

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**Civil Application No.9098 of 2014
In
Second Appeal Stamp No.18353 of 2014**

Jaywant s/o Vithalrao @ Bhausahab
Deshmukh.

.. Applicant.

Versus

Haribhau S/o Narayanrao Chavan
And Others.

.. Respondents.

Shri. N.B. Khandare, Advocate, for applicant.

Shri. G.V. Mohekar, Advocate, for respondent Nos.1 & 6.

Shri. S.A. Wakure, Advocate, for respondent No.4.

Shri. Milind Patil, Advocate, for respondent Nos.10 & 11.

CORAM: T.V. NALAWADE, J.

DATE : 3 MAY 2016

ORDER:

1) The application is filed for grant of leave to file second appeal against the judgment and decree of Regular Civil Appeal No.230/1984 which was pending in the Court of the District Judge-1, Ambajogai, District Beed. The applicant is the purchaser *pendent lit* from one of the defendants of the suit which was filed for the relief of partition and separate possession. The suit is decreed

by the first appellate Court and the property purchased by the present applicant is held to be joint Hindu family property. Both the sides are heard.

2) It is the case of the present applicant that land Survey No.255 was owned by his vendor, Venubai and he has purchased this land under registered sale deed dated 25-1-1994. It is his case that as he is the purchaser, he is entitled to challenge the decision given by the first appellate Court in respect of the suit property.

3) Regular Civil Suit No.37/1978 was filed by respondent Haribhau against step mother Venubai (defendant No.4), step brothers (defendant Nos.2 and 3), real brother (defendant No.5) and purchaser of some other property from defendant No.1. It is the case of Haribhau that Survey No.255 was acquired by the defendant No.1 from the income of joint Hindu family properties and so it is also the joint Hindu family property. It is his case that no partition had taken place and as the father is not effecting partition he is required to file the suit.

4) Defendant Nos.1 to 4 filed joint written statement. They contended that Balwantrao, father of defendant No.1, died prior to year 1951 but prior to that defendant No.1 had separated from Balwantrao and all the properties are acquired by him. It is his case that after death of first wife, defendant No.1 married with defendant No.4. It is the case of the defendant No.1 that in the year 1955-56 dispute started between the plaintiff and defendant No.5 (real brothers *inter se*) on one hand and the family of the second wife of the defendant No.1 on the other and so he gave few lands to the plaintiff and defendant No.5 and they started living separate. It is contended that in the past, Regular Civil suit No.153/1956 was filed by defendant No.1 due to this dispute but compromise took place and compromise decree was made. It is contended that there after proceeding was started under the Ceiling Act and in that proceeding plaintiff admitted that he was living separate from defendant No.1.

5) Defendant No.1 took defence that Survey No.255 was with him as restricted owner. It is his contention that it was Inam property and so he is absolute

owner of the property in view of the provisions of the Inam Abolition Act. In the written statement he contended that he has given this property to defendant No.4, second wife and accordingly he has also made will in her favour. The suit was filed prior to the date of transaction made by the defendant No.4 in favour of the present applicant and also prior to the actual so called alienation made by defendant No.1 in favour of the defendant No.4.

6) Evidence was given by both the sides. Defendant No.1 examined himself. He gave evidence as per his aforesaid contentions. He deposed that it is his self acquired property. However, on the basis vital admission given by him and other circumstances, the first appellate Court held that Survey No.255 is also the joint Hindu family property. It appears that when evidence was given by the defendant No.1 till that time no record was produced to show that the property was actually given to defendant No.4 by defendant No.1. No other defence was taken by defendant No.1 also in the written statement in the trial Court.

7) During pendency of the appeal filed by Haribhau, both defendant Nos.1 and 4 died. Their legal representatives, defendant Nos.2 to 4 and also plaintiff and defendant No.5 were already on the record. Defendant Nos.1 and 4 were represented by the counsel in the trial Court and also in the District Court. Same counsel represented defendant Nos.2 and 3. In spite of this circumstance, no amendment was made in the written statement by these defendants and nothing was informed to the Court about the so called transfer of the property by defendant No.1 in favour of defendant No.4 and then sale of the property by defendant No.4 to the present applicant. First Appeal came to be filed on 14-10-2009. The present proceeding came to be filed on 18-3-2014, after the expiry of the period fixed to file second appeal. Thus after considering the present application this Court again will be required to consider as to whether there is sufficient cause to the present applicant and that delay can be condoned. Delay of more than 3 and half years is caused. Legal representatives of defendant Nos.1 and 4 have not challenged the decision of the first appellate Court.

8) It is the case of the present applicant that Survey No.255 was given under will of 1971 to Venubai by defendant No.1. He has contended that in Regular Civil Suit No.577/1984 filed by Venubai this property was given to Venubai by defendant No.1 and so she had become absolute owner of this property in the year 1984 itself. It is contended that under registered sale deed dated 25-1-1994 Venubai sold Survey No.255 to him and so he is entitled to challenge the decision of the District Court.

9) Contention made by the applicant shows that when First Appeal No.230/1984 was pending, which was continuation of the suit, another suit was filed without informing to the District Court like Regular Civil Suit No.533/1984 by the defendant No.4 against defendant No.1. Compromise decree is on the record. It shows that the suit was filed on 11-12-1984 and the compromise decree was prepared on 15-12-1984. Thus, suit summons was not issued and it was collusive suit. It was only for injunction. Venubai had contended that Survey No.255 was given by the defendant No.1 to her by way of maintenance. She had contended that defendant No.1 was

obstructing her possession over Survey No.255 and so the suit was required to be filed. There was no record to show that land Survey No.255 was given by the defendant No.1 to defendant No.4 for maintenance. Defendant No.1 admitted the claim made by defendant No.4 and decree was prepared accordingly. It needs to be kept in mind that no sale deed was made by defendant No.1 in favour of defendant No.4. Only due to compromise decree made in Suit No.533/1984, Venubai could not have become owner of the suit property as no title was transferred to her. Further Regular Civil Appeal No.230/1984 was pending. All these acts were done during pendency of the appeal by defendant No.4 and defendant No.1. Whatever they had done was certainly subject to the decision of Regular Civil Appeal No.230/1984.

