

(2024) 10 BOM CK 0017

Bombay High Court (Aurangabad Bench)

Case No: Second Appeal No. 67 Of 2024 With Civil Application No. 3438 Of 2024

M/S Honesty Land Developers
Through Its Partners Dinesh
Yashwant Patil And Anr

APPELLANT

Vs

Shri Madhukar Sonaji Salve Died
Thr Lrs Nirmala Madhukar Salve
And Ors

RESPONDENT

Date of Decision: Oct. 18, 2024

Acts Referred:

- Code of Civil Procedure, 1908 - Order 7 Rule 3

Hon'ble Judges: Sandipkumar C. More, J

Bench: Single Bench

Advocate: Shambhuraje V. Deshmukh

Final Decision: Disposed Of

Judgement

Sandipkumar C. More, J

1. The appellants, who are the original plaintiffs in Regular Civil Suit No. 810 of 2011, have challenged the judgment and order dated 08.12.2023 passed by the learned District Judge-1, Aurangabad i.e. the learned First Appellate Court, in Regular Civil Appeal No. 139 of 2014. Under the said judgment and order, the learned First Appellate Court, by allowing the appeal has set aside the judgment and order dated 21.04.2014, passed by the learned trial Court i.e. 8th Jt. Civil Judge, Junior Division, Aurangabad in the aforesaid civil suit.

Background facts of the case are as under :-

2. The appellants/plaintiffs have preferred the aforesaid Regular Civil Suit No. 810 of 2011 for permanent injunction to restrain the respondents/defendants from causing obstruction to their possession over the suit plots namely plot Nos. 1 to 12, 15, 16, 20, 23, 26 to 28, 32, 37, 46, 69, 71, 72, 76 to 79, 82 to 86, 89 to 93 and 95 i.e. in all 40 plots out of joint layout plan on certain portion of land Block Nos. 124 and 125 situated at village Gandheli, Taluka and District Aurangabad. The appellants/plaintiffs are claiming that the aforesaid suit plots have been purchased by them in an auction held by the HDFC Bank. According to the plaintiffs, Smt. Parvatabai Jagannath Rithe, Govind Kaduba Rithe, Karbhari Jagannath Rithe and Raju Jagnath Rithe all resident of Chikalthana, were the owners of the land admeasuring 85 R in Block Nos. 124 and 41 R in Block No. 125. They had executed registered power of attorney dated 11.03.2002 in favour of Kalyan Dnyandev Hivale and Kacharu Suryabhan Hivale for development of the aforesaid land and to prepare lay out in respect of the said lands, by dividing it into plots. The aforesaid original owners (hereinafter referred to as "Rithe Family Members") had also authorized Kalyan Hivale and Kacharu Hivale to sell the plots from the proposed layout on the said land under the said power of attorney. Accordingly, the aforesaid power of attorney holder Kalyan and Kacharu prepared sanctioned layout consisting in all 96 plots and sold them to different purchasers under the respective sale deeds on the basis of power of attorney issued by Rithe Family Members.

3. Some of the purchasers of those plots, for raising finance, had mortgaged the same with HDFC Bank, but when they became defaulters and their accounts were converted into 'non- performing asset' (NPA), H.D.F.C. Bank seized those plots under the provisions of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "the SARFAESI Act") and sold those plots in auction. The plaintiffs purchased the aforesaid suit plots in the said auction vide sale certificate dated 14.08.2008 and accordingly their names were mutated in Revenue Record of those plots vide mutation entry No. 1869, certified on 22.09.2008. The plaintiffs then applied for measurement of land to the Land Records Office which was carried on 20.05.2009. According to the plaintiffs, Rithe Family Members had already sold out their entire land existed in Survey Nos. 124 and 125 under the power of attorney and therefore, they had no concerned with the plots of entire layout prepared by Kalyan and Kacharu.

