IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 15 OF 2008

Dagadu Bayaji Sinde
Age : 76 Yrs., Occ. Agril.,
R/o : At Mandali, Taluka : ..... **APPELLANT/**
Karjat, Dist. : Ahmednagar. **[ORI. PLAINTIFF]**

V E R S U S

1. Vitthal Bayaji Shinde
[since deceased Thr. L.Rs.]

1-(a) Ashok Vitthal Shinde
Age : 30 Yrs., Occ. Agril.,
R/o : H.No. 177, Bhindikhau
Shamlal Maharaj Chal,
Shivaji Nagar, Indor
[Madhya Pradesh].

1-(b) Radha Vitthal Shinde
Age : 20 Yrs., Occ. Household,
R/o : H.No. 177, Bhindikhau
Shamlal Maharaj Chal,
Shivaji Nagar, Indor
[Madhya Pradesh].

2. Gorakh Bayaji Sinde
Age : 43 Yrs., Occ. Service &
Agril., R/o : H.No. 177,
Bhindikhau Shamlal Maharaj
Chal, Shivaji Nagar, Indor
[Madhya Pradesh].

3. Shankar Bayaji Sinde
Age : 40 Yrs., Occ. Service &
Agril., R/o : H.No. 177,
Bhindikhau Shamlal Maharaj
Chal, Shivaji Nagar, Indor
[Madhya Pradesh].

4. Pandurang Bayaji Sinde
Age : 36 Yrs., Occ. Service &
Agril., R/o : H.No. 177,
Bhindikhau Shamlal Maharaj
Chal, Shivaji Nagar, Indor ..... **RESPONDENTS/**
[Madhya Pradesh]. **[ORI. DEFENDANTS]**

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Mr. N.V.Gaware, Advocate for Appellant.
Mr. H.U.Dhage, Advocate for R – 1-A,
1-B, 2 to 4.

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CORAM : T.V.NALAWADE, J.

DATE OF JUDGMENT : 04/07/2016

JUDGMENT :

1. The Appeal is filed against the Judgment and Decree of R.C.A. No. 54/2004 which was pending in the Court of the Ad-hoc District Judge -3, Ahmednagar. The Appeal filed by the defendants of R.C.S. No. 81/1998 which was pending in the Court of the Civil Judge [Jr.Division], Karjat is allowed by the District Court and the decree given against them of declaration of ownership of plaintiff is set aside. Heard both sides.

2. In short, the facts leading to the institution of the Appeal can be stated as follows.

The Suit was filed in respect of some portion of land G.No. 157 admeasuring 3 H. 25 R. and some portion of land G.No. 158. Both the lands are situated at village Mandali, Tahsil Karjat, district Ahmednagar.

3. The plaintiff is real brother of defendant Nos. 1 to 4. It is the case of the plaintiff that partition had taken place amongst the brothers and their father and since then they are leaving separate. It is the case of the plaintiff that the suit property was sold by their father to Bijabai and Hausrao to pay the debt. It is the case of

the plaintiff that he purchased the suit property from these 2 persons after the partition, though he purchased these properties in the name of his father. It is contended that father was living with the plaintiff and as per the desire of father, the property was purchased in the name of father of the plaintiff, but the consideration was paid by the plaintiff and the possession also was handed over to the plaintiff.

4. Father of the parties died on 13/09/1994 and the Suit came to be filed on 08/06/1998. It is the case of the plaintiff that defendants tried to enter their names in respect of the suit lands in the revenue record after the death of their father and then the cause of action took place for the Suit. It is the case of the plaintiff that the defendants have no concern with the suit property, but due to their obstruction and conduct, relief of declaration needs to be granted in favour of the plaintiff.

5. Defendant Nos. 1, 3 and 4 filed joint Written Statement and contested the Suit. They did not admit the case of the partition. They contend that the suit

property is ancestral property of their father. It is their case that as the father was living with the plaintiff, the plaintiff wants to grab the entire property. It is their case that each brother has $1/5^{th}$ share in the suit property. They had claimed the relief of counter claim to get their share separated. Defendant No. 2 adopted this Written Statement. Plaintiff filed Written Statement to the aforesaid counter claim. He denied the aforesaid contentions made by the defendants.

6. Issues were framed on the basis of aforesaid pleadings. Both sides gave evidence. The trial Court held that there was partition effected during life time of the father of parties and the property was purchased by the plaintiff after the partition. It was held by the trial Court that the property was purchased in the name of father by the plaintiff, but the consideration was paid by the plaintiff. The District Court held that initially the property was standing in the name of father and the property was belonging to joint Hindu family of the father of the parties. The District Court held that as the property was purchased by father, each brother has equal share in this property.

7. This Court [other Hon'ble Judge] admitted the Appeal on 19/06/2008 by holding that substantial questions of law need to be formulated on ground Nos. (iii), (iv), (v), (ix) and (x) of Appeal memo. So, the following grounds are treated as substantial questions of law.