10) Even if for a moment it is accepted that the defendant No.1 had intention to give Survey No.255 to defendant No.4, such contention cannot help the present applicant in any way for the following reasons :

(i) If it was absolute property of defendant No.1 he could not have transferred the property to defendant No.4 unless there was compliance of the provisions of the Transfer of Property Act and the Indian Registration Act. No such document was executed, no stamp duty was paid and there was no registration of the transaction. Such compromise could not have transferred the title from defendant No.1 to defendant No.4 in absence of any other record. It needs to be kept in mind that if there was transfer of property the so called will had become inoperative.

(ii) The partition suit was pending (in appeal) and so even if there was transfer of any kind, such transfer would have been subject to the decision of the partition suit. Neither defendant No.1 nor defendant No.4 informed to the District Court about the aforesaid circumstance. No permission was obtained from the District Court as required by provision of section 52 of the Transfer of Property Act.

(iii) The legal representatives of defendant No.1 Venubai continued to prosecute the matter like in the past and present applicant did not come on the record even after the death of defendant No.4. It needs to be presumed that whatever rights, interests the present applicant wants to get on the basis of sale deed of defendant No.4 were subject to decision of the partition suit and he cannot get anything more than what Venubai could have achieved in the partition suit.

(iv) Contention of the present applicant that he had no knowledge about the pendency of the litigation is totally incorrect and unacceptable. In respect of the transaction it is not his case that he had made inquiry of any kind or notice was published before purchasing the property. The circumstances show that he cannot be treated as bona fide purchaser. His contention and the record show that in the proceeding filed for permission of sale by Venubai before the authority created under the Inam Abolition Act, objection was raised by the plaintiff Haribhau and after the objection the order was made. There is record to show that revenue proceeding was filed for mutation after the

death of defendant No.1 and in that proceeding present applicant had appeared and he had filed say. That was the proceeding of the year 2000. The reply filed, copy of which is on the record, shows that he had knowledge of the litigation like suit filed by Haribhau for partition bearing RCS No.37/1978. Thus from prior to the year 2000 present applicant had the knowledge about the litigation. In any case there was no conveyance deed executed in favour of Venubai by defendant No.1 and so no title had passed to Venubai and at least to that extent inquiry ought to have been made by the present applicant.

11) The learned counsel for the applicant placed reliance on following reported cases :-

- (1) **(2012) 2 SCC 738 (A. Nawab John v. V.N. Subramaniam)**; and,
- (2) **(2013) 5 SCC 397 (Thomson Press (India) Ltd. v. Nanak Builders & Investors (P) Ltd.**

The facts of the reported cases were different. In the present matter the applicant knew the pendency of the litigation but he preferred to remain away from the Court and it is defendant Nos.1 and 4 who defended the matter

till the end. The finding given by the District Court is a finding of fact and it is to the effect that Survey No.255 is the joint Hindu family property of the plaintiff and the plaintiff is entitled to get share in this property also. It is already observed that no title has passed under the sale deed executed in 1994 in favour of the present applicant. Even if the will is considered at this stage though it was not produced and proved, only the share of the defendant No.1 could have been given to Venubai by defendant No.1 under the will. The opportunity to prove the will was lost by Venubai. The present applicant has also lost that opportunity. In view of the aforesaid circumstances, the property was sold prior to the death of defendant No.1 no title could have been passed by the defendant No.4 in favour of the present applicant.

12) The discussion made shows that the present applicant intentionally did not come forward to join the litigation in the first appeal even when he had full knowledge of the litigation. Even after the decision, he kept mum for about 3 and half years. There is certified copy of the judgment delivered by the trial Court showing

that it was collected in the year 2000 itself by the present applicant. It cannot be said that he did not keep follow up after the decision of the suit. Scope of the second appeal is limited and that limitation was applicable even as against the defendant Nos.1 and 4. On the basis of the vital admission given by the defendant No.1 in the evidence and the fact that there was sufficient nucleus and the property was acquired when the parties were living in joint Hindu family, the first appellate Court has held that Survey No.255 is also joint Hindu family property. It is already observed that it is a finding of question of fact. Delay of more than 3 and half years is caused in filing the proceeding by the present applicant. On this point learned counsel for the respondent, original plaintiff, placed reliance on some reported cases like -

- (i) **2016 (1) ALL MR 539 (Sunder Kishanrao Jadhav v. Shampatrao Mariba Nisrgandha);**
- (ii) **2010 (4) ALL MR 529 (Qamber Jeevaji v. State of Maharashtra);**
- (iii) **(2016) 2 ALL MR 235 (Vasant Vithal Gawand v. Shantram Tukaram Gawand);**
- (iv) **2016 (2) ALL MR 441 (Mountain Villas v. Deputy Registrar, Cooperative Societies).**

There is no dispute over the propositions made by this Court in the aforesaid reported cases. The submission made for the present applicant that he steps in the shoes of the vendor can be accepted but there are aforesaid circumstances against him. Due to the delay caused by the present applicant and his conduct already discussed it can be said that the applicant approached late to create complications and to protract handing over of the possession of the suit property. This Court holds that permission cannot be given to file second appeal to the present applicant.

13) In the result, civil application stands dismissed. Other pending civil applications also stand dismissed.

Sd/-
(T.V. NALAWADE, J.)

rs1