.e. there are no concurrent findings, it is necessary to consider whether the first appellate court was justified and has given sound reasons or not for setting aside the decree passed by the trial court.

15. On carefully considering the evidence and the documents on record, I find that the suit was for injunction *simpliciter*. The plaintiffs claimed that they were in possession and cultivation of the suit land by virtue of ownership. Admittedly, father of the plaintiffs was previous owner of the suit land. He had sold the suit land to Janardan Bhide vide sale-deed (Exhibit 41) and as per Mutation Entry (Exhibit 46), the

said property was reconveyed by Janardan Bhide. Defendant No. 1 in written-statement has admitted this fact. Admittedly, the reconveyance-deed is not produced by the defendant.

16. The learned first appellate court was very much impressed with the arguments regarding suppression of material facts by the plaintiffs. However, the evidence of PW 1 Pandurang was recorded in 1994. That time he was aged 38 years. So, he must have been born in 1956. If questions are asked to him about the sale-deed of 1944 or alleged mortgage to Bedkya in 1961, he could not have answered as he was not born at the time of sale-deed and he was too young at the time of agreement with Bedkya Patil in 1961 (Exhibit 42). When the suit is for perpetual injunction and when plaintiffs have pleaded that they were owners and they were in cultivating possession, the pleadings were on record. The statement of the plaintiffs that defendants had no concern, is far from reality, but it is not a material aspect.

17. The entries in 7-12 extracts have presumptive value as per S. 157 of the Land Revenue Code. Considering the fact that the plaintiffs and their father Kalu Mhatre were owners of the suit land, this presumption is more strengthened. Strong and cogent evidence was required to rebut this presumption.

18. As far as sale-deed in favour of Janardan Bhide by Kalu Mhatre is concerned, it appears to be a loan transaction. Kalu Mhatre has executed reconveyance. The said reconveyance - deed is not produced by defendant No. 1. In fact, the case of defendant No.1 about payment of Rs. 750/- by defendant No. 1 to the plaintiff for obtaining reconveyance from Janardan Bhide is afterthought. This case was not pleaded initially by the defendant No. 1. On the contrary, he has pleaded that he and Kalu Mhatre were jointly cultivating the suit land. In para 3, he recorded that he paid money from which encumbrance by way of agreement with Bedkya Patil was cleared, but there was no pleading that he paid money to Kalu Mhatre, and Kalu Mhatre paid the said amount to Janardan Bhide. This has been

subsequently added by amendment. Even in the written-statement it was claimed that Kalu Mhatre has executed documents in favour of Bedkya Patil in 1965, whereas the agreement (Exhibit 42) is of 1961.

19. The defendant has examined DW 2 Babu, son of Bedkya Patil. He claimed that Kalu Mhatre has mortgaged land to his father in 1961. Exhibit 42 was bearing his thumb impression. However, in the cross-examination, his evidence has been falsified. He admitted that he is not signatory to Exhibit 42. He has admitted that he did not pass any receipt of Rs. 700/-; he could not tell, who was in possession of the suit land since 1970. Thus, he does not support case of defendant No. 1 that defendant No. 1 paid money to Kalu Mhatre to get the encumbrances vide Exhibit 42 redeemed and in return Kalu Mhatre put defendant No. 1 in possession.

20. DW 3 Hari Patil is witness on the material agreement to sell (Exhibit 43), purportedly executed by Kalu Mhatre in

favour of defendant No. 1. In cross-examination, he admitted that he was not knowing what was written in the agreement, exhibit 43; it was not read over to him. It was first written and after three days, he put his signature. Thus, he is not witness to the document or the transaction or execution of the sale by Kalu Mhatre. His evidence is of no use to prove the document.

21. DW 4 Fulchand has deposed that there was dispute between the plaintiffs and defendant No. 1. Defendant No. 1 was a Sarpanch of the village. A meeting was held, but the dispute could not be resolved. His evidence is not relevant.

