

Sushma

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 29 OF 2014

Maruti Ganpat Shinde and another ... Appellants

Versus

Janabai Maruti Kale ... Respondent

....

Mr. P.S. Pawar – Advocate for Appellants

Mr. P.C. Mayure h/f. Mr. S.S. Chapalgaonkar – Advocate for Respondent

....

CORAM : GAURI GODSE, J.

DATE : 01st March, 2023

PER COURT :

1. This Second Appeal is preferred by the plaintiffs for challenging the dismissal of their suit by the first appellate Court for removal of encroachment and possession. The suit was initially partly allowed by the Trial Court and the respondent – defendant was directed to hand over the possession of the suit property to the plaintiffs.
2. By the judgment and decree passed by the First Appellate Court the judgment and decree passed by Trial Court is set aside and the suit of the appellants is dismissed. The appellants had filed

Regular Civil Suit No. 277 of 2007 for removal of encroachment to the extent of 8 R land out of Survey No. 30/9 admeasuring 1 H 68 R. It was the case of the appellants that there was a sale deed executed in favour of the defendant with respect to the suit property. However, the same was without any consideration. The respondent had encroached over the suit property by way of installing a tin shed and hence, the suit was filed for removal of encroachment and possession. The respondent appeared in the suit and denied the suit claim and filed a counter claim for declaration that in the event, the sale deed dated 08th September, 1986, executed in favour of the respondent was held to be illegal, then in that event, the respondent was entitled for getting executed a fresh document of transfer by way of specific performance in respect of the suit property. By judgment and decree dated 30th July, 2010, the learned Civil Judge Junior Division, Kopargaon, partly allowed the suit of the appellants and directed the respondent to hand over possession of the suit property by holding that the respondent had carried out encroachment on the suit property. The counter claim filed by the respondent was dismissed. The

respondent – defendant had preferred Regular Civil Appeal No. 42 of 2010. The learned District Judge – 1, Kopargaon, allowed the appeal and the decree for possession passed by the Trial Court is set aside and the suit is dismissed. Hence, the present Second Appeal is filed by the original plaintiffs.

3. Learned Advocate appearing for the appellants submitted that since the sale deed executed in favour of the respondent was without payment of any consideration, the sale deed did not create any right, title and interest in the respondent with respect to the suit property. Hence, the respondent was not entitled to retain the possession of the suit property. Learned Advocate for the appellants further submitted that the case of the respondent for seeking specific performance with respect to the suit property was negated by both the Courts. Hence, the Second Appeal would require consideration on the question of law regarding entitlement of the appellants to seek possession over the suit property.
4. Learned Advocate for the respondent submitted that both the Courts have disbelieved the case of the appellants with respect to the challenge of the sale deed executed in favour of the

respondent on the point of non-payment of consideration amount. Thus, the right, title and interest of the respondent over the suit property is accepted by both the Courts. Hence, the appellant is not entitled to seek any relief of possession with respect to the suit property. He submitted that there is no question of law involved in the Second Appeal. Hence the Second Appeal be dismissed.

5. I have considered the submissions of both the parties. I have perused the record of the Second Appeal. It is not in dispute that by way of registered sale deed the suit property was transferred to the respondent and the respondent was put in possession of the suit property pursuant to the sale deed. Though, there is a challenge to the sale deed on the ground that there was no consideration paid pursuant to the sale deed, the Trial Court has held the sale deed to be void in view of the provisions of Section 8 of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 (“said Act of 1947”). Hence, the Trial Court had decreed the suit by holding that the possession of the respondent over the suit property was by way of encroachment. The Trial Court had held that there was no

valid transfer pursuant to the sale deed in favour of the respondent for want of permission under the provisions of the said Act of 1947.

6. The First Appellate Court has framed points for consideration with respect to the case of the appellants that the respondent had made encroachment on the suit property and whether the appellants were entitled for possession of the suit property. The First Appellate Court has examined the documents on record and has held that even if the case of respondent is accepted that Sub-Divisional Officer has held the sale deed to be void, the Civil Court had no jurisdiction to decide relief of possession in view of Section 22 read with Section 36(A) of the said Act of 1947. The First Appellate Court has examined the evidence on record and has held that in the cross-examination, the plaintiffs had admitted that the possession of the suit land was handed over to the defendant pursuant to the sale deed. Hence, the First Appellate Court has set aside the decree passed by the Trial Court on the ground that there was no evidence on record to show that there was any kind of encroachment by the respondent on the suit land.

7. There is no dispute that the possession of the suit land was handed over to the respondent pursuant to the execution of the sale deed. The challenge to the validity of the sale deed in favour of the respondent is on the ground of non payment of consideration amount. The learned Trial Court has held the sale deed to be void for want of necessary permission under the provisions of the said Act of 1947. So far as the challenge to the sale deed on the ground of non payment of consideration amount is concerned, there is no finding recorded by the Trial Court that consideration amount as agreed in the sale deed was not paid as contended by the plaintiff.
8. The learned Trial Judge has decreed the suit only on the ground that the sale deed in favour of the respondent was void for want of permission under the provisions of the said Act of 1947. The First Appellate Court has also not believed the case of the plaintiff that there was no consideration amount paid pursuant to the sale deed executed in favour of the respondent. The First Appellate Court has relied upon the provisions of the said Act of 1947 and has held that the breach of any of the provisions of the said Act of 1947 cannot be dealt with by the Civil Court. In the

event there is any challenge to the sale deed being void for breach of any of the conditions of 1947, the competent authority would have jurisdiction to decide the claim of the plaintiffs on the ground of breach of any of the provision of the said Act of 1947.

9. The First Appellate Court has relied upon the decision of this Court in the case of ***Tukaram Motiram Shinde vs. Vishwanath Bhimrao Khandele***¹ and ***Gokulsing Jalamsing Patil vs. Julalsingh Fattesing Patil***² and held that the provisions of summary eviction under Section 22 of the said Act of 1947 for breach of any of the provisions under the said Act of 1947 is vested with the Competent Authority and not the Civil Court. Hence the First Appellate Court has reversed the decree passed by the Trial Court and dismissed the suit.
10. I do not find any fault with the reasoning recorded by the First Appellate Court. There is nothing brought on record to show that the consideration amount was not paid to the respondent pursuant to the sale deed. It is not in dispute that respondent was put in possession of suit land pursuant to the sale deed. The

1 2003 (6) Bombay C.R. 389

2 2008 (3) B C J 81

submission on behalf of the appellants for challenging the sale deed on the ground of non payment of consideration amount is not accepted by both the Courts. The submission of the sale deed being void for breach of the provisions of the said Act of 1947 is rightly dealt with by the First Appellate Court by relying upon the aforesaid two decisions of this court. The submissions for challenging the sale deed being void for breach, if any, of any of the provisions of the said Act of 1947, cannot be dealt with by the Civil Court. Hence once the respondent is put in possession pursuant to execution of the duly registered sale deed, it cannot be said that the possession of the respondent over the suit land is by way of some encroachment.

11. I do not find any illegality or perversity in the reasoning recorded by the First Appellate Court. The Second Appeal does not raise any substantial question of law.
12. Second Appeal is dismissed.

[GAURI GODSE, J.]