4. The appellants/plaintiffs had further contended that, on 25.09.2011 at about 3:30 p.m. the defendants alongwith 20 to 25 persons came to the spot and started obstructing possession of the plaintiffs over the suit plots. On making inquiry, the plaintiffs got knowledge that the original owners i.e. Rithe Family Members, despite having no right, title in the suit plots, had in fact sold certain portion of land Gut Nos. 124 and 125 to the defendants by playing fraud upon Court and under fake documents knowing fully well that no land was left to their ownership in the aforesaid gut

numbers. Thus, the plaintiffs were constrained to file suit for permanent injunction as above.

5. On the contrary, the defendants, vide their written statement (Exh.90), strongly resisted the suit by denying all the adverse allegations against them. According to them, the plaintiffs had not given proper description of the suit plots as required under Order VII Rule 3 of the Code of Civil Procedure. Moreover, the plaintiffs had claimed more area than their entitlement as per the pleadings in the plaint. They claimed that the power of attorney holder was not entitled to prepare layout plan jointly without converting the same into non agricultural purpose. They further contended that, the plaintiffs had not produced the documents of loan taken by the plot holders from the H.D.F.C Bank and the documents in respect of action taken by the H.D.F.C Bank under the SARFAESI Act and there were no documents in favour of the plaintiffs showing that, they were put in actual possession of the suit plots. They came out with the case that Shivaji Govind Rithe being the legal representative of Govind Rithe had filed Regular Civil Suit No. 172 of 2011 against the remaining legal representatives in respect of Block Nos. 124 and 125. On 21.06.2011, a compromise took place in the said suit and shares of the legal representatives of Govind Rithe were determined in the aforesaid gut Nos. 124 and 125. On the basis of said compromise, mutation entry mentioning the respective shares of all the legal representatives was certified. In the said compromise decree, Shivaji Govind Rithe was given 21 R land, Vishnu was given 22 R land and 21 R land was given to Shashikala whereas 21 R land was given to Hirabai in gut No. 124 and accordingly, they were in possession of their respective portion. For Gut No. 125, portion of 21 R land was given to Kesharbai Govind Rithe and she was put in possession of the same. The aforesaid legal representatives and Parvatabai from Rithe Family Members executed three registered sale-deeds in favour of the present respondents/defendants on 12.08.2011 and on the basis of those sale-deeds, the defendants have claimed that they are in possession of the same. Thus, it is claimed by the defendants that plaintiffs have no right to claim permanent injunction against them as they already became owner of their lands.

6. The learned trial Court framed issues and by conducting trial, decreed the suit and restrained the respondents/defendants from obstructing possession of the appellants/plaintiffs over the suit plots.

7. Feeling aggrieved with the said decree, the respondents/defendants preferred an appeal before the learned First Appellate Court as mentioned above, which was allowed and the learned trial Court decree was set aside. Hence, this Second Appeal.

8. Learned counsel for the appellants/plaintiffs submits that, the erstwhile owners of the entire layout area in Gut Nos. 124 and 125 i.e. Rithe Family Members had executed power of attorney in the year 2002 itself for selling the plots after preparation of layout

and on the basis of said power of attorney, the power of attorney holders Kalyan and Kacharu had already sold entire plots from those layout. Thus, there was no land in balance with Rithe Family Members, but the legal representatives of Govind Kaduba Rithe, by taking the disadvantage of their names in the record of rights of the land Gut Nos. 124 and 125, played fraud upon the Court and by suppressing the earlier sale of entire layout, got mutated their names under the compromise decree and then sold their respective shares to the present defendants knowing fully well that, they had no balance land in the area of 5 Acres 36 Gunthas of Gut Nos. 124 and 125. He further pointed out that, the learned trial Court had properly appreciated the evidence on record and rightly concluded that the plaintiffs became owners of the suit plots and were put in possession accordingly long back by the authorities of H.D.F.C. Bank. He pointed out documentary evidence to that effect. According to him, the learned First Appellate Court did not consider the evidence on record in proper perspective and wrongly travelled beyond the scope of provisions under Specific Relief Act and thereby set aside the decree of the learned trial Court erroneously. In support of his submissions, he relied on the judgment in the case of Hon'ble Apex Court in the case of Azgar Barid (D) by Legal heirs and others Vs. Mazambi @ Pyaremabi and Others, reported in 2002 DGLS (SC) 214

