

SMT. BAYANABAI KAWARE

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v.

RAJENDRA S/O BABURAO DHOTE

(Civil Appeal No.19625 of 2017)

B

NOVEMBER 23, 2017

[R. K. AGRAWAL AND ABHAY MANOHAR SAPRE, JJ.]

*Transfer of Property Act, 1882 – ss. 54 and 123 – Possession and mesne profits – Claim of, on basis of sale deed – Respondent-plaintiff purchased the suit land from a Housing Co-operative Society vide registered sale deed and was, accordingly, placed in possession of the suit land by the Society – After few years, appellant encroached upon the suit land and erected a ‘kacha’ hut – Respondent filed suit against appellant claiming possession and mesne profits in relation to the suit land – Trial Court and the First Appellate Court held that since the sale deed was not properly proved, the respondent’s suit was dismissed – High Court held that the respondent proved the sale deed as required in law and, therefore, was entitled to claim decree for possession on the basis of sale deed as owner against the appellant – On appeal, held: Sale deed was duly proved by the respondent and rightly relied on by the High Court for passing a decree of possession against the appellant – It is for the reasons that, firstly, the execution of the sale deed does not need any attesting witness like the gift deed, which requires at least two attesting witnesses at the time of its execution as per s.123 of the Transfer of Property Act, and Secondly, s.68 of the Evidence Act, which deals with the examination of the attesting witness to prove the execution of the document, does not apply to sale deed, which is governed by s.54 of the Transfer of Property Act – Appellant (defendant) did not dispute the respondent’s vendor’s (Housing Society) title – Further, respondent entered in witness box and proved its execution and further did not raise any objection when the sale deed was being exhibited in evidence – In light of these admitted facts, respondent had a better title of suit land as against the appellant, who had no title to the suit land – Evidence Act, 1872 – s. 68.*

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A           **Dismissing the appeal, the Court**

**HELD: 1.1** The High Court held that the sale deed was duly proved as required in law and accordingly passed the decree for possession against the appellant in relation to the suit land. The reasoning of the High Court is correct. The respondent was able to prove the sale deed and was, therefore, rightly held entitled to claim decree for possession of the suit land on the strength of the sale deed against the appellant. [Paras 18 and 19] [1034-C-D]

**1.2** It is for the reasons that, firstly, the execution of the sale deed does not need any attesting witness like the gift deed, which requires at least two attesting witnesses at the time of its execution as per Section 123 of the Transfer of Property Act, 1882; and Secondly, Section 68 of the Evidence Act, 1872, which deals with the examination of the attesting witness to prove the execution of the document, does not apply to sale deed, which is governed by Section 54 of the Transfer of Property Act. [Para 20] [1034-E-F]

**2.** Further, the appellant (defendant) in this case did not dispute the respondent's vendor's (Housing Society) title. On the other hand, she, in clear terms, admitted their title in her written statement. It is also not in dispute that the respondent entered in witness box and proved its execution and further did not raise any objection when the sale deed was being exhibited in evidence and indeed, rightly for want of any legal basis. [Para 21] [1034-G]

**3.** In the light of these admitted facts, the sale deed in question was duly proved by the respondent and was, therefore, rightly relied on by the High Court for passing a decree of possession against the appellant. It was a clear case where the respondent had a better title of the suit land as against the appellant, who had no title to the suit land. All that the appellant had was a plea of adverse possession which was not held proved. [Para 22] [1034-H; 1035-A]

CIVIL APPELLATE JURISDICTION :Civil Appeal No. 19625 of 2017.

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From the final Judgment and Order dated 11-10-2012/12-10-2012 of the High Court of Judicature at Bombay, Bench at Nagpur in Second Appeal No.304 of 1997. A

Anshuman Singh, Satyajit Desai, Ms. Anagha S. Desai, Advs for the Appellant.

