

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

***SECOND APPEAL NO. 358 OF 2013
ALONG WITH
CIVIL APPLICATION NO. 948 OF 2013***

1. Shivaji Abasaheb Patil
2. Babasaheb abaso Patil
(since deceased through Lrs.)
2A. Smt.Jayashri Babasaheb Patil
2B. Mrunali Vijayrao Patil
3. Mr.Ashok Abasaheb Patil,
Appellant No.2B R/at Tandulwadi,
Tal. Walwa, Dist. Sangli;

All other appellants R/at Pokhale,
Tal. Panhala, Dist. Kolhapur.

... Appellants/applicants.

v/s

1 Bandu Shankar Naik
(since deceased through Lrs)
1A. Smt.Savitri Bandu Naik & ors.

... Respondents

Mr.S.S.Patwardhan for the appellants/applicants.

Mr.Yuvraj narvankar for Resp. Nos.3 and 4.

Coram: N.M. Jamdar, J.

Dated: 9 August 2016

ORAL ORDER:

The Appellants challenge the concurrent judgment and order

passed by the Civil Judge, Junior Division, Panhala, dated 28 November 2007 and the judgment and order passed by the District Judge, Kolhapur, dated 28 February 2013. By the impugned orders, the suit and appeal filed by the Appellants have been dismissed.

2 The suit was filed by the Appellants seeking declaration for title and permanent injunction against the Respondents. Initially, the suit was decreed by judgment and order dated 21 June 2005 and appeal was filed by the Respondents which was allowed by the judgment and order dated 29 March 2007 and the proceedings were remanded to the learned Civil Judge. Thereafter the impugned orders have been passed.

3 Learned counsel for the Appellants firstly submitted that the learned Civil Judge, upon remand, exceeded the scope of remand. He submitted that the learned District Judge has made it clear that the suit was remanded only to give an opportunity to the Appellant to cross-examine the Court Commissioner and all other findings which were in favour of the Appellants were not disturbed. The submission cannot be accepted. The learned District Judge allowed the appeal and set aside the judgment and decree dated 21 June 2005. Though the learned Judge directs that opportunity be given to the Appellants to cross-examine the Court Commissioner, the direction was only to ensure that the same error is not made again. The learned Civil

Judge was directed to give fresh decision. The Appellants did not challenge this direction of setting aside the judgment and decree in its entirety. On the other hand, the Appellants anticipated in the proceedings upon remand and made submissions on merits on all aspects. Issues were framed by the learned Civil Judge on merits. After the decision on merits, when the first appeal was filed, no objection was taken that learned Civil Judge exceeded the scope of remand. In view of this position, therefore, both parties clearly understood that the order of remand was to consider the suit on merits in its entirety.

4 Learned counsel for the Appellants then submitted that heirs of the deceased Defendant No.1 supported the case of the Appellants/Plaintiffs when they were brought on record. He submitted that the earlier judgment and decree was binding upon the Defendant No.1 and inconsistent orders have been passed, namely, decreeing the suit in the first round and the dismissal of the suit in the second round. This submission also cannot be accepted. The first judgment and decree is not in existence and the suit was tried on merits again. Secondly, Defendant No.1 had clearly asserted his own title. As rightly held by the learned District Judge, the heirs cannot now take a stand and disown the stand originally taken by Defendant No.1. It is not a question of setting up an independent title but relinquishment of the stand already taken. The Respondent who has purchased the property cannot be put in such prejudicial situation by wavering

stands of the original Defendant and his heirs.

5 As regard the merits of the matter are concerned, the burden is on the Plaintiffs to assert their title. Both the Courts have assessed the documentary evidence and the Grampanchayat record and found that the manner in which the name of Biru, through whom the Appellants traced their title, was suspicious. Both the Courts noted that the entry in the name of Biru, was made on 25 January 1982, and on the same date a specific number 193/2 was given and within five days sale deed was stated to be executed in favour of the Plaintiffs. Both the Courts also found that that there is manipulation of the record and noted as to how and on what basis the entry in the name of Biru was made was not traceable. Though it is urged by the learned counsel for the Appellants that this resolution was seconded by Defendant No.3, the burden of proving title which was on the Plaintiffs could not have been discharged unless the Plaintiffs independently showed that Biru had title to the suit property. Once Biru's title was suspicious, no right could accrue to the Appellants and merely because Defendant No.3 in his capacity as a member of the Grampanchayat, participated in the resolution does not confer title on the Appellants.

6 In the circumstances, no substantial question of law arises. No other question of law was urged.

7 The second appeal is accordingly dismissed. The civil application is disposed of.

(N. M. Jamdar, J.)