

(2009) 07 BOM CK 0116
In the Bombay High Court
Case No : Second Appeal No. 193 of 1990

Siddhi Daubhal and Kasabai Chunilal Daubhal	APPELLANT
Vs	
Suresh Prohit and Chunilal Daubhal	RESPONDENT

Date of Decision : 10-07-2009

Acts Referred:

Citation : (2009) 9 BomCR 857

Hon'ble Judges : P.R. Borkar, J

Bench : Single Bench

Advocate : M.D. Joshi, for the Appellant; A.M. Dabir, for the Respondent

Final Decision : Dismissed

Judgement

P.R. Borkar, J.—This is a second appeal filed by original defendant Nos. 2 and 3 being aggrieved by the judgment and decree passed by the Additional District Judge, Jalna in Regular Civil Appeal No. 191 of 1983 decided on 6.3.1990, whereby the judgment and decree of the trial court (Civil Judge, Junior Division, Bhokardan) in Regular Civil Suit No. 16 of 1977 decided on 14.9.1983 was reversed and suit of Respondent No. 1-Plaintiff for injunction was allowed. The trial court had not only dismissed the suit, but even in the absence of Cross Objections, directed the plaintiff to handover possession of suit property to the Defendants within three months from the date of the said judgment.

2. Briefly stated, the facts giving rise to this second appeal are that, Suresh-Respondent No. 1 herein was the original plaintiff. He filed suit for injunction in respect of six acres portion of land on northern side out of survey No. 15 which in all is admeasuring 35 acres 6 gunthas situated at village Ibrahimpur, Taluka Bhokardan, District Jalna. Plaintiff had purchased the said property for Rs. 2000/= by a registered sale deed dated 8.5.1974 from respondent No. 2 (original defendant No. 1) who is father of appellant No. 1 and husband of appellant No. 2. Since the purchase of the land, he has been in possession of the said property. The appellants and Respondent No. 2 were disturbing his possession and,

therefore, he filed suit for perpetual injunction.

3. It is necessary to consider the written statement filed by Respondent No. 2 (original defendant No. 1) who is father of appellant No. 1 and husband of Respondent No. 2 in some detail, as the same throws much light on the matter. Respondent No. 2 Chunilal in paragraph 2 of his written statement at Exh. 14, admitted that he is husband of present appellant No. 2 and father of appellant No. 1. However, he denied that he was Karta of the family. He further contended that eastern 15 acres land is belonging to and is in possession of his family and he himself, appellant No. 1 and his other sons were owners thereof. The property was cultivated by his sons and wife. He had not sold any portion from survey No. 15 on northern side to Respondent No. 1 plaintiff and that the plaintiff was never in possession of the suit property. There is a well, so also 13 mango trees in the northern portion of said 15 acres land; the land on that side is fertile and its price is more than Rs. 5000 per acre. Respondent No. 2 further contended in the written statement that Dr. Gopikishan, the father of the plaintiff had joint hands with revenue officers and on the basis of false and bogus sale deed had got false mutation entries made in revenue record without notice to the Defendants. No amount was received by Respondent No. 2 from the plaintiff and he had not handed over possession of any land to the plaintiff. In paragraph 10 of the written statement, it is further stated that the father of Respondent No. 1-Plaintiff is running illegal business in his dispensary, like gambling by way of Matka and selling psychotropic drugs. According to Respondent No. 2, he used to go to the dispensary of the Plaintiff's father and there he was addicted to gambling. For 8 to 10 years prior to his written statement dated 4.7.1977, he was not looking after management of his family nor doing any work and everything was being looked after by his wife-appellant No. 2. He had not sold any land. Marriage of his daughter was performed one year prior to said written statement which is filed in July 1977.

4. Appellants herein original defendant Nos. 2 and 3 filed their written statement at Exhibit 15 and made out a case that Defendant No. 1 (Respondent No. 2 herein) was not the Karta of the family; that he was addicted to various vices; the land is in possession of the appellants; Respondent No. 2 had no right to sell the property and there was no legal necessity to sell the property. Defendant Nos. 2 and 3 also stated about illegal business run by the father of Respondent No. 1-Plaintiff and ultimately prayed for dismissal of suit with compensatory costs.

