

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

**SECOND APPEAL NO. 46 OF 2017
WITH
CIVIL APPLICATION NO. 86 OF 2017**

Mahadeo Kalu Mhatre ... Appellant
Versus
Ambubai Maya Mhatre ... Respondent
.....
Mr. Sandesh D. Patil i/b Ms Anusha P. Amin for the Appellant.
.....

CORAM : SANDEEP K. SHINDE, J.

DATE : 12th FEBRUARY, 2019.

P. C.:

1. Heard learned Counsel for the appellant-defendant at length.
I will refer the parties as plaintiff and defendant.
2. Perused the notes of evidence, copy of the plaint and agreement to sale dated 2nd November, 1982.
3. Appellant was the defendant in Regular Civil Suit No.17 of 2005 filed by his sister for declaration of title, removal of encroachment on the suit land and possession thereof. The trial Court decreed the suit, against which defendant No.1 preferred Regular Civil Appeal No. 50 of 2009. The appeal was partly allowed and decree was modified, whereby the defendant was directed to hand over the possession of land admeasuring 30'X 65' of the suit land. Decree was also modified by declaring the plaintiff, as owner of

the land Gat No.10-A area admeasuring 21.79 R. It is against the decree passed in Regular Civil Appeal, the defendant has preferred this appeal.

4. The Courts below concurrently rendered a finding of fact that the agreement to sale dated 2nd November, 1982 allegedly executed by plaintiff in favour of defendant, has not been proved in substance by the defendant. I have perused the said agreement. The said agreement does not refer to possession of land admeasuring 25'X 65' being handed over to the defendant by the plaintiff. Since, the plaintiff did not disputed her thumb impression on the said agreement, it is argued that execution of the agreement was proved and such other evidence on record has proved the fact that the defendant was put into possession in pursuance to the agreement dated 2nd November, 1982. It is submitted that the finding recorded by the Courts below is perverse being inconsistent to the evidence on record.

5. Defendant's possession over the suit land is not in dispute. However, question is what is the character of his possession. Whether it is pursuant to the agreement dated 2nd November, 1982 or permissive or unauthorised and as encroacher. Though the defendant contends that he was put in possession pursuant to the agreement dated 2nd November, 1982, but there is no recital in the said agreement to hold that he was put in possession of the subject

land 30'X 65'. It appears from the plaint that the plaintiff has not referred to agreement dated 2nd November, 1982 at all, but the defendant in defense pleaded and placed the agreement on record.

6. Though the plaintiff did not step into the witness box and did not deny her thumb impression on the said agreement that itself does not prove the execution of agreement and that the defendant was put in possession of the suit land by the plaintiff.

7. That, upon appreciating the evidence, both the Courts below concurrently concluded that the defendant failed to prove his possession over the suit either in pursuant to agreement dated 2nd November, 1982. It is held that defendant could not prove his right to remain in possession of the suit land. More so, the defendant did not take any steps for years together to get the subject document dated 2nd November, 1982 registered or sought its performance.

8. Be that as it may, in my view the finding recorded by the Courts below is consistent with the evidence on record. The appeal does not give rise any substantial question of law, therefore it is dismissed. Civil application does not survive and it is disposed of.

(SANDEEP K. SHINDE, J.)