

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

SECOND APPEAL NO.333 OF 1993

Tanaji Pandurang Waghmode	.. Appellant
Vs.	
Hanumant Murlidhar Borkar & Ors.	.. Respondents

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Mr.R.S. Kate, Advocate for the Appellant.
Mr.A.V. Datar, Advocate for the Respondents.

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CORAM : R.K. DESHPANDE , J.

DATED : JUNE, 18 2015.

P.C. :

Heard the learned counsel appearing for the appellant and the learned counsel for the respondents.

2 The trial Court passed a decree in Regular Civil Suit No.62 of 1991 on 10th December, 1982, declaring that the plaintiff is having half share in the suit land bearing Gat No.300, as described in paragraph 1 of the plaint and the sale-deed executed by the defendant no.2 Pandurang in favour of the defendant no.1 Jainuddin on 15th April, 1977 is declared to be null and void to the extent of half share of the plaintiff. By subsequent order dated 18th March, 1991, passed to record the findings under order XLI Rule 25 of the Code of Civil Procedure in terms of the order passed in Civil Appeal No.4/B/1989,

the trial Court has held that the sale-deed subsequently executed on 6th April, 1989 by the defendant no.1 to the defendant no.4 is not binding on the plaintiff to the extent of his half share in the suit properties and the same is hit by the doctrine of *Lis-Pendens*. The Appellate Court has dismissed the Civil Appeal No.4/B/1989 by the Judgment and order dated 29th March, 1993. Hence the defendant no.4 who is the ultimate purchaser is before this Court in this Second Appeal.

3 The controversy involved before the Courts below was whether the plaintiff had any legal right, either to claim any share in the property owned by his brother Tukaram, or had any right to challenge the alienation made by his brother, the defendant no.2 Pandurang Murlidhar on 15th April, 1977 in favour of the defendant no.1, who is the third party. The Courts below have held that the plaintiff had half share in the property belonging to his brother Tukaram and hence the transfer of property by the another brother Pandurang on 15th April, 1977 in favour of the defendant no.1 was void and not binding to the extent of half share of the plaintiff in the said property. In the light of this controversy, this Court has Admitted the present Second Appeal on 5th July, 1992, on the following substantial questions of law:

(i) Whether the plaintiff could file the suit inasmuch as assuming Tukaram's share was available for devolution upon his death?

(ii) Whether father who was alive took the entire interest as heir in Class-II(1)?

(iii) What would be share of the plaintiff after father's death during the pendency of the suit?

(iv) Whether Tukaram had during his lifetime already sold the land?

4 The undisputed factual position is that it is the specific averments made by the plaintiff that there was a partition between Murlidhar and his three sons namely : (1) Pandurang, (2) Tukaram and (3) Hanumant on 27th April, 1963. The suit property which is said to be Gat No.300 or Survey No.39/2+3/1-C had fallen to the share of Tukaram. Tukaram died intestated on 27th August, 1971 and he was issue less. He survived by his father Murlidhar who was defendant no.3 in the suit in question, the brother Pandurang who was the defendant no.2 in the suit in question and Hanumant, the plaintiff. As per Rules of succession under section 8 of the Hindu Succession Act, 1956, the devolution of the property of the deceased dying

intestate shall be in accordance with schedule therein. Neither the brother nor the father come under the category of Class-I heirs under the said schedule. In Class-II of the said schedule, item - I is of the father and in item no.-II at serial number 3 is the brother. If the father is alive, the brother would not have any share in the property of the brother. In view of this, the plaintiff had no right or interest in the properties left over by the brother Tukaram and the suit in question was therefore not maintainable for such a relief. The substantial question of law at serial no.(i) is answered accordingly.

5 No doubt, the alienation of the property is by the another brother Pandurang, who had also no share or interest in the property. But the father was alive and he took the entire interest as heir in Class-II(1) in the schedule. The challenge could have been only at his instance, which was not done. The question of law at serial no.(ii) is answered accordingly. The father died during the pendency of suit and thus the defendant no.1 and the defendant no.4 perfected their title on the basis of the sale-deeds dated 15th April, 1977 and 6th April, 1989. The Courts below have therefore committed an error in passing and confirming the decree in favour of the plaintiff. The substantial question of law is, therefore, answered accordingly.

6 In the result, the Second Appeal is allowed. The Judgment and decree passed by the trial Court in Regular Civil Suit No.63 of 1991 on 10th December, 1982 as has been confirmed in Civil Appeal No.4/B/1989 of this Judgment and order dated 29th March, 1993 are hereby quashed and set aside. Regular Civil Suit No.62 of 1991 filed by the respondent - plaintiff is dismissed. No order as to costs.

(R.K. DESHPANDE, J.)