
(2005) 12 BOM CK 0122
In the Bombay High Court
Case No : Second Appeal No. 100 of 1996

Wasudeo Wabhitkar

APPELLANT

Vs

Vilas Tonge and Others

RESPONDENT

Date of Decision : 19-12-2005

Acts Referred:

Citation : (2006) 4 ALLMR 361 : (2006) 2 MhLj 625

Hon'ble Judges : R.C. Chavan, J

Bench : Single Bench

Advocate : K.V. Sirpurkar, for the Appellant; Rajeev Madkholkar, for the Respondent

Final Decision : Dismissed

Judgement

R.C. Chavan, J.—The plaintiff in Regular Civil Suit No. 185 of 1979 before the learned Civil Judge, Junior Division, Warora, has preferred this appeal challenging the appellate judgment rendered by the learned Additional District Judge, Chandrapur, which resulted in dismissal of his suit, though initially decreed by the trial Court.

2. In a partition in the family of the plaintiff, his brother Bholaram had been allotted 5.96 acres of land bearing Survey No. 142. This partition had taken place in 1965. Since Bholaram did not have the capacity to perform the agricultural operations, the land remained in the cultivation of the plaintiff, who was giving share of the crop to Bholaram. In 1968, Bholaram sold 2.96 acres of land to defendant No. 3. On 2-5-1969, Bholaram sold remaining 3 acres of land to the plaintiff. Defendant No. 3 had sold a part of land purchased by him to one Dada Bhusari in July, 1979. Defendant No. 3 obstructed the plaintiff's possession and, therefore, the plaintiff made enquiries and learnt that the whole field was mutated in the name of the defendant. He, therefore, filed the suit for injunction to restrain the defendants from disturbing his possession over 3 acres of land.

3. By filing a written statement, the defendants contended that defendant No. 3

had purchased the entire area of 5.96 acres bearing Survey No. 142 from Bholaram by a registered sale-deed dated 31-12-1968 for a sum of Rs. 2,000/-. The defendants were placed in possession. Defendant No. 3 claimed to have given 3 acres of land to the plaintiff for cultivation for three years from 1970-71 to 1972-73. The plaintiff restored possession to the defendant in 1973-74. Defendant No. 3 was in possession till he was restrained by an ex parte injunction on 30-8-1979. He stated that he sold 2.98 acres of land to Bhusari and remaining 2.98 acres of land was left with him. The defendants prayed for dismissal of the suit.

4. After framing necessary issues, the learned Trial Judge received evidence of the parties and held in favour of the plaintiff. He held that the photo copy of the sale-deed produced by the defendant was not admissible. He, therefore, decreed the suit. On appeal, the learned Additional District Judge did not disturb the findings of the learned Trial Judge as regards title, but held that defendant No. 3 was in possession of the property and, therefore, the plaintiff should recover possession from the defendant in due course of law. Aggrieved thereby, the plaintiff has preferred this appeal.

5. I have heard Smt. K.V. Sirpurkar, the learned Counsel for the appellant, and Shri Rajeev Madkholkar, the learned Counsel for the respondents. Though the learned Trial Judge ignored the sale-deed executed by Bholaram in favour of defendant No. 3 because the defendant had produced only a photo copy issued by the office of Sub Registrar and which was marked as Article D1, it may be seen that there was enough evidence to indicate that Bholaram had in fact sold the entire 5.96 acres of land to the defendant. The certified photo copy from the office of Sub-Registrar was held inadmissible because the plaintiff had not proved the loss of the original. The plaintiff had stated that the sale-deed was given to the Patwari for effecting necessary entries in the revenue record and that the Patwari gave the sale-deed to the plaintiff. In fact the defendant had given a notice Exhibit 44 calling upon the plaintiff to produce the original sale-deed. This lays sufficient foundation for the claim that original was not with the defendant. If the sale-deed was indeed with the defendant, since he had produced a certified photo copy, he would have definitely produced the original as well.

6. There is nothing to show that the certified photo copy is forged or fabricated. Apart from this, the defendant has produced Index No. 2 at Exhibit 63, which shows that Bholaram had executed a sale-deed of entire 5.96 acres of land in favour of defendant No. 3 on 31-12-1968 and that such a document was registered at the Sub-Registrar's office. This is a certified extract of a public document and establishes the correctness of certified photo copy of sale-deed Article D1. Apart from this, the recitals in para 11 of the plaint would themselves show that the plaintiff knew that Bholaram had executed a sale-deed in respect of the entire 5.96 acres of land in favour of the defendant. It was alleged in para 11 of the plaint that the defendant fraudulently got the sale-deed from Bholaram by including the suit land. Thus the fact that the sale-deed was got from

Bholaram by the defendant is not disputed by the plaintiff himself. In view of this, there should have been no difficulty in reading Article DI as a document admissible in evidence. This copy of sale-deed would show that on 31-12-1968 Bholaram had sold the entire 5.96 acres of land to the defendant. In view of this, Bholaram was left with nothing in Survey No. 142 to be conveyed to the plaintiff. Therefore, the evidence of plaintiff himself, PW 2 - scribe of the sale-deed in plaintiffs favour, which is marked as Exhibit 46, or the evidence of his other witnesses is irrelevant.

7. Since Bholaram was left with nothing to be conveyed after having sold the entire field to the defendant on 31-12-1968, the story of the plaintiff that he purchased 3 acres of land on 2-5-1969 has to be rejected. It is also worthy of note that the plaintiff has totally negated the defendants' contention that 3 acres of land has been placed in possession of the plaintiff for the purpose of its cultivation for three years,

8. In view of this, the appeal fails and is dismissed.