

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.553 OF 2014
with
CIVIL APPLICATION NO.9359/2014

Rekha w/o Gururaj Kattimani = APPELLANT
(orig.Defendant)

VERSUS

Nagamma @ Nageshwari wd/o Gangaram
Hulgunde = RESPONDENT
(orig.plaintiff)

Mr.Milind Patil,Advocate for Appellant;
Mr.RP Adgaonkar, Advocate for Respondent.

CORAM : SMT.VIBHA KANKANWADI,J.

RESERVED ON : 17/08/2021

PRONOUNCED ON : 28/09/2021

PER COURT :-

1. Present appeal has been filed by original defendant, challenging concurrent judgment and decree. Present respondent is original plaintiff, who had filed Regular Civil Suit No.504/2010 before 2nd Joint Civil Judge, JD,, Latur for perpetual injunction. It came to be decreed on 30.8.2012. Present appellant-original defendant challenged the said judgment and decree in Regular Civil Appeal No.330/2012. The said appeal was heard by learned Adhoc District Judge-1, Latur and was dismissed on

17.10.2013. Hence, this Second Appeal.

2. Heard learned Advocates appearing for the respective parties.

3. It has been vehemently submitted on behalf of the appellant that, certain admissions given by the plaintiff's witness have not been considered at all by both the Courts below. Both the Courts below failed to consider the pleadings. The plaintiff had tried to contend that the cause of action arose on 28.11.2010 and in Para 5, it has been stated by the plaintiff that the defendant has ejected the plaintiff from the strip of house property adjacent to the house of the defendant by hooting off the plaintiff. Even he had refused the request of the plaintiff for enjoyment of her property by stating that some part of the suit property belongs to her house property and, therefore, the plaintiff is compelled to file the suit on the cause of action dated 28.11.2010. Thus, in the plaint itself when it has been stated that the plaintiff has been dispossessed from the strip of land then the suit, simplicitor for

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injunction, is not maintainable. Further, in this case, the defendant was claiming ownership over part of the suit property and, therefore, in view of decision in the case of Anathula Sudhakar Vs. P.Buchi Reddy – 2008 (4) SCC 594, wherein it has been specifically held that, where a cloud is raised over plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. In other words, when the cloud is raised on the plaintiff's title then, the simplicitor suit for injunction, is not maintainable. Similar ratio has been laid down in Meher Chand Das Vs. Lal Babu Siddique – 2007 AIR (SC) 1499; and Vinay Krishna Vs. Keshav Chandra – AIR 1993 SC 957. He further submitted that both the Courts below have failed to consider that the plaintiff has not entered into the witness box. She has examined only her Power of Attorney and, therefore, in view of Janki Vashdeo Bhojwani Vs. Indusind Bank Ltd. And Ors. – AIR 2004 (3) SCC 584, the case will have to be treated as without evidence on behalf of the plaintiff and, therefore, it ought to have been dismissed at the threshold.

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4. The plaintiff has examined her vendor. At the same time, the defendant has come with a case that from the same person, the property in her possession was taken under an agreement to sell and, therefore, the injunction ought not to have been clamped against the defendant by ignoring the rights and possession secured by the defendant from the vendors of the plaintiff under the agreement to sell, the said agreement was enforceable against the subsequent purchaser, as provided under Section 19 of the Specific Reliefs Act.

5. Another fact to be noted is that, PW 2 – Manohar Gomare, who was vendor of the plaintiff, has flatly now denied execution of the agreement to sell in favour of the defendant. Therefore, element of fraud on the part of the defendant, ought to have been discussed by the courts below. Substantial questions of law are, therefore, arising in this case, requiring admission of the Second Appeal.

6. Per contra, learned Advocate appearing for the respondent relied on the reasons given by

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both the Courts below for submitting that no substantial questions of law are arising in this case. Further, he submitted that Para No.5 of the plaint cannot be read in isolation because there might be a typographical mistake. Further, there was an opportunity to the defendant to bring the said situation on record. If we consider the cross-examination of plaintiff's witness, then it can be seen that there is no such suggestion given to the witness for the plaintiff that would show dispossession of the plaintiff. Further, in her own testimony, the defendant has not stated that she has, at any point of time, dispossessed the plaintiff. On the contrary, though the plaintiff had contended that the defendant has constructed compound wall; yet in her cross-examination, the defendant has admitted that she had brought material to make construction, however, as dispute arose between her and the plaintiff, she could not construct the compound wall. If these facts and the admissions are considered, then definitely they do not reflect that the plaintiff is admitting, at any point of time, that the defendant has made encroachment on her property. Therefore, the suit

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for simplicitor injunction, was maintainable. So also, when the plaintiff had based her claim on the registered sale-deed and she had produced that document on record, as well as the fact that the defendant has not produced any such counter-document to establish title, the ratio laid down in the decisions relied on by the appellant, is not applicable.

