

(1998) 06 BOM CK 0080

In the Bombay High Court

Case No : Second Appeal No. 90 of 1983

Rameshwar Gopikishan Toshniwal

APPELLANT

Vs

Sakhubai Gaikwad died through L.Rs.

RESPONDENT

Date of Decision : 18-06-1998

Acts Referred:

Transfer of Property Act, 1882 — Section 53

Citation : (1999) 3 ALLMR 57 : (1999) 2 BomCR 301

Hon'ble Judges : R.G. Deshpande, J

Bench : Single Bench

Advocate : B.A. Darak, for R.R. Jethalia, for the Appellant; Smt. C.S. Deshmukh, for P.R. Deshmukh, for the Respondent

Judgement

R.G. Deshpande, J.—Original defendant has come up in Second Appeal challenging the judgment and order dated April 28, 1983, passed by the Assistant Judge, Jalna, in Regular Civil Appeal No. 117/81 arising out of the judgment and order dated November 28, 1979 passed by Civil Judge, Junior Division, Ambad in Regular Civil Suit No. 87/76. Original plaintiff present respondent - Sakhubai initiated the proceedings for possession of the suit land from defendant. In nut shell, the case was, Vithoba Gaikwad i.e. the husband of the plaintiff who expired in the year 1972 was the owner of Survey No. 210 to the extent of 18 acres. He had become the owner in pursuance of the tenancy proceedings by way of conferral ownership on him u/s 38-E of the Hyderabad Tenancy and Agricultural Lands Act 1950. Naturally, after the death of Vithoba, present lady - Sakhubai became the owner thereof. She cultivated the suit land. However, some time in the year 1973, the present appellant original defendant illegally and forcibly occupied the suit portion i.e. 4 acres and 20 gunthas out of the above land. Not only this, but sometime in the year 1976, plaintiff realised that the defendant had even surreptitiously got entered his name into the revenue record so far as that area was concerned. On demand of possession by the plaintiff, a blunt refusal was there on the part of the defendant which prompted the present respondent to initiate the present proceedings.

2. The defence of the appellant in short was, Vithoba was never the owner of the land, muchless from the year 1967 to 1972-73. According to him, the plaintiff never possessed the land in the year 1972-73 or any time prior to that. He came up with a defence that he got the land purchased from Vithoba through a registered sale-deed dated May 30, 1967. He, therefore, rested his defence also on the revenue entries which were made in pursuance thereof.

3. After weighing the evidence on the record and after having appreciated the pleadings of the parties, the learned Judge of the trial Court observed that the plaintiff was not in possession of the suit land through her husband. He also reached to the conclusion that even after the death of her husband, Sakhubai never possessed the said land, muchless in the year 1973. The learned Judge of the trial Court, relying on the sale-deed observed that the land was purchased by the appellant defendant Rameshwar and he was having the possession of the land since then. The learned Judge of the trial Court, therefore, dismissed the suit on all counts.

4. Dissatisfied with the judgment of the learned Judge of the trial Court, the respondent plaintiff approached the lower Appellate Court through Regular Civil Appeal No. 117/81. The learned Judge of the lower Appellate Court reappreciated the evidence, appreciated the facts of the case, weighed the pleadings of the parties before him in proper perspective and reached to the conclusion that Vithoba the husband of the plaintiff had become the owner of the land in pursuance of the provisions of section 38-E of the Hyderabad Tenancy and Agricultural Lands Act, 1950. The learned Judge of the lower Appellate Court dissecting the provisions of law and relying on specific provision of section 50-B of the Hyderabad Tenancy and Agricultural Lands Act, 1950, reached to the conclusion that the same could be said to have been caught within the mischief of the provisions of this section and hence the transaction itself was as against law and no sanctity could be attached to the said document on sale-deed. The learned Judge of the lower Appellate Court, therefore, observed that when the transaction itself was ab-initio void, the question of acquiring any right, title or interest in the property by vendee Rameshwar did not arise. In view of this specific observation by the learned Judge, the natural conclusion was that the Civil Suit to which an objection was tried to be raised as not maintainable has been held to be maintainable for eviction of unauthorized occupier as the possession of the appellant was not less than that of an unauthorized occupier or a person in wrongful possession. The learned Judge of the lower Appellate Court, therefore, rightly held that the provisions of section 98 of the Hyderabad Tenancy and Agricultural Lands Act, 1950 could not be invoked in the present case and that the Civil Court could have passed the decree. Thus the natural conclusion on the basis of the above said findings was to allow the appeal by setting aside the judgment and decree passed by the Court below. Appeal was thus allowed which is challenged in the present Second Appeal.

5. Shri Darak, learned Counsel appearing for Shri R.R. Jethalia, Advocate for the

appellant vehemently urged that when the suit was filed the appellant was a boy of 14 years i.e. minor and during the proceedings before the Appellate Court he was of 17 years. He attained the majority, according to the appellant in the year 1980-81 and hence according to the appellants, there were no proper amendments made in the suit, as well as in the appeal memo and further that he could not have been said to have afforded proper opportunity to defend himself. A pointed question was asked to the learned Counsel as to whether was the objection at any point of time was raised as regard this lacuna in the trial Court or was this point raised before the Appellate Court. Shri Darak had to answer in negative. Having once gone through this question, I do not find that there is any substance in this point that can be allowed to be raised at this stage. Even otherwise, since the decree is already passed, I do not feel that it could be said to be any illegality, at the most it may be an irregularity.

6. Shri Darak, learned Counsel further argued that he could have drawn the advantage from the provisions of section 53-A of Transfer of Property Act. However, I am afraid that this argument of Shri Darak can be accepted at this stage. In fact, all the points which appear to have been raised in this Appeal are nothing but the questions of fact, which do not require any reconsideration in this appeal. There is no substance in this Second Appeal. Second Appeal stands dismissed with costs.

7. Second appeal dismissed.