

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

SECOND APPEAL NO. 358 OF 2020
WITH CA/6119/2020 IN SA/358/2020

Shivaji S/o. Vitthalrao Somwanshi,
Age – 58 years, Occ – Agril,
R/o. Selu, Tq. Ausa, Dist. Latur ...Appellant

Versus

1. Satish S/o. Keruba Bandgar,
Age – 51 years, Occ – Agri,
R/o. Selu, Tq. Ausa, Dist. Latur
2. Hanumant S/o. Vitthalrao Somwanshi,
Age – 48 years, Occ – Agri,
R/o. Selu, Tq. Ausa, Dist. Latur
3. Sunil S/o. Sandipan Dande,
Age – 48 years, Occ – Agri,
R/o. Selu, Tq. Ausa, Dist. Latur.
4. Manohar Devidas Rathod,
Age – 27 years, Occ – Agri,
R/o. Selu, Tq. Ausa, Dist. Latur ...Respondents

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Mr. A. A. Khande, Advocate for the Appellant.
Mr. Sachin Panale, Advocate for Respondent Nos. 1 and 3.
Mr. M. D. Shinde, Advocate for Respondent No. 2.
Mr. Shrikant Kulkarni, Advocate for Respondent No. 4.

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CORAM : R.M. JOSHI, J
RESERVED ON : MARCH 30, 2023
PRONOUNCED ON APRIL 25, 2023

JUDGMENT

1. This appeal is filed under Section 100 of the

Code of Civil Procedure (for short 'CPC') by original plaintiff in R.C.S. No. 425/2012 and being aggrieved by the judgment and decree passed by the District Judge, Latur in R.C.A. No. 87/2017 has preferred this Appeal. Parties are referred to by their nomenclature in the original proceedings.

2. In short the case of the plaintiff and defendant, which has led to this appeal, can be summarized as follows:

Plaintiff filed suit for declaration that he is the owner and in possession of land admeasuring 1H 68R land towards west side in Block no. 512 admeasuring 3H 36R and has sought injunction restraining the defendant from disturbing his peaceful possession over the suit land. Plaintiff and Defendant no. 2 are brothers. It is claimed by Plaintiff that there was a partition between brothers in respect of land block no. 512 and land admeasuring 1H 68R land towards western side of the said block came to his share. He further stated that defendant no. 2 executed agreement to sell with plaintiff on 19.07.2003 in respect of 1H 68R land towards east side of the said land. Defendant no. 2

thereafter executed nominal sale deed in favour of defendant no. 1. With these averments, suit is filed by plaintiff on 30.01.2014.

3. Defendant no. 1 by filing written statement denied the claim of the plaintiff about the ownership and possession of the suit land. He claimed that by virtue of registered sale deed dated 24.11.2003 executed by Defendant no. 3 in his favour he became owner and he is in possession of the suit land. It is also claimed that his name is also mutated in the revenue record in respect of the said land. It is alleged by these defendants that by agreement to sell between defendant no. 2 and plaintiff is false and nominal document.

4. Defendant no. 2 by filing written statement admitted the claim of the Plaintiff. It is further reiterated that the sale deed executed by him in favour of the plaintiff is nominal sale deed. Defendant No. 3, who is the purchaser of the suit land from defendant no. 1, during the pendency of the suit claim that by registered sale deed dated 29.04.2013 he has become owner and he is in possession of the suit land.

5. On the basis of aforesaid pleadings, issues were framed and parties led their respective evidence. Learned trial Court by passing judgment and decree dated 04.05.2017 restrained defendants from obstructing possession of the plaintiff over the suit land. Being aggrieved by the said judgment and decree, defendant no. 3 preferred appeal against the said judgment in R.C.A. No. 87/2017, which came to be allowed and suit was dismissed.

6. Learned Counsel for the Plaintiff states that the First Appellate Court has committed error in not appreciating the evidence on record correctly. It is stated that the Appellate Court was confused with regard to the fact that the issue involved herein pertain to the side for which the plaintiff is claiming his possession in respect of the block no. 512. It is stated that admittedly plaintiff has share in the suit land and therefore, the Trial Court has rightly passed order of injunction in view of the obstruction caused by the defendants to his possession over the same. In support of his submissions, he relied on following judgments: Baji Nath Vs. Vishwanath Pandey and Others,

2000 (3) AWC 2213, T. Lakshmipathi and Others Vs. P. Nithyananda Reddy and Others, 2003 AIR SCW 2436, Tanushree Basu and Ors Vs. Ishani Prasad Basu and Ors, AIR 2008 SC 1909 & Prabhakar Gones Parbhoo Navelkar (Dead) through Lrs and Ors Vs. Saradchandra Suria Prabhu Navelkar (Dead) through Lrs and Ors, AIR Online 2019 SC 958.

