

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***CIVIL APPELLATE JURISDICTION*****SECOND APPEAL NO. 110 OF 2018****ALONGWITH****CIVIL APPLICATION NO. 245 OF 2018****ALONGWITH****CIVIL APPLICATION (ST) NO. 17122 OF 2018****IN****SECOND APPEAL NO. 110 OF 2018**

**Namdeo Darku Jahdav,
Since deceased through legal heirs
Deoram Namdeo Jadhav & Ors.**

..... Appellants**VERSUS**

Sangita Sanjay Ahire & Ors.

..... Respondents

Mr.P.B.Shah, i/b. Mr.K.P.Shah for the Appellants.

Mr.G.R.Agrawal for the Respondent nos. 1 to 5.

CORAM : R.D. DHANUKA, J.

DATE : 27th AUGUST, 2019

P.C.

By this appeal filed under section 100 of the Code of Civil Procedure, 1908, the appellants (original plaintiffs) have impugned the judgment and decree dated 29th January, 2018 passed by the learned District Judge -2, Niphad allowing Regular Civil Appeal No.70 of 2016 filed by the original defendant nos. 1 and 2 and setting aside the part of the decree which was granted in favour of the appellants by the trial court.

2. The appellants filed a suit for a declaration that the appellants

were the owners of the agricultural land, for perpetual injunction from restraining the defendants from obstructing the possession of the plaintiffs over the agricultural land and for cancellation of the sale deed made in favour of the defendant no.1 by the defendant nos.3 to 5.

3. The suit was resisted by all the defendants by filing written statement. The plaintiffs examined three witnesses. The defendant nos. 1 and 2 examined two witnesses. The defendant nos. 3 to 5 examined defendant no.4 as a witness.

4. The learned trial judge after considering the evidence, partly decreed the suit. Insofar as prayer for declaration that the appellants are the owners of the suit property is concerned, the trial court rejected the said prayer. The trial court however declared that the sale dated 19th September, 2014 in respect of the land admeasuring 2 Hectors land in Gat No.386 executed in favour of the defendant no. 1 by defendant nos. 3 to 5 was illegal. The appellants herein did not challenge the decree rejecting the prayer of the appellants for declaration of the ownership in respect of the suit property. Insofar as the relief granted in paragraph (3) of the judgment and decree dated 5th April, 2016 declaring the sale deed as illegal, the defendant nos. 1 and 2 preferred an appeal before the learned District Judge being Regular Civil Appeal No. 70 of 2016.

5. The first appellate court formulated five points for determination and held that the appellants (original plaintiffs) had not succeeded to the right in the suit property under agreement for sale Ex.71 and sale deed Ex.72 created in favour of the Namdeo or his wife Sakhrabai. The appellate court also rendered a finding that the defendant no.1 on the

other hand proved that he was a *bonafide* purchaser of the suit property and the owner in possession of the suit property by virtue of the registered sale deed dated 19th September, 2014.

6. Mr.Shah, learned counsel for the appellants (original plaintiffs) invited my attention to some of the documents annexed to the second appeal and also the compilation of the pleadings and documents and would submit that the appellants had proved their possession in respect of the suit properties. The trial court had rightly rendered a finding in favour of the appellants in respect of the possession which findings could not have been reversed by the first appellate court. He submits that the sale deed executed in favour of the defendant no.1 was totally illegal and could not have been upheld by the first appellate court.

7. Mr.Agrawal, learned counsel for the defendant nos.1 and 2 on the other hand would submit that the trial court had rendered a finding of possession in favour of the appellants based on a pencil entry. He was neither the owner nor had any possessory rights in respect of the suit property. As against that the predecessor in title of the defendant no. 1 was the owner of the suit property. Their names were recorded in the 7/12th extract.

8. Learned counsel invited my attention to various findings of fact rendered by the first appellate court on the issue of possession in favour of his client and against the appellants.

9. It is submitted by the learned counsel that though the trial court had clearly held that the appellants had failed to prove their ownership in the suit property, the appellants did not file either any appeal or even

cross objection in the appeal preferred by his client and thus cannot challenge the rejection of relief by trial court across the bar. In support of this submission, learned counsel placed reliance on the judgment of this court in case of ***Smt.Kamlabai Narayanrao Wagh & Anr. vs. Smt.Muktabai wd/o. Bajirao Patil & Ors., 2018(5) ALL MR 250.***

10. A perusal of the findings rendered by the trial court insofar as possession of the appellants is concerned, paragraph (21) of the judgment and decree passed by the trial court indicates that the said finding is rendered on the basis of the pencil entry. The appellants had failed to prove their possession in respect of the suit property. It is not in dispute that the rejection of the prayer for declaration of the ownership of the appellants by the judgment and decree of the trial court dated 5th April, 2016 has not been impugned by the appellants by filing a separate appeal or cross objection against the defendant nos. 1 and 2 before the learned District Judge.

11. The appellants have filed the suit for declaration of the ownership of the suit property and simultaneously possession based on the same cause of action.

12. The trial court did not consider the 7/12th extract and other related documents produced by the defendant nos. 1 and 2 and rendered findings of possession in favour of the appellants merely on the basis of the pencil entry which could not be considered as conclusive for the purpose of rendering a finding of possession. The first appellate court has considered this issue in great detail in the impugned judgment and decree rendered on 29th January, 2018.

13. Insofar as the sale deed in favour of the defendant no.1 is concerned, the same was executed after issuing a public notice. The defendant no.1 had made proper enquiry of title in respect of the suit property of the predecessor of the title. This aspect is also considered in great detail by the first appellate court.

14. The findings rendered by the first appellate court being not perverse, cannot be interfered with by this court in this second appeal filed under section 100 of the Code of Civil Procedure, 1908. Second appeal is devoid of merit. In my view, no substantial question of law arises in this second appeal. I, therefore, pass the following order :-

(a) Second appeal is dismissed.

(b) In view of the dismissal of the second appeal, Civil Application No.245 of 2018 does not survive and is accordingly dismissed.

(c) In view of the aforesaid view taken by this court in the aforesaid order, no case is made out for taking the additional documents, Civil Application (St) No.17122 of 2018 is also accordingly dismissed. No order as to costs.

(d) Mr.Shah, learned counsel for the appellants seeks continuation of the *ad-interim* protection granted by this court to enable his client to challenge this order before the Hon'ble Supreme Court. Mr.Agrawal, learned counsel for the defendant nos. 1 and 2 on instruction

states that his client would not execute the decree passed by the first appellate court for a period of six weeks from today. Statement is accepted. It is made clear that during this period of six weeks, the appellants shall not create any third party rights.

[R.D.DHANUKA, J.]