

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

SECOND APPEAL NO. 266 OF 2019

APPELLANTS: 1] Prabhakar s/o Gopalrao Yadav,
Ori. Plaintiffs Aged about 53 years,
 Occu: Agriculture.

 2] Purushottam s/o Gopalrao Yadav,
 Aged about 43 years,
 Occu: Agriculture.
 Both R/o near Chitnavis Park,
 Taluka & District-Nagpur.

...V E R S U S...

RESPONDENTS :1] Duryodhan s/o Ganpat Hadke,
Ori. Defendants Age 53 years, Occu: Private Business,
 R/o Plot No. 7, Bajrang Nagar, Nagpur.

 2] Anusayabai w/o Kesharao Thakre,
 Aged about 56 years, Occu:
 Household, Tahsil – Nagpur (Gramin),
 Mouza Hudkeshwar, Post- Pipla, Tah. &
 Dist. Nagpur.

 3] Abdul Majid Muzaffar Shah (Deleted)

4] Mohd. Jabbir s/o Abdul Majid,
Aged about 51years, Occu: Business,
R/o Baidyanath Chowk, Untkhana,
Nagpur.

Shri Madhur Deo, counsel for Appellants.
None for the respondents

CORAM : ANIL S. KILOR, J.
DATE : 13th DECEMBER, 2021

ORAL JUDGMENT :

1. This is an appeal arising out of the judgment and decree dated 14/02/2019, passed in Regular Civil Appeal No. 496/2011, by the learned District Judge-12, Nagpur, dismissing the original plaintiffs' appeal challenging dismissal of the suit for declaration, permanent injunction and cancellation of sale-deeds vide judgment and decree dated 24/02/2010, passed in Special Civil Suit No. 578/2004 by the learned 6th Joint Civil Judge, Senior Division, Nagpur.

2. The brief facts of the present case are as under:
(parties are referred to as per their status before the trial Court).

3. Defendant No.1 along with one Sidharth Ramdasji Dange, had purchased one acre land each, by two separate registered sale-deeds dated 10.04.1990 and 19.07.1991, out of field No. 101/3 of Hudkeshwar from Shri Keshav Vithoba Thakre. They partitioned the land by partition-deed dated 09.11.2001. Thereby, defendant No.1 become owner of the Northern land admeasuring 0.40 Hectare. The plaintiffs purchased the said property from defendant No.1 by registered sale-deed dated 24.05.2002, for a valuable consideration and also took its possession from defendant No.1.

4. The plaintiffs got changed the record of the suit property from Class-II to Class-I before the execution of the sale-deed. After purchasing the suit property, they prepared layout over it and carved out various plots of various sizes therein for selling to the public for residence and accordingly, several plots have been agreed to be purchased by the various persons and amounts have been accepted by them from the

prospective purchasers of the plot.

5. It is the case of the plaintiffs that sometime in the month of July 2002, they came to know that defendant No.1 is trying to sell the suit property. On 10.07.2002, four/five persons came on the suit property and stated to the plaintiffs that they were also owners of the suit property. Therefore, the plaintiffs issued a legal notice on 12.07.2002 to defendant No.1 directing him not to create any sort of nuisance, obstructions and third party interest over the suit property, as they are absolute owners of the suit property. They also issued public notice in Daily Lokmat dated 14.07.2002.

6. The plaintiffs further pleaded that thereafter, defendant No.2 approached the plaintiffs and stated that defendant No.1 has executed a registered sale-deed in her favour on 20.04.2004 in respect of the portion admeasuring 4550 sq. ft. of the suit property, but this fact was never told to them even at the time of execution of the sale-deed in their

favour.

7. It is the further case of the plaintiffs that the Defendant No.1 also prepared different layout over the suit property and tried to sell the plots out of that layout illegally. The plaintiffs learn that defendant No.1 executed sale-deed dated 20.04.2002 in favour defendant No.2 by virtue of the compromise between defendant Nos. 1 and 2. Hence, the suit was filed for declaration, permanent injunction and cancellation of sale deeds.

