



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.14 OF 2017
WITH
CIVIL APPLICATION NO.38 OF 2017
IN
SECOND APPEAL NO.14 OF 2017
WITH
CIVIL APPLICATION (ST.) NO.2842 OF 2019
IN
SECOND APPEAL NO.14 OF 2017

Manaji Babu Dhavade (since deceased)
through LR's and Ors..

... Appellants.

Versus

Shantaram Barakya Humane and Ors.

... Respondents.

Mr. Tushar Sonawane, Advocate for the Appellants.

CORAM : SHARMILA U. DESHMUKH, J.

DATE : JANUARY 24, 2024

P. C.:

1. Heard.
2. Being dissatisfied with the judgment dated 10th March, 2016 passed by the Appellate Court dismissing the Appeal and the Cross-Objection, the original defendant nos.1 to 8 have filed the present Appeal.
3. Regular Civil Suit No.40 of 2001 was filed simpliciter for

injunction. The case of the plaintiff was that the suit property bearing gut No.233 was owned by Manka Bapu Dalvi, who died issue-less. According to the plaintiff, the plaintiff is a legatee under the Will of Manka Bapu Dalvi and the suit property has been bequeathed to the plaintiff and after the death of the testator, the plaintiff is in continuous possession of the suit property. It is further pleaded that the defendants have no right, title and interest in the property however, the plaintiff's possession being obstructed by the defendants is on the basis of another Will propounded in favour of defendant Nos.9 and 10.

4. The suit came to be resisted by the Defendants. The written statement was filed by defendant no.1 and adopted by defendant nos. 2 to 8. The contention of defendant no.1 was that suit property was being cultivated by defendant nos. 8 and 9 and the defendant nos.8 and 9 were also taking care of Manka Dalvi, who executed registered Will in their favour. It is contended that defendant nos.8 and 9 are in possession of the suit property. Defendant nos.9 and 10 filed their written statement and supported case of defendant nos.1 to 8. The parties went to trial.

The trial Court decreed the suit holding that the plaintiffs are in possession. Against the judgment of trial Court Regular Civil Appeal No.86 of 2011 was filed which came to be dismissed.

5. Pertinently, the defendant Nos.9 and 10, who were propounding the later Will of Manka Bapu Dalvi had not preferred an appeal against the judgment of the trial Court and accepted the trial Court's judgment. It is the present Appellants, who claimed to be cultivating the suit property assailed the findings before the Appellate Court as well as before this Court.

6. Learned counsel appearing for the Appellants would submit that the substantial question of law which arises in the present case is whether the suit simpliciter for injunction would lie when the defendant Nos.1 to 8 have raised a cloud over the title of the plaintiff by relying upon the later Will of testator in favour of defendant Nos.9 and 10.

7. The Appellate Court has framed the following points for consideration, which read thus:

“POINTS

FINDINGS

1 Whether the plaintiff proves that he is in possession of the said suit property ?

Yes.

2 *Whether the plaintiff proves that defendants are obstructing his peaceful possession ?* *Yes.*

3 *What order & decree ?* *As per final order.”*

8. After considering the evidence, the Appellate Court has observed that as there was no challenge by the defendant Nos.9 and 10, the decree has attained finality as against those defendants and the present Appellants have no right to challenge for the reason that they have failed to prove any right, title and interest in the property and there is no claim that they were in possession of the property at the time of filing of the written statement. The Appellate Court observed that the whole effort was to prove that the defendant Nos.9 and 10 had come in possession of the suit property by virtue of the later Will executed in the year 1984.

9. As regards the relief of injunction, the Appellate Court considered the 7/12 extract of the property which showed that the plaintiff was in possession of the property prior to the death of Manka Bapu Dalvi and was in continuous possession of the property till 2001. The Appellate Court also observed that there is

a specific remark in the mutation entry as regards the name of the plaintiff being mutated by reason of the registered Will executed in favour of the plaintiff. The Appellate Court also observed that there is no Appeal before the Revenue Authority against the said mutation entries.

10. From the findings of the trial Court, it appears that there was no document produced by the defendant Nos.1 to 8 to demonstrate their possession over the suit property. All that is contended is that the defendant Nos.9 and 10 have given them right to cultivate. It is settled that a person cannot transfer a better title than that which he has. In the present case, it is not demonstrated that the defendant no.9 and 10 were in possession of suit property and as such no possession of right can be transferred to defendant nos. 1 to 8. In support, he relies upon the decision in the case of *T. V Ramakrishna Reddy v. M.Mallappa and Another*, reported in *(2021) 13 SCC 135*.

11. There is no dispute with the proposition of law laid down that where the plaintiff's title is under a cloud a suit simpliciter for injunction would not lie. In case of *Anathula Sudhakar vs. P.Bucchi*

Reddy (dead) by Lr's reported in *AIR 2008 Supreme Court Cases 2033*, the Apex Court has held that where the plaintiff has clear title supported by documents, if a trespasser without any claim to title merely denies the plaintiff's title, it does not amount to raising cloud over his title. Mere denial of the title of the plaintiff should not drive the plaintiff to file suit for declaration of title. In the present case, it is not the defendant Nos.9 and 10, who have propounded the later Will have asserted their title over the suit property. In fact, the defendant Nos.9 and 10 have accepted the findings of the trial Court. It is the Appellants, who claim to have given right of cultivation, who are propounding the Will which has been executed in favour of the defendant Nos.9 and 10 and thereby denying the title of the plaintiff. The documents on record sufficiently indicate the execution of the Will in favour of the plaintiff as well as the mutation entry which mutates the name of the plaintiff in the revenue record on the basis of the Will. Unless there is a serious dispute to the title of the plaintiff, it cannot be said that a cloud has been raised over the title so as to drive the plaintiff to seek declaration before seeking injunction.

12. In the present case, the defendant Nos.9 and 10 have not even challenged the Will on the basis of which the plaintiff is claiming title to the property and neither challenged the revenue entries. Considering the facts of the case, it cannot be said that a cloud has been raised over the title of the plaintiff, so as to drive the plaintiff to file a suit for declaration before a suit for injunction can be said to be maintainable.

13. Having regards to the discussion above, no substantial question of law arises in the present Appeal. Appeal stands dismissed. In view of the dismissal of the Appeal, Civil Applications do not survive and stand disposed of.

14. It is needless to clarify that the observations herein are only for the purpose of deciding the validity of the judgment and decree which are subject matter of challenge. If any suit is filed for declaration of title, the same is required to be decided on its own merits and in accordance with law.

(Sharmila U. Deshmukh, J.)