

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

904 SECOND APPEAL NO. 243 OF 2016
WITH CA/3807/2016 IN SA/243/2016

KAILAS DAULAT CHAUDHARI
VERSUS
BALIRAM VEDU CHAUDHARI AND OTHERS

...
Advocate for Appellant : Yawalkar Siddharha B.

...
CORAM : T.V. NALAWADE, J.
DATED : 22nd March, 2016.

ORDER :

1. The appeal is filed to challenge the judgment and order of Ad-hoc District Judge-1, Amalner delivered in Appeal No. 80/2012 and also against the order made on Exh. 54 in Regular Darkhast No. 4/2005 by the Court of Civil Judge, Junior Division, Amalner. Heard the learned counsel for appellant.

2. Regular Civil Suit No. 35/1984 was filed by respondent - Baliram Choudhari for relief of partition and separate possession against his brother Hiranman, father Vedu and other relatives. The parties are Hindus. The suit was dismissed on 26.3.1993. Then parties tried to settle the dispute and one compromise document was prepared on 13.4.1993. Under this document, partition was admitted and then sale deed was executed by Nana Hiranman Choudhari, party to the

compromise in respect of land Gat No. 140/1. On this document, Baliram Choudhari, one of the plaintiffs of aforesaid suit had signed as a witness. The said transaction took place on 24.5.1993.

3. The decision given in Regular Civil Suit No. 35/1984 was challenged by the plaintiffs including Baliram by filing Civil Appeal No. 15/1993. The appeal was received by the District Court on 26.4.1993 and the appeal came to be decided on 8.4.2003. The appeal was allowed. The judgment and decree of Trial Court was set aside and the suit of the plaintiffs was decreed. The First Appellate Court held that the plaintiffs were entitled to get share in the suit property as described in Schedule 'B' of the plaint. Relief of mesne profit was also given.

4. On the basis of aforesaid decision given by the First Appellate Court, Regular Darkhast bearing No. 4/2005 is filed. In this Darkhast, the purchaser from Nana Choudhari namely present appellant is made party respondent. At Exh. 33 application was initially filed by present appellant for taking objection to the execution. In that application, he contended that there was compromise between the parties though the suit was dismissed and in the compromise, the property sold by Nana

was allotted to the share of Nana. He contended that there was the bar of provision of section 115 of the Evidence Act, estoppel, against the decree holder in view of the said compromise. He contended that he was not informed about the pendency of the appeal filed against the decision of the Trial Court by anybody. He also contended that he was not made party respondent in the appeal when the property was sold to him. He contended that the provisions of section 52 of the Transfer of Property Act cannot be used against him. He prayed for giving permission to lead the evidence by filing application at Exh. 54. After hearing both the sides, the Executing Court rejected the application of the present appellant.

5. It is not disputed that the decision given by the Trial Court was challenged by filing appeal in District Court and the appeal was filed within prescribed period of limitation. The learned counsel for appellant placed reliance on the case reported as **2008 (1) Mh.L.J. 340 [Sardar Hasanbhai Attar Vs. Usman Papamiya Attar Shaikh and Ors.]**. In that case, it is observed by this Court that third party can also obstruct the execution of decree for possession and opportunity needs to be given to him also to show his rights in respect of the suit property. There cannot be any dispute about this proposition.

Though the little bit different reasoning is given by the Executing Court, it can be said that no mistake is committed by Executing Court in rejecting the application in view of the aforesaid circumstances. The aforesaid circumstances are sufficient to infer that during pendency of the proceeding, the appeal, the transaction was made and the transaction is hit by provision of section 52 of the Transfer of Property Act.

6) The learned counsel for appellant placed reliance on the case reported as **2015 (5) Mh.L.J. 745 [Ballappa Sidhappa Guddodagi and Ors. Vs. Bhagavva Nagappa Magdum (D) thr. Legal heirs & Ors.]**. In this case, this Court has made observation that when objection is filed under the provision of Order 21, Rule 99 of Civil Procedure Code and third party has raised objection by claiming ownership in the suit property, permission needs to be given to lead evidence in the objection proceeding. On the basis of this observation, the learned counsel submitted that such opportunity was not given to the appellant and so, the order made by the Executing Court is bad in law. This submission is not at all acceptable. The facts of the reported case were altogether different and objection petitioner was claiming ownership in a part of the suit property and in his own right. In the present matter, the property came to

be purchased by the appellant during pendency of the appeal and so, it cannot be said that present appellant is claiming something in his own right. The contentions made by the appellant in the application, which are already quoted, are sufficient to infer that he had knowledge about the nature of litigation. The transaction was made within the time prescribed for filing of the appeal against the judgment and decree of the Trial Court. Thus, there was no scope to the present appellant to defend the possession. No substantial question of law as such is involved in the matter and there was no question of giving opportunity to lead the evidence as everything is matter of record.

7. In the result, appeal stands dismissed. Civil Application is disposed of. The learned counsel for appellant requested for stay to the execution of decree given in favour of respondents. Such relief is also refused in view of the circumstances already mentioned.

[T.V. NALAWADE, J.]

ssc/