

HARSHADA H. SAWANT
(P.A.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.2125 OF 2024

Shabbir Abdul Shaikh

.. Petitioner

Versus

Gulab Bhavka Shaikh and Anr.

.. Respondents

.....

- Mr. Vaibhav D. Kadam a/w. Ms. Aprajita Mahto, Mr. Shrinath Badade, Mr. Kalpesh Karkera and Mr. Vallabh, Advocates for Petitioners.

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CORAM : MILIND N. JADHAV, J.

DATE : FEBRUARY 21, 2024

P.C.:

- 1.** Heard Mr. Kadam, learned Advocate for Petitioners.
- 2.** Petitioner is Plaintiff in the Trial Court. Regular Civil Suit No.228 of 2022 has been filed seeking declaration and injunction in respect of suit property described in the suit plaint. Suit property as described is nomenclatured as 31R out of Gat No.3 and 17R out of Gat No.6 situated at Chinchodi Khurd, Taluka - Yeola, District - Nashik. Plaint proceeds on the basis that by Sale Deed dated 31.03.2008, Petitioner has purchased the aforementioned suit property from one Mr. Kasam Papamiya Shaikh.
- 3.** Precursor to the suit is one more Civil Suit namely Regular Civil Suit No.164 of 2006 filed by Plaintiff himself against the very same Defendants. That suit was dismissed on merits and Appeal filed against dismissal of the said suit was also dismissed. What is pertinent

are the findings returned in that suit. The judgment passed in that suit dated 31.07.2012 has been considered by the learned Trial Court while considering the Plaint, Exhibit-5 Application in this suit also. It is seen that the learned Trial Court while dismissing Regular Civil Suit No.164 of 2006 has returned a finding the Plaintiff had failed to prove that Mr. Kasam Papamiya Shaikh was having any *locus standi* to execute the Sale Deed dated 31.03.2008 in respect of the suit property. Learned Trial Court has further observed that Plaintiff has failed to prove that he has acquired valid title by virtue of Sale Deed dated 31.03.2008 and he has also failed to prove that he is in exclusive possession of the suit property. The Trial Court has in fact concluded that said Mr. Kasam Papamiya Shaikh has no *locus standi* to execute the Sale Deed in respect of the suit property and Plaintiff having not proved his possession and ownership and having failed to prove title of his vendor Mr. Kasam Papamiya Shaikh, no relief can be granted to the Plaintiff. Hence the previous suit was dismissed on merits.

4. Mr. Kadam would argue that despite the judgment dated 31.07.2012 in Regular Civil Suit No.164 of 2006, Plaintiff has once again approached the Civil Court by filing Regular Civil Suit No.228 of 2022 and has encountered disturbance and obstruction from the Defendants. Hence he filed a fresh Suit i.e. present Regular Civil Suit

No.228 of 2022 for the same relief and on the same cause of action as in the previous suit. Learned Trial Court ought to have considered that the present Regular Civil Suit No.228 of 2022 was therefore clearly barred by *res judicata* and should have dismissed the suit *in limine* but rather Exhibit-5 application was considered and while observing the findings returned by the Court in the earlier suit proceedings, Exhibit-5 was rejected. Against denial of Exhibit-5, Plaintiff filed Miscellaneous Civil Appeal No.115 of 2023. By a reasoned order, the learned Appellate Court rejected Miscellaneous Civil Appeal No.115 of 2023 with costs and upheld and confirmed the order passed below Exhibit-5. It is seen that while dismissing Exhibit-‘5’, learned Appellate Court has clearly returned a finding that this being the second round of litigation between the same parties, for the same relief, for the same property and for the same cause of action, the fresh / present suit was clearly not maintainable and permissible in law as it was clearly barred by principles of *res judicata*. Such finding is returned in paragraph No.12 of the Miscellaneous Civil Appeal No.115 of 2023 order dated 02.11.2023.