9. On the contrary, learned counsel for the respondents/defendants supported the judgment of the learned First Appellate Court and claimed that, the general power of attorney was for an agricultural land and there was no sanction for conversion of the said agricultural land into non agricultural land. According to him, the location of the suit plots is not given by the plaintiffs and without identifying the suit property, the learned trial Court should not have granted injunction in favour of the plaintiffs. Thus, he prayed for dismissal of this Second Appeal.

10. It is significant to note that, under order dated 08.08.2024, this Court had observed that since the learned counsel for the rival parties had argued the matter at length, it could be decided finally at admission stage. On going through the record and the judgments of both the learned Courts below, the following substantial question of law is involved in this matter :-

“Whether the learned First Appellate Court was justified in reversing the findings of the learned trial Court, which was based upon the oral and documentary evidence adduced by the parties on record ?

11. The main contention of the appellants/plaintiffs is that, when they had secured the possession and title of the suit plots by following due process of law, then how the defendants are entitled to disprove their title and possession over the suit plots on the basis of sale-deeds got executed by Rithe Family Members by playing fraud upon the Court, specially when the land of Rithe Family Members was already sold to the

purchasers of 96 plots, in its entirety. As against this, the defendants have come out with the case that they have become owners of the land which they purchased from Rithe Family Members and when the plaintiffs could not file on record the documents in respect of their acquiring title by following due process of law, they must be treated as owner of the property.

12. On perusal of the judgment of the learned trial Court, it is evident that the learned trial Court has held that the appellants/plaintiffs have proved their possession over the suit plots which they acquired by following due process of law and therefore, they are entitled for decree of perpetual injunction. On the contrary, the learned First Appellate Court has reversed the findings of the learned trial Court mainly on the ground that, the plaintiffs could not give the exact location of the suit plots and their evidence in respect of their contentions in the plaint is out of pleading and hence, not admissible. Thus, when the substantial question of law is in respect of proper appreciation of evidence on record, then the findings of both the learned Courts below are to be tested in the light of evidence on record itself and only thereafter it can be decided that whose finding is proper.

13. Since beginning it is case of the appellants/plaintiffs that, land admeasuring 5 Acres 36 Gunthas in Gut Nos. 124 and 125 was belonged to Rithe Family Members namely Govind Kaduba Rithe, Karbhari Jagganath Rithe, Raju Jagannath Rithe and Parvatabai Jagannath Rithe and they had executed the power of attorney which is at Exh.79 in the year 2002 in favour of Kalyan and Kacharu Hiwale, who in turn got sanctioned layout plan in respect of the said area by dividing it into 96 plots. However, the learned First Appellate Court in its judgment has raised certain doubts about the area mentioned in the said power of attorney by comparing it with the pleadings of the plaintiffs. The learned First Appellate Court has observed that, the plaintiffs had come with the case that the original owners, the. Rithe Family Members owned 85 R land in Block No.124 and 41 R land in Block No.125 and therefore, after adding those areas it comes to 3 Acres and 6 Gunthas, then how the plaintiffs can claim that the layout was prepared in total land of 5 Acres and 36 Gunthas. The learned First Appellate Court has further observed that after subtracting land admeasuring 3 Acres and 6 Gunthas from the land admeasuring 5 Acres and 36 Gunthas, 2 Acres and 30 Gunthas land still remained in the name of Rithe Family Members. By this observation, the learned First Appellate Court has discarded the conclusion of the learned trial Court that after execution of power of attorney (Exh.79) no land was in balance in the name of Rithe Family Members. This finding of the learned First Appellate Court has to be tested on the basis of evidence.

