

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

SECOND APPEAL NO. 54 OF 2014

APPELLANT: Khushal Suryabhan Ukey (dead)
Org.Deft through L.Rs

1. Madhav Khushal Ukey
aged about 45 years, Occ. Nil.
2. Tejraj Khushal Ukey,
aged about 45 years, Occ. Nil
3. Babitai Khushal Ukey,
aged about 45 years, Occ. Nil,

Resident of Uttarwadhona, Tq. Ner,
District – Yavatmal.

...VERSUS...

- RESPONDENTS:**
1. Babulal s/o Tatyaji Dole,
aged about 55 years, Occ. Agri.
 2. Dhnyaneshwar s/o Babulal Dole,
aged about 33 years, Occ. Agri.
 3. Chunnilal Babulal Dole,
aged about 31 years, Occ. Agri.

All resident of Heti (Sonkhas), Tq. Ner,
Dist. Yavatmal.

4. Sau. Satyabhama Ghanashyam
Suryavanshi, aged about 55 years,
Occ. Labourer, R/o. Bangarnagar,
Yavatmal.
5. Baulibai Panjabrao Chaoudhari,

aged about 50 years, Occ. Labourer,
R/o. Ner, Dist. Yavatmal.

6. Smt. Dushila Khushal Ukey (dead)
7. Smt. Sita Kisanrao Raut (dead)
8. Shri Anand Sudhakar Ganjiwale,
R/o. Tilak Wadi, Near Rathod Hospital,
Yavatmal, Tah & Dist. Yavatmal.

Mr. R.R.Puri, Advocate for the appellants.
Mr. Anand Deshpande, Advocate for respondent no.1

CORAM : AVINASH G. GHAROTE, J.
DATE : 26/09/2022.

1] Heard Mr. Puri, learned counsel for the appellants and Mr. Deshpande, learned counsel for respondent No.1. None for the other respondents, though served.

2] It is not disputed that one Parvatabai Deshbratar was the owner of the land of Gat No. 180 admeasuring 2.54 HR. Paravatabai by two sale deeds dated 16.2.2001 Exhs. 46 and 47 sold the land of Gat No. 180, in two portions to the plaintiff no.2 and plaintiff no.3, who claim to have also been placed in possession. The sale deeds indicate that the actual physical possession of the subject properties had been delivered to the plaintiff Nos. 2 and 3.

3] In a suit filed by the plaintiffs for recovery of possession and mense profit, on the basis of the title, in view of the sale deeds dated 16.2.2001 i.e. R.C.S No. 27/2003, a plea was set up by the defendant Khushal Suryabhan Ukey that the property in question was given by Parvatabai, orally to one of her daughter namely Dushila (the wife of Khushal Ukey - Deft No.1) as she was the weakest of her four daughters, so that the proceeds from the cultivation could be utilized for her sustenance and it is in this fashion that Khushal Suryabhan Ukey - Defendant No.1 is claimed to have come into possession of the suit property i.e. the land of Gat No.180.

4] Before the learned Trial Court in order to prove the sale deeds dated 16.2.2001 Exhs. 46 & 47, the attesting witness Babulal Tatyaji Dole (plaintiff No.1) was examined as PW-1, who deposed in consonance with the execution and registration of the sale deeds at Exhs. 46 & 47. PW-2 Govind Ghatol was examined on behalf of the plaintiffs to indicate an earlier execution of an agreement (Souda Chitti) by Parvatabai in favour of plaintiff no.1 (which was proved

by him at Exh.71). PW-3 Kisan Dole at Exh.89, was examined as a witness on the spot inspection. PW-4 Shrawan Kalokar was examined at Exh. 87, as the second attesting witness to the sale deeds Exhs. 46 & 47. Sakharam Awatare was examined as PW-5 at Exh.88 as a witness to the agreement of sale at Exh.71.

