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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.387 OF 2015

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| 1. Taramati w/o Kalyan Hajare
Age - 53 years, Occ - Agriculture
R/o Kodgaon, Taluka - Paranda,
District - Osmanabad
At present Sakat (Khurda),
Taluka - Paranda, District - Osmanabad | APPELLANTS |
| | |
| 2. Dattatraya s/o Parmeshwar Deokar,
Age - 25 years, Occ - Agriculture
R/o as above | |
| 3. Ranjit s/o Ankush Deokar,
Age - 24 years, Occ - Agriculture
R/o As above | |

VERSUS

- | | |
|---|-------------|
| 1. Allauddin s/o Shahabuddin Shaikh
Age - 80 years, Occ - Agriculture
R/o Sakat (Khurda), Taluka-Paranda
District- Osmanabad | RESPONDENTS |
| | |
| 2. Habib s/o Allauddin Shaikh,
Age - 49 years, Occ - Agriculture
R/o as above | |

.....
Mr. Anant R. Deokate, Advocate for the appellants
Mr. S. S. Choudhari, Advocate for respondent No.1
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[CORAM : SUNIL P. DESHMUKH, J.]

DATE : 9th FEBRUARY, 2016

ORAL JUDGMENT :

1. Heard learned advocates for the parties.

2. This is second appeal of defendants No. 2 to 4, aggrieved by concurrent decrees of two courts, one by the trial court and the other by the appellate court.

3. Respondent No. 1 is original plaintiff and respondent No. 2 is original defendant No. 1. Parties hereinafter would be referred to by their status in special civil suit No.147 of 1997.

4. Plaintiff instituted the suit for declaration of title, injunction and alternatively for possession in respect of agricultural land bearing survey No. 236 *admeasuring* 2 hectare 24 *Are* situated at village Sakat (kh) Taluka-Paranda, District-Osmanabad and further declaration that sale deed of suit property executed by defendant No. 1 in favour of defendants No. 2 to 4 on 29th October, 1996 to be null and void. Plaintiff and defendant No. 1 are father and son *inter-se*. Plaintiff is an illiterate person. While upon death of mother of defendant No.1, the plaintiff was about to marry on second occasion, it appears that the property came to be recorded in the name of defendant No.1 under guardianship of his parental aunt Mumtajbi. According to plaintiff, this was although recorded as on partition, the plaintiff never intended to part with ownership and possession of suit property. It was recorded in good faith in order to give sense of

security for better life to defendant No.1.

5. On attaining majority, according to plaintiff, defendant No.1 got addicted to vices and purported to part with the property under registered sale deed referred to hereinabove in favour of defendants No. 2 to 4. Plaintiff contends that his ownership over the property had never been lost in fact and in law, though revenue record depicts possession of defendant No.1 after 1972, the same had been allowed in good faith. As the property was purportedly sold under registered sale deed, cause of action had arisen for him to institute suit for declaration and injunction.

6. Defendant No. 1 appears to have not filed written statement. Defendants No. 2 to 4 filed written statement opposing plaintiff's claim. It is their contention that in 1973 plaintiff had gifted the property to defendant No. 1 orally under a document known as *Hiba*. At the time of *Hiba*, defendant No.1 was minor and it was under that circumstance Mumtajbi – paternal aunt of defendant No.1 had accepted possession of suit property on behalf of minor and was cultivating it on his behalf. Defendant No. 1, on attaining majority, cultivated suit property till it was sold to defendants No. 2 to 4 under sale deed dated

29th October, 1996. Defendants No. 2 to 4 purchased suit property from defendant No. 1 for a huge consideration of Rs.2,50,000/-. It is defendants No. 2 to 4 who are in possession of the property and the plaintiff is not at all in possession. Defendants have further contended that defendant No. 1 had been in continuous possession as owner since 1973 and no objection had ever been raised by plaintiff during this period from 1973 to 1996, and therefore, defendant No. 1 had become owner by adverse possession and accordingly had sold suit land to defendants No. 2 to 4.

7. Having regard to the pleadings of the parties, the trial court had framed issues with reference to ownership of the property by plaintiff, about nullity of sale deed dated 29th October, 1996 and it being void, whether *Hiba* having been proved by defendant No.2 and defendant No.1 having acquired ownership by adverse possession. The trial court found claim to ownership of the plaintiff to be proper, however, found that the plaintiff cannot be said to be in possession and as such, injunction had not been granted. The trial court further found that the share of property having been given to defendant No.1 under *Hiba* has not been proved by defendant No.2, nor it can be said that he had acquired ownership by adverse possession. The

trial court, as such, declared the plaintiff to be owner of 2 hectare, 24 Are land referred to in the plaint and further declared that sale deed dated 29th October, 1996 to be null and void and defendants No.2 to 4 were directed to hand over possession of the suit land to the plaintiff.

8. Defendants No.2 to 4 as such, were before the appellate court in regular civil appeal No.453 of 2014 (old No.76 of 2010). The appellate court had framed points for determination similar to the issues as have been referred to hereinabove and concurred with the findings given by the trial court.

