

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.459 OF 2013

SOMNATH S/O NAGNATHAPPA HALGE
VERSUS
VIRBHADRA S/O NAGNATHAPPA HALGE (DIED) THR LRS.
KASTURABAI W/O VIRBHADRAPPA HALGE AND ORS

...

Mr. Amol Joshi, Advocate for the appellant.
Mr. Amay Sabnis h/f Mr. S. W. Munde, Advocate for respondent Nos.2
and 4.

...

CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 30.09.2021

ORDER :-

. Present second appeal has been filed by the original plaintiff challenging the concurrent findings and decree by both the Courts below. He had filed Regular Civil Suit No.528 of 1982 (Old) and Regular Civil Suit No.308 (New) for recovery of possession of the disputed plots in Survey Nos.41 and 42 situated at Parli-Vaijnath and for perpetual injunction before the learned Civil Judge Senior Division, Parli-Vaijnath, Dist. Beed. The said suit came to be dismissed on 12.09.2000. He preferred Regular Civil Appeal No.158 of 2000. Learned District Judge-3, Ambajogai, Dist. Beed dismissed the appeal on 11.07.2012. Hence, this second appeal.

2. Heard learned Advocate Mr. Amol Joshi for the appellant and learned Advocate Mr. Amay Sabnis holding for learned Advocate Mr. S.

W. Munde for respondent Nos.2 and 4.

3. It has been vehemently submitted on behalf of the appellant that both the Courts below have not considered the facts and the law points involved in correct perspective. The effect of the decision in the earlier suit i.e. Regular Civil Suit No.163 of 1981, which was also for perpetual injunction and it was in respect of same property, was not considered at all. Thereafter, the decree passed in Regular Civil Suit No.172 of 1983 has also not been considered. In fact, there was compromise between the plaintiff and original defendant No.1 in Regular Civil Suit No.163 of 1981. In this case also, there was compromise between plaintiff and defendant No.3. Defendant No.3 was also a purchaser of the property from defendant No.1. Accordingly, defendant No.3 has handed over the portion of the land which he had purchased from defendant No.1. The only contesting parties are defendant Nos.2 and defendant No.4, who claimed that by virtue of agreement to sell executed in their favour by original defendant No.1, they are in possession. Both the Courts below failed to consider that though initially the legal representatives of defendant No.1 denied the story put forward by the plaintiff, yet later on when the matter was compromised, they have supported the plaintiff. Further, both the Courts below have not considered that there is only agreement to sell in favour of defendant Nos.2 and 4 if their story of

defence is considered. The agreement to sell will not give any kind of right, title and interest to them to retain the possession of the property. Plaintiff had claimed ownership over 2 Acres of land on the eastern side of the suit land, which was shown by the blue colour map annexed to the plaint. Defendant Nos.2 and 4 cannot claim more interest than defendant No.1 could have claimed, but now the legal representatives of defendant No.1 are supporting the plaintiff. Therefore, defendant Nos.2 and 4 cannot go against their proposed vendor. Defendant Nos.2 and 4 have no right to retain the possession with them as they have not even filed suit for specific performance of the contract. Therefore, substantial questions of law are involved in this case requiring admission of the second appeal.

4. Per contra, the learned Advocate Mr. Amay Sabnis holding for learned Advocate Mr. S. W. Munde for respondent Nos.2 and 4 supported the reasons given by both the Courts below and submitted that no substantial questions of law are involved in this case. Though other two suits might be decided in favour of the plaintiff may be by way of compromise, even then defendant Nos.2 and 4 were not party to those proceedings and, therefore, those decrees are not binding on them. This has been rightly considered by both the Courts below.

5. At the outset, it can be seen from the contents of the plaint that the

plaintiff was claiming to be separate since 1969 from defendant No.1, who was his real brother. Plaintiff had come with the case that there was a partition between him and defendant No.1 in the year 1969 when their father was alive. Then, it is said that as regards Survey Nos.41 and 42 is concerned, these plots remained to be partitioned. Their father had assured that he would give 2 Acres of land each out of Survey Nos.41 and 42 to plaintiff as well as defendant No.1. According to the said assurance, the said partition had taken place. Both the brothers got 2 Acres of land each in both survey numbers in the year 1978, then he says that the portion, which had come to his share, was his exclusive property and defendant No.1 had no concern with the same. However, he agreed to sell two plots to defendant Nos.2, 3 and 4. That agreement to sell was executed on 29.05.1982. Since defendant No.1 had no *locus standi* to sell the suit property, it was then contended by the plaintiff that defendant Nos.2, 3 and 4 are the trespassers and, therefore, the suit for declaration of ownership and recovery of possession was filed.