14. Admittedly, in the plaint as well as in the affidavit in evidence, the plaintiffs have pleaded that original owners are the owners of 85 R land out of Block No. 124 and 41 R land out of Block No. 125. However, in the power of attorney (Exh.79) it is clearly

mentioned that, the same was executed by Rithe Family Members for area admeasuring 5 Acres and 36 Gunthas jointly in Block Nos.124 and 125. Therefore, the documentary evidence on this aspect needs to be scrutinized. If 7/12 extract of Gut No. 124 at Exhibit-30 is perused, then it reveals that Govind Kaduba Rithe was having only 85 R land in his name in entire Gut No. 124, totally admeasuring 10 H

24 R. Likewise, Karbhari Jagannath Rithe was having 30 R land in the same, whereas Raju Jaggnath Rithe was having 80 R land in Gut No. 124. It means the members of Rithe Family were having only 1 H 95 R land in Gut No. 124 from the total area of 10 H 24 R. Similarly, if 7/12 extract of Gut No. 125 at Exhibit-32 is perused, then it reveals that the total area of Gut No. 125 was 5 H 90 R and out of the same, Parvatabai Jaggnath Rithe was having 20 R land, whereas Govind Kaduba Rithe was holding 21 R land in the same. Thus, it can be seen that Rithe Family Members were jointly having total area of 2H 36 R in Gut Nos. 124 and 125 which is equivalent to 5 Acres 36 Gunthas as mentioned in General Power of Attorney at Exhibit-79.

15. It is extremely important to note that, in civil proceedings no person is allowed to give oral evidence contrary to the documentary evidence. Admittedly, the plaintiffs have shown only 1 H 26 R land in their pleadings belonging to the original owners Rithe Family in Block Nos. 124 and 125, but the documentary evidence on record clearly indicates that Rithe Family Members were having 5 Acres 36 Gunthas land in the aforesaid Gut numbers and therefore, when they had executed the power of attorney (Exh.79), then it was in respect of their entire share in the aforesaid Gut numbers. Therefore, considering these facts, the observation of the learned First Appellate Court that the learned trial Court wrongly came to the conclusion that, after execution of power of attorney, no land remained with the original owners for execution of the sale-deed in favour of the defendants, is apparently perverse. There may be a mistake on the part of the plaintiffs in pleading wrong area being the area of original owners in their paragraph No. 2 of the plaint. Therefore, the observations of the learned First Appellate Court that the evidence of P.W. No.3 in respect of total area of land admeasuring 5 Acres 36 Gunthas mentioned in Exhibit-79, is without pleadings and therefore, not admissible, is not proper. The learned First Appellate Court merely on the basis of wrong pleadings of the plaintiffs, has ignored the documentary evidence on record and thus recorded the aforesaid erroneous observations.

16. The record further shows that, the appellants/plaintiffs have also examined one of General Power of Attorney holders Kalyan as P.W. No.3 and he has proved the contents of the general power of attorney (Exh.79) given to him by Rithe Family Members for their entire area in Gut Nos. 124 and 125. He has also stated that, on the basis of said registered general power of attorney dated 11.03.2002, he got sanctioned layout in respect of the said area and sold all the 96 plots to the respective purchasers of the same. It is extremely important to note that, the said general power of attorney

(Exh.79) is still intact as it is and neither the members of Rithe Family nor the present defendants have challenged the same till today. Moreover, the earlier purchasers of the suit plots have also not challenged the entire action under the SARFAESI Act taken against them by the H.D.F.C. Bank till today.

17. Further, the H.D.F.C. Bank employee Shri. Patil i.e. P.W. No.2 in his evidence has stated that, the suit plots were mortgaged with H.D.F.C. Bank by the concerned purchasers of the same and since they could not repay mortgaged amount, a procedure under the SARFAESI Act was initiated and the same were forfeited and then publicly auctioned. His evidence indicates that the present appellants/plaintiffs had purchased the suit plots by following the due process of law under the provisions of the said Act and accordingly the sale certificates are on record at Exhibit -40 to 64, 66 to 71 and 73. The evidence of Shri. Patil is not shattered in the cross-examination also and nothing adverse in respect of title of the plaintiffs over those suit plots has come on record. It is important to note that the entire procedure under the SARFAESI Act resulting into the acquiring of title by the plaintiffs is neither challenged by Rithe Family Members nor by the present respondents/defendants and also from the earlier purchasers of the suit plots. Thus, there is sufficient evidence to hold that the plaintiffs have acquired ownership of the suit plots, even though the documents in respect of the action under the SARFAESI Act are not produced on record.