5. There was absolutely no prayer by way of counterclaim either by appellants or Respondent No. 2 in their respective written statements and in spite of that, the trial court misled itself into framing issues as to whether Respondent No. 2 was Karta of the family; whether he sold the property to Respondent No. 1-Plaintiff for benefit of the estate. The learned trial Court answered that Respondent No. 2 was Karta of the family but held that he had not sold the property as Karta and the sale was not for benefit of the estate. There is no issue framed regarding

legal necessity. But, said issue was discussed at length. In fact, the issues framed were not necessary for decision of suit for perpetual injunction in absence of any counterclaim. Only questions those should have been considered were whether the plaintiff was in the settled possession of the suit property and whether there was obstruction to his possession by Respondent No. 2 and appellants-original defendants. Though the trial court answered that the plaintiff was in possession of the property as owner, it ultimately directed the plaintiff to handover possession of the suit property to defendants within three months from the date of the order.

6. This Second appeal is admitted on 18.1.1991 on ground Nos. 3, 8 and 9 of the appeal memo which are as follows;

3. The learned Judge has wrongly held that the suit is not based on title. Whereas the Plaintiff has stated that he is claiming the relief of perpetual injunction on the basis of his title derived by him. As per law, unless the Plaintiff proves his title and right to possess, the Plaintiff cannot succeed in getting injunction.

8. Admittedly, it is a joint family property and ancestral property of the Defendant No. 1 and Defendant Nos. 2 and 3 and there are other minor coparceners, who are jointly in possession of the property. In such circumstance, the suit simplicitor for injunction is not maintainable, since the property is a undivided property and a coparcener can not be clamped with injunction.

9. The learned Additional District Judge has failed to see that the view of our High Court is that a purchaser of a share of joint Hindu family must bring a suit for general partition and carve out his share, assuming that the Defendant No. 1 sold some portion, and the simplicitor suit of injunction is not maintainable?

7. In this case, respondent No. 1-plaintiff has come out with a case that particular 6 acres portion of land has been in his possession. According to him, on earlier day of sale deed, they had gone to the land, the portion to be sold was demarcated and handed over to him by respondent No. 2. So, suit for injunction is in respect of specific portion of land. So, this is not a case where undivided share/portion of land is sold by a coparcener of Hindu family to a stranger. In that light, we have to answer later two points raised at the time of admission.

8. Shri A.M. Dabir, learned Counsel for Respondent No. 1, has taken me through the judgment of the trial court and more particularly discussion about issue Nos. 2, 3 and 4 and the final order. To say least, the order is simply indefensible. It shows hazy legal notions and confusion of mind. It appears from discussion on issue No. 3 that the trial court did come to the conclusion that Respondent No. 1-Plaintiff was in possession of the property. The court has held this on the basis of sale deed, revenue entries, but appears to have come to a conclusion that possession is not delivered as owner as the sale was not for legal necessity and, therefore, ultimately directed the plaintiff to hand over possession to the defendants. Be that as it may.

9. So far as judgment of the Additional District Judge is concerned, in paragraph 3 of the judgment, he has come to a conclusion that the plaintiff has proved his possession over the suit property which he has purchased and described as suit property and, therefore, is entitled to injunction. Shri M.D. Joshi, learned Counsel for appellants herein argued that no points for determination are framed and, therefore, judgment of the first appellate court needs to be set aside. He relied the case of Khatunbi and Others Vs. Aminabai, . Paragraph 3 of the judgment of the District Court reads as follows;

3. Whether the Plaintiff proved his possession and whether he is entitled to the decree for injunction are the only two points, which (are) necessary in the Lower Court and in this Court. I differ with the findings given by the learned Civil Judge and hold that Plaintiff proved both these points and he is entitled to the decree. The reasons for my findings are as below.

It, therefore, cannot be said that necessary points were not framed in the appeal against decree in a suit for perpetual injunction simplicitor.

