

Urmila Ingale

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 593 OF 2017
WITH
CIVIL APPLICATION NO. 1036 OF 2017

Balkrishna Motilal Kambale .. Appellant
Vs.
Manoj Popatlal Shaha & ors. .. Respondents

Mr.Prabhanjan Gujar, for the Appellant.
Mr.Surel S.Shah, for the Respondent No.5.

CORAM : M.S.KARNIK, J.

DATE : 07th OCTOBER, 2019

PC. :

. Heard learned Counsel for the appellant.

2. The appellant - original plaintiff had filed the Suit simpliciter for injunction restraining the defendants from interfering with the peaceful possession of the plaintiff over the suit land. It is the contention of the learned Counsel for the appellant – original plaintiff that on the basis of unregistered agreement of sale dated 22/07/2000 executed by respondent

No.3 – original defendant No.3 in favour of the plaintiff at Exhibit 83, it is the plaintiff who is in possession. Learned Counsel for the appellant invited my attention to the agreement of sale dated 22/07/2000 wherein there is recital that possession of the suit land is handed over to the plaintiff by defendant No.3 on the date of the execution of the agreement.

3. It is the case of the plaintiff that defendant No.3 executed sale deed in the name of defendant No.1 on 29/08/2002 vide Exhibit 104 relating to area admeasuring 1 H 99 R out of Gat No. 128. Further defendant No.3 executed sale deed in the name of defendant No.2 on 29/08/2002 vide Exhibit 122 relating to area admeasuring 81 R out of land Gat No. 128. It is not in dispute that the name of plaintiff was never entered into record of rights on the basis of the agreement of sale dated 22/07/2000. As a matter of fact, defendant No.2 in whose favour sale deed dated 29/08/2002 is executed is real brother of the plaintiff.

4. Learned Counsel for the plaintiff would submit that the Suit is simpliciter for injunction and that the plaintiff can surely claim the relief of injunction restraining the defendants from obstructing his possession over the suit land on the strength of the agreement of sale dated 22/07/2000. He would submit that agreement of sale is admitted to have been executed by defendant No.3 in favour of plaintiff and therefore considering the recital in the agreement that possession has been handed over to the plaintiff, Suit is perfectly maintainable. Learned Counsel for the appellant would submit that it is the case of defendant No.3 that agreement of sale dated 22/07/2000 is cancelled by deed of cancellation dated 29/08/2002. In the submission of learned Counsel for the appellant it was for the defendant No.3 to prove by cogent evidence the deed of cancellation. In fact it is the defendant No.1 who has deposed about this deed of cancellation though the same has been executed by defendant No.3. In the submission of the learned Counsel, this is impermissible in as much as for proving the deed of cancellation it was not enough

for the defendant No.1 to have deposed. In support of his submission, he would rely upon the decision of this Court in the case of **Bank of India Vs. M/s. Allibhoy Mohammed & Ors. reported in 2008(4) ALL MR 808.**

5. Learned Counsel for the respondents supported the orders passed by the Courts below. He would submit that the Courts below have recorded concurrent finding that the plaintiff is not in possession and therefore the present Appeal deserves to be dismissed as no substantial question of law arises for consideration.

6. I have gone through the orders passed by the Courts below and relevant document dated 22/07/2000 executed by defendant No.3 in favour of the plaintiff. The plaintiff filed the Suit simpliciter for injunction. The plaintiff however did not seek any relief of specific performance of the agreement dated 22/07/2000. In fact, on 29/08/2002 defendant No.3 executed sale deed in the name of plaintiff vide Exhibit 73 relating to his

half share in the Well in Gat No. 128 as well as half share to take water therefrom. Defendant No.3 also executed sale deed in the name of defendant No.1 on 29/08/2002 relating to an area admeasuring 1 H 99 R out of Gat No. 128. On the very same day, defendant No.3 executed a sale deed in the name of defendant No.2 on 29/08/2002 relating to an area 81 R out of Gat No. 128. There is no dispute that defendant No.2 is the real brother of plaintiff. The name of plaintiff is not entered in the record of rights on the basis of agreement of sale dated 22/07/2000 whereas in respect of sale deeds referred to above, the name of respective parties have been entered into the record of rights. The Appellate Court has noted that the plaintiff was very much present in the office of the Sub- Registrar when the sale deed was executed in his favour in respect of half portion of the Well and on the very same day, the other sale deeds are registered of which one is in favour of his brother. It is in this context, the finding is recorded by the Courts that the plaintiff was well aware that defendant No.3 was going to execute sale deeds in the name of defendants No.1 & 2 relating to suit land.

The plaintiff has not filed the Suit declaring the sale deeds of 2002 as null and void and not binding on him nor has plaintiff filed the Suit for specific performance of the agreement of sale dated 22/07/2000.

7. It is also material to note that considering the evidence on record, the Courts below have come to the conclusion that agreement of sale dated 22/07/2000 is executed as and by way of security of repayment of hand-loan of Rs.50,000/- which the plaintiff has obtained from defendant No.3. Considering the concurrent findings recorded by Courts below even on the point that the agreement of sale dated 22/07/2000 is executed by way of security for loan advanced to defendant No.3, I do not see any reason to interfere with the well considered finding of facts recorded by Courts below. The judgment relied upon by learned Counsel for the appellant in the case of **Bank of India** (*supra*) has no application in the facts of the present case as the Courts below have not dismissed the Suit on the sole basis of the cancellation deed dated

29/08/2002. The Appeal is dismissed. In view of the dismissal of the Appeal, Civil Application also stands disposed of.

(M.S.KARNIK, J.)

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