



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.422 OF 1993

WITH

CIVIL APPLICATION NO.7564 OF 2003
IN SECOND APPEAL NO.422 OF 1993

Bhagwan S/o Sakharam Khatol,
Age 24 years, Occu. Agril.,
R/o Aurangabad.

... **Appellant.**
(Ori. Plaintiff)

Versus

Sahebrao S/o Dhondiba Mahanor,
Age 44 years, Occu. Agril.,
R/o. Nakshetrawadi,
Tq. and District Aurangabad.

... **Respondent.**
(Ori. Defendant)

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Advocate for Appellant : Mr. K. A. Ingale.
Advocate for Respondent : Mr. A. D. Kasliwal.

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CORAM : SHAILESH P. BRAHME, J.

RESERVED ON : 04.08.2025

PRONOUNCED ON : 07.08.2025.

JUDGMENT :-

1. Heard both the sides finally.
2. Appellant is aggrieved by judgment and decree dated 01.01.1993 passed by learned Additional District Judge, Aurangabad in Regular Civil Appeal No.26 of 1989, allowing appeal of the respondent thereby dismissing the suit of the appellant for possession and arrears of rent. Appellant's suit

bearing Regular Civil Suit No.1051 of 1987 was partly decreed by the Trial Court to the extent of arrears of rent only.

3. Appellant who is original plaintiff claims to be the owner of plot No.95, situated at Nakshtrawadi, Aurangabad. It was purchased by registered sale deed dated 18.06.1982 from the respondent. It was let out on 15.01.1983 by the appellant to the respondent on rent of Rs.80/- per month. Respondent paid rent upto April 1987. A notice terminating tenancy was issued by the appellant on 15.09.1987. Thereafter, suit was filed for possession and arrears of Rs.480/-.

4. Suit is contested by the respondent denying title of the appellant as well as theory of tenancy. It is contended that respondent is all the while in possession of the suit plot on title.

5. Appellant examined three witnesses. The respondent examined two witnesses. The Courts below are at variance as to the ownership of the appellant and the creation of tenancy. As Lower Appellate Court is against the appellant on the point of ownership and the tenancy, the points of termination of tenancy and arrears of rent are not gone into.

6. Second Appeal is heard on following substantial questions of law :

“i. Whether the learned District Judge was justified in holding that the sale deed dated 18.06.1982 executed by defendant in favour of plaintiffs is invalid only on the basis of discrepancy in the evidence of PW.2/attesting witness when sale deed, being registered document would raise presumption under Section 49 of the Registration Act ?

ii. Whether in absence of the specific challenge is to execution of sale deed by defendant, the appellate Court was justified in discarding plaintiff's case and reversing the findings on issue No.1 as recorded by trial Court.

iii. Whether Trial Court was justified in holding that notice under Section 106 of Transfer of Property Act is invalid and whether appellant/plaintiff can be non-suited on that ground ?”

7. Learned counsel Mr. Ingale for the appellant has canvassed that Lower Appellate Court committed error of jurisdiction in doubting the ownership of the appellant in the wake of registered sale deed, mutation entry and oral evidence. He would submit that discrepancy in the deposition of the witnesses found by the learned Judge is insignificant and it would not affect the title. It is vehemently submitted that respondent did not challenge sale deed at any point of time. It is submitted that notice of termination Exh.23 is valid as per

Section 106(3). It is further submitted that no cross objection was required to be filed but Order 41 Rule 33 empowers Lower Appellate Court to grant relief of possession.

8. Per contra, learned counsel Mr. Kasliwal for the respondent submits that suit was partly decreed to the extent of arrears of rent. It was incumbent upon the respondent/appellant to prefer appeal against the refusal of decree for possession which is not done. Hence, it is not open for him to seek relief of possession. It is submitted that sale deed dated 18.06.1982 is silent regarding payment of consideration. The oral testimony of the witnesses also does not disclose payment of consideration. No date is mentioned on which the possession was handed over. It is contended that the transaction was incomplete and no title was ever transferred.

9. I have considered rival submissions of the parties. I have also gone through record and proceedings with the assistance of both sides. A registered sale deed executed by the respondent in favour of the appellant is marked at Exh.30. There is no documentary evidence to show that tenancy was created, rent was fixed and rent was paid upto 15.04.1987. The notice of termination dated 15.09.1987 under Section 106 at Exh.23 was served on the respondent on 03.10.1987. In the

backdrop of above admitted facts, I proceed to examine the rival contentions.

10. Appellant had filed suit for reliefs of possession and arrears of rent which are distinct in nature. The decree for possession is refused by the Trial Court, albeit, decree for arrears of rent is granted. Respondent preferred appeal against partial relief of arrears of rent. Appellant did not file any cross appeal or cross objection to challenge denial of decree of possession. It is mandatory for him to challenge the same. If a finding is recorded against the party who is defending a decree in an appeal, then, there is no requirement of preferring any cross objection or cross appeal.

11. Learned counsel Mr. Kasliwal appearing for respondent has rightly relied on the judgment of ***Banarasi and others Vs. Ram Phal ; AIR 2003 Supreme Court 1989*** which is consistently followed. In that view of the matter, in the absence of any challenge, I am not inclined to grant relief of possession in the present appeal.

12. The parties are inter-se related and that is the reason put forth by the appellant for letting out suit plot without executing any formal lease deed. There is no documentary

evidence to show that tenancy was created and rent of Rs.80/- per month was fixed. A notice at Exh.23 issued by the appellant terminating tenancy and demanding rent is the only document to show that tenancy was created. No rent receipts are placed on record. In the absence of convincing material, I am not inclined to hold that a tenancy was created and respondent committed default.