9. Mr. A. R. Deokate, learned advocate appearing for the defendants with quite some vehemence submits that having regard to the undisputed position about revenue entry in favour of defendant No.1 having been recorded way back in 1973 and since then the property having been continuously shown in the name of defendant No.1 and even after consolidation said position continued. For over 22 to 23 years it was defendant No.1 who had been recorded as owner of the suit property. In such a case, the property came to be purchased by the present appellants - defendants No.2 to 4. He further submits that there is sufficient indication of that the action under which the revenue

record was got mutated in 1973 was *Hiba*. He submits that the parties - rather the plaintiff and defendant No.1 are *muslims* and defendant No.1 had been minor in 1973 and further that it was on his own accord an application had been moved to revenue authorities by the plaintiff to mutate the property in the name of defendant No.1. He submits that defendant No.1 being minor, it was his parental aunt Mumtajbi who had accepted possession on behalf of minor defendant No.1. Thus, the position clearly refers to that there had been offer, acceptance and delivery of possession. All the three ingredients required for a valid *Hiba*, as such had been present. He submits that the application, in the circumstances should have to be viewed from this angle. He submits that the revenue record continuously having been shown in the name of defendant No.1 for over a period of twelve years, without any disturbance and with the knowledge of the plaintiff, with the passage of time and duration of twelve years, the title of the property had vested in defendant No.1 and as such, he became owner by adverse possession and accordingly dealt with the property. He further submits that the plaintiff claims to be in possession of the property, however, on facts and in evidence, the plaintiff has not only failed to establish his possession over the suit property but it has clearly emerged that it is defendant

No.1 who continued to be in possession of the property. Having regard to such claim, the claim of retaining the suit property will have also to be viewed accordingly. He, therefore submits that the two courts below have gone by technicalities rather than the undisputed position emerging from the evidence on record.

10. In order to buttress his submission that it was under *Hiba* the property came to be recorded in favour of defendant No.1, he purports to seek support to said proposition from a three judges bench of the Supreme Court in the case of “*Abdul Rahim and Others Vs. Sk. Abdul Zabbar*” reported in 2009 (5) *Mh.L.J.* 701. However, on reading the same, said judgment appears to have been rendered on the facts, which are widely apart from the ones involved in present case. There, the case itself had been based on a registered gift deed executed and it was with reference to the same, the decision had been given by the Supreme Court. In stark contrast, in present matter, it is defendants No.2 to 4 who have developed the theory of *Hiba* and as such, it was incumbent on them to prove that *Hiba* in fact had been executed by the plaintiff.

11. In continuation of aforesaid, although defendants No.2 to 4 contend that there was *Hiba*, no evidence worth credence had at

all been adduced on behalf of defendants No.2 to 4 save and except bare statements. Though Mr. Anant Deokate, learned advocate refers to that it was not possible to bring direct evidence in this respect, since defendant No.1 had been continuously absent in the matter despite being served and that a proper inference can be drawn from the same. Yet, it is defendants No.2 to 4 who have claimed that there was *Hiba* and as such, it was absolutely necessary for them to bring on record some credible material, especially when paternal aunt who was supposed to be guardian of minor defendant No.1 had been alive. No such efforts appear to have been made by defendants No.2 to 4. That apart, the defendants having not been able to overturn legal position, under Muslim law that during lifetime of father that the person by an act, which is not registered one, in respect of immovable property can have title being transferred. It is by now well settled position of law that mere revenue entries are not sufficient to confer title to a party.

12. Thus, having regard to aforesaid, consideration by courts hitherto, the title being held by the plaintiff in law can hardly be faulted. The findings thereon as such, appear to have been given by the courts below. Once title is held in favour of the person, the question about his entitlement to possession will have to be

considered. In the present case, it is the father who had given the son possession the suit property in order to secure better life since he was about to get married on second occasion. It was under his authority, the property had been put in possession of the guardian, Mumtazbi. The possession which continued with defendant No.1 who does not appear to have held the property with hostility to title of father, claim of adverse possession in the absence of a clear case, can hardly be sustained. Under the circumstances, it cannot be said that on the date of the sale deed executed in favour of defendants No.2 to 4 by defendant No.1, the defendant No.1 had any title to the property. The transfer of title under the registered sale deed can hardly be said to have been derived by defendants No.2 to 4 the vendees. It is well known principle in law that no better title can be transferred by the transferer to the transferee than the one held by him.

13. Having regard to aforesaid, since defendant No.1 cannot be said to have held any legal title to the suit property, sale deed in favour of defendants No.2 to 4 by him would hardly be able to give any title to defendants No.2 to 4.

14. The situation as emerges that subsequently question of law as sought to be raised by the appellants, as referred to in

grounds No.1, 2 and 3 under ground No.11, of the memorandum of appeal, does not carry any weight. Second appeal, as such, fails and stands dismissed.

15. In view of disposal of second appeal, civil application No.9487 of 2015 does not survive and stands disposed of.

[SUNIL P. DESHMUKH, J.]

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