7. At the outset, it is to be noted that the plaintiff is mother of defendant; yet it appears that the relationships between them were so strained that they are required to knock the doors of the Court. It was the specific case of the plaintiff that she is owner of house property bearing No.MH No.R-B/1311, situated at village Kanheri, Tq. Latur. It has been described in two Parts in Para 1 of the plaint. Even rough sketch has been appended to the plaint itself. She contended that she purchased the property in parts. First sale-deed was executed on 18.6.1984; second on 30.6.1985 and the third and the last as on 21.4.1986. The vendors are — Advocate Manohar Gomare and Kazi Sayyed Nasiroddin. The defendant's

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property has been shown to be property adjacent towards east of the suit house part-II and towards East southern side of part-I. It was the contention in Para 4, wherein it is stated that the defendant started disputing with the plaintiff and when the plaintiff applied for city survey office for measurement, the defendant quarreled, stating that she has not encroached on the suit property, rather, she had stated that she has share in it and, therefore, she will not allow the plaintiff to develop the property. What has been stated is that the defendant has forcibly erected compound wall to her house property and then in Para No.5, it has been tried to contend that the defendant has ejected the plaintiff from the strip of the house property adjacent to the house of the defendant by hooting off the plaintiff. In Para No.5, it has not been stated that the ejectment is by way of construction of the wall. Therefore, the interpretation, which the learned Advocate for the appellant, intends to make to object filing of the suit for simplicitor injunction, cannot be so interpreted. Even in the testimony what has been contended is, that the defendant has erected the

compound wall. According to the plaintiff, it is beyond the area of the plaintiff. But they do not say that that it is in their area. Further, we will have to consider the testimony of the defendant in this respect, wherein, in her cross, she has admitted that she had brought the construction material; but since the dispute arose, she has not erected the compound wall. Under such circumstance, definitely, by any stretch of imagination, it can be said that the plaintiff had intended to contend that the defendant has encroached on her property.

8. The plaintiff had come with a positive case of ownership and she has produced the sale-deed. The defendant was not claiming ownership over the property that has been described in Para 1 of the plaint, Part-I or Part-II. She tried to contend that her husband had agreed to purchase and Advocate Manohar Gomare had agreed to sell the land to him and had put them in possession. At the outset, it can be said that the agreement to sell, even if, for the sake of arguments, is accepted, it will not give any kind of right

equivalent to ownership. At the most, the right, that can be claimed under the agreement to sell is to get sale-deed executed. Another fact is that the said agreement was not a registered document, though the defendant contended that under the said document, the possession was handed over. Merely on the basis of agreement to sell it cannot be said that in this case, the plaintiff's title was under cloud. In Anatula Sudhakar Vs. P.Buchi Reddy's case (cited supra), it is held that, - Where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simplicitor." Here, as aforesaid, on the basis of the agreement to sell, the plaintiff's title was not under cloud. Further, when the plaintiff had examined her vendor - PW 2 - Manohar Gomare, who is stated to have entered into that agreement to sell, has flatly denied execution of the said document. At one place, he has claimed ignorance of transaction in respect of half of the

plot, which was remaining after sale of another half to the plaintiff. Important point to be noted is that, original document was not shown to this person and such agreement to sell was not tried to be got proved. What was shown was, attested photo copy, by which he was unable to say, as to whether that document bears his signature or not. Therefore, when the agreement to sell has also not been proved by the defendant, it cannot be said that there was cloud over the title of the plaintiff. The defendant has examined her husband DW 2 – Gururaj Kattimani. He has also stated that he has erected compound wall towards east and north side of his property. So also, on the western side, but towards sought, it is only half. Steel material of construction is in the property described in Part I and plaintiff has not allowed them to make construction. Interesting point to be noted is that in his testimony, he has stated that he purchased plot No.19 through agreement to sell. Agreement to sell cannot become sale-deed unless it is registered under Section 17 of the Indian Registration Act. His evidence in respect of proof of that document is very much cryptic. In his

cross-examination, he has admitted that he had not filed any suit for specific performance of the contract. Interesting point to be further noted is that he claims unawareness as to from whom his wife has purchased the said land and he had now then come with a case that there was no transaction of sale between him and PW 2 – Manohar Gomare. Then it appears that there is further deviation in his testimony to the defence pleaded. He has then come with a case that the transaction has been got done through his father-in-law and he was not aware about it. But then he says that he had handed over the amount to his father-in-law. In fact, taking into consideration all these things, it appears that title of the defendant, if at all it is there, was under cloud and not of the plaintiff. No substantial question of law is arising on that count.

9. Both the courts below have concurrently held that the plaintiff is in lawful possession of the suit property. The obstruction, that was raised by the defendant, has been proved and, therefore, the suit has been rightly decreed and

the appeal has been rightly dismissed.

10. As no substantial question of law is arising in this case, in view of Kirpa Ram (Deceased) Through L.Rs. And Ors. Vs. Surendra Deo Gaur and Ors. - (2021) 3 Mah.L.J. 250, the Second Appeal deserves to be dismissed. Further, note of the decision is also taken of the recent judgment of the Hon'ble Apex Court in the case of Bala subramaniam and Anr. Vs. M. Arockiasamy (Dead) Through L.rs. - (Civil Appeal No.2066/2012 decided on 2nd September, 2021), which was Three-Judge Bench decision, wherein it has been observed, -

"15. In view of the above, although the counsel for the appellant may be technically correct in his submission that the High Court erred in not clearly answering the question of law framed by it under Section 100,CPC, the High Court was still within its jurisdiction to determine whether the reading of the evidence on record by one of the Courts below was perverse. Question of law for consideration will not arise in abstract but in all cases will emerge from the facts peculiar to that case and there cannot be a strait jacket formula. Therefore, merely because the High Court

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refers to certain factual aspects in the case to raise and conclude on the question of law, the same does not mean that the factual aspect and evidence has been re-appreciated."

11. Therefore, the facts have been taken into consideration to consider as to whether the findings of both the Courts below are perverse. As no substantial questions of law are arising, the Second Appeal stands dismissed. Pending Civil Application stands disposed of.

(SMT. VIBHA KANKANWADI)
JUDGE

BDV