5] On behalf of the defendants/appellants, since the original defendant Khushal Ukey was no more, his son Madhav Khushal Ukey (Defendant No.1a) was examined as DW-1 at Exh.111; Rajni Tejraj Ukey, the daughter-in-law of Khushal (wife of Defendant No. 1b), was examined at Exh.113 and one Parmanand Borkar, the owner of the adjacent field was examined as DW-3. The learned Trial Court by the judgment dated 18.3.2009, holding that the scribe to the sale deeds Exhs. 46 and 47 was not examined and so also the plaintiffs 2 and 3 did not enter into the witness box and the evidence of PW-3 did not prove the possession of the plaintiffs under the sale deeds and the evidence of PW-2 and PW-5 did not prove the agreement of sale Exh.71, dismissed the suit for possession.

6] The learned Appellate Court by the impugned judgment dated 31.7.2013 reversed the judgment of the learned Trial Court and granted a decree of possession.

7] Mr. Puri, learned counsel for appellants in support of the judgment of the learned Trial Court relies upon **Vidyadhar vrs. Manikrao, AIR 1999 SC 1441** (paras 15 and 16) to contend that since the plaintiff Nos. 2 and 3 in whose favour the sale deeds at Exhs. 46 & 47 stood executed and registered, did not enter the witness box, the learned Trial Court was justified in drawing the adverse inference under Section 114 of the Evidence Act. He further submits that the original defendant no.1 Khushal was throughout in possession of the suit property under an oral tenancy created in his favour by Parvatabai. He further submits that the evidence laid on record did not support the sale deeds at Exhs. 46 & 47 and therefore, the learned Appellate Court was not correct in granting a decree for possession.

8] On 30.3.2015, the appeal was admitted on the following substantial question of law:

Whether the suit was barred in view of the provisions of Order II Rule 2 and Order XXIII Rule 3 of the Code of Civil Procedure?

9] In so far as the said substantial question of law is concerned , it would be material to note that RCS No. 21/2002 filed by the plaintiffs was for permanent injunction against Khushal and Parvatabai, on the basis of a plea by the plaintiffs that they were in possession of the suit property, on the basis of the sale deeds dated 16.2.2001. The application for temporary injunction filed therein was rejected by the learned Trial Court holding that the defendant no.1 Khushal was in possession of the suit field. Thereafter on 7.8.2003, the plaintiffs moved an application for withdrawal of RCS No. 21/2002, with liberty to file a fresh suit, which came to be rejected on 29.10.2003. The said suit thereafter came to be dismissed for want of leading evidence on 11.11.2003.

10] Since the application for withdrawal with liberty came to be rejected, the question of the subsequent suit i.e. RCS No. 27/2003 filed by the plaintiffs on 1.10.2003 for possession, being

barred by the provisions of Order XXIII Rule 3 of the CPC did not arise at all, for the reason that RCS NO. 21/2002 was not withdrawn, as the application for the same stood rejected by the order dated 29.10.2003. The question of applicability of Order II Rule 2 of CPC also did not arise for the reason that RCS No.21/2002 was for injunction claiming the plaintiff to be in possession, whereas the subsequent suit RCS No. 27/2003 was for possession. The basic plea in both the suit was totally different. It is further material to note that considering the pleadings and reliefs claimed in RCS No. 21/2002, the question of claiming the relief as claimed in the subsequent suit in RCS No. 27/2003, at the time of institution of RCS No. 21/2002 did not arise at all, in view of which the provisions of Order II Rule 2 of CPC clearly were not attracted. The substantial question of law therefore framed on 30.3.2015 has to be answered in the negative.

11] It is equally a matter of record that the sale deeds dated 16.2.2001 at Exhs. 46 & 47 were executed and registered by Parvatabai in favour of the plaintiff Nos. 2 and 3. The execution and registration of these sale deeds have never been questioned by

Parvatabai during her life time. That apart, even the daughter of Parvatabai, naneky Dushali w/o Khushal Ukey who was defendant No. 1D in RCS No. 27/2003 had at no point of time challenged the sale deeds dated 16.2.2001 in favour of plaintiff Nos. 2 and 3. The defendant no.1 Khushal, therefore, had no locus whatsoever, to raise any challenge to the sale deeds dated 16.2.2001 whatsoever, even by way of defence in RCS No. 27/2003.