5. The decree dated 31.07.2012 passed in Regular Civil Suit No.164 of 2006 is at Exhibit-D, page No.56 of the Writ Petition. I have perused the same and compared it with the suit plaint. The suit property as described in the previous suit proceedings is the same as is

described hereinabove and is the subject matter of present suit i.e. Regular Civil Suit No.228 of 2022. Parities are the same. It is seen that claim of Plaintiff is based upon similar averments as in the previous suit that Mr. Kasam Papamiya Shaikh had received the suit property by Release Deed on 29.08.2005 and thereafter he executed a Sale Deed in favour of Plaintiff on 31.03.2008 and on that basis Mutation Entry was effected and Plaintiff claims to be owner and possessor of the suit property thereafter. However, while deciding the earlier suit the learned Court has considered the entire genealogy of Papamiya Shaikh and has held that Mr. Kasam Papamiya Shaikh was not entitled to sell the suit property and therefore Plaintiff could not have derived any title to the suit property. The learned Trial Court has gone through the evidence and witness action led before it in Regular Civil Suit No.164 of 2006. Learned Trial Court has held that though the earlier suit was filed on the basis of the Release Deed executed by Mr. Kasam Papamiya Shaikh in favour of Plaintiff on 29.08.2005, the said Release Deed was not filed on record nor proved and therefore Plaintiff had sought amendment of the suit plaint by seeking to refer to and rely upon the Sale Deed dated 31.03.2008 to claim entitlement to the suit property. Learned Trial Court has also referred extensively to the consolidation extract placed on record which was proved by the Defendants and ultimately held that Plaintiff had not proved his possession and ownership of the suit property and also failed to prove

that the vendor Mr. Kasam Papamiya Shaikh was not having lawful title to execute the Sale Deed in favour of Plaintiff. Further non filing of the Sale Deed and Release Deed on record at the time of decision in Regular Civil Suit No.164 of 2006 which was decided on 31.07.2021 was held as fatal to the Plaintiff's case.

6. Mr. Kadam has next drawn my attention to the Mutation Entry at Page No.114. The date of the Mutation Entry is 26.02.1969, but the month February i.e. '2' is clearly tampered with as is noticeable to the naked eye when photocopy of the said Mutation Entry is seen by the Court. All that Mutation Entry states is that Mr. Kasam Papamiya Shaikh for 15 years was having possession of the suit property as owner and nothing more. The said Mutation Entry by itself cannot confer any right, title or interest either on Mr. Kasam Papamiya Shaikh or the Plaintiff and Plaintiff will have to show better right, title and interest.

7. In any event in view of the specific findings returned by the learned Appellate Court that the present suit i.e. Regular Civil Suit No.228 of 2022 is clearly impermissible in law in view of it been barred by principle of *res judicata*, the said suit ought to have been dismissed. The reason why I say so is because defence is taken by Plaintiff to consider his submissions on the basis of the decision given in the previous suit i.e. Regular Civil Suit No.164 of 2006. For that to

be considered, filing of second Suit No.228 of 2022 is not the remedy and he could have approached the Appellate Court. Filing of a similar second suit on the same cause of action is nothing but sheer abuse of the process of law committed by the Plaintiff.

8. Though this Writ Petition is filed under the provisions of Article 227 of the Constitution of India it ingrains provisions of Article 226 and for this I take help of the decision of the Supreme Court in the case of *Mora Tollways Ltd. Vs. Bihar State Road Development Corporation Ltd. and Anr.*¹.

9. It is clearly seen that the present Suit which is filed by Plaintiff i.e. Petitioner before me for the same cause of action is in respect of the same property as in the earlier suit which has been dismissed and Appeal against the said dismissal has also been dismissed and thus the second suit is clearly not maintainable. This is not only sheer abuse of the process of law but also Plaintiff has overreached the legal system and this should not be tolerated by any Civil Court. Hence, I am inclined to not only dismiss the present Writ Petition with exemplary costs but also inclined to pass an order dismissing Regular Civil Suit No.228 of 2022 in the Trial Court.

10. The dismissal of the Writ Petition and Suit in the above facts is certainly not unconditional. Petitioner shall pay exemplary costs of

¹ 2018 SCC OnLine 2333.

Rs.50,000/- (Rupees Fifty Thousand Only) to the Kirtikar Law Library, High Court, Mumbai within a period of two weeks from today. No extension of time shall be allowed to pay the costs.

11. Needless to state that Regular Civil Suit No.228 of 2022 before Trial Court shall stand comprehensively dismissed. Copy of this order shall be placed before the learned Trial Court. Learned Trial Court is directed to take this order on record and appropriate orders be passed for dismissing the suit. If the costs are not paid as directed, the Collector / Tahsildar Nashik shall recover the costs from the Petitioner as arrears of land revenue in accordance with law and pay over the same to the Kirtikar Law Library.

12. With the above directions, Writ Petition is dismissed.

H. H. SAWANT

[MILIND N. JADHAV, J.]

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