

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

Civil Application [CAS] No.437 of 2021
in
Second Appeal No.150 of 2021

Revatirao Sitaram Chaikate

vs.

Mahadeo Sambhaji Tonge

Office notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.

Court's or Judge's Orders

Shri Omkar Deshpande, Advocate for the Applicant/Appellant.

CORAM : S.M. MODAK, J.
DATE : 3rd AUGUST, 2021.

Heard the learned Advocate for the appellant-
original defendant.

02] The suit filed by the plaintiff-owner for recovery of possession for declaration came to be decreed. The defendant-purchaser went in first appeal. He was not successful. Hence, the present second appeal has been filed.

03] I have heard learned Advocate Shri Deshpande for the appellant at great length. The main area of the dispute is about possession of the suit field. That is to say, whether the plaintiff-owner has handed over the possession on 27/12/1990, when the first Issar Chitthi (Agreement) was executed or whether the defendant took forceful possession of the land in April, 1992. The trial Court, after considering the evidence of both the sides, concluded that the possession was not given on 27/12/1990, but the defendant took forceful

possession in April, 1992. The first appellate Court has also confirmed this finding.

04] There was a feeble attempt on behalf of the defendant to take the benefit of the provisions of Section 53A of the Transfer of Property Act. However, it was rejected by the trial Court as well as the first appellate Court. It is for two reasons. One is, the fact of handing over possession voluntarily was not proved and second is, the defendant-purchaser could not prove his readiness and willingness. An argument was made that the fact of taking forceful possession was not pleaded in notice dated 12/05/1992. However, the trial Court and the first appellate Court had given the reasons for the said omission.

05] The learned Counsel for the appellant relied upon the judgment of the Hon'ble Supreme Court in the case of **Shrimant Shamrao Suryavanshi & another vs. Pralhad Bhairoba Suryavanshi [dead], through L.Rs. & others (AIR 2002 SC 960)**. It has been held that though the purchaser might not have filed the suit for specific performance, he may defend his possession by taking recourse to the provisions of Section 53A of the Transfer of Property Act. Prior to taking such benefit, the Hon'ble Supreme Court has laid down certain criterion. Both the Courts below have not given benefit of that section. I agree to that.

06] An attempt was made to contend that second Issar Chitthi (Exh.38), dated 31/10/1991 was first time stated by the plaintiff in his evidence and it was not pleaded in the plaint. The appellant-defendant may be

right in his submission. The learned Advocate read over to me the evidence of plaintiff as well as the defendant on this aspect. The plaintiff has called upon the defendant to produce the originals. As it is not produced, the plaintiff has relied upon the secondary evidence at Exh.38. It is also true that the defendant has cross-examined the plaintiff on the point of certain lacunae in that case. However, when the evidence of the defendant is perused, he had explicitly stated about the said Exh.38. So, I do not think that the appellant-defendant can make any grievance about the said lacunae, mainly because he himself has stated about that agreement.

07] An another attempt was made by contending that the plaintiff-owner cannot forfeit the earnest money. However, the trial Court directed the plaintiff - owner to refund the amount once the possession has been received. So, for the above reasons, I do not think that any case for interference by this Court is made out. I do not find any substantial question of law involved.

08] Hence, the appeal stands dismissed. The appellant is given two months' time to hand over the possession to the respondent. He should not create any third party interest during that period.

JUDGE

**sandesh*