8. Defendant No.1 resisted the suit by filing written statement at Exh.33. He admitted his ownership over the suit property. According to him, after becoming an absolute owner of the suit property, he has prepared a layout on the said land and demarcated 16 plots for selling purpose and accordingly he sold some plots to the various persons and executed the sale-deeds in their favour. He further stated that the plaintiffs have approached him intending to purchase the plot demarcated on the alleged suit property and therefore,

he agreed to sell the Plot No.15 to them. He received amount of Rs. 25,000/- by cheque towards full consideration of the plot. He further stated that he met with an accident in the month of January 2002 and at that time the operation of his head was performed recently and therefore, he was on bed rest.

9. He further submitted that, on 23.5.2002, the plaintiffs approached the defendant and insisted for executing the sale-deed in their favour, he agreed to execute the sale-deed on 24.05.2002 for plot No.15. He further submitted that, the plaintiffs prepared the sale-deed and called him in Sub-Registrar's office for execution. He further submitted that he signed and executed the sale-deed without reading it due to his ill-health. He learned from the Revenue Officer that, the plaintiffs submitted the application for mutation in respect of the entire suit property and then he inquired the matter and found that the plaintiffs have got executed the sale-deed of entire suit property by playing fraud, taking undue advantage of ill-health of defendant No.1

and by misrepresentation. He further stated that at that time, he himself was not the owner of the entire suit property. He stated that he had already executed the sale-deed in favour of defendant No.3 for the area of 6300 sq.ft worth of Rs. 1,26,000/- and also to Shri Nagrare, Smt. Thakre and also agreed to sell the plot to Mr. Mohankar an area, about 3900 sq.ft. for the consideration of Rs. 3,90,000/-.

10. He also contended that, when he came to know the facts, he approached the plaintiffs and asked for cancellation of the alleged sale-deed and get executed the sale-deed for the plot No.15, but the plaintiffs refused to do it and thereby they constrained him to issue legal notice dated 02.08.2002 through his Advocate and also issued a public notice in daily newspaper Lokmat Samachar dated 06.08.2002 and clarification dated 08.08.2002.

11. The Defendant No.1 denied that, the plaintiffs purchased the suit property vide the sale-deed dated 24.05.2002. According to him, the plaintiffs obtained the

sale-deed by playing fraud and misrepresentation with him and therefore, he filed the suit for declaration, permanent injunction and cancellation of sale-deed before the Court of the learned 2nd Joint Civil Judge, Senior Division, Nagpur bearing Special Civil Suit No. 602/2002.

12. The Defendant No.1 further denied that, he handed over possession of the suit property to the plaintiffs, they changed the record from Class-II to Class-I. He stated that he did not get the possession from Thakre, his predecessor-in-title. He also stated that, he never sold out the entire suit property to anybody and handed over its possession. He denied that, the plaintiffs prepared layout in the suit property and agreed to sell the plots to different persons etc. He further stated that, this fact came to his knowledge after publication of Notice in Daily Newspaper dated 14.07.2002. Therefore, according to him, he has also published notice in daily Lokmat Samachar dated 06.08.2002 and clarification dated 08.08.2002, about the fraud committed by the plaintiffs and also filed the suit for cancellation of alleged

sale-deed dated 24.05.2002. Defendant No.1 denied rest of the adverse contentions made by the plaintiffs and prayed for dismissal of the suit.

