

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.260 OF 2014

WITH

SECOND APPEAL NO.261 OF 2014

alongwith

CIVIL APPLICATION NO.659 OF 2014

Shri. Arvind Pundalik Pawaskar Appellant

Vs.

Shri. Sudhakar Pundalik Pawaskar Respondent

Mr. A.S. Khandeparkar and Amogh Karandikar i/by A.S. Khandeparkar & Associates for the Appellant.

Mr. N.V. Walawalkar, Senior Counsel i/by Mr. Suresh Sabrad, Advocate for the Respondent.

Coram : Smt. R.P. SondurBaldota, J.

Date : 18th March, 2015

PC :

- 1). The Appeals are directed against the concurrent finding of fact by the Courts below in the suit filed by the respondent for partition of the joint property and for separate possession of one-half share. The trial Court decreed the suit by its judgment and decree dated 14th

June, 2010 and dismissed the counter-claim filed by the appellant. Being aggrieved by the order of the trial Court, the appellant preferred two appeals being Regular Civil Appeal No. 82 of 2012 and Regular Civil Appeal No. 113 of 2012 against the order of the trial Court in the suit and on the counter-claim. The appeal Court, by its common judgment dated 4th January, 2014 dismissed both the appeals with costs. The appellant has thereafter filed the present appeals.

2). The facts of the case stated in brief are as follows :-

. The grandmother of the parties, one Hirabai was the owner of the suit property which consisted of open land, as well as, a two storeyed house property. By registered gift-deed dated 29th May, 1976, she gifted the suit property to the appellant and the respondent. A portion of that property was later acquired by the State of Maharashtra, compensation in respect of which has been received and shared by both the brothers. Appellant is the younger brother. The respondent by the notice dated 1st December, 2003 demanded partition and separate possession of his half-share in the suit property from the appellant. The appellant by his reply dated 8th December, 2003 refused to effect partition of the suit property. Thereupon, the respondent filed suit for partition.

3). The appellant contested the suit contending that, the gift by the grandmother was neither accepted by the respondent nor possession

of the suit property was obtained by him during the lifetime of the grandmother. Therefore, the gift in favour of the respondent was not completed and the respondent did not acquire any right to the suit property under the gift-deed. He claimed that, he had obtained possession of the entire suit property under the gift deed and as such became the exclusive owner and possessor of the same. By way of counter-claim, the appellant prayed for a declaration that he is the exclusive owner of the suit property and sought perpetual injunction to restrain the respondent, inter-alia, from creating any third party rights over the suit property. The respondent filed his written statement to the counter-claim contending that, since 29th May, 1976 he is in possession of one-half share in the suit property as the co-owner alongwith the appellant. His name is recorded in the revenue records, as well as, the municipal records alongwith the appellant as the co-sharer. Further, the gift of suit property had been accepted by him. The parties examined themselves in support of their respective claims and also produced the documents of gift-deed, revenue records and the municipal records. On appreciation of the evidence, the Courts below found that the grandmother of the parties, Hirabai had gifted the suit property to both the brothers vide registered gift-deed dated 29th May, 1976. As such, both the brothers are entitled to one-half share in the suit property and for partition and separate possession. The Courts below rejected the claim of the appellant of

exclusive right to the suit property. The Courts below noted that, it was admitted position that on the date of execution of the gift-deed, the possession of the suit property was delivered. The recital of the gift-deed showed that, possession was delivered to both the parties. The original document of gift-deed was handed over to the respondent and had been produced in evidence from his custody. It was held that, the recitals to the gift-deed coupled with delivery of the gift-deed to the respondent and acceptance of the document by the respondent was sufficient to hold that the gift was accepted by the respondent. This was further supported by the entries in the record of rights of the suit property, wherein the names of the parties are recorded as co-sharers of the suit property. The Courts below further noted that, the reply sent by the appellant to the notice for partition did not challenge the right of the respondent to the suit property under the gift-deed. The only submission made by the appellant in the reply was that, the respondent had not looked after the suit property for several years and it was the appellant who had spent substantial amount in maintaining the suit property. The crucial evidence found by the Courts below in favour of the respondent and against the appellant was the Affidavit filed by the appellant in L.A.R. No. 66 of 2003 before the Civil Judge Senior Division, Sindhudurg, Oras where the appellant admitted the share of the respondent in the property acquired by the Government.

- 4). One of the contentions taken up by the appellant before the courts below as well as before this court is that the suit property is inalienable in view of the condition embodied in the gift deed and that the appellant would have preferential right to purchase half share of the respondent in the suit property. The condition imposed in the gift deed is that the property given in gift should not be alienated under a sale-deed or under any document. The courts below have held that the condition imposed is void in view of Section 10 of Transfer of Property Act, which provides that where the property is transferred subject to a condition or a limitation absolutely restraining the transferee from parting with or disposing off his interest in the property, the condition or limitation is void. The only exception carved out in the Section is in case of a lease where the condition is for the benefit of the lessor or those claiming under him. There is no infirmity whatsoever in this finding.
- 5). Thus, there is no substantial question of law arising for consideration of this court in the two appeals. The appeals are therefore dismissed.
- 6). In view of dismissal of the Second Appeals, the Civil Application does not survive, the same is accordingly disposed off.

(Smt. R.P. SondurBaldota, J.)