10. Learned Counsel for the appellant cited case of Thimmaiah and Others Vs. Ningamma and Another, and drew my attention to headnote `B' which relates to Karta's powers to dispose of coparcenary property. In present case, appellants have not challenged sale deed in favour of Respondent No. 1-plaintiff. There is no declaration prayed by way of counterclaim or by separate suit regarding sale deed in favour of plaintiff. There is no occasion to consider whether the sale by Respondent No. 2 in favour of Respondent No. 1 was for legal necessity or benefit of the estate. The sale by a Karta of the family would be at the most voidable. In any case, Respondent No. 2 was entitled to sell his undivided share in the ancestral property. In a suit for perpetual injunction, we are concerned with whether the plaintiff was in settled possession of the property in question as on the date of the suit and whether there was threat to his possession at the hands of the defendants.

11. Learned Counsel for the appellant relied upon paragraph No. 26 of the case of Hardeo Rai Vs. Sakuntala Devi and Others, . In the said case, sale of undivided share of coparcener in joint family property and right of purchaser were considered and it is laid down that the coparcenary interest can be transferred subject to condition that the purchaser without the consent of other coparceners cannot get possession of what he has purchased. In the present matter, it is the case of Respondent No. 1-Plaintiff that he was actually put in possession of six acres of land purchased by him. There is a positive evidence led to that effect and the first appellate court has considered the said evidence and held that the the plaintiff proved his exclusive possession over the suit property. So the case of Hardeo Rai (supra) is not applicable to the facts of the present case.

12. Here, I may rely on the case of Rame Gowda v. M. Vardappa Naidu 2004 AIR SCW 4205. It is held therein that where the plaintiff is in settled possession of

the property, he is entitled to protect his possession, even though he failed to prove his ownership or title. Even a true owner cannot dispossess such trespasser except otherwise than in due course of law and grant of injunction was proper. What is "settled possession" is also discussed. I may refer to observations of the Hon'ble Apex Court in paragraph 8 of the judgment which read as follows:

8. It is thus clear that so far as the Indian law is concerned the person in peaceful possession is entitled to retain his possession and in order to protect such possession he may even use reasonable force to keep out a trespasser. A rightful owner who has been wrongfully dispossessed of land may retake possession if he can do so peacefully and without the use of unreasonable force. If the trespasser is in settled possession of the property belonging to the rightful owner, the rightful owner shall have to take recourse to law; he cannot take the law in his own hands and evict the trespasser or interfere with his possession. The law will come to the aid of a person in peaceful and settled possession by injuncting even a rightful owner from using force or taking law in his own hands, and also by restoring him in possession even from the rightful owner (of course subject to the law of limitation), if the latter has dispossessed the prior possessor by use of force.

13. In order to prove possession, the Plaintiff-Respondent No. 1 examined himself on oath at Exhibit 95 and stated that by a sale deed dated 8.5.1974, Respondent No. 2 sold six acres land out of survey No. 15 which was in all admeasuring 35 acres 6 gunthas, for Rs. 2,000/=. He further deposed that the sale was effected by Respondent No. 2 as he (Resp. No. 2) needed money for marriage of his daughter and private work. It is ancestral property of Respondent No. 2. Respondent No. 2 was Karta of the joint family. One day prior to execution of the sale deed, Respondent No. 2 took consideration amount and handed over possession to him. He paid Rs. 2,000/= to Respondent No. 2 at his house and possession was delivered to him in presence of his father and witnesses Vithal and Subhash. After the sale deed, he continued to be in possession of the property, mutation entry produced at Exhibit 96 was sanctioned in his name. He also produced 7 x 12 extract for the period 1974-75 to 1976-77 at Exhibit 97 to prove his possession. Plaintiff also produced revenue receipts showing payment of taxes by him.

14. In order to show actual possession, Plaintiff has examined Vithal Pagare as PW3 at Exhibit 104. PW3 Vithal deposed that for 7-8 years property was in possession of plaintiff-Respondent No. 1. He could not tell boundaries. He appears to be a labourer engaged by Respondent No. 1. If the agricultural labourer could not tell the season or month in which he worked in the field of respondent No. 1, that should not be the reason for disbelieving his evidence.

