

Sequeira

***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION***

***SECOND APPEAL NO. 159 OF 2014
Along with
CIVIL APPLICATION NO. 388 of 2014***

Mr.Subhash Dnyanoba Kanchan

Age: Major, Occ.: Agriculturist & ors. ... Appellants/Applicants
V/s

Shri Baban Ravaji Borate

Age: 69 Years, Occ. Agriculturist & anr. ... Respondents

Mr.A.V.Anturkar, Senior advocate a/w Mr.Tanaji Mhatugade i/by
Mr.S.B.Deshmukh, for Appellants/Applicants.

Mr.N.V.Walawalkar, Senior advocate a/w Mr.Rahul Kate for Respondent
No.1.

***Coram: N.M. Jamdar, J.
Monday, 2 May 2016***

ORAL ORDER:

By this Appeal, the Appellants challenge the judgment and order dated 21 February 2014 passed by the District Judge, Baramati and the Judgment and Decree dated 21 March 2013 passed by the learned Civil Judge, Senior Division, Baramati wherein the Suit filed by the Respondent No.1 was decreed and the Appeal filed by the Appellants was dismissed.

2. The suit property is a piece of land as described in the plaint, within the limits of village Nandur. A Civil Suit No.49 of 2007 was filed by the Respondent No.1-Plaintiff for declaration and perpetual injunction against

the Appellants. It was the contention of the Respondent No.1 that the suit properties were of his father Raoji, who expired on 25 August 1949. Thereafter his wife Muktabai survived him. Raoji and Muktabai had two children i.e. Respondent No.1 and his sister Sarubai. It was contended that Defendant No.7 – the husband of Sarubai was called to manage the properties since the Respondent No.1-Plaintiff was a minor. Defendant No.7 taking advantage of this position created hollow sale deeds in favour of Defendant Nos.8 and 9. It was contended that the Defendant Nos.7, 12 to 15 did not have any rights in the suit property and could not have sold the suit property. Accordingly, the declaration was sought that Sale deed executed by Defendant No.7, 12 to 15 in favour of Defendant Nos.8 and 9 and the sale deed executed by Defendant Nos.8 and 9 thereafter in favour of Defendant Nos.10 and 11, be declared as hollow deeds and not binding on him.

3. Written statement was filed by Defendant Nos.7, 12 to 15 wherein it was contended that since the Respondent No.1 was minor, Defendant No.7 looked after the property. The mother of Respondent No.1 felt that the Respondent No.1 should be given due credit for maintaining the property and therefore created ownership rights in favour of Defendant No.7 and that is how the Defendant No.7 had a right in the property. On these grounds, the Suit was defended by Defendant No.7. The other Defendants also filed their written statements and resisted the Suit.

4. The learned civil Judge framed Issues as to whether the Respondent No.1 proved that he is owner and in possession of the suit property and whether Sale deeds in question are illegal and not binding. The learned

Civil Judge, after considering the evidence on record answered the issues in affirmative and decreed the suit by the Judgment and Order dated 21 March 2013. The learned Civil Judge declared that Respondent No.1 is the owner of the suit property and in possession and Sale deeds are illegal. The Appeal filed by the Appellants, bearing Regular Civil Appeal No.61 of 2013, was dismissed by the learned District Judge by order dated 21 February 2014. Thereafter the present Second Appeal is filed.

5. Mr.Anturkar, the learned senior advocate for the Appellants submitted that, even assuming the Sale deeds are not binding on the heirs of Respondent No.1, an injunction cannot be granted against the Appellants whose predecessors connect their title to Sarubai and Sarubai had rights in the property. He submitted that Muktabai who is the mother of Respondent No.1 and Sarubai died on 7 November 1977 which is after the year 1937 and therefore she had acquired rights in the property. He submitted that, consequently, the Sale deed executed by Sarubai, which is the case of Respondent No.1 himself, cannot be stated to be void and at the most not binding on the share of Respondent No.1. He submitted that even though the case made out by the Appellants that the Appellants have right to the entire property it can be restricted to the share of Sarubai and that being the position, no injunction could have been granted against the Appellants-co-owners in view of the decision of the Apex Court in *Tanushree Basu and others v/s Ishani Prasad Basu and others*¹. He submitted that the question raised is a pure question of law on the basis of admitted factual position and therefore, can be permitted to be agitated in the Second Appeal.