13. I find it necessary to delve on important facets of the matter i.e. ownership of the appellant. The Courts below are at variance on this count. Though appellant is not entitled to the relief of possession, he is entitled to claim ownership of the suit plot and entitled to assail finding recorded by the Lower Appellate Court in that regard. By implication of powers under Section 103 of CPC, this Court has jurisdiction to consider claim of ownership of the appellant.

14. Appellant examined himself who was minor at the time of execution of the sale deed. He examined his father who was looking after the transaction and the attesting witness Jijaram. The sale deed is marked at Exh.30 when contents and execution are proved by the oral evidence. It's a registered sale deed. It has probative value and cannot be discarded for insignificant deficiencies in the oral evidence.

15. It is tried to be argued by Mr. Kasliwal that sale transaction was invalid because factum of payment and possession are not proved. The contents of the sale deed at Exh.30 refers to consideration of Rs.3,000/- which is corroborated by P.W.1 and P.W.3. In the absence of any dispute regarding the quantum of consideration, the date of payment carries little significance.

16. The sale deed Exh.30 further refers to handing over of possession. Being registered document it cannot be discarded easily. The witness of the respondent deposed that possession was with the respondent only but he is an interested witness. I do not find that there are major discrepancies or illegality in the sale transaction.

17. This Court cannot be oblivious of the fact that in pursuance of the sale deed record of right is mutated vide entry No.409 and it is produced on record at Exh.25. This mutation has also not been challenged by the respondent. If the respondent comes up with theory that there was no sale transaction at all, then, he would have challenged the sale deed by filing appropriate suit for declaration. Notice at Exh.23 was served upon him. But still he did not challenge sale deed.

The respondent is estopped from challenging ownership of the appellant. I am of the considered view that appellant is the owner of the suit plot and he is entitled to take recourse to secure possession as permissible in law.

18. Learned counsel for the appellant is rightly referred to judgment of Supreme Court in the matter of ***Jamila Begum Died through L.Rs. Vs. Shami Mohd. Died through L.Rs. and another ; 2019 (4) Mh.L.J. 500*** in respect of probative value of a registered document. Its paragraph No.14 is relevant which is as follows :

“14. Sale deed dated 21.12.1970 in favour of Jamila Begum is a registered document and the registration of the sale deed reinforces valid execution of the sale deed. A registered document carries with it a presumption that it was validly executed. It is for the party challenging the genuineness of the transaction to show that the transaction is not valid in law. In Prem Singh and others Vs. Birbal and others, (2006) 5 SCC 353, it was held as under :-

“27. There is a presumption that a registered document is validly executed. A registered document, therefore, prima facie would be valid in law. The onus of proof, thus, would be on a person who leads evidence to rebut the presumption. In the instant case, Respondent 1 has not been able to rebut the said presumption.”

The above judgment in Prem Singh’s case has been referred to in Vishwanath Bapurao Sabale Vs.

Shalinibai Nagappa Sabale and Others, (2009) 12 SCC 101.”

19. Reliance is placed by the learned counsel for the appellant on the judgment of *Azgar Barid (Dead) by Legal Representatives and others Vs. Mazambi Alias Pyarembai and others ; (2022) 5 Supreme Court Cases 334* in respect of the powers of Appellate Court under Order 41 Rule 33. This is not a fit case to invoke Order 41 Rule 33 for granting relief of possession to the appellant. In the case at hand, appellant chose not to file appeal against refusal of decree of possession. This glaring facts distinguishes the case from the reported judgment. The judgment will not help the appellant.

20. Further reliance is placed on judgment of *Giani Ram and others Vs. Ramjilal and others, (1969) 1 Supreme Court Cases 813*. It provides for scope of powers of the Appellate Court under Order 41 Rule 33. The appellant has failed to make out a case for relief of possession. Hence, this judgment will not help him.

21. Learned counsel for respondent Mr. Kasliwal seeks to rely on judgment and the scope of jurisdiction under Section 100 of the Civil Procedure Code. By referring to judgment of

Damodar Lal Vs. Sohan Devi and others ; 2016 ALL SCR 379 and *Thiagarajan and others Vs. Sri. Venugopalaswamy B. Koli and others ; AIR 2004 Supreme Court 1913 (1)*. This judgment will not help the respondent because I am not granting relief of possession and arrears of rent. But rectifying the findings on the point of title by invoking powers under Section 103 of the Civil Procedure Code.

22. Further reliance is placed on the judgment of *Kaliaperumal Vs. Rajagopal and another ; AIR 2009 SC 2122*. The respondent did not challenge sale deed either by separate suit or by counter claim. Being registered instrument there is a presumptive value of title of the appellant. No benefit of the reported judgment can be given to the respondent.

23. For the reasons referred above, though I am not inclined to allow Second Appeal, I hold that findings for the substantial questions of law at serial Nos. (i) and (ii) needs to be recorded in favour of the appellant. I, therefore, pass following order :

ORDER

- (i) Second appeal is dismissed. There shall be no order as to cost.

- (ii) However, appellant is held to be owner of suit plot and he is entitled to take recourse to remedy available for him for securing possession separately.
- (iii) In view of disposal of second appeal, civil application does not survive. The civil application as such is disposed of.

(SHAILESH P. BRAHME, J.)

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24. Learned counsel for the appellant after pronouncement of the order, seeks stay to the operation of the part of declaration incorporated in the present order.

25. Learned counsel for the appellant opposes the request.

26. The declaration part cannot be said to be executable one, immediately. I do not find any case is made out for granting stay. The request is rejected.

(SHAILESH P. BRAHME, J.)

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vmk/-