15. There is evidence of PW4 Subhash Deshpande at Exh.105 on the point of execution of agreement of sale, delivery of possession and execution of sale deed. He stated that on earlier day, there was agreement of sale at the house of

Respondent No. 1-plaintiff. At that time, Rs. 2,000/= were paid to Respondent No. 2 by Respondent No. 1. Thereafter, they went to the land at about 10 am or 11 am. Respondent No. 2 measured the land, Respondent No. 1 performed the agricultural operations and thus possession of land was actually delivered in his presence. This witness has also signed the sale deed. Besides sale deed, there are entries in 7x12 extracts regarding actual possession of plaintiff over the suit land.

16. On behalf of Defendants, Respondent No. 2 Defendant No. 1 is examined as DW1 at Exhibit 107. His evidence shows that he has no regard for the truth. He changed his version from time to time. In his examination-in-chief, he deposed that he did not execute sale deed in favour of plaintiff respondent No. 1; he had not taken any consideration from plaintiff; he was in possession of the property. In the cross examination, he stated that he was knowing father of Respondent No. 1 and he had no concerned with Dr. Gopikishanthe father of the plaintiff. Witness was confronted with allegations made by him in the written statement against father of Respondent No. 1, to which reference is made earlier. Though Respondent No. 2 admitted his signature on the written statement, he stated that he could not tell name of the person who told him that Dr. Gopikishan runs Worli Matka business. He stated that he had not gone to dispensary or house of Dr. Gopikishan Purohit, nor he had seen Dr. Purohit while running Worli Matka. Thus, here is a witness, who makes wild allegations against the father of the plaintiff and then disowns the same. Thereafter again he said that the contents of paragraph 10 of his written statement are true and that his previous statement before the court was wrong. Then he said that he had not personally gone to Dr. Gopikishan, but had demanded tablets from the doctor. Then he said that he used to play Matka and doctor used to accept bets. Respondent No. 2 then said that he is living jointly with his son. There was no partition till then. Appellant No. 1 was 15 years old when the sale had taken place. He used to work in the land. Then he said that there was no water in the well in summer. Then he changed and stated that the sale deed was obtained from him while he was under influence of liquor. He did not take any steps for cancellation of the sale deed. He stated that his son and wife had filed suit for cancellation of sale deed but that has been dismissed on 11.2.1981.

17. Respondent No. 2 further changed and stated that he had not sold the land, but it was mortgaged by him. The mortgage took place on the Ota of house of Dr. Purohit. He received Rs. 1975/= on the date of agreement. On next day, he executed sale deed under influence of liquor. Exhibits 77 (V.P.) and 103 (the sale deed) bear his signatures. He was not aware if seven years earlier, court had issued temporary injunction against him. Respondent No. 2 was thus hiding the truth.

18. At Exhibit 109, there is evidence of present appellant No. 1 Siddhesing (DW1) and he has deposed that his father was not Karta of the family, he never cared for the family, he was addicted to vices and was a drunkard and used to

play cards. He was gambling matka. According to Siddhesing, his father was not doing any work and was living at Bhokardan. One Phulsing Bhandarwala is examined at Exhibit 110, so also one Jaikisan Dobhal at Exhibit 111. They deposed that the suit land was in possession of appellant No. 1 and prior to 1516 years, his father (Respondent No. 2) was in possession of the same.

19. On considering the evidence on record, findings of facts recorded by District Court and the conclusion by trial court that the plaintiff was in possession of the property, in my opinion, this second appeal must fail. Respondent No. 1-plaintiff is entitled to decree for injunction as he was in actual settled possession of the suit property as on the date of filing of the suit. I, therefore, answer substantial questions of law raised in this second appeal at the time of admission of the appeal, against appellants and Respondent No. 2 and in favour of Respondent No. 1-plaintiff.

20. In the circumstances, second appeal fails and is dismissed. Appellants to pay costs to Respondent No. 1-plaintiff throughout and bear their own.