

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

SECOND APPEAL NO.161 OF 2017

Hanmanta Janardhan Bharte

... Appellant

Versus

Mahaling Shivmurti Gadgade
(since decd.) thr. Lrs. And Ors.

... Respondents

Mr. Milind R. Deshpande for the Appellant.

**CORAM: SHARMILA U. DESHMUKH, J.
DATED : 26th FEBRUARY 2024 .**

P. C. :

1. Heard Mr. Milind Deshpande for the Appellant.
2. Being dissatisfied by the judgment dated 21st January 2016 of the Appellate Court in Civil Appeal No.274/2012 dismissing the Appeal thereby upholding the judgment of the Trial Court dated 5th May 2012 passed in Regular Civil Suit No.1251/2003, the original plaintiff is before this Court.
3. The case of the plaintiff was that 37R land out of Gut No.69 which is the suit property was the joint family property of defendant Nos.1 and 3. According to the plaintiff, defendant Nos.1 and 3 orally partitioned

the property and started cultivating their respective shares. As there was obstruction by the defendant No.3, defendant No.1 filed Regular Civil Suit No. 470/1998 for partition by metes and bounds which came to be decreed and defendant No.1 was held entitled for his half share. It was pleaded that according to the said decree, defendant No.1 paid the amount of Rs.21,500/- in the Court on 29th January 2000 and filed Regular Darkhast Number No.45/2000 for execution. It was pleaded that subsequently on 8th July 2002, defendant No.1 executed registered agreement for sale and handed over the possession of the suit property to the plaintiff. The transaction was to be completed within a period of 11 months and the plaintiff was assured by defendant No.1 that the land is free from all encumbrances by showing decree in Regular Civil Suit No.470/1998. It was pleaded that however plaintiff was not informed that defendant No.3 has filed Regular Civil Appeal No.470/1999 against the decree in Regular Civil Suit No.470/1998. It was pleaded that in the Appellate proceedings a settlement was arrived at between defendant No.1 and defendant No.3 and as such the execution proceedings were not proceeded with. The instant suit came to be filed by the plaintiff for the declaration that the settlement decree between the defendant No.1 and 3 is *void ab initio* and in breach of agreement for sale as defendant No.1 by

the said settlement has relinquished his right over half share which was after execution of the sale deed. It was also pleaded that the transaction was to be completed after the outcome of the execution proceedings and that the plaintiff does not have sufficient amount to pay the Court fees for filing suit for specific performance and therefore the suit is filed for simplicitor injunction.

4. The suit came to be resisted by the defendants. Defendant No.1 denied the execution of the sale deed dated 8th July 2022 and it was also contended that plaintiff was never in possession of the suit property. It was contended that on 16th April 1998 defendant No.3 had published a public notice that nobody should enter into any transaction with defendant No.1. It was further contended that defendant No.2 by misleading defendant No.1 got executed agreement for sale in collusion with the plaintiff.

5. Subsequently, on 25th February 2005 defendant No.1 filed another written statement supporting the plaintiff. Defendant No.2 in capacity as one of the heirs of defendant No.1, who expired during pendency of the Suit filed written statement supporting the plaintiff.

6. The parties went to trial. The Trial Court dismissed the suit and held that the plaintiff has failed to take possession and that he is not entitled for declaration as prayed.

7. As against this Civil Appeal No.274/2012 was filed by the plaintiff. The Appellate Court framed the following points for determination.

<u>Sr. No.</u>	<u>POINTS</u>	<u>FINDINGS</u>
1	Does plaintiff prove that the compromise decree passed in Civil Appeal No.470/1999 is not binding upon him ?	No
2.	Does plaintiff prove his possession over the suit land ?	No.
3.	Does plaintiff prove obstruction by defendants in his possession in suit land ?	No.
4.	Whether plaintiff is entitled for declaration that the compromise decree passed in Civil Appeal No.470/1999 is not binding upon him ?	No.
5.	Whether plaintiff is entitled to perpetual injunction sought ?	No.
6.	Whether the impugned judgment and decree requires any interference ?	No.
7.	What order and decree ?	As per final order.