¹ (2008) 4 SCC 791.

6. Mr.Walawalkar, the learned Senior advocate for the Respondents submitted that the above argument of the Appellants was never made earlier and only in the course today. He submitted that Defendant No.7 on oath has deposed that Sarubai had no rights in the property and the Appellants have made no inquiries as to how Defendant No.7 had acquired title to the property. He submitted that even assuming the Appellants have purchased their title from Sarubai, the principle laid down in the case of *Tanushree* (supra) cannot be made applicable and the remedy of the Appellants would be to institute a Suit for partition as they are strangers to the property.

7. The present Appeal is filed by Defendant Nos.8 and 9. They have sought to base their right on a Sale deed stated to be executed by Defendant No.7 and others on 13 June 1978. Subsequently, three more sale deed have been executed on 29 April 1985, on 13 February 2006 and 29 March 2010, which are during the pendency of the proceedings. As regards the questions of law raised by Mr.Anturkar admittedly, it was never urged before the Courts below. A completely new theory is being put up by the Appellants. Both the Courts have declared the Sale deed as not binding on the share of the Respondent No.1. Mr.Anturkar has also submitted that for the purpose of this sole question of law this position will have to be accepted, however, title of Sarubai needs to be considered. In that backdrop, the deposition of the Appellants and the cross-examination is material. The Appellant-Defendant No.8 has admitted that, before executing the Sale deed, he never inquired from Defendant No.7 – Rajaram Tamhane as to how he acquired title to the property. He asked for

no papers, no documents were shown to him, he never made any inquiries in the Revenue office. He did not check any of the revenue entries. Thus, the Appellant No.8 did not bother to ascertain whether the Defendant No.7 had any title to the property. Defendant No.7 in his deposition has clearly admitted that Sarubai had no connection to the property once Respondent no.1 had become major. He admitted that, after mother of Respondent No.1 expired, Sarubai did not take any objection for change of name or for annexing the name of Respondent No.1 in the property record. He has admitted that, he was called to manage the properties when Respondent No.1 was a minor. Mr.Walawalkar rightly submitted that had this ground as urged by Mr.Anturkar today was taken in the beginning of litigation, the Respondent No.1 would have demonstrated that Sarubai had relinquished all her rights in favour of Respondent no.1 in the suit property. Allowing the Appellants to take up this ground for the first time in Appeal, will gravely prejudice the Respondent No.1.

8. Apart from this position, the other ground raised is regarding grant of injunction. Both the Courts have concurrently held that Respondent No.1 is in possession of the property. The reliance on the decision of *Tanushree* (supra) by Mr.Anturkar is misplaced. This decision is in respect of coparcener and the suit therein was filed for partition. In that connection, the Apex Court held that no injunction can be granted in favour of one co-sharer against another in a joint family property. In the present case, no such grievance is made by Defendant No.7. When Defendant No.7 made his stand clear by filing the written statement and gave admissions to which none of the Appellants objected on the ground that Sarubai had independent right in the property. Therefore, since the

Appellants admittedly are strangers to the property, at the most had a remedy of enforcing partition for demarcation of shares, which has not been done.

9. The Respondent No.1 being in possession, is entitled to protect the property from strangers and there is no error committed by both Courts in granting the order of injunction and declarations as regards Sale deeds. No other questions of law were raised. In fact, all other argument made in appeal memo were expressly given up. The argument that is urged does not involve any substantial question of law. The Second Appeal is accordingly dismissed.

10. Civil Application stands disposed of.

11. The learned counsel for the Appellants seeks continuation of the order dated 11 March 2014 passed in this Appeal. The same is continued for a period of ten weeks from today.

(N. M. Jamdar, J.)