

Sequeira

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

***SECOND APPEAL NO. 9 OF 2018
Along with
CIVIL APPLICATION NO. 1831 OF 2017***

Mr.Jahid Abdul Sakur Usmani .. Appellant
Vs
Ms.Hemalata Chintamani Kulkarni and another .. Respondents

***Along with
SECOND APPEAL NO. 194 OF 2011
Along with
CIVIL APPLICATION NO. 493 OF 2011***

Ms.Hema Chintam Kulkarni and others .. Appellants
Vs
Mr.Jahid Abdul Sakur Usmani .. Respondent

Mr.Amol A.Deshpande, for the Appellant.

Mr.S.N.Chandrachood, for Respondent No.2 in Second Appeal No.9 of 2018 and Appellant in Second Appeal No.194 of 2011.

***Coram : N.M.Jamdar, J.
Date : 22 January 2018.***

Oral Order :

The Second Appeal No.194 of 2011 and Second Appeal No.9 of 2018 are between same parties and involve the same suit premises and that both the appeals have been tagged together and argued by the learned counsel for the parties together. Though Second Appeal

No.194 of 2011 has been admitted on 9 November 2011 by framing substantial question of law, at the joint request, the same is also taken up for consideration along with Second Appeal No.9 of 2018, which is pending admission.

2. The subject matter of both these appeals are premises situated on plot No.22 along with the structure in Ninad Co-operative Housing Society, Vadgaon Sheri, bearing House No.3/9, admeasuring 3150 sq.ft.. The Plaintiff in both these Appeals is the same i.e. Jahid Abdul Sakur Usmani.

3. In Second Appeal No.194 of 2011, the facts are that the Plaintiff filed Regular Civil Suit No.44 of 2008 seeking injunction that the Respondents are threatening to dispossess him and create third party rights and therefore, they be restrained. The suit was dismissed by the learned Civil Judge, Senior Division, Pune by judgment and order dated 30 July 2009. Civil Appeal No.515 of 2009 was filed by the Plaintiff and the Appeal was allowed by judgment and order dated 21 January 2011 and Respondents were restrained by order of perpetual injunction from obstructing the possession of the Plaintiff. As against this order Second Appeal was filed, which was admitted on 9 November 2011.

4. In the meanwhile, it appears that the Plaintiff i.e. Mr.Jahid Usmani had filed another suit bearing No.44 of 2008 against Ninad Housing Society where the premises are situated and temporary

injunction was granted against the Society. The Respondents filed Miscellaneous Civil Appeal No.104 of 2008 which was allowed against which Plaintiff filed Writ Petition No.5562 of 2008 which was disposed of and thereafter the Plaintiff again filed another suit bearing Special Civil Suit No.1414 of 2013 contending that the Plaintiff was residing in suit premises as a tenant since the year 1998 and on 30 April 2007, a gift deed was executed in his favour by the landlady Shantabai and therefore, he has become owner of the suit premises. It was also contended by the Plaintiff that the sale deed which was executed by Defendant No.1 daughter of Shantabai in favour of Defendant No.2, on 27 August 2010, was illegal. The learned Civil Judge, Pune dismissed the suit filed by the Plaintiff. The said Respondent filed counter claim seeking possession which was granted by judgment and order dated 16 January 2017. Civil Appeal No.200 of 2017 filed in the District Court, Pune was dismissed by the learned District Judge by judgment and order dated 5 June 2017.

5. Heard learned counsel for the parties.

6. From the narration of the facts above, it is clear that the Appellant-Plaintiff has instituted various proceedings in his endeavour to continue to occupy the premises. Varying stands have been taken in the litigations. In Regular Civil Suit No.44 of 2008, the contention of the Appellant-Plaintiff was that deceased Shantabai had executed Development agreement in his favour. Thereafter the

writ petition filed was withdrawn contending that the Appellant-Plaintiff wants to file a suit for specific performance. The suit from which Second Appeal No.9 of 2018 arises is based primarily on document dated 30 April 2007 which the Appellant-Plaintiff seeks to convert into a gift deed. Both the Courts have scrutinised this document and found that it was not gift deed at all. Both the Courts have also considered the surrounding circumstances.

7. Firstly, the document itself is titled Development agreement. It was stated to be executed on 30 April 2007. The possession receipt is stated to have been executed on 18 October 2007. On 9 November 2007, Shantabai passed away. Though it is stated to be contended that the gift deed was executed out of love and affection since the Appellant took care of deceased Shantabai, why she was gifting the entire property to a tenant excluding her daughter, is not explained. In the earlier suit the Plaintiff did not come with the theory of any gift deed but relied on this document as a Development agreement. The recitals in this agreement clearly speak about development of a small portion situated on the first floor. Thus there was no need to prepare a possession receipt thereafter. The learned counsel for the Appellant submitted that the gift deed is registered. Even assuming the deed is registered, it can be seen that it is a Development agreement. That because it is registered, it cannot be converted to a gift. A gift deed must contain all the necessary recitals and the Courts are not precluded from considering the surrounding

circumstances, conduct of the parties and the case of the very same litigant in the earlier proceedings. It is therefore, clear that the Appellant has only sought to advance the theory of gift as an after thought and there is no consistency in the stand taken by the Appellant. Once it is held that there is no right in favour of the Appellant then the sale deed executed by the daughter of Shantabai as heir, in favour of Defendant No.2 will have to be upheld and therefore, there was no error committed by both the Courts in granting relief in favour of the Defendants.

8. The learned counsel for the Appellant submitted that the Appellant-Plaintiff is a tenant of two rooms and there is observation to that effect by the learned trial Judge. In appeal the learned District Judge has examined the so-called rent receipt and found that there are no particulars whatsoever. In this receipt, it is not the case of the Appellant-Plaintiff that the Appellant-Plaintiff is a simplicitor tenant of the suit property. First it was contended that there is Development agreement executed by the landlady then, there is a contention that there is a gift executed in favour of the Appellant-Plaintiff. Now the learned counsel for the Appellant submits that those stands be ignored and the Appellant-Plaintiff be considered as a simplicitor tenant of the property. Such submissions cannot be accepted. There is no evidence regarding the tenancy. Therefore, there is no question of law that arises for consideration. In this circumstance Appeal No.9 of 2018 which is pending for admission deserves to be dismissed.

9. As far as Second Appeal No.194 of 2011, the same was admitted on 9 November 2011. The learned counsel for the Appellant submitted that the learned District Judge has directed the Appellants in this appeal not to dispossess the original Plaintiff without following due process of law. Since the Second Appeal No.9 of 2018 directing the Plaintiff to hand over possession is dismissed, it is clear that the due process of law is followed and the learned counsel for the Appellant-Plaintiff seeks leave to withdraw the Second Appeal No.194 of 2011 stating that Second Appeal No.194 of 2011 does not survive, in view of dismissal of Second Appeal No.9 of 2018. In view of this statement it is not necessary to decide the question of law framed. Second Appeal No.9 of 2018 is dismissed. Second Appeal No.194 of 2011 is dismissed as withdrawn.

10. In view of the above order passed in both the Second Appeals, the Civil Applications stand disposed of.

(N.M.Jamdar, J.)