Rahul Chitnis, Aaditya A. Pande, Chander Shekhar Ashri, Advs for the Respondent. B

The Judgment of the Court was delivered by

**ABHAY MANOHAR SAPRE, J.** 1. Leave granted.

2. This appeal is filed by the defendant against the final judgment and order dated 11/12.10.2012 passed by the High Court of Judicature at Bombay, Nagpur Bench, Nagpur in Second Appeal No.304/1997 whereby the Single Judge of the High Court allowed the appeal filed by the respondent herein and reversed the judgment/decreed dated 26.08.1996 passed by the 3<sup>rd</sup> Additional District Judge, Nagpur in Regular Civil Appeal No.152/1989 which arose out of judgment/decreed dated 31.01.1989 passed by 3<sup>rd</sup> Joint Civil Judge, Junior Division, Nagpur in Regular Civil Suit No.1210/1985, which had dismissed the respondent's civil suit. C D

3. In order to appreciate the short controversy involved in the appeal, few relevant facts need mention hereinbelow. E

4. The appellant is the defendant whereas the respondent is the plaintiff in a civil suit out of which this appeal arises.

5. The dispute relates to plot No.12 of field No.13/3, P. H. 44 situated in Mouza Parsodi Tahsil, District Nagpur admeasuring 1625 sq.ft. (hereinafter referred to as the "suit land"). F

6. The suit land originally belonged to one Housing Co-Operative Society called – "Subhash Nagar Gruha Nirman Sahakari Sanstha Limited, Nagpur" (hereinafter referred to as "Society"). The respondent purchased the suit land from the Society vide registered sale deed dated 29.12.1981 and was, accordingly, placed in possession of the suit land by the Society. G

7. In March 1985, it was noticed by the respondent that the appellant had encroached upon the suit land owned by him and erected a kacha hut on one portion of the suit land without any authority. This led the respondent to serve legal notice dated 22.04.1985 on the appellant H

A asking her to remove the hut, which was illegally erected by her on the suit land. Since the appellant did not remove the hut, the respondent filed a suit being Civil Suit No.1210/85 in the Court of Civil Judge, Junior Division, Nagpur against the appellant claiming possession and *mesne profits* in relation to the suit land.

B 8. The suit was founded essentially on the allegation, *inter alia*, that the respondent is the owner of the suit land having purchased the same from the Society by registered sale deed dated 29.12.1981(Ex.P-31). It was alleged that the respondent was placed in possession of the suit land pursuant to the sale deed. It was alleged that the appellant, in  
C March 1985, un-authorisedly entered into the suit land and erected one hut on one portion of the suit land and hence, the suit is filed by the respondent seeking possession of the suit land and also claiming the *mesne profits* from the appellant.

9. The appellant filed written statement and denied the respondent's claim. According to her, the suit land was allotted to one  
D Dhondiba Lodhi by the Society, who then constructed his house on the land and on his death, his wife - Hirabai became its owner. It was then averred that Hirabai entered into an agreement with the appellant on 22.05.1972 to sell the suit land and pursuant to the agreement, was placed in possession of the suit land. It was averred that since then the appellant  
E continued to remain in possession of the suit land without any interruption from anyone and has accordingly acquired ownership of the suit land by virtue of she being in adverse possession of the suit land. This, in substance, was her defense.

10. The Trial Court framed the issues and parties adduced their  
F evidence. By judgment/decreed dated 31.01.1989, the Trial Court dismissed the respondent's suit. It was held that, firstly, the respondent failed to prove the sale deed (Ex.P-31) inasmuch as the sale deed had some kind of discrepancies and also no attesting witness was examined; secondly, the appellant was in possession of the suit land since 1972 and hence perfected her title over it by adverse possession; thirdly, the dispute,  
G which is the subject-matter of civil suit, pertained to the business of the Society and hence covered by Section 91 of the Maharashtra Cooperative Societies Act (in short "the Act") and is, accordingly, barred under Section 163(1) of the Act.

