



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 116 OF 2018

Sudam Karbhari Kale.

...Appellant.

Versus

Kashinath Pandurang Jagtap
Since deceased through legal heirs
and Others.

...Respondents.

Ms. Rukmini Khairnar i/b Mr. P. N. Joshi for the appellant.

Coram : Sharmila U. Deshmukh, J.

Date : February 22, 2024.

P. C. :

1. Being dissatisfied by the common judgment dated 30th June 2016 passed by the appellate Court in Civil Appeal No. 119 of 2005 and Civil Appeal No. 157 of 2005, the original defendant no.5 is before this Court.
2. Facts of the case are that the appeals were filed by the plaintiffs as well as original defendant no.5 challenging the judgment and order passed in RCS No. 155 of 1996 by the trial Court dated 15th January 2004 by which the suit of plaintiff seeking declaration that defendant no. 1 had no interest in the suit property and that he be declared as owner as also the counter claim of defendant no.1 for redemption of the mortgage of suit property came to be dismissed.

3. The case of original plaintiff was that the suit lands were purchased by his father Pandurang from one deceased Shankar Kale and possession was also handed over. It was pleaded that the name of defendant no.1 Satyabhama who was the sister in law of Shankar appeared in the revenue records and the contention was that Satyabhama had no relation with Shankar, however, taking undue advantage of the common surname, her name came to be entered in the revenue records. An amendment came to be carried out pleading that his father had acquired ownership and possessory rights in the suit property on the basis of sale deeds and as such a declaration for ownership was sought.

4. Defendant no.1 resisted the suit contending that after the demise of Khanderao, the suit lands along with other properties were inherited by Shankar, Pandurang and Muralidhar and that she is the widow of deceased Pandurang. It was contended that she had filed RCS No. 43 of 1965 for partition in which the matter was settled and based on the compromise deed suit lands came to her share. It was also contended in the alternative the deeds executed by Shankar were not conditional sale deeds but mortgage and as such the counter claim was filed for redemption of mortgage.

5. It appears that during the pendency of suit, Satyabhama died and

the appellant herein, that is, defendant no.5 on the basis of Will dated 5th April 1997 stated to have been executed by Satyabhama in his favour, was impleaded as a party, in the capacity of legal representative of Satyabhama.

6. The parties went to trial and the trial court dismissed the suit as also the counter claim. It was held by the trial Court that the plaintiff had failed to establish his right, title and interest as well as possession of suit lands. As regards the counterclaim, it was held that defendant no.1 had not claimed relief against defendant nos. 2 to 4 and was thus not entitled to redemption of mortgage.

7. As against this, the appeals came to be filed. The appellate court held that the plaintiffs have failed to prove that on the basis of conditional sale deeds, his father had got right title interest in the suit properties. As regards the issue of redemption of mortgage, the appellate court held that the same does not survive. The appellate court held that as Shankar had no right title interest in the suit property, the execution of documents in favour of 3rd persons was *void ab initio* and as such the relief of redemption of mortgage by defendant no.1 or her heirs does not arise at all.

8. Heard Ms. Rukmini Khairnar, learned counsel appearing for the

appellant.

9. Learned counsel appearing for the appellant would submit that the substantial question of law which arises is that after the plaintiffs have failed to prove any right title interest in the suit properties on the basis of sale deeds, the relief of possession should have been granted to the defendant. She would submit that while dismissing the suit and the counterclaim the appellate court has protected the possession by not granting the relief of possession of suit properties. She would submit that once the sale deeds were held to be *void ab initio*, declaration about the defendants being the owner of property ought to have been granted.

10. Considered the submissions and perused the record.

11. The original plaintiffs have not challenged the findings of appellate court and it is defendant no.1 claiming through the Will of defendant no.1 - Satyabhama who is before this court. The issue which has been canvassed is that once the sale deeds have been held to be *void ab initio*, the relief of recovery of possession ought to have been granted. If the counter claim preferred by defendant no.1 is perused the relief that has been sought is of redemption of mortgage only. Although in the counter claim it has been pleaded that the plaintiffs do

not have any right title interest in the property and for the purpose of obtaining such declaration, the present counter claim has been filed, the fact remains that no relief of recovery of possession was sought. The trial court as well as the appellate court has therefore rightly not framed any issue as regards the recovery of possession from the original plaintiffs. In the absence of any specific pleadings as well as the prayer in that respect being sought, no relief of recovery of possession could have been granted by the Appellate court. The Appellate Court after holding that sale deeds are *void ab initio* have rightly held that the issue as regards the redemption of mortgage does not survive for consideration.

12. In the light of above, no substantial question of law arises as there is no perversity in the findings. Needless to clarify that it is open for defendant no.5 to initiate necessary proceedings seeking recovery of possession if so maintainable in law. Second appeal is dismissed.

13. In view of the disposal of second appeal, civil/interim application(s) taken out in this appeal, if any, does not survive and the same is disposed of.

[Sharmila U. Deshmukh, J.]