13. Defendant No.2 resisted the suit by filing written statement Exh. 34. She stated that defendant No.1 had purchased only one acre land from her husband. She further stated that he demarcated layout thereon and sold the plots to the various persons and therefore, he is not owner of entire area of 1 acre. She denied the execution of the sale-deed in favour of the plaintiffs and called it as illegal, bogus, bad in law and contrary to provisions of law. She also called the said sale-deed as null and void and not binding on her. She also stated that the plaintiffs got executed the sale-deed by playing fraud. She also stated that defendant No.1 failed to pay the consideration to her husband and therefore, the possession of the suit property was never handed over to defendant No.1 and it is still with her husband. Thereafter, she stated that the defendant No.1 has written in writing as compromise letter dated 01.03.2002 stating that he has given

amount of Rs. 50,000/- to defendant No.2 and remaining amount of Rs. 1,00,000/- is to be paid within the stipulated period. She further stated that, the defendant No.1 has demarcated layout on the suit property and sold plot to the various persons. She also stated that as per the compromise letter, defendant No.1 sold her Plot No.3 for consideration of Rs. 45000/-. She further stated that he also sold plot No.2 on 19.04.2002 in favour of defendant Nos. 3 and 4. She stated that after publication of notice by the plaintiffs, she issued notice to them as well as the defendant No.1 on 22.07.2002. By stating so, defendant No.2 denied each and every adverse contention made by the plaintiffs and prayed for dismissal of the suit.

14. Defendant Nos. 3 and 4 failed to file their written statement and therefore, the suit was proceeded without their written statement.

15. The learned Trial Court has held that, the plaintiffs failed to prove their ownership over the suit property and the

sale-deed executed in favour of defendant Nos. 2 to 4 by defendant No.1 are null and void. It is further held that the plaintiffs also failed to prove that the defendants are trying to interfere and obstruct the possession of the plaintiffs over the suit property. In view of these findings, the suit came to be dismissed with costs by impugned judgment and decree. The plaintiffs challenged the said decision.

16. I have heard Shri Madhur Deo, learned counsel for the appellants. None for the respondent though served.

17. This Court, on 21/06/2019 has framed the following substantial questions of law:-

“(i) Whether the lower appellate Court was right in dismissing the entire suit of the plaintiffs in the light of the observations made in paragraph no. 25 of his judgment?”

“(ii) Was it not open on the part of the learned appellate Court to grant appropriate relief in view of the provisions of Order VII Rule 7 of the Code of Civil Procedure?”

“(iii) What will be the impact of Division Bench

judgment of this Court in Guna Krishna Gauns and anr. vs. Antonio Joao Braganza alias Antush Braganza and Ors. reported in 2009 (3) Mh.L.J. 22?”

18. Shri Madhur Deo, learned counsel for the appellants submits that, while denying the decree for declaration, permanent injunction and cancellation of the sale-deeds executed in favour of the defendant Nos. 2 to 4, both the Courts have concurrently held that the plaintiffs are the owners of the suit property and the sale-deeds executed by the defendant No.1 in favour of defendant Nos. 2 to 4 in respect of the part of the suit property, are null and void.

19. It is further submitted that, on arriving at a conclusion that, the plaintiffs had not made out the case for cancellation of sale-deed executed by defendant No.1 in favour of the defendant Nos. 2 to 4, both the Courts below ought to have decreed the suit for declaration to the extent area other than mentioned in the sale-deed of the defendant Nos. 2 to 4. Furthermore both the Courts below ought to

have granted permanent injunction against the defendants in respect of that portion of land. However, dismissal of the entire suit, is illegal and not sustainable in the eyes of law.

20. He has argued that, it is well settled principle of law that the relief can always be moulded by the Court and can be granted even if not claimed, if it is otherwise clear from the pleadings and evidence on record. For this purpose, he referred to provision of Order VII Rule 7 of the Code of Civil Procedure.

21. Lastly, he argued that both the Courts below have not considered the fact that the suit property is open site and the sale deed executed by the defendant No.1 in favour of the plaintiffs is a registered sale-deed, in which there is a specific mention that, the possession of the suit property was handed over to the plaintiffs. It is submitted that, the aforesaid registered sale-deed has a presumptive value and unless it is rebutted, it can be presumed that, the plaintiffs are in possession of the suit property. Thus, he submits that, this

Court at least can presume that the plaintiffs are in possession of the suit property excluding the area which was sold out to the defendant Nos. 2 to 4. Accordingly, he prays for grant of permanent injunction restraining the defendant Nos. 1 to 4 and others from disturbing possession of the plaintiffs over the suit property excluding the part of the suit property, which is in the possession of the defendant Nos. 2 to 4.