7. Learned Counsel for the Original Defendants, purchaser of the suit land, opposed the said contention by stating that these defendants having acquired title and possession over the suit land on the basis of registered sale deed and mutation entry and in ignorance of the said evidence Trial Court has issued injunction against defendants in respect of the suit land passed order of injunction, which was rightly reversed by the First Appellate Court.

8. From the perusal of the plaint it can be easily gathered that the plaintiff does not dispute that originally land block no. 512 was held in common by plaintiff and defendant no. 2. It is further claimed by him that area of 1H 68R land went to the share of the defendant no. 2. Thus, there is no dispute about

the fact that the defendant no. 2 was owner and had right to dispose of his property. It is further admitted that defendant no. 2 executed sale deed in favour of the defendant no. 1. The sale deed dated 24.11.2003 is registered sale deed which carries presumption and unless rebutted by defendant no. 2 who claims that it was a nominal sale deed, it has to be held that by said document the right, title and interest in the suit land was transferred by defendant no. 2 in favour of the defendant no. 1.

9. Perusal of the evidence on record shows that the defendant no. 2 had filed suit bearing R.C.S. No. 509/2012 against defendant no. 1 claiming that the sale deed was nominal and for seeking direction of the re-conveyance of the suit land. Admittedly, the said suit is dismissed on 17.08.2016. Thus, competent Court of law has held that the sale deed is real transaction of sale and not nominal as claimed by the defendant no. 2. Defendant no. 1 by relying upon the mutation entry in respect of suit land to prove his possession over the same. As against this, as per case of Plaintiff, Defendant No. 2 has agreed to sell his share to him but

admittedly no sale deed is executed. The agreement to sell does not create any right in favour of Plaintiff in respect of land owned by Defendant no. 2.

10. In this backdrop, Trial Court has held that there is no partition between Plaintiff and Defendant No. 2 and that Defendant No. 2 had no right to dispose of any part of land. This observation of Trial Court is contrary to settled law that even in respect of coparcenary undivided share can be alienated by any one of coparcener. Thus, the said finding recorded by Trial Court cannot sustain. Similarly, it is further held that Plaintiff and his brother jointly possess the said land and Defendant no. 3 failed to prove possession over it. This observation is contrary to the evidence on record i.e., sale deed and mutation entry in respect of land. Even if trial Court comes to the conclusion that suit land is jointly held and the defendant no. 1 was able to prove title and possession over it, no injunction could have been granted against the co-owner.

11. As regards the claim of the defendant no. 3 of acquisition of title in respect of the suit land during

the pendency of the suit is concerned, the sale deed executed by defendant no. 1 in favour of this defendant cannot be held to be illegal only for the reason that it was executed during the pendency of the *lis*. It is settled law that effectiveness of sale deed executed during the pendency of the suit depends upon the outcome of the suit and *ipso facto* such sale deed does not become invalid. Herein this case, First Appellate Court has rightly held that the defendant no. 1 is owner of the suit land and is in possession thereof. Thus, validity of transaction between defendant no. 1 and defendant no. 3 does not get affected in any manner whatsoever.

12. Trial Court has seriously erred in appreciating evidence on record and also in considering legal position with regard to alienation of undivided share in jointly held property. Learned First Appellate Court in exercise of power under Section 96 read with Order XLI of CPC has rightly reappreciated the evidence on record and arrived at correct findings.

13. The First Appellate Court has rightly appreciated the evidence on record and dismissed the

suit. For want of any perversity in the said findings, this is not a fit case to entertain the Appeal. In order to sustain Second Appeal under Section 100 of the CPC the Appellant needs to show involvement of substantial question of law, which is absent herein. In the result, the appeal stands dismissed with costs. Pending applications, if any, are also disposed of.

(R.M. JOSHI, J.)

Malani