

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL (STAMP) NO.11276 OF 2023
WITH
INTERIM APPLICATION NO.4122 OF 2023
IN
SECOND APPEAL (STAMP) NO.11276 OF 2023**

Rahul Bharatanand Gurav

...Appellant

Versus

Nagesh Durgadas Dhotre

...Respondent.

....

Mr. Shrishail Sakhare for the Appellant.

Mr. Anand S. Kulkarni for the Respondent.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

DATED: 23rd OCTOBER, 2023.

P.C.:-

1. This Second Appeal under Section 100 of the Civil Procedure Code has been preferred against the judgment and order dated 08/12/2022 passed by District Judge-1, Solapur in Regular Civil Appeal No.193 of 2019. By the impugned judgment the learned District Judge dismissed the appeal and thereby confirmed the judgment and decree dated 20/08/2019 passed by learned 4th Joint Civil Judge, Senior Division, Solapur, in Special Civil Suit No.153 of 2013.

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2. The dispute is in respect of two flats being Flat Nos.8A and 8B. CTS No.8391/15/1/3, situated on the second floor of the building situated on Solapur Railway Lines, Solapur. The said flats shall be hereinafter referred to as the 'suit flats'.

3. The suit flats were purchased by Ajit Bhagwan Karvande from Anil Pandhe. He had availed loan from Solapur Janata Co-operative Bank and mortgaged the suit flats as colateral security. Said Ajit Karvande expired and the flats were transferred in the name of his wife. Since the wife of Ajit Karvande and his legal representatives failed to repay the said loan, the flats were attached and were put in auction. The Plaintiff-Respondent purchased the suit flats in an auction held on 22/12/2012 and sale certificate dated was issued on 10/01/2013. The Plaintiff claimed that the Appellant was in illegal possession of the suit flats. He refused to handover possession of the suit flats to the Plaintiff and hence a suit came to be filed for recovery of possession.

4. The Appellant admitted that the suit flats were purchased by Ajit Karvande and upon his demise the suit flats were transferred in

the name of his widow. The Appellant also admitted that the suit flats were mortgaged to the Bank as collateral security and that the bank had attached the suit flats and that the Respondent -Plaintiff had purchased the suit flats in an auction held by the Bank. The Appellant-Defendant also admitted that sale certificate has been issued in favour of the Respondent -Plaintiff but claimed that the same has been obtained by fraud.

5. The defence set up by the Appellant is that in the year 2007, he and his father had entered into an agreement with Mr. Anil Vasantrya Pandhe, the Builder and Developer, who had developed the said property. The Appellant-Defendant averred that said Anil Pandhe had agreed to sell the suit flats to him for sale consideration of Rs.8,50,000/- and that he had paid earnest money of Rs.2,00,000/- and was put in possession of the suit flats. The Appellant further claimed that the mortgage as well as the auction was fraudulent and the same is not binding on him.

6. The suit flats are undisputedly on the second floor of the building, however, due to a typographical error in the plaint, the suit

flats were stated to be on the first floor. At the stage of final hearing, the Plaintiff amended the plaint to rectify the said error and accordingly the words “first floor” were substituted with the words “second floor”. Taking undue advantage of the amendment, the Appellant filed a counter claim stating that at the stage of final hearing several new facts had come to his knowledge. He sought to withdraw the admission that Ajit Karvande had purchased the suit flats and further sought a declaration that the sale certificate was not binding on him.

7. It is pertinent to note that in terms of Order 8 Rule 6A of CPC counter claim has to be filed either before or after the filing of the suit but before the Defendant has delivered his defence or before the time limited for delivering his defence has expired. As noted above, the Appellant-Defendant had filed a counter claim at the stage of final hearing and hence the Trial Court did not grant leave to the Defendant to adduce any evidence in respect of the pleadings and averments raised in the counter claim.

8. On merits, the Trial Court as well as the Appellate Court have held that the suit flats were owned by Ajit Karvande and that after

his death the name of his widow was recorded in the survey records. Both the Courts have recorded a finding that Ajit Karvande had availed loan by mortgaging the suit flats as collateral security. Ajit Karvande and later his legal representatives defaulted in repaying the loan and hence the suit flats were attached and subsequently auctioned. It is not in dispute that the Respondent -Plaintiff was the successful bidder and the sale certificate has been issued in his favour.

9. Both the Courts have recorded concurrent findings that the Appellant herein had failed to prove that he had entered into an agreement with Anil Pandhe in respect of the suit flats or that he had paid earnest money to said Pandhe or that he was put in possession of the suit flats as part performance of the contract. Both the Courts below have also taken note of the fact that the Appellant had not challenged the sale certificate. It is also observed that though the Appellant has claimed that the sale certificate was obtained by fraud, he has not given particulars of fraud. Moreover, the auction or sale is not challenged by the widow of Ajit Karvande, the owner of the suit flats. The Trial Court as well as the First Appellate Court has recorded a specific finding that the Appellant has failed to prove any right, title or interest in respect of the suit flats. Being aggrieved by the

concurrent findings recorded by the Courts below, the Appellant has filed this appeal under Section 100 of the CPC.

10. Heard Mr. Shrishail Sakhare, learned counsel for the Appellant and Mr. Anand S. Kulkarni, learned counsel for the Respondent. I have perused the records and considered the submissions advanced by the learned counsel for the respective parties.

11. It is not in dispute that the suit flats were purchased by Ajit Karvande from Anil Pandhe. The name of Ajit Karvande was recorded in survey records on the basis of the sale deed and upon his death the names of his legal representatives have been entered in the survey records. Said Ajit Karvade had availed loan and mortgaged the suit flats to the Bank as collateral security. It is also not in dispute that Ajit Karvande and later his widow failed to repay the loan and as such the Bank attached the suit flats and put them in auction. The Respondent purchased the suit flats in an auction held on 22/12/2012 and sale certificate was issued in his favour on 10/01/2013. Though the Appellant claims that he had agreed to purchase the suit flats from the Builder, he had not adduced any evidence to prove such agreement or payment of earnest money or that he was put in possession of the suit

flats. The Appellant -Defendant also admitted that the suit flats were already sold to Ajit Karvande and that he had not challenged the said sale transaction or the sale certificate issued in favour of the Respondent -Plaintiff. In such circumstances, both the courts below upon analysing the evidence, have concluded that the Appellant has failed to prove that he has right, title or interest in respect of the suit flats. The findings recorded by both the courts below are neither perverse nor contrary to the provisions of law. No substantial question of law is involved. The appeal has no merits and is accordingly dismissed.

12. Learned counsel for the Appellant seeks stay of the execution to challenge the order before the Hon'ble Supreme Court. The executing court shall not proceed with the execution proceedings for a period of four weeks from the date on which this order is uploaded, subject to the Appellant filing an undertaking before the Trial Court/ Executing Court that he will not transfer, alienate or create third party right or interest in respect of the suit flats in any manner.

(SMT. ANUJA PRABHUDESSAI, J.)