18. It is extremely important to note that, the aforesaid sale certificates are in existence since August - 2008 and not challenged by anybody till today. Moreover, the most important ingredient for grant of perpetual injunction i.e. the possession of the disputed plots, is also there on record since the sale certificates in respect of the suit plots include respective possession receipts also. Those possession receipts, which are on record along with the sale certificates, clearly indicate that the suit plots were given in possession of the appellants/plaintiffs in the month of August - 2008 itself. Nothing is established by the present defendants/respondents that after August - 2008, the plaintiffs had lost possession of the same. Therefore, the evidence on record definitely shows that the appellants/plaintiffs have not only established their ownership over the suit plots, but also adduced satisfactory documentary evidence in support of their possession over the same.

19. Now coming to the defence of respondents/defendants, it is claimed by the respondents that, the legal representatives of Govind Kaduba Rithe had in fact filed Regular Civil Suit No.172 of 2011 for partition and in that suit there was compromise amongst them and accordingly, certain portion of the lands from Gut Nos. 124 and 125 was allotted to them. On going through the mutation entry No. 2721 at Exh. 92 based on compromise decree in the aforesaid suit indicates that the names of legal representatives of Govind Kaduba Rithe were mutated for the area admeasuring 85 R in land Gut No. 124 and 21 R in Gut No. 125, which they had sold to the

respondents/defendants under sale-deeds (Exh. 96 and 97). Additionally, Parvatabai of the original Rithe Family Members also sold her 20 R land to the defendants vide sale-deed (Exh.98). However, it has already come on record by way of documents that under the general power of attorney (Exh.79) executed in the year 2002 itself, Rithe Family Members had already given possession of their total land admeasuring 5 Acres 36 Gunthas in the aforesaid Gut Nos. 124 and 125 for preparation of layout and selling the plots so prepared. Further, the evidence of P.W. No.3 i.e. one of the power of attorney holders Kalyan has indicated that after sanctioning the layout for that area, he had sold all the 96 plots of the said layout to the concerned purchasers. Moreover, the plaintiffs thereafter purchased in public auction, the suit plots which were owned by some other persons who became defaulters and faced action under the SARFAESI Act at the hands of H.D.F.C. Bank /Financial Institute.

20. Thus, this entire process which remained unchallenge either by Rithe Family Members or the defendants indicates that, in the year 2011 there was no land remained in the name of Rithe Family Members in the aforesaid Gut numbers. Thus, it appears that the legal representatives of Govind Rithe must have played mischief by filing frivolous suit for partition and thereby entering into compromise by keeping the Court in dark about the earlier facts. This certainly amounts to playing a fraud upon the Court. It is settled that no person can pass title of any land to the other person, if he does not possess the same. In the instant matter it has been clearly established on the basis of documentary evidence that no land was in existence in the name of Rithe Family Members in the year 2011. Thus, the respondents/defendants on the basis of sale- deeds at Exhibits – 96, 97 and 98 can not claim ownership over the suit plots.

21. The learned First Appellate Court in its judgment has observed that the plaintiffs had not challenged the sale-deeds of defendants whereby they purchased the land from legal representatives of Kaduba Rithe. However, as discussed above, the legal representatives of Kaduba Rithe had in fact played fraud upon the Court knowing fully well that there were no lands in existence to the share of Govind at the time of filing the frivolous suit i.e. Regulr Civil Suit No. 172 of 2011. As such, when the present plaintiffs were not party to the said sale-deeds which were prima facie illegal, there was no occasion arose for the plaintiffs to claim any declaration about the so called sale-deeds executed in favour of the defendants. Even otherwise also, the entries made in the revenue record of the concerned lands at Exhibits – 90, 91 and 93 on the basis of aforesaid sale-deeds are cancelled by the Sub-Divisional Officer. Thus, the observations of the learned trial Court that the ownership of the defendants over the land admeasuring 01H 26 R in Gut Nos. 124 and 125 is defective, is absolutely correct and proper. On the contrary, the learned First Appellate Court has failed to appreciate the evidence on record to that effect.

