

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
AURANGABAD BENCH, AT AURANGABAD.**

Second Appeal No. 0038 of 2019

District : Latur

1. Faizualla s/o. Umarkhan Deshmukh,
Age 67 years,
Occupation Agriculture,
R/o. Nandurga, Taluka AUSA,
Dist. Latur.

2. Attaulla s/o. Faizulla Deshmukh,
Age 41 years,
Occupation Agriculture,
R/o. Nandurga, Taluka AUSA,
Dist. Latur.

.. Appellants
(Original
defendants)

versus

Sabiyabegum w/o. Fartulla Deshmukh,
Age 53 years,
Occupation Agriculture,
R/o. Nandurga, Taluka AUSA,
Dist. Latur.

.. Respondent
(Original
plaintiff)

.....

Mr. Avinash D. Aghav, Advocate, for the appellants.

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 20TH FEBRUARY 2019

O R D E R :

01. Present appeal has been filed by the original defendants, challenging the judgment and decree passed by learned Ad hoc District Judge-1, Latur, in Regular Civil Appeal No. 37 of 2015 dated

24-08-2018, whereby their appeal came to be dismissed. In the said appeal, appellants had challenged the judgment and decree passed in Regular Civil Suit No. 230 of 2008 by 2nd Joint Civil Judge (Junior Division), Ausa, District Latur, dated 21-01-2015.

02. The said suit was filed by the present respondent - plaintiff for declaration and perpetual injunction. It has been vehemently submitted on behalf of the appellants, that the appellants possess the suit property by virtue of an agreement to sell executed by plaintiff on 12-03-1997. The said agreement was impounded by the learned trial Court. On the basis of said agreement to sell, the defendants had made counter claim and prayed for specific performance. Learned trial Court has wrongly held that defendants had failed to prove the agreement to sell, payment of earnest amount, readiness and willingness to perform their part of contract and thereby the counter claim was dismissed. The first appellate Court also failed to consider that the agreement to sell which was impounded during the pendency of the trial could have been used for collateral purpose under Section 49 of the Registration Act and under such circumstance, when the defendants were in settled possession of the suit property, their possession ought to have been protected. He placed reliance on the decision of the

Hon'ble Apex Court in *Rame Gowda (D) by LRs. Vs. M. Varadappa Naidu (D) by L.Rs.* [AIR 2004 SC 4609]. Based upon the same decision, the injunction order was confirmed by this Court in *Baban Anantrao Naik Vs. Sau. Pramila Uttamrao Yenare & another* [2011(6) All.M.R. 15]. According to him, substantial questions of law are arising in this matter.

03. Taking into consideration the pleadings of the parties, evidence that has been led and the decision by both the Courts below, it is not even necessary to issue notice to the respondent in this case. Only if the appellants show substantial question of law, then only the second appeal can be entertained under Section 100 of the Code of Civil Procedure, 1908.

04. Plaintiff had come with a case that defendant no.01 is her brother-in-law and defendant no.02 is son of defendant no.01. There was a partition between defendant no.01 and husband of plaintiff about 35 years prior to the suit. 15 acres of land in Survey No.90 and the suit property which was admeasuring 88 R situated at Nandurga, Taluka Ausa, from Survey No. 70-A was allotted to her husband. However, her husband had gifted the suit property as well as 15 acres land in 1990 to her by *Hibanama* and since then she is the owner and possessor of the suit property. Her name has been entered to the revenue record. It is to be noted

that in the written statement, then the defendants have come with a specific case that plaintiff had entered into an agreement to sell. That means, they were admitting plaintiff as the owner of the suit properties and how the property has devolved on her. Therefore, we need not go into that aspect.

