

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.

SECOND APPEAL NO. 15 OF 2016
WITH
CIVIL APPLICATION NO. 16298 OF 2015

1. Bhagirathi Arun Mhetre (since deceased),
2. Ramling Parshwanath Bubane,
Age 65 years, occup. Agri. , R/o Ter,
Tq. and Dist. Osmanabad
3. Bharat Parshwanath Bubane,
Age 61 years, occup. Agri., r/o as above,
4. Balasaheb Parvshwanath Bubane, Appellants/Orig.
Age 55 years, occup. Agri. & service, Defendants
R/o as above

vs

Baban s/o Bhagwan Fund, Respondent/
Age 55 years, occup. Agril., Orig. Plaintiff
R/o Ter, Tq. & Dist. Osmanabad

Mrs M. A. Kulkarni, Advocate for applicant
Mr. M. B. Kolpe, Advocate for respondent

CORAM : SUNIL P. DESHMUKH, J.
11TH JANUARY, 2016

ORAL JUDGMENT:

1. Heard learned counsel Mrs. Kulkarni appearing on behalf of appellants and Mr. Kolpe learned counsel appearing on behalf of respondent.

2. The principal thrust with which submissions are being advanced on behalf of the appellants are that, the appellate court while allowing regular civil appeal no. 107 of 2009 under order

dated 13-08-2015 had committed grave error in not framing proper points for determination while dealing with and reversing the findings given by the trial court on the issues while decreeing the suit bearing regular civil suit no. 26 of 2005 filed by present appellant no.1 Bhagirathibai by judgment and order dated 02-05-2009.

3. The facts in brief are that one Parswanath Mhetre was the common ancestor of Bhagirathi, Ramling, Bharat, Balasaheb and Adinath. It is not in dispute that surveys no. 79/3/1 and 79/4/1 are the ancestral properties left behind by Parshwanath and his wife Rukminibai. Ramling is the eldest in the family. In 1990, to be precise on 05-04-1990, Ramling and Adinath sold 2 hectare, 74 Aar land in favour of defendant no. 4 Baban Fund-present respondent. Possession had been delivered to purchaser-defendant no. 4 and mutation accordingly had taken place in revenue record.

4. Subsequently, it appears that there was a partition among male members left by deceased Parshwanath i.e. Ramling, Bharat and Balasaheb since by then Adinath had died leaving behind no issue. This partition had taken place around 1998 in which 2 hectare, 34 Aar land was given in the share of Bharat and Balasaheb. Mutation accordingly had taken place and continued without any interruption. The property was being enjoyed by persons in possession peaceably and without disturbance.

5. In 2005, however, Bhagirathibai who is daughter of Parshwanath and sister of Ramling, Bharat and Balasaheb, had instituted suit for partition and separate possession left behind by deceased Parshwanath referred to hereinbefore claiming that the sale deed executed by Ramling and Adinath in favour of defendant no.4 Baban is not binding on her.

6. Said suit proceeded and the trial court decreed the same, declaring Bhagirathi to be entitled to 1/10th share and in possession of suit property, holding that the sale deed executed by Ramling and Adinath in respect of 2 hectare, 34 aar in favour of defendant no. 4 is not legal and binding on the plaintiff and that the plaintiff be paid mesne profit at the rate of ₹ 2,000/- per annum from the date of the suit till she gets possession of her independent share.

7. The matter as such was taken in appeal by defendant no.4 – purchaser. The appellate court allowed the appeal and set aside the judgment and decree of the trial court. While considering the appeal, the court had framed point for determination viz. whether the sale deed dated 05-04-1990 in respect of land ad-measuring 2 hectare 74 aar out of gut no. 172 executed by defendant no. 1 Ramling and deceased brother Aadinath in favour of defendant no. 4 is *void-ab-initio* and answered the same in the negative.

8. While deciding the appeal, the appellate court found that the plaintiff Bhagirathibai during pendency of appeal, died and had not left behind any issue.

9. The crucial point as such involved and considered was whether the sale deed executed by Ramling and deceased Aadinath was for legal necessity or not. The court had taken into account the aspect that it is for the purchaser to give evidence in this respect. However on closer scrutiny, the appellate court found that though defendant no. 4-purchaser had not entered into witness box, there is sufficient evidence on record indicating that the property was being sold for medical treatment to Aadinath who then was suffering from cancer. In the face of this, appeal came to be allowed.

10. Mrs. Kulkarni, learned counsel appearing for the appellants vehemently submits that the appellate court has committed grave error by not framing proper points. It is contended that while reversing judgment of the trial court, it was incumbent for appellate court to have visited reasons given by trial court and discuss the same by giving cogent reasons for its reversal. In the absence of the same, judgment rendered by the appellate is claimed to be improper and perverse.

11. The facts not in dispute and which are referred to above are that Parshwanath left behind four sons and a daughter and the

fact that property has been dealt with by Ramling for medical treatment to deceased brother Aadinath having come on record through plaintiff Bhagirathibai herself, the question of discharge of burden of proving legal necessity by defendant no. 4 stands relegated to background. That apart, partition is stated to have taken place in 1998 among the brothers and accordingly mutation has also taken place under entry no. 364. Bhagirathibai who was married even before 1990 had not objected to both the events till 2005 i.e. sale deed in favour of defendant no. 4 in 1990 and enjoyment of the property by said purchaser as owner in possession without interruption nor had her brothers objected to such enjoyment by purchaser-defendant no.4. In such a case, the period for claiming possession of the property sold to defendant no. 4 had been over with efflux of twelve years. In the face of above, the family members, including plaintiff Bhagirathibai could not have staked claim for possession of the property sold and as such, sold portion could not have formed part of property under partition at the instance of the plaintiff.

12. Further, with the death of plaintiff Bhagirathibai the cause of action in the given circumstances can be deemed to have subsided. Ramling himself had not questioned legality and correctness either of alienation by him in defendant no. 4's favour or partition which had taken place in 1998 as depicted under mutation entry no. 364.

13. In the circumstances, defendant no. 4 and property purchased by him would not be affected by the litigation at the behest of plaintiff Bhagirathibai, and Ramling who had not disputed the partition would stand estopped in the circumstances from taking benefit of the decree passed by the trial court.

14. There is no suggestion that Bhagirathibai had ever intended to claim portion of the property not covered under the sale deed.

15. In view of aforesaid, second appeal may not have any legal and practical efficacy and does not give rise to any substantial question of law. Second appeal stands dismissed as such.

16. Civil application does not survive and stands disposed of as such.

SUNIL P. DESHMUKH, J.

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