

CASE NO.:
Appeal (civil) 2283 of 1998

PETITIONER:
Shankar Popat Gaidhani

RESPONDENT:
Hiraman Umaji More (Dead) by LRs. & Ors.

DATE OF JUDGMENT: 14/02/2003

BENCH:
S.B. SINHA & AR. LAKSHMANAN.

JUDGMENT:

JUDGMENT

S.B. SINHA, J :

This appeal arises out of a judgment and decree dated 14.12.1990 passed by the Bombay High Court in First Appeal No.640 of 1979 affirming a judgment and decree passed by the Court of Civil Judge, Senior Division at Nashik in Special Civil Suit No.57 of 1974.

The appellant herein is said to be an agricultural tenant and in occupation of the property in question admeasuring 4 acres, 16 gunthas being Gut No.189 (Survey Nos.23/2 and 23/3) situated at Village Palse in the District of Nashik. The said property admittedly belonged to Original Defendant No.1 (since deceased). On or about 2.7.1970, an agreement of sale was executed by him in favour of Defendant No.7, Ganu Mahadu Gayakhe. The said agreement was cancelled. Defendant No.1 thereafter agreed to sell the suit land to the Defendant No.8. The said agreement was also cancelled by Original Defendant No.1 and the amount of advance taken by him was repaid. He then entered into another agreement with the plaintiff in respect of the suit land, the consideration whereof was fixed at Rs.20,000/-. By way of earnest money, a sum of Rs.10,000/- was paid by the plaintiff to Defendant No.1. At the relevant time, Original Defendant No.1 had taken a loan from the Land Mortgage Bank on the security of the suit land. From the amount he received from the plaintiff, Original Defendant No.1 repaid his earlier loans. He thereafter allegedly received a sum of Rs.6,000/- from the plaintiff.

The co-sharers of the Original Defendant No. 1 by a notice to the plaintiff raised a contention that the said property is a joint family property and thus the said Defendant was not the sole owner thereof.

The appellant herein, claiming himself to be a tenant in the said lands also sought to get his name entered in the revenue records. The Original Defendant No.1, however, at the instance of the plaintiff, requested the revenue authorities not to enter the name of the appellant herein in the revenue records.

The Original Defendant No.1, however, avoided to execute the sale-deed in favour of the plaintiff. He filed a suit for specific performance of the agreement to sell as also for a direction upon Respondent No.7 to cause delivery of possession to him and a decree for perpetual injunction against Defendant No.8 (Appellant herein) as also against Defendant Nos. 3 to 6 thereof as they had claimed interest in the property. The appellant herein in his written statement, inter alia, contended that as he had been cultivating the suit land since last five years as a tenant, Defendant Nos.1 to 5 and 7 had no concern with the possession of land and as he was a tenant in possession, the Civil Court had no jurisdiction to investigate into the rights of the tenant.

On the pleadings of the parties the learned Trial Court framed as many as 16 issues including :

"(9) Does defendant No. 7 prove that he is the tenant in the suit property described in para 1 of the plaint ?

(9A) Whether the contentions for defendant Nos. 7 and 8 as regards tenancy are bona fide contentions necessitating the reference ?

(10) Does defendant No. 8 prove that he is the tenant in the suit property described in para 1 of the plaint ?

(11) Whether the specific performance of the sale agreement can be granted in view of the provisions of the Bombay Tenancy and Agricultural Lands Act, 1948 ?"

The learned trial court decreed the suit directing :

"(a) The Defendant No. 1 do execute sale deed of the suit property in favour of the plaintiff on the latter's making payment of Rs. 4,000/- in accordance with the terms and the conditions of the agreement Exhibit 130.

(b) The Defendant Nos. 1 to 6 are hereby permanently restrained by mandatory injunction from getting the names of the Defendant Nos. 2 to 6 entered to the suit land by way of final entries.

(c) The Defendant Nos. 1 and 8 are hereby restrained permanently by mandatory injunction from getting the final entry of the name of the Defendant No. 8 to the suit land in the R.R. as tenant.

(d) The Defendant Nos. 2 to 6 are hereby directed by permanent injunction to get pencil entries of their names to the suit land in the R.R. cancelled.

(e) The Defendant No. 8 is hereby directed by mandatory injunction to get pencil entry of his name in the R.R. to suit land cancelled.

(f) The Defendant Nos. 1 to 6 and 8 do pay the costs of this suit to the Plaintiff and bear their own."

The plaintiff did not challenge the said judgment and decree either by filing an appeal or by preferring any cross objection. Original Defendant No.1 alone preferred an appeal against the said judgment and decree.

The High Court while dismissing the appeal directed :

"Consequently, the Appeal must be dismissed. We find that the decree passed in Clauses (b), (c), (d) and (f) is proper and must be confirmed. We clarify that the decree in terms of clause (a) of the Order passed by the trial Court shall be construed as directing delivery of possession of the suit land by the heirs and legal representatives of Appellant-original Defendant No.1 to the Plaintiff by way of specific performance of the agreement as prayed for by the plaintiff in addition to executing the Sale Deed in accordance with the terms and conditions of the Agreement (Exhibit 130), as ordered by the trial Court."

Mr. Bhasme, learned counsel appearing on behalf of the appellant, has raised two short contentions in support of the appeal. The learned counsel would contend that having regard to the provisions contained in Sections 29(3A) , 64, 70(b), 80, 85 and 85A of the Bombay Tenancy and Agricultural Lands Act, 1948, the Civil Court had no jurisdiction to determine any question relating to agricultural tenancies. Mr. Bhasme would urge that the appellant herein has not preferred any appeal against the grant of decree for specific performance being against the Original Defendant No.1 having regard to the fact that no decree for possession was passed by the learned Trial Judge and, thus, the High Court must be said to have committed an error in issuing the impugned directions.

Although there appears to be some substance in the contentions raised by Mr. Bhasme, we are of the opinion that this Court need not go thereinto. From the judgment under appeal, it appears that the appellant herein was not represented before the High Court. Presumably because no decree for delivery of possession in respect of the suit property was passed, the appellant chose not to contest the appeal, as he might have been advised that he could raise his contentions in a proceedings which may be initiated by the plaintiff for recovery of possession of the suit land after a deed of sale is executed in his favour by the Original Defendant No.1.

The plaintiff, as noticed hereinbefore, did not question the judgment and decree passed by the Trial Court. Evidently, the Court did not grant a decree for recovery of possession so far as the suit land is concerned. In that view of the matter, the High Court, in our opinion, committed a serious error in granting a relief in favour of the plaintiff in an appeal filed by Defendant No.1, purporting to modify Relief (a), as aforementioned; particularly in view of the fact that amongst others, the Appellant claimed himself to be in physical possession of the lands in question. The Appellant, indisputably was not a party to the said agreement for sale.

The High Court also could not have exercised its jurisdiction in issuing the said direction even under Order 41 Rule 33 of the Code of Civil Procedure inasmuch the said provision could not be invoked by one respondent as against another as therefor it was obligatory on the part of the plaintiff to file a cross objection in terms of Order 41, Rule 22 of the Code of Civil Procedure and give notice in relation thereto to the parties who claimed independent possession over the suit land.

We are, therefore, of the opinion that part of the judgment under appeal whereby possession has been directed to be delivered in favour of the plaintiff may be set aside. We, however, make it clear that the judgment of the trial court is not being interfered with. The appeal is allowed to the aforementioned extent. However, there shall be no order as to costs.