



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 194 OF 2017

Dhondiram Rau Patil

Since deceased thr. LRs.

...Appellant.

Versus

Madhav Tukaram Nikam and Others.

...Respondents.

Mr. Vikrant A Desai h/f Mr. S. M. Kamble for the Appellant.

Mr. Sachin P. Shetye for the Respondent No. 1A to 1E.

Coram : Sharmila U. Deshmukh, J.

Date : April 24, 2024.

P. C. :

1. Being dissatisfied by the judgment dated 7th May 2016 passed by the First Appellate Court rejecting the appeal and confirming the judgment dated 31st July 2003 of the Civil Judge, Senior Division, Kolhapur in Special Civil Suit No. 168 of 2000, the original Defendant no.2 is before this Court.

2. Special Civil Suit No.168 of 2000 was filed by the Plaintiffs seeking specific performance of the agreement for sale dated 5th June 1997 executed between the Defendant no.1, who was the owner of the property, and the plaintiff. The Defendant no.1 filed his written statement resisting the claim contending that there was no

agreement for sale executed in favour of the Plaintiff and that the signature was obtained on a blank paper under threat. The Defendant no.2, who is the Appellant before this Court, contended that on 23rd September 1997 the defendant no.1 agreed to sell the suit property to him and has executed an agreement for sale and since then the Defendant no.2 is in possession of the suit property.

3. The trial Court upon consideration of the evidence, decreed the suit and directed the Defendant no.1 to execute the sale deed of the property and the Defendants to deliver the possession of suit property to the Plaintiff. As against this, Regular Civil Appeal No. 10 of 2013 was filed by the Defendant no.2 which appeal came to be dismissed.

4. Heard Mr. Desai, learned counsel appearing for the Appellant and Mr. Shetye, learned counsel appearing for the Respondent No. 1A to 1E.

5. Learned counsel appearing for the Appellant would point out to the finding of the First Appellate Court as regards the execution of sale deed and would submit that the First Appellate Court has noted that during the cross-examination of the Defendant no.1 by the Defendant no.2, the Defendant no.1 has denied the said transaction

with the Plaintiff. He would further submit that issue of possession of the property has been held to be in favour of the Defendant no.2 by the trial Court and the substantial question of law which arises in the present case is that under Section 22 of the Specific Relief Act, 1963, unless specific relief of possession is sought, the same cannot be granted. He would further submit that possession is with the defendant no.2 which is protected by way of an injunction in previous suit being Regular Civil Suit No. 200 of 1999.

6. *Per contra* learned counsel appearing for the Respondent Nos. 1A to 1E submits that decree has been executed and the possession has been taken over by the Plaintiff. This statement is disputed by learned counsel appearing for the Appellant contending that the possession is still with the defendant no.2.

7. Learned counsel appearing for the Respondent Nos.1A to 1E would further point out that the Appellate Court on re-appreciation of evidence on record, has answered the issue as far as the execution of agreement dated 5th June 1997 and the readiness and willingness in favour of the Plaintiff and this Court in exercise of powers under Section 100 of the Code of Civil Procedure, 1908 may not interfere with the concurrent findings of fact.

8. I have considered the submissions and perused the record.

9. The trial Court has decreed the suit and directed the possession to be handed over which is in accordance with the relief sought in the plaint. Perusal of the plaint would indicate that the Plaintiff has sought specific performance of the agreement for sale dated 5th June 1997 as well as a direction to the Defendants to hand over the vacant and peaceful possession of the suit property. Admittedly, the present Appellant is also a Defendant in the Special Civil Suit No.168 of 2000. The contention that under Section 22 of the Specific Relief Act, 1963 unless a specific relief is claimed, it cannot be granted thus is liable to be rejected in view of the specific relief of possession sought in the suit.

10. As regards the execution of agreement for sale, the First Appellate Court has considered the evidence and noted that the Defendant no.1 , i.e, the owner, has admitted his signature on the agreement for sale. The Appellate Court further noted that the defendant no.1 has admitted that he had agreed to sell the suit property to the Plaintiff and has accepted Rs.1 lakh as earnest money. The Defendant no.1 has specifically admitted that on reading contents of the agreement for sale he has signed it and has admitted his signature on the said document. He has further admitted that by his

free will he has executed the agreement for sale Exhibit 50.

11. The Appellate Court considered the vital piece of admissions given by the Defendant No. 1 and on the basis of the said admissions has rightly dismissed the Appeal. The stray admission of the Defendant No.1 in the cross-examination by the Defendant no.2 denying the transaction with the Plaintiff will not have the effect of nullifying the admissions which are given at the time of cross-examination by the Plaintiff. It is the cumulative evidence which is required to be considered. The Appellate Court on the basis of evidence on record has further noted that the Defendant no.2 has not entered into witness box and has instead deposed through power of attorney, which evidence cannot be considered as the facts deposed were not personal to the power of attorney holder. The Appellate Court also noted that the alleged agreement for sale between the Defendant No. 1 and the Defendant No. 2 is not on record and as such the Appellate Court declined the claim of Defendant no.2. On the aspect of readiness and willingness, the Appellate Court noted that the plaintiff has shown his readiness and willingness to pay the balance consideration and has called upon the Defendant No. 1 to execute the sale deed.

12. On the re-appreciation of evidence, the Appellate Court has

rightly held that the agreement for sale dated 5th June 1997 has been executed by the Defendant No. 1 in favour of the Plaintiff of his free will and the Plaintiff is ready and willing to comply with his obligations under the agreement for sale.

13. When the execution of agreement is admitted and the further requirements for grant of specific performance are satisfied, the Appellate Court has rightly decreed the suit for specific performance.

14. As regards possession, which is claimed to be with the Defendant No.2, the Defendant No.2 has not stepped into the witness box nor has he produced the agreement for sale executed between himself and the Defendant No. 1. It is not the case of the defendant No. 2 in the written statement that by virtue of Section 53A of the Transfer of Property Act, 1882, his possession is required to be protected. For the purpose of application of Section 53A of the Transfer of Property Act, 1882, it is necessary to demonstrate that there has been a contract in writing between the parties and pursuant thereto further acts have been done by the person seeking to protect his possession and that he is ready and willing to perform his part of contract. From the material produced on record, no case of doctrine of part performance under Section 53A of the Transfer of Property Act, 1882 has been demonstrated.

15. In view of the discussion above, no substantial question of law arises. The appeal stands dismissed.

16. In view of the disposal of Second Appeal, nothing survives for consideration in the pending civil/interim applications and the same stand disposed of.

[Sharmila U. Deshmukh, J.]