22. To consider the rival contentions of the parties, I have gone through the record and also perused the judgment and decree passed by both the Courts below.

23. Admittedly, in this matter, the sale-deed which claimed to have executed by the defendant No.1 in favour of Plaintiffs, is relating to the total area admeasuring 4550 Sq.,Ft. Thus, the prayer clause made in the plaint, is in respect of the entire suit property.

24. There is no dispute in this matter that the sale-

deeds executed by the defendant No.1 in favour of the defendant Nos. 2 to 4 are prior in time to the sale-deed executed in favour of the plaintiff's, i.e. sale deeds dated 10/04/1990 and 19/07/1991.

25. It has come on the record that even prior to the sale-deed of the plaintiffs, the name of the defendant no.2 was recorded in the Revenue Record i.e. in 7/12 Extract (Exhibit-67).

26. Both the Courts below have concurrently held that the plaintiffs have failed to prove that he is the owner of the entire suit property and in possession of the entire suit property.

27. Both the Courts below further denied the decree for cancellation of the sale-deeds executed by the defendant No.1, in favour of the defendant Nos. 2 to 4.

28. There cannot be any quarrel over the law laid

down by Division Bench of this Court in the case of ***Guna Krishna Gauns and another V/s Antonio Joao Braganza alias Antush Braganza and others***¹, that, relief can always be moulded by the Court and can be granted even if not claimed, if it is otherwise clear from pleadings and evidence on record.

29. Order-VII Rule 7 of the Code of Civil Procedure provides that, every plaint shall state specifically the relief which the plaintiffs claim, either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the court may think just to the same extend as if it had been asked for.

30. In this matter, admittedly the prayer for cancellation of sale-deeds executed by defendant no.1 in favour of the defendant nos. 2 to 4 was made, however, no alternative prayer was sought for seeking permanent injunction excluding the area mentioned in the sale-deeds of

1 2009 (3) Mh.L.J. 22

the defendant Nos. 2 to 4.

31. Thus, knowing well that the sale-deeds which were executed by defendant No.1 in favour of defendant Nos. 2 to 4 are prior in time to the sale-deed of the plaintiffs and though having complete knowledge about the area and description of the properties in possession of the defendant nos. 2 to 4, no necessary details have been given in the plaint in respect of the same while asking for injunction.

32. Moreover, the prayer sought by the plaintiffs is general. The plaintiffs are claiming injunction against not only the defendants, but also against other persons, who are not even party to the suit. This fact shows that the plaintiffs himself is not sure which part of the suit property is in his possession. Unless, the plaintiffs proves his possession over the entire suit property or part of the suit property, the injunction, as claimed, cannot be granted.

33. The learned counsel for the appellants though

made an oral submission that, this Court may mould the relief under Order-VII Rule 7 of Code of Civil Procedure by excluding the area in possession of the defendant Nos. 2 to 4. however, he is not in a position to state the boundaries and the total area which is in possession of the defendant Nos. 2 to 4.

34. Furthermore, he argued that in view of the judgment in the case of *Dr. Madhukar Trimbak Gore V/s Vasant Ramkrishna Kolhatkar*², if this Court passes a decree granting injunction excluding the land in possession of the defendant Nos. 2 to 4, in execution proceeding, the executing Court can make proper inquiry to identify the suit property. The said contention cannot be accepted in absence of necessary pleadings showing boundries of the land in possession of defendant Nos.2 to 4.