22. The evidence on record discloses that there are no proper pleadings and evidence to show that defendant No. 1 paid money to Kalu Mhatre and Kalu Mhatre paid it to Janardan Bhide and got the agreement of reconveyance from him.

23. The case that Bedkya Patil was in possession of the suit land is not supported by 7-12 extracts. The agreement to sell Exhibit 43 does not disclose delivery of possession.

24. After considering the defence and evidence of defendant No. 1, there are several questions unanswered as follows:

- (i) If defendant No. 1 was put in possession after agreement of sale (Exhibit 43), why this fact was not recorded in the agreement?
- (ii) If defendant No. 1 has paid the entire consideration, the said fact cannot be ascertained, as material part of Exhibit 43 has been washed away. The witness to agreement, Exhibit 43 has not supported defendant No. 1. If defendant No. 1 is to be believed, the question arises, why he had not obtained sale-deed from Kalu Mhatre?
- (iii) If defendant No. 1 or earlier Bedkya Patil were put in possession of the suit land, why its effect was not given in the 7-12 extracts?
- (iv) If defendant No. 1 was put in possession under agreement to sell, why plaintiffs did not seek specific performance of the contract?

25. Learned first appellate court did not take into

consideration that in 1970 PW 1 Pandurang was hardly aged 14 years; he may not be having knowledge about any transaction between his father and defendant No. 1. It was wrong on the part of the first appellate court to assume that PW 1 was deliberately suppressing the facts. On the contrary, there is material variance in the pleadings and evidence of defendant No. 1, which was not considered.

26. Learned first appellate court failed to consider that agreement (Exhibit 43), does not disclose delivery of possession, nor there was pleading about readiness and willingness by defendant No. 1 to perform his part of contract. The doctrine of part performance was clearly inapplicable in a suit for perpetual injunction. If plaintiffs were not in possession, they would not be entitled to get injunction. It was immaterial whether the defendants were entitled to get protection or not. It would have been relevant only in a suit for possession.

27. Considering all the facts, I find that the evidence on

record disclose that there was some money lending transaction between the plaintiffs and the defendant No. 1 and probably the plaintiffs handed over to defendant No. 1 earlier sale-deed (Exhibit 41) as a security. The agreement to sell (Exhibit 42) is not at all proved and is highly suspicious. The pleadings show that it was executed in 1965 whereas the document shows that it is of 1961. The witness (DW 2) was not present at the time of said transaction. The said transaction has not been proved.

28. In the light of the entire evidence on record, I find that defendant No. 1 failed to rebut the presumption under S. 157 of the Land Revenue Code, arising out of the consistent entries in the 7-12 extracts, showing occupation and cultivation of plaintiffs from 1950 to 1990. The agreement to sale, Exhibit 43, also does not disclose delivery of possession, nor defendant No. 1 has examined any adjacent neighbour to prove his possession and cultivation.

29. The learned Civil Judge, J. D. has properly

appreciated the evidence and has given reasons, which were not considered by the first appellate court. Though the learned Civil Judge has not considered all these facts, he has relied on many of these facts. The well reasoned judgment of the trial court could not have been interfered by the first appellate court.

30. In the circumstances, the appeal deserves to be allowed.

31. However, when the plaintiffs have not claimed declaration of ownership, learned Civil Judge, J.D. erred in granting the decree of declaration. The declaration claimed by the plaintiffs could not have been granted. Hence, the decree of trial court only to the extent of perpetual injunction deserves to be restored. Hence, I answer the substantial questions of law accordingly, and pass the following order.

ORDER

(i) The second appeal is allowed.

(ii) The judgment and decree in first appeal, being Civil

Appeal No. 225/1996 are set aside, to the extent of reversal of decree of perpetual injunction, granted by the learned trial court.

- (iii) The judgment and decree of the trial court passed in Regular Civil Suit No. 283/1989 is restored to the extent of perpetual injunction, with costs only.
- (iv) The decree be drawn-up accordingly.

Sd/-
[A. M. DHAVAL, J.]

Vinayak Halemath