6. Defendant Nos.2 and 4 contested the suit and denied that plaintiff is the owner of the suit property. According to them, defendant No.1 was exclusive owner and possessor of the property and his name was reflected so in the record of rights since long. They purchased the property after confirming the revenue record and, therefore, they are the

bona fide purchasers for value without notice. Since the date of agreement to sell they are in possession of the respective suit plots. Their names have also been entered to the record of rights. Further, they have also contended that they have made structures on the suit property and they are enjoying the constructed portion.

7. It is also to be noted that original defendant No.1 died during the pendency of the suit. His legal representatives were brought on record. Initially, they had denied all the averments in the plaint, however, it appears that later on they have given written statement stating that they are accepting the claim of the plaintiff.

8. From the pleadings, evidence and the judgment of both the Courts below, it can be seen that the plaintiff was not sure about the source of his title over the suit property. At one breath, he was saying that he became exclusive owner of the suit property by virtue of partition that had effected in the year 1978, but at the same time he is also claiming that his father has bequeathed the suit property to him. Plaintiff cannot take plea of title through different sources. There has to be only one source to claim ownership over an immovable property.

9. The learned first Appellate Court has rightly considered that since Survey No.41 is totally admeasuring 16 Acres 16 Gunthas and Survey No.42 is admeasuring 14 Acres 14 Gunthas, but the suit property is

someway restricted to 2 Acres, then it could have been described by boundaries in view of Order VII Rule 3 of the Code of Civil Procedure. Though he had filed rough sketch and indicated the suit property with blue colour, it appears that boundaries were not mentioned in that map also. When the location of the suit property itself is not properly proved, an executable decree cannot be passed.

10. Plaintiff had filed Regular Civil Suit No.163 of 1981 against defendant No.1 and others. It was for declaration of ownership and perpetual injunction in respect of the suit property itself. The exact date of filing of the suit is not on record of this Court at this stage, but taking into consideration the year, definitely it would have been filed prior to this suit. Then the question arises as to why that suit was not amended when alleged agreement to sell was executed by defendant No.1 in favour of defendant Nos.2 and 4. Whether there was necessity to file any suit, is a question. Though the said suit was decreed, it appears that the legal representatives of deceased defendant No.1 preferred appeal bearing Regular Civil Appeal No.152 of 1988. After the said appeal was filed, there was compromise between the plaintiff and legal representatives of defendant No.1 and thereby they admitted the claim of the plaintiff. It has been rightly observed by both the Courts below that since defendant Nos.2 and 4 herein were not party to that proceedings,

the said decree is not binding on them. Possibility of compromise in collusion against the interest of defendant Nos.2 and 4 cannot be ruled out.

11. Even in this case, initially, the legal representatives of defendant No.1 had contested the suit, but after the compromise had arrived at in Regular Civil Appeal No.152 of 1988; they have changed their written statement/stance before the learned Trial Judge in this case. Such somersault cannot be allowed.

12. If we consider the pleadings and the proof, it reveals from the story of the plaintiff that land Survey Nos.41 and 42 were already partitioned between him and the brother, then the question arises how the plaintiff can base his claim on the basis of Will left by his father. By that time, if the plaintiff had become the owner of the suit property by virtue of partition, the father of plaintiff had no authority to execute Will in favour of the plaintiff.

13. Both the Courts below have rightly considered that though defendant Nos.2 and 4 had not filed suit for specific performance of the contract, yet the agreement was entered into on 29.05.1982. Therefore, in view of the said registered agreement to sell, which was containing the statement about handing over the possession to them by defendant No.1, defendant Nos.2 and 4 have right to protect their possession under

Section 53-A of the Transfer of Property Act. One more fact that is required to be considered is that defendant No.1 though appears to have filed suit for cancellation of document of agreement to sell and it is stated that it was decreed against defendant No.4, yet the plaintiff is not party to that proceedings. He cannot take advantage of that decree. Here, there was iota of contract between defendant Nos.2 and 4 who are admittedly in possession of the disputed property with the plaintiff. When evidence was adduced to show that original defendant No.1 was the owner of the property and the revenue record supported it, they purchase the property after considering the record. Defendant Nos.2 and 4 cannot be blamed for anything beyond the record. Defendant Nos.2 and 4 cannot be equated to a trespasser. At the cost of repetition, it can be said that when the plaintiff was not sure as to which area came to him in the partition, then the action will not be maintainable.

14. Both the Courts below have considered the evidence properly and, therefore, no substantial questions of law are arising in this case requiring admission of the second appeal. Hence, second appeal stands dismissed.

[SMT. VIBHA KANKANWADI, J.]

scm