H 11. The respondent, felt aggrieved by the judgment of the Trial Court, filed First Appeal before the 3<sup>rd</sup> Additional District Judge, Nagpur

being Regular Civil Appeal No.152 of 1989. The Appellate Court, by judgment dated 26.08.1996, dismissed the appeal and affirmed the judgment and decree of the Trial Court. The Appellate Court reversed the two findings of the Trial Court. One was in relation to the bar contained in Section 91 of the Act and the other relating to the plea of adverse possession. In other words, the Appellate Court reversed the two findings of the Trial Court and held that, firstly, the bar contained in Section 91 of the Act does not hit the civil suit and hence maintainable in Civil Court and secondly, the appellant (defendant) failed to prove her adverse possession over the suit land and hence cannot be declared the owner of the suit land on the strength of her alleged adverse possession over it. However, since the Appellate Court confirmed the finding of the Trial Court insofar as it pertained to not properly proving the sale deed dated 29.12.1981 (Ex.P-31), the suit was dismissed. In other words, the Appellate Court also held that the respondent (plaintiff) was not able to prove the sale deed dated 29.12.1981 in accordance with law and hence no decree could be passed in respondent's favour in relation to the suit land on the strength of such unproved sale deed.

12. Felt aggrieved by the judgment of the Appellate Court, the respondent (plaintiff) filed Second Appeal under Section 100 of the Code of Civil Procedure Code, 1908 (hereinafter referred to as "the Code") in the High Court (Nagpur Bench). The High Court framed the following question of law:

**"Whether it is necessary for the plaintiff appellant to examine his vendor and attesting witnesses to prove his title to the suit property in a suit for recovery of possession against the encroacher when there is a registered sale deed executed by his vendor in his favour?"**

13. The appellant (defendant), however, did not file any cross objection under Order 41 Rule 22 of the Code to challenge the adverse findings recorded by the First Appellate Court and, therefore, those findings attained finality.

14. By impugned judgment, the High Court allowed the Second Appeal and while setting aside of the judgments/decrees of the two courts below decreed the appellant's suit. The High Court held that the respondent has proved the sale deed as required in law and, therefore, he was entitled to claim decree for possession on the basis of the sale deed (Ex.P-31) as an owner against the appellant. Felt aggrieved, the

A defendant filed the present appeal by way of special leave against the judgment of the High Court before this Court.

15. Heard Mr. Anshuman Singh, learned counsel for the appellant and Mr. Rahul Chitnis, learned counsel for the respondent.

B 16. Having heard the learned counsel for the parties and on perusal of the record of the case, we are inclined to dismiss the appeal as, in our opinion, the High Court is right in its reasoning and its conclusion.

17. As observed supra, the only question involved in the appeal before the High Court was whether the sale deed dated 29.12.1981 (Ex.P-31) in relation to the suit land was duly proved by the respondent.

C 18. The Trial Court and the First Appellate Court held that since the sale deed was not properly proved, the respondent's suit was dismissed whereas the High Court reversed the said finding and held that the sale deed was duly proved as required in law and accordingly passed the decree for possession against the appellant in relation to the suit land.

D 19. We agree with the reasoning of the High Court. In our opinion also, the respondent was able to prove the sale deed and was, therefore, rightly held entitled to claim decree for possession of the suit land on the strength of the sale deed dated 29.12.1981 (Ex.P-31) against the appellant.

E 20. It is for the reasons that, firstly, the execution of the sale deed does not need any attesting witness like the gift deed, which requires at least two attesting witnesses at the time of its execution as per Section 123 of the Transfer of Property Act, 1882; and Secondly, Section 68 of the Evidence Act, 1872, which deals with the examination of the attesting witness to prove the execution of the document, does not apply to sale deed, which is governed by Section 54 of the Transfer of Property Act.

F 21. It is not in dispute that the appellant (defendant) in this case did not dispute the respondent's vendor's (Housing Society) title. On the other hand, she, in clear terms, admitted their title in her written statement. It is also not in dispute that the respondent entered in witness box and proved its execution and further did not raise any objection when the sale deed was being exhibited in evidence and indeed, rightly for want of any legal basis.

G 22. In the light of these admitted facts, we are of the view that the sale deed dated 29.12.1981 was duly proved by the respondent and was,  
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therefore, rightly relied on by the High Court for passing a decree of A  
possession against the appellant. It was, in our opinion, a clear case  
where the respondent had a better title of the suit land as against the  
appellant, who had no title to the suit land. All that the appellant had was  
a plea of adverse possession which was not held proved.

23. This being the only point involved in the case and the same B  
having been answered against the appellant, we find no merit in the  
appeal. The appeal thus fails and is accordingly dismissed.

Ankit Gyan

Appeal dismissed.