(iii) Whether the appellate Court has erred in appreciating the provision of Section 34 of the Specific Relief Act, 1963 and has further erroneously arrived at a conclusion that the Suit of the appellant was not maintainable without asking the relief of cancellation of sale deeds as the appellant has only prayed for declaration of ownership ?

(iv) Whether the appellate Court has misread and misunderstood the provision of section 91 and 92 of the Indian Evidence Act and thus has dissented with the view by the learned trial Court ?

(v) Whether the appellate Court has erred in not considering the aspect of previous partition between the appellant and the respondents during the life time of their father namely Bayaji which goes to the very root of the matter and thus has caused great prejudice to the appellant ?

(ix) Whether the appellate Court has failed to appreciate the fact that the consideration was paid by two separate cheques of the account of the appellant of which the counter foils have been presented in the Court and there appears to be entries in the ledger book of the A.D.C.C. Branch, Ghogargaon ?

(x) Whether the appellate Court has failed to appreciate the oral evidence of P.W. 2 Bhagchand Pathare [Exh. 45] who is the bank Manager of A.D.C.C. Bank and has supported the case of the appellant and who has also categorically deposed that the provident fund amount was credited in the account of the appellant and the appellant had issued two cheques in favour of Hausrao Gangarde and Bijabai Wable ?

8. Both the sides have given evidence. Following are the few admitted facts and the circumstances which are proved, which need to be kept in mind while appreciating the rival contentions and the material.

[i] It is not disputed that both the suit properties were ancestral properties of the father of the parties. Exh. 58 and one agreement which is

not exhibited, but which is not disputed show that the father Bayaji had sold S.No. 157 [to the extent of his share of 81 R.] to Smt. Bijabai on 26/04/1989 for the consideration of ₹ 18,000/-. The other document shows that property bearing S.No. 59/2 [to the extent of 40 R.] given in possession of Hausrao by Bayaji for the consideration of ₹ 10,000/- [Rupees Ten Thousand] on 30/11/1987. The sale deeds of 1992 show that aforesaid properties were sold by Smt. Bijabai and Hausrao to Bayaji. The consideration of ₹ 22,000/- was paid to Bijabai for the sale deed dated 29/05/1992 and consideration of ₹15,000/- was paid to Hausrao. It appears that in the recent sale deed, recent number of the property which was with Hausrao is mentioned.

[ii] The transaction made by Bayaji in the past was shown as sale transaction but the parties admit that they were mortgage transactions and Bayaji had right to get back these properties from Smt. Bijabai and Hausrao.

[iii] In both the sale deeds [Exhs. 56 and 57] executed in favour of father of the plaintiff, the vendors have mentioned that consideration was already received by them

in cash. Thus, both the vendors had received consideration prior to 07/04/1992 and 29/05/1992.

9. In view of the pleadings in the plaint, it was necessary for the plaintiff to prove that the consideration passed from him and only due to the desire of his father, he purchased the property in the name of his father. For that plaintiff had made an attempt to prove that he had made the payment of consideration by cheque.

10. One Pathare, bank employee, is examined by the plaintiff to prove that he made the payment through cheque. The evidence of this witness shows that in April and May, 1992 some amount was credited in the bank of this witness by the plaintiff and it was provident fund amount of the plaintiff. The account proved is at Exh. 59. This shows that on 08/04/1992, amount of ₹ 40,000/- was shown to be paid to Hausrao. This document further shows that the amount of ₹ 22,000/- was again paid to Hausrao on 30/05/1992. In this extract it is shown that amount of ₹ 35,860/- was shown to be paid to B.H.Wable, the vendor of other sale deed, on 08/04/1992. Thus, the amount shown to be paid to

the 2 vendors does not tally with the dates of the transactions and also the contents of the sale deeds executed in favour of the father of the plaintiff. The amounts were different. Further, no evidence is given to have counter cheque like the encashment of the cheques by these 2 persons in their account. No explanation of the aforesaid discrepancies are given by the plaintiff. Further, these 2 vendors are not examined by the plaintiff. When admittedly, the properties were with these vendors by way of mortgage, such evidence was necessary.

11. The circumstance that the sale deeds were executed in the name of father is there and due to that circumstance inference is not possible that the plaintiff got executed the sale deed. On the contrary, inference is there that the father purchased the properties in view of the provisions of Sections 91 and 92 of the Indian Evidence Act. No action was taken by the plaintiff during life time of father and this circumstance also can not be ignored.

12. The aforesaid discussion shows that the

property was owned by the father of the parties. This Court holds that the District Court has not committed any error in giving the decision against the present appellant. Further, the Suit was also not filed within 3 years from the date of transaction. No evidence like copy of application allegedly given to the revenue authority by the defendants is produced to show that cause of action took place subsequently. No substantial question of law as such is involved in the matter though the aforesaid points were to be considered as substantial questions of law.

13. In the result, Second Appeal stands dismissed.

14. At this stage, learned counsel for the appellant seeks continuation of interim relief for some time. In view of the aforesaid observations, such prayer is rejected.

[T.V.NALAWADE, J.]