

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
(CIVIL APPELLATE JURISDICTION)

SECOND APPEAL NO. 298 OF 1993

1. Chima Savaeram Bhagwat,
Aged 53 years, R/o. Karanjikar Galli,
Bhagur, Distt. Nashik,
2. Mahadu Savaleram Bhagwat,
Aged 53 years, R/o. Sonambe,
Taluka Sinnar, Distt. Nashik,
3. Keshav Savaleram Bhagwat,
Aged 48 years, R/o. Karanjikar Galli,
Bhagur, Distt. Nashik,
4. Jagannath Savaleram Bhagwat,
Aged 38 years, R/o. Sonambe,
Taluka Sinnar, Distt. Nashik,
5. Keru Bhika Bodke, aged 60 years,
since deceased through Legal
Representatives as under
- 5a. Yamunabai Keru Bodke,
- 5b. Nivrutti Keru Bodke,
- 5c. Trimbak Keru Bodke,
- 5d. Valubai Keru Bodke,
- 5e. Anusayabai Radhakisan Shinde,
- 5f. Janabai Ramchandra Shinde,
Sr.Nos. 5a to 5d, R/o. Sonambe,
Sr.No. 5e and 5f, r/o Tangaon,
Taluka Sinnar, Distt. Nashik

APPELLANTS

...VERSUS...

- 1] Chandrabgagabai Bhimaji Bagwat,
aged 53 years,
- 2] Bhaskar Bhimaji Bhagwat,
aged 33 years,
- 3] Mohan Bhimji Bhagwat,
aged 25 years,
- 4] Babu Bhimji Bhagwat,
aged 18 years, M/G Sr.No.1
5. Kum. Bali Bhimji Bhagwat,
aged 15 years, M/G Sr.No.1
- 6] Lilabai Dattu Kale,
aged 29 years, R/o. Sakur,
Taluka Igatpuri, District-Nashik.

Sr.Nos. 1 to 5 R/o. Bhagur,
Taluka and Distt. Nashik.

RESPONDENTS

Shri V.A.Thorat, Advocate for appellant
Shri P.N.Joshi, Advocate, for respondents.

CORAM: R. K. DESHPANDE, J.
DATE : 6th AUGUST, 2015 .

ORAL JUDGMENT

1] In Regular Civil Suit No. 233 of 1979, the trial Court passed a decree on 08.06.1987, directing the defendants to jointly and severally hand over the peaceful possession of the suit property to the plaintiffs. This was the subject matter of challenge in Civil Appeal No. 310 of 1987 before the lower Appellate Court, which has although

dismissed the appeal, a decree for execution of the sale deed to the extent of 4/5th share and to deliver the possession to the plaintiff, has been passed. Hence, the original defendants are before this Court in this second appeal.

2] The operative portion of the decree passed by the lower appellate Court is reproduced below.

The appeal stands dismissed with cost.

The Defendant Nos. 1 to 4 are directed to execute the sale deed to the extent of 4/5th share i.e. H.0-57 R in land Gat No. 485 situated at village Sonbambe, Taluka Sinnar, District Nasik in favour of the Respondents – Plaintiffs by receiving Rs.8,400/- from the plaintiffs – Respondents and deliver the possession of 1/5th share of the disputed land to the plaintiffs – respondents, from the Defendant No.5.

3] It is not in dispute that the original plaintiff did not claim the aforesaid relief. After the lower appellate Court heard the matter finally and closed it for judgment, an application was filed on 09.07.1992 for grant of permission to amend the plaint and incorporate the aforesaid relief which has been granted by the lower appellate Court. On 10th July, 1992, the lower appellate Court allowed the amendment and on 13th July, 1992, the application for time to file additional written statement was

rejected and on 14th July, 1993, the decree is passed in the aforesaid terms. Though the appeal was dismissed, the Court passed a decree granting the reliefs as per the amended prayer clause in the plaint.

4] On 15.06.1993, this court admitted the second appeal and framed the following substantial questions of law.

(I) Whether the possession of the appellant no.5 is illegal and forceable over the entire area and alternatively over 1/5th share of the respondent branch?

(II) Whether the sale is bad owing to the law of Prevention of Fragmentation Act?

(III) Whether the respondents could claim right of preemption?

(IV) Whether issues were not framed in accordance with the pleadings?

(V) Whether the judgments are contrary to law, and lastly;

(VI) incidentally, other grounds raised in memo.

5] The learned counsels appearing for the parties submit that it is not necessary for this Court to decide the aforesaid substantial questions of law framed by this Court and by consent of the parties, the matter can be sent back to the

lower appellate Court for decision afresh for the reasons that, (i) the application for amendment was entertained after the matter was closed for judgment, (ii) the defendants were not granted opportunity to file consequential amendment, as the application for such permission was rejected, and (iii) without hearing the parties concerned on the amendment, the judgment has been delivered immediately on 14th July, 1992.

6] In view of this, the judgment and order passed by the lower appellate Court needs to be set aside with an order of remand.

7] In the result, the second appeal is allowed. The judgment and order dated 14.07.1992 passed by the lower Appellate Court in Civil Appeal No. 310 of 1987 is hereby quashed ad set aside. The matter is remitted back to the lower appellate Court to decide the appeal afresh after considering the application for amendment of the plaint and granting opportunity to the defendants to file consequential amendment, if required. The parties to appear before the lower appellate Court on 7th September, 2015 on which date the Court shall issue notices to the parties for appearance. The lower appellate Court shall

decide the appeal within a period of three months from the date of first appearance of all the parties before it.

The record and proceedings if received be immediately forwarded to the lower appellate Court so that the Court can fix the further date for hearing of the matter on 7th September, 2015, itself.

Consequently, the civil application, if any, does not survive.

JUDGE

Rvjalit