12] The proof of the execution and registration of the sale deeds can be established either by examining the executant, the scribe, or the attesting witnesses. In the instant matter, admittedly the plaintiff no.1 Babulal Dole was the attesting witness to the sale deeds, who was examined as PW-1 at Exh.35. Not only that the second attesting witness to the sale deeds Shrawan Kalokar was also examined as PW-4 at Exh.87. The evidence of both these witnesses indicates the due execution and registration of the sale deeds by Parvatabai. This being the position, in my considered opinion, nothing turned around in the plaintiff Nos. 2 and 3 not entering into the witness box, as the title to the property in them stood proved by examination of PW-1 and PW-4. Even Parvatabai, who was

defendant No. 2 in RCS No. 21/2002, in her reply to the application for temporary injunction at Exh. 17, had admitted the execution and registration of the sale deeds dated 16.2.2001 at Exhs. 46 & 47 and the delivery of possession to the plaintiff Nos. 2 and 3 on the date of the sale deeds. In fact her reply to the application for temporary injunction at Exh. 17 in RCS No. 21/2002 was a complete admission of the case put forth by the plaintiffs herein. This would clearly indicate that since Parvatabai herself during her life time had admitted the execution and registration of the sale deeds dated 16.02.2001 Exhs. 46 and 47 in favour of plaintiffs 2 and 3, the same could not have been disputed by the defendant no.1 Khushal. Any discrepancy in the agreement of sale at Exh.71 claimed to have been executed by Parvatabai in favour of plaintiff no.1 Babulal, for which PW-2 Govindrao Ghatol and PW-5 Sakharam Awatare were examined would be of no use for the reason that the claim in the suit was not based upon the agreement of sale Exh. 71, but upon the sale deeds dated 16.2.2001 at Exhs. 46 & 47, the execution and registration of which stood admitted by Parvatabai during her life time itself.

13] The institution of RCS No. 27/2003 was necessitated as it was alleged that taking advantage of the findings rendered in the application for temporary injunction in RCS No.21/2002, the defendant no.1 Khushal had taken forcible possession of the suit property. The plaintiff no.1 being the father of plaintiff Nos. 2 and 3 had entered into the witness box in support of the claim in the suit and therefore, nothing could be made out on the ground of non examination of the plaintiff 2 and 3, as their title and earlier possession of the suit property stood admitted by Parvatabai herself.

14] The claim by defendant no.1 was merely based upon a plea that Parvatabai during her life time had given the property in her possession to her daughter Dushila on behalf of whom the defendant no.1, being her husband, was cultivating the same, which also indicates the falsity of the subsequent claim raised by defendant No.1 Khushal of being a tenant of the suit property, as even according to him, no such relationship was created by Parvatabai in his favour at any point of time.

15] The learned Trial Court appears to have given undue weightage to the plea that the plaintiffs 2 and 3 had not entered into the witness box, by raising adverse presumption against them, which could not be sustained, on the ground that their title and possession already stood admitted by Paravatabai herself and the plea for possession as raised in the plaint was duly averted to and proved by the plaintiff no.1.

16] The learned Appellate Court has rightly found that the plaintiffs 2 and 3 were the owners of the suit field by virtue of the sale deeds dated 16.2.2001 Exhs.46 and 47. The DW-1 Mahadeo Ukey as well as DW-2 Rajni were not persons who could have spoken anything regarding the sale deeds dated 16.2.2001 at Exhs. 46 & 47 and specifically so when the executant of the sale deeds namely Parvatabai herself had already admitted their execution and registration as well as delivery of possession thereunder, to the plaintiffs 2 & 3. That being the position, the learned first Appellate Court was correct in granting a decree to the plaintiffs for possession of the land of Gat no. 180, as the defendant no.1 Khushal or for that matter the deft no.1D Dushila, the daughter of Parvatabai

could not have laid a claim to the suit property in any manner whatsoever. Reliance by Mr. Puri, learned counsel for the appellants on **Vidyadhar** (supra) is of no assistance to the peculiar facts of the present case, where the title and possession of the property in question stood admitted by Parvatabai herself and the plea of possession stood proved by the evidence of PW-1. For the reasons stated above, the substantial question of law as framed on 30.3.2015 has already been answered in the negative and even otherwise I do not see any reason to interfere in the impugned judgment and decree as passed by the learned Appellate Court. The appeal therefore is without any merits, and is accordingly dismissed. No costs.

JUDGE

Rvjalit