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sa207.14.

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 207 OF 2014
WITH
CIVIL APPLICATION NO.3247 OF 2014

1) Asaram S/o Sudam Band,
Age: 42 years, Occ. Agriculture,
R/o Ghosapuri, Tal & Dist. Beed

2) Chandrabhan Patilbua Band,
Age: 55 years, Occ. and
r/o as above

...APPELLANTS
(Orig. Defendants)

VERSUS

Lalitabai w/o Damodhar Kakade,
Age: 55 years, Occ. Service,
R/o PHC, Jarud, Tal. and Dist. Beed

...RESPONDENTS
(Orig. Plaintiff)

Mr C. V. Dharurkar, Advocate for appellants;
Mr S. K. Naikwade, Advocate for respondent

CORAM : N.W. SAMBRE, J.

DATE : 3rd March, 2015

ORAL ORDER

The present Second Appeal is by original defendants.

2. The respondent/plaintiff filed Regular Civil Suit No.239 of 2006 claiming that Gat No.186, which is suit property, is owned by her as she

has received the same in the partition effected by her father and the suit property stood in her name since last 33 years. As the plaintiff got an employment at some other station, the appellants/defendants have encroached on the said property, as such, the respondent filed suit for possession against them. It is claimed that the defendants have encroached to the extent of 43 R land.

3. The appellants/defendants filed their written statement at Exh.14, resisting the claim of the respondent/plaintiff, resulting in framing of the issues at Exh.15. The defendants have come out with a case that they are in possession of the suit property since last 50 years through their father. According to them, after implementation of consolidation scheme, the land in question came to their share and the land in question is mutated in the name of the father of the appellants/defendants since 1971-72. They further claimed that the claim put-forth by the plaintiff is not sustainable, in view of the provisions of section 36-A of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act.

4. On behalf of the plaintiff, she has examined her brother, namely, Ramkisan Band at Exh.16. In addition to above, she has placed reliance upon 7/12 extracts at Exh.24 for the year 1973 to 2006. The defendant has examined himself at Exh.35.

5. The learned Trial Court, after considering the claim of the parties, decreed the suit by judgment dated 29th January, 2008.

6. An appeal carried by the appellants herein, being Regular Civil Appeal No.44 of 2008, came to be dismissed on 26th November, 2013. Thus, the present Second Appeal.

7. Mr Dharurkar, learned Counsel appearing on behalf of the appellants would urge the following substantial question of law :-

Whether both the Courts below were right in decreeing the suit, based on the testimony of the power of attorney holder, who was examined at the behest of the plaintiff.

8. Learned Counsel, in support of the above contention, has invited my attention to Exh.16 – affidavit filed by Bhagirath Ramkisan Band, holder of general power of attorney on behalf of the plaintiff. In order to canvass the above referred contention, he has submitted that the said witness of the plaintiff has deposed as a power of attorney holder. Apart therefrom, he has also invited my attention to the ground raised in the memo of appeal before the Lower Appellate Court, i.e. ground no.X, which reads thus :-

“That, as per the judgment reported in AIR supreme Court page the evidence led by the power of attorney can not be considered, but this precedent has overlooked by the lower court at the time of hearing. In view of the said Judgement and direction of Hon'ble S.C. The suit shall be remanded to trial court.”

9. After considering the above referred contention and having gone through the evidence of the witness of the plaintiff, who was examined at Exh.16, it is noticed that though the said witness holds general power of attorney for the plaintiff, however, perusal of his examination-in-chief and cross-examination reflects that the said witness has deposed on his personal information, being brother of the plaintiff. Though the learned Counsel appearing on behalf of the appellants has sought to place reliance on the judgment of the Apex Court, in the matter of **Janki Vashdeo Bhojwani & anr. vs. Indusind Bank Ltd. & ors.**, reported in **AIR 2005 SC 439**, so as to canvass that a power of attorney holder cannot depose in support of the plaint, and has invited my attention to the observations made in paragraphs no.12 to 14 of the said judgment, however, it is required to be noted that such power of attorney holder can always depose to the extent of his personal knowledge. There is no dispute about the relationship of the said witness with the plaintiff and his personal knowledge about the dispute in question was never assailed. So as to canvass this grievance, though my attention is invited to ground no.

(X) in the memo of appeal, perusal of the said ground, which is reproduced above, depicts complete vagueness. Perhaps, such issue was never raised before the Trial Court, so also the Lower Appellate Court. It is also required to be noted that the Apex Court has observed that if the power of attorney has rendered some 'acts' in pursuance to power of attorney, he may depose for the principal in respect of such acts, however, he cannot depose for the principal for the acts done by the principal and not by him. Such power of attorney holder, as is held, cannot depose for the principal in respect of the matter which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined. In the present case, the appellants/defendants have cross-examined the said witness Bhagirath as he has deposed out of his own knowledge in relation to the claim put forth before the Court. At no point of time, as is observed herein above, the defendants ever had raised any objection or sought dislodging of said evidence or witness.

10. In the light of above, in my opinion, both the Courts below have rightly decreed the suit of the plaintiff.

11. So far as the other question of law raised on behalf of the appellants, in relation to the consolidation entries is concerned, this Court has refrained from going into the same as, for appreciation of the said

ground, this Court will be required to re-appreciate the entire set of evidence. In absence of any substantial perversity in appreciation of the evidence, the said contentions raised by the appellants, cannot be gone into.

12. For the reasons stated in the foregoing paragraphs, the instant Second Appeal, which is against the concurrent findings, lacks merit and thus stands dismissed with no order as to costs.

13. In view of dismissal of the Second Appeal, Civil Application No.3247 of 2014 does not survive and stands disposed of.

(N.W. SAMBRE, J.)

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