35. The judgment in the case of *Dr. Madhukar Trimbak Gore (supra)*, and the law discussed in the said judgment can

be considered in the light of facts and circumstances of the said case, which are distinguishable and not identical to the facts of the present case.

36. Hence, I am of the opinion that the judgment in the case of *Dr. Madhukar Trimbak Gore (supra)* is of no help to the appellants.

37. The learned counsel for the appellants submits that, denying decree of granting permanent injunction in respect of the suit property, excluding the area in possession of the defendant Nos. 2 to 4 on the ground that, the description of the property in possession of the plaintiffs have not been given is highly technical and for that purpose, the relief cannot be denied to the plaintiffs. He has placed reliance on the case of *Lalji Dharamsey and others V/s Bhagwandas Ranchghoddas*³ wherein it has been held that the procedure is the handmaid and not the mistress of the judicial process.

38. After going through the said judgment, it is apparent that the Court has considered the events and developments, subsequent to institution of the proceeding and as a rule of fairness to both side.

39. In the present matter, it is not the case of the plaintiffs that the sale-deeds of the defendant Nos. 2 to 4 were executed subsequent to filing of the suit. In that view of the matter, the principle laid down in the said judgment is not applicable in the peculiar facts and circumstances of the present case.

40. The learned counsel for the appellants placed reliance in the case of ***Anathula Sudhakar v/s P. Buchi Reddy (dead) by Lrs and others***⁴ and he has placed reliance on paragraphs-16 of the said judgment. The Hon'ble Supreme Court of India, in the aforesaid case has held that if two persons claimed to be possession in vacant side, one who is able to establish title thereto will be considered to be in

4 (2008) 4 SCC 594

possession, as against the person who is not able to establish title.

41. There is no dispute about the law laid down in the said judgment. However, once both the Courts below have held in favour of the defendant Nos. 2 to 4 that they have established their title over the part of the suit property, it cannot be held that the plaintiffs are in possession of the entire suit property by applying the principle that possession follows title.

42. In that view of the matter, I do not find the judgment cited in the case of *Anathula Sudhakar (supra)* is of any help to the plaintiffs in this matter.

43. The learned counsel for the appellants has relied upon the judgment in the case of *Lankeshwar Malakar and others V/s R. Deka and others*⁵, as regards the description of the properties in the plaint, and submits that, the description given in the plaint is sufficient to identify the land in

5 (2006) 13 SCC 570

possession of the plaintiffs, excluding the land owned by the defendant Nos. 2 to 4. The facts of the said case are distinguishable and hence, the said judgment is of no help to the appellants. The same is the position in respect of judgment cited by the learned counsel for the applicnats in the case of *Nari Shringar Big Bazar, Nagpur and another V/s Pantaloon Retailing (India) Ltd.*⁶

44. At this stage, the learned counsel for the appellants submits that defendant No.1 has filed the suit for cancellation of the sale-deed executed in favour of the plaintiffs and the said suit is pending. He submits that the finding recorded by the learned first Appellate Court in para-30, as regards the genuineness of the sale-deed executed in favour of the plaintiffs would come in his way in the said suit, wherein the present plaintiffs are the defendants.

45. After going through para-30 of the impugned judgment and decree dated 14.02.2019, it is clear that there

6 2008 (3) Mh.LJ.

is no positive finding recorded by the learned first Appellate Court that the sale-deed executed by defendant No.1 in favour of the plaintiffs are not genuine. However, the Court has expressed doubt in respect of genuineness in view of the facts recorded in the said part. So, in absence of any such positive findings on the basis of genuineness of the sale-deed of the plaintiffs, I do not find any substance in the submission of the learned counsel for the appellants that the same will come in his way in the suit filled by the defendant No.1 against the plaintiffs.

46. Accordingly, I answer the substantial question of law in above terms and pass the following order:-

ORDER

- a] The appeal is **dismissed**.
- b] Pending application(s), if any, stand(s) disposed of. No order as to costs.

[ANIL S. KILOR, J.]

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