22. The learned First Appellate Court appears to have set aside the decree passed by the learned trial Court, also by holding that the learned trial Court did not differentiate between the total area of land in Gut Nos. 124 and 125 and the area of land which is subject matter of the present suit and without proper identification of the property, granted permanent injunction against the defendants. However, since beginning, it is the case of the plaintiffs that the subject matter of the present suit is only the area of 5 Acres 36 Gunthas out of Gut Nos. 124 and 125. Moreover, for the said area the layout was prepared and 96 plots were there in the said layout which were sold to the concerned purchasers. It is extremely important to note that, 40 plots were seized by the H.D.F.C. Bank – Financial Institute and then sold to the plaintiffs. Further, it is extremely important to note that after preparation of layout, the entire land belonged to Rithe Family Members was sold to various plots purchasers and therefore, there was no balance land in the name of Rithe Family Members. Moreover, the plaintiffs have also established that the possession receipts of those plots were also executed in their names by the concerned officials of H.D.F.C. Bank – Financial Institute alongwith the sale certificates on record. It is extremely important to note that, none from the plot owners of the said layout, who are still in possession of the same, has taken any objection to the possession of the plaintiffs over the suit plots on the basis of proper identification of the suit plots.

23. It is also important to note that, it is specifically pleaded by the plaintiffs in the plaint that after acquiring suit plots in the year 2008 under the sale certificates they had applied to Deputy Director of Land Records for measurement of the said land and accordingly measurement was effected and location of the suit plots was identified by preparing the measurement plan. It is to be noted that the said measurement plan forms part of the record and proceeding wherein the location of suit plots is mentioned. Unfortunately, the plaintiffs before the learned trial Court could not prove the contents of the said map for the location of the suit plots. Be that as it may, but when the defendant's title is found defective in respect of the area in land Gut Nos. 124 and 125 allegedly acquired from the legal representatives of Govind Kaduba Rithe, then they certainly cannot obstruct the possession of the plaintiffs over the suit plots on the basis of sale-deeds at Exhibits – 96, 97 and 98. Therefore, the defendants cannot be benefited by the failure on the part of the plaintiffs to get the measurement plan proved by the concerned surveyor. Thus, the observations of the learned First Appellate Court about the plaintiffs failing in giving proper identification of the suit plots definitely appears erroneous. On the contrary, it has already established by the plaintiffs that they are in possession of the suit plots since 2008 and nothing has been produced on record by the other side that thereafter the plaintiffs were dispossessed or lost possession of the suit plots.

24. The learned counsel for the plaintiffs heavily relied on the judgment in the case of Azgar Barid (D) (supra) wherein it is observed that, the learned First Appellate Court was not justified in reversing the findings of the learned trial Court which were based on proper appreciation of evidence. Thus, after discussing the evidence on record, this Court has concluded that, the learned trial Court had in fact appreciated the evidence on record in proper perspective, but the learned First Appellate Court ignored the same and by relying upon the sale-deeds executed in favour of the defendants specially by ignoring the fact that Rithe Family Members were not the owners of their portion in the land Gut Nos. 124 and 125, unnecessarily set aside the decree of the learned trial Court. As such, considering all these aspects, the substantial question of law is answered in the negative. Resultantly, the Second Appeal stands allowed. The impugned judgment and order passed by the learned First Appellate Court is hereby set aside and the judgment and decree passed by the learned trial Court in Regular Civil Suit No. 810 of 2011 stands confirmed.

25. The Second Appeal is accordingly disposed of alongwith pending Civil Application No. 3438 of 2024.