05. Plaintiff had come with a case, that she was getting the property cultivated through yearly *Salgadi* i.e. kind of servant and the defendants were obstructing her possession. Therefore, she filed the suit for declaration as well as permanent injunction. The defendants had come with a case, that by virtue of said agreement to sell, dated 12-03-1997, they had paid earnest amount of Rs. 35,000/- out of total consideration of Rs. 45,000/- and they were put in possession by the plaintiff. According to them, since 12-03-1997, they possess the suit property. It is also their case, that since the suit property was coming under the beneficial zone, permission from the Government was required and, therefore, plaintiff had agreed to bring the said permission. The said sale deed was to be executed after obtaining the permission. It was also stated that when the plaintiff was a relative of the defendants and a *Pardanshin* woman, defendant no.02 had not made enquiry about the said permission. It is also stated that he is still ready and willing to get the sale deed executed and, therefore, the counter claim was

made. Defendants had examined themselves as well as attesting witness and scribe in order to prove the said document. It will not be out of place to mention here, that the said document was impounded when it was found that it was on a deficit stamp paper. Plaintiff has totally denied the execution of the said document. So also, it was stated that plaintiff had executed a separate document i.e. receipt in respect of receipt of amount of Rs. 35,000/-. Both these documents have been denied. Both the Courts below have appreciated the evidence adduced on behalf of the defendants.

06. It is to be noted that the defendants have come with a case, that possession was parted in pursuance to the said document. The said document ought to have been registered as per provisions of Section 17 of the Indian Registration Act. When it has not been registered, it is required to be seen as to whether it can be even considered for collateral purpose under Section 49 of the Indian Registration Act. Another aspect that is also required to be considered is that the said document of agreement to sell though as per the defendants was executed on 12-03-1997, the stamp paper of Rs. 20/- was purchased on 29-02-1996. As per Section 52B of the Bombay Stamp Act (present Maharashtra Stamp Act), such stamps can be used within six months of its purchase and when they are not used or in respect of which no allowance

has been claimed on or before the day immediately preceding the date of commencement of Bombay Stamp (Amendment) Act, 1989, then such stamp paper would become invalid. Invalidly stamped documents would thus become liable to be inadmissible in evidence or of be impounded or penalty be imposed as provided in the Act. No doubt, the stamps are adhesive or impressed but significantly stamps are not defined in this Act. Section 49 relates to impressed stamps, while Section 52B relates to stamps and can mean adhesive stamps also. Therefore, on that count also, the said agreement is also required to be viewed with suspicion. There is no explanation by the defendants as to why such an old stamp was used to execute the agreement to sell. The scribe has also not given that kind of explanation.

07. If defendants had paid substantial amount of consideration, if we presume for a moment, that such agreement was executed, then the natural conduct on the part of the defendants would have been to get their names included in the revenue record. However, perusal of the 7/12 extract showed that name of the plaintiff alone is shown in ownership as well as possession column. From another angle also, the fact can be seen that if the agreement was executed in the year 1997, then why till 2008, when the suit was filed, the defendants have kept mum. Written statement has been filed in the year 2009 and then

the counter claim has been made. Merely by saying that plaintiff is a *Pardanshin* lady and relative, the defendants kept quiet, is not a good and reasonable ground. It does not show that they were ever ready and willing to perform their part of the contract.

08. The discrepancies in the testimony of the witnesses of the defendants have been taken note of by both the Courts below and, therefore, it is stated that on the factual aspect about handing over of possession in pursuant to the alleged agreement to sell cannot be said to have been proved. Both the Courts have rightly held that since the defendants have failed to prove readiness and willingness so also execution of the agreement itself, they are not entitled to get specific performance of the contract. Per contra, evidence of the plaintiff was consistent. She has proved her ownership and the possession would follow that. That is also supported by revenue record. Under such circumstance, the suit was rightly decreed and the appeal has been rightly dismissed. No substantial question of law is arising.

09. The ratio laid down in the case of *Rame Gowda (D) by LRs. (supra)* is not applicable here, for the simple reason that the concept of settled possession was different which was stated in that proceedings. Here, in this case, defendants had come with a case

that they possess the suit property by virtue of a document which they have failed to prove. Further, decision in *Baban Anantrao Naik's* case (*supra*) was in an appeal from order i.e. in respect of challenge to the interim order. Under such circumstance, that cannot be helpful to the defendants.

10. Since the appellants have failed to point out any substantial question of law, the second appeal is hereby dismissed / not admitted.

(Smt. Vibha Kankanwadi)
JUDGE

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