

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.476 OF 2016
ALONGWITH
CIVIL APPLICATION NO.971 OF 2016

Shivaji Nivruti Patil & Ors.

..... Appellants

VERSUS

Anandrao Baburao Patil & Ors.

..... Respondents

Mr.Umesh R. Mankapure for the Appellants.

Mr.R.A.Thorat, Senior Advocate, i/b. Mr.P.J.Thorat for the Respondents.

CORAM : R.D. DHANUKA, J.

DATE : 14th OCTOBER, 2016

P.C.

By this second appeal filed under section 100 of the Code of Civil Procedure, 1908, the appellants (original plaintiffs) have impugned the judgment and decree dated 10th February, 2010 passed by the learned District Judge-II, Islampur dismissing the Regular Civil Appeal No.28 of 2012 filed by the appellants. In the said appeal the appellants had impugned the judgment and decree dated 5th January, 2012 passed by the 6th Joint Civil Judge, Senior Division, Islampur, District Sangli in Regular Civil Suit No.319 of 2003 filed by the plaintiffs inter alia praying for perpetual and mandatory injunction and allowing the counter claim filed by the defendant nos. 1,2, 6 and 11.

2. It was the case of the plaintiffs that the suit property was purchased by the deceased Baburao and his brother Nivrutti, the father of plaintiff nos. 1 to 3 and husband of plaintiff no.4 who had been adopted by step mother of plaintiff. It was the case of the plaintiffs that the suit property was jointly cultivated by the family

of the Nivrutti and Baburao. It was also the case of the plaintiffs that the said property was jointly constructed by the said Nivrutti and Baburao.

3. The plaintiffs filed a suit for perpetual injunction against the defendants. The defendants filed counter claim through the legal heirs of the representatives of Baburao claiming exclusive right, title and interest in the suit property. The learned trial judge framed six issues for determination. Both the parties led documentary as well as oral evidence before the learned trial judge.

4. The learned trial judge has rendered a finding that the plaintiffs had proved possession in respect of the part of the property and that the plaintiffs had failed to prove the title of Nivrutti in respect of the suit property.

5. The learned trial judge dismissed the suit for perpetual injunction filed by the plaintiffs and allowed the counter claim filed by the defendant nos. 1, 2, 6 and 11. The learned trial judge directed the plaintiffs to handover the possession of the portion admeasuring 12.55 mtrs. in length towards east-west and 4.6 mtrs. in widths towards north-south of the suit property to defendant nos. 1, 2, 6 and 11 within three months from the date of the judgment. Being aggrieved by the said judgment and decree, the original plaintiffs preferred appeal (28 of 2012) before the learned District Judge, Islampur.

6. The learned District Judge formulated three points for determination. The first appellate court independently considered the entire evidence and pleadings once again and has held that the plaintiffs had failed to prove that the suit property was jointly purchased by Nivrutti and Baburao. It is held by the first appellate court that the suit property is self acquired property of Baburao. The defendants

were permitted by Nivrutti by way of permissive user to occupy the suit property and did not have any right, title or interest of any nature whatsoever in the suit property.

7. Being aggrieved by the said judgment and decree passed by the first appellate court, the plaintiffs have preferred this second appeal under section 100 of the Code of Civil Procedure.

8. Mr.Mankapure, learned counsel appearing for the plaintiffs invited my attention to some of the averments made in the plaint and also invited my attention to some of the sale deeds entered into between Nivrutti and Baburao after the sale deed of 1949 was entered into in the name of Baburao. He submits that inspite of the adoption of Nivrutti by his step mother, the Nivrutti and Baburao continued to remain together as real brother. He submits that several properties were jointly purchased by the said Nivrutti and Baburao which itself would indicate that the suit property was also jointly purchased by them. He submits that though the plaintiffs through their witnesses had sufficiently proved before the learned trial judge that the suit property was jointly purchased by Nivrutti and Baburao and the said Nivrutti had also shared the amounts incurred in construction of the immoveable properties thereon, the trial court as well as the first appellate court have not considered the oral evidence in right perspective.

9. It is submitted by the learned counsel for the plaintiffs that though the first appellate court considered the subsequent sale deeds showing the joint purchase of various properties by Nivrutti and Baburao, the first appellate court however rendered a perverse finding that insofar as the suit property is concerned, the same was self acquired property of Baburao.

10. Mr.Thorat, learned senior counsel for the defendants on the other hand placed reliance on the findings rendered by the two courts below. He submits that admittedly the suit filed by the plaintiffs was simplicitor for perpetual injunction and not for declaration of the right, title and interest in the suit property.

11. It is submitted by the learned senior counsel that the sale deeds relied upon by the plaintiffs before first appellate court for the first time were admittedly in respect of transactions carried out much after 1949 when the suit property was solely acquired by Baburao. He submits that the plaintiffs failed to establish both before the courts below the nexus of the purchase of the suit property by Baburao from the joint family fund.

12. It is submitted that both the courts have considered the oral and documentary evidence and more particularly the admissions of the witnesses examined by the plaintiffs who admitted in cross examination that the suit property was purchased by Baburao and not Nivrutti. He submits that the witnesses examined by the plaintiffs also failed to prove that the construction which was carried out in the suit property in the year 1974 was jointly carried out by Nivrutti and Baburao. He submits that the findings of fact rendered by two courts are concurrent and not being perverse cannot be interfered by this court under section 100 of the Code of Civil Procedure, 1908.

13. I have perused the record with the assistance of the learned counsel for the parties. The learned trial judge has rightly appreciated the oral and documentary evidence and have placed reliance on various admissions of the witnesses examined by the plaintiffs who categorically admitted that the suit property was

purchased by Baburao and not by Nivrutti. None of the witnesses examined by the plaintiffs could prove the case of the plaintiffs that the suit property was jointly purchased. It is not in dispute that in the suit filed by the legal heirs of Nivrutti, the plaintiffs had prayed for perpetual injunction simplicitor and no relief for declaration of their alleged right, title and interest in the suit property was prayed. In view of the counter claims filed by the defendants praying for right, title and interest in the suit property, both the courts have considered the said issue at great length and after considering the documentary and oral evidence, rightly rendered findings on the title and interest of the Baburao in the suit property.

14. In my view even if the plaintiffs were able to demonstrate before the first appellate court that some of the properties were jointly acquired by Nivrutti with Baburao much later after 1949 when the suit property was purchased in the name of Baburao, the same would not indicate that the suit property which was purchased in the year 1949 in the name of Baburao also was jointly purchased. The plaintiffs also failed to prove that the said property purchased in the year 1949 was purchased out of the funds of the joint family property. Nivrutti was already given in adoption to his step mother in the year 1932.

15. In my view the findings of fact rendered by the two courts below are concurrent findings and being not perverse cannot be interfered with by this court under section 100 of the Code of Civil Procedure, 1908. Both the courts have dealt with all these issues at great length. No infirmity can be found in the impugned judgments and decrees passed by two courts below. The appeal is devoid of merits. In my view no substantial questions of law has arisen in this matter. Second appeal is accordingly dismissed. No order as to costs.

16. In view of dismissal of the second appeal, civil application does not survive and is accordingly dismissed.

(R.D.DHANUKA, J)