

FARAD CONTINUATION SHEET NO.
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD.

Office Memoranda of appearance, directions and orders.	Notes, of Court's orders and Registrar's	Office Coram,	Court's or Judge's orders.
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SECOND APPEAL NO. 210 OF 2012
WITH CA/3736/2012 IN SA/210/2012

BAPU SHARAD SHINDE
VERSUS
SHIVAJI MADHAVRAO SHINDE AND ANR

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Advocate for Appellant : Mr. Bangar Nilkanth P.
Advocate for Respondent Nos.1 and 2/ Caveator: Mr.
Chaitanya V. Dharurkar.

CORAM: T. V. NALAWADE, J.
DATED: 5th OCTOBER, 2015.

PER COURT:

1. The appeal is filed against the judgment and decree of Regular Civil Appeal No.158 of 2009 which was pending in the Court of District Judge-2, Beed. Both the sides are heard.
2. Special Civil Suit No. 12 of 2008, was filed by respondent Appellant against the Respondents for relief of declaration and for the relief of perpetual injunction. The suit was filed in respect of some agricultural lands and the sale deed made by defendant Bharat Shinde.

3. It is the case of plaintiff that his father had married with Nagarbai and from Nagarbai his father has one son (plaintiff) and two daughters. It is contended that father of plaintiff had some differences with Nagarbai and then he developed relations with one Taibai and to Taibai, 2 issues were born from father of plaintiff, Defendant No.1 Bharat is said to be a son born to Taibai. Swati, daughter is not made party to the suit. It is contended that as there was no marriage between father of plaintiff and Taibai there was no question of defendant No.1 succeeding to the property of his father as the properties were ancestral properties.

4. It is the case of plaintiff that after the death of his father, which took place prior to 1990, the defendant No.1 got his name entered as legal heir of father of plaintiff in the revenue record of suit property. It is contended that on 14th January, 2008 when defendant No.2 obstructed the possession of plaintiff over the suit properties, plaintiff realised that the properties were sold by defendant No.1 to defendant No.2. It is the case of plaintiff that as defendant had no title in the suit property, no title is passed to defendant No.2 and so, the

plaintiff needs relief of declaration.

5. Defendant No.2 is uncle of plaintiff and also of defendant No.1. He contested the matter. He contended that father of plaintiff had performed marriage with Taibai and till the death Sharad, father of plaintiff, had cohabited with Taibai. It is contended that after the death of Sharad the names of both the widows/ wives of Sharad and issues born from both the widows/ wives were entered in the revenue record as heirs of Sharad. It is contended that plaintiff never challenged the mutation made in favour of defendant No.1 dated 9th April, 1990. It is contended that separate shares were entered in the names of plaintiff and defendant No.1 and they were enjoying their shares separately since the year 1990. It is contended that plaintiff himself had sold 20 Ares portion from Survey No.637/AA/1/2 to defendant No.2 under sale deed of 1999 and so he cannot say that parties were not separately enjoying the properties. It is contended that defendant No.1 was enjoying the property for more than 18 years as owner and so the property is purchased by defendant No.2 from defendant No.1.

6. Issues were framed on the basis of aforesaid pleading. Both the Courts below have held that plaintiff has failed to prove that on the date of suit he was in possession of the suit property. The trial Court had given relief of declaration in respect of sale deed and the sale deed was set aside. The first Appellate Court has set aside this decision and the entire suit is dismissed. The first Appellate Court has held that the suit for relief of declaration is not filed within limitation.

7. It is not disputed that by the mutation of 1990 the suit properties were entered in the name of defendant No.1. This Court has gone through the original record, which includes the revenue record. The record shows that names of both plaintiff and defendant No.1 were entered as owners and they were cultivating their portions. It is not disputed that plaintiff himself had sold 20 Ares portion from one such land under a sale deed to defendant No.2 in the past.

8. The first Appellate Court has held that the suit for declaration of ownership ought to have been filed within 3 years from the date of cause of action and the cause of action took place in the year 1990, when the mutation

was made in favour of defendant No.1. The learned counsel for the Appellant submitted that the mutation could not have given any title to defendant Bharat as he cannot be called as a legitimate son of father of plaintiff. Even if this contention is accepted as it is, the fact remains that after the death of Sharad the name of defendant No.1 was entered in the revenue record and Courts below have given finding that the plaintiff was not in possession of the suit property on the date of the suit. Plaintiff never challenged the entries made in the revenue record even in respect of ownership. The suit was not for possession and so there was no question of consideration of other Articles like Article 65 of Limitation Act.

9. The Courts below have held that the suit is hit by provision of Section 34 of Specific Relief Act. The suit for relief of only declaration was filed by plaintiff when as per the record defendants were in possession of the suit property. The suit could have been disposed of only on the basis of this finding also. In any case, as the suit was not filed for the relief of possession, the Courts below were not expected to consider the case of title.

10. The learned counsel for the Appellant placed reliance on one case reported as **2011 (4) Mh.L.J. 527 (Gian Kaur V/s Raghubir Singh)**. On the other hand, learned counsel for Respondent placed reliance on two reported cases like **1993 AIR (SC) 957 (Vinay Krishna V/s Kesgav Chandra)** and **2013 AIR SCW 3063 (Venkataraja & Ors. V/s Vidyane Doureradjaperumal (D) Thr. Lrs. & Ors.)**. The facts of the case on which reliance is placed by learned counsel for the Appellant shows that along with relief of declaration and permanent injunction there was alternate relief of possession also. In view of that circumstance the Apex Court held that the suit was tenable and it was not hit by Section 34 of Specific Relief Act. In the cases on which reliance is placed by learned counsel for the Respondent, the Apex Court held that when the suit was not filed for relief of possession, even when the plaintiff was not in possession and the suit was filed only for declaration purpose, such suit is not tenable in view of provision of Section 34 of Specific Relief Act and the Court is not expected to use discretion and grant relief of declaration. In the present matter the

relief of declaration in respect of sale deed executed was claimed and no relief was claimed in respect of possession. Both the Courts below have given finding that plaintiff was not in possession on the date of the suit and so, there is no material available for formulation of substantial question of law.

11. In the result, the appeal stands dismissed.

12. In view of final disposal of the second appeal itself, nothing further survives in the civil application for stay and the same stands disposed of accordingly.

[T. V. NALAWADE, J.]

Dt.05/10/2015
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