8. The Appellate Court held that the decree in RCS No.470/1998 was not produced neither consent terms of the said decree was produced by the plaintiff and as such it is not possible for this Court to decide the legality or validity of the same. As regards the aspect of possession the Appellate Court considered the evidence of witnesses on the aspect of partition and on the appreciation of evidence held that there are material contradictions about the actual possession of defendant No.1 over the suit property. The Appellate Court also held that when there was oral partition there was no necessity for defendant No.1 to file RCS No.470/1998 and for payment of Rs.21,500/- for possession. The Appellate Court held that the question of handing over of possession to the plaintiff does not arise as defendant No.1 was never in possession of Gut No.69. On the aspect of Section 53A of Transfer of Property Act, the Appellate Court held that the plaintiff himself has pleaded that due to lack of funds for payment of Court fees, Suit was not filed for specific performance and therefore there is no question of being ready and willing to perform his part of the contract. The Appellate Court therefore dismissed the Appeal.

9. Heard Mr. Milind Deshpande, learned counsel for the

Appellant.

10. Mr. Deshpande, learned counsel appearing for the appellant would submit that the question which arises in the present case is the binding effect of compromise decree on the plaintiff when he was not a party to the proceedings. He would further submit that there is perversity in findings as the Appellate Court has failed to consider the evidence of the witnesses as regards the partition between defendant Nos.1 and 3. He would further submit that the evidence on record shows that he was put in possession of the suit property and as such was entitled to protect the possession under Section 53A of Transfer of Property Act.

11. Considered the submission and perused the record.

12. The plaintiff has filed Suit i.e. RCS No.1251/2003 for declaration that the consent decree in RC Suit No.470/1998 entered into between the defendant No.1 and 3 is not binding and for an injunction simplicitor not to disturb the plaintiffs possession over the suit property. As the challenge was to the consent decree, it was incumbent upon the plaintiff to produce on record consent decree/ compromise deed so that

legality or validity thereof could have been adjudicated by the Court.

13. Admittedly, in the present case, the consent decree/compromise deed has not been produced by the plaintiff. In the absence of document itself being on record the Trial Court as well as the Appellate Court could not have adjudicated the legality or validity of the same. As regards the aspect of possession, relief of injunction was sought not to disturb the plaintiffs possession. For being entitled to the relief of injunction it was necessary firstly for the plaintiff to prove that there was partition between the defendant No.1 and 3 and secondly that subsequent to the execution of sale deed dated 8th July 2002, the plaintiff was put in possession of the suit property. The witnesses who are examined on behalf of the plaintiff have deposed about the oral partition between defendant Nos.1 and 3 and that defendant No.1 was in possession of the suit property. However the witnesses have further admitted that it was defendant No.3 alone who was cultivating the entire land. In view of this material contradictions in the evidence of the witnesses as regards the actual possession of defendant No.1 over the suit property, the Appellate Court has disregarded the evidence. Another aspect which was rightly considered by the Appellate Court was that if the

defendant No.1 was in possession of the property there was no necessity of filing of RCS No.470/1998 for partition by meets and bounds and payment of Rs.21,500/- for possession. If defendant No.1 himself was not in possession of the property, the question of plaintiff being put in possession does not arise. In addition, there is an admission of the plaintiff that he has not taken any crop after execution of the sale deed and there is no material produced on record to demonstrate the plaintiff's possession since 2003. As the material on record did not demonstrate possession of the plaintiff over the suit property there was no question of any injunction being granted or possession being protected under Section 53A of Transfer of Property Act. The Appellate Court has rightly considered the averment of the plaintiff that he was not having any funds even to pay Court fees for filing of the suit. Protection is available under Section 53A of Transfer of Property Act upon the essential condition of readiness and willingness on the part of prospective purchaser being satisfied which is not established in present case.

14. Considering the evidence which is on record the Trial Court and Appellate Court has rightly appreciated the same. In appeal under Section 100 of Civil Procedure Code, 1908 it is impermissible for this

Court to re-appreciate the evidence unless there is perversity demonstrated. In the present case there is no perversity. As such no substantial question of law arise. Appeal stands dismissed.

(SHARMILA U. DESHMUKH, J.)