

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
Writ Petition NO. 11325 OF 2014

Baburao Ramchandra Chotave
And Ors.

...Petitioners

Versus

Prabhakar Shivaji Jadhav
And Ors.

...Respondents

....

Mr.Raghvendra B. Kulkarni a/w. Yogesh Dharane, Advocate for
the Petitioners.

Mr.Balasaheb R. Deshmukh a/w. Akash Kotecha, Advocate for
Respondents No.1 to 5.

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CORAM : R. G. KETKAR, J.

DATE : 08th DECEMBER, 2016

P.C.

1. Heard Mr.Raghvendra Kulkarni, learned Counsel for
the petitioners and Mr.Balasaheb Deshmukh, learned Counsel
for respondents No.1 to 5, at length.

2. By this Petition under Article 227 of the
Constitution of India, the petitioners, hereinafter referred to as
the 'plaintiffs', have challenged the order dated 5.7.2014 as also
the judgment and order dated 18.8.2014 passed by the learned
District Judge. By order dated 5.7.2014, the learned District
Judge granted respondents No.1 to 5, leave to file appeal. By
subsequent order dated 18.8.2014, the learned District Judge

stayed the execution of the judgment and decree dated 10.1.2014 passed by the learned trial Judge in Regular Civil Suit No.307/2013.

3. In support of this Petition, Mr. Kulkarni submitted that the suit instituted by the plaintiffs for declaration that the sale deed dated 18.4.1983 is null and void and not binding on all the plaintiffs; for perpetual injunction, was decreed on 10.1.2014. He submitted that the respondents No.1 to 5 filed application for leave to appeal as they were not party in the suit. Without issuing notice to the plaintiffs as also without hearing the plaintiffs, the learned District Judge passed following order on 5.7.2014 :

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Heard the ld. Counsel. Perused the application. Considering the submissions, the permission is granted to file appeal as prayed for.
Sd/- 5/7/2014
DJ1 ”

4. Mr. Kulkarni submitted that perusal of the above order shows that no reasons were given by the learned District Judge for granting leave to appeal. On this ground, the order granting leave deserves to be set aside.

5. On merits, Mr. Kulkarni submitted that plaintiff No.1 had registered notice of *lis pendens* in respect of Regular Civil Suit No.89/2013. Despite that, respondents No.1 to 5 claimed to have purchased 25 Ares out of Gat No.33/2 by sale deed dated 5.4.2013. Thus, the property was purchased by respondents No.1 to 5 after registration of notice of *lis pendens*. He further submitted that apart from that in the present suit instituted by the plaintiffs, he took out application for injunction restraining the defendants in the suit from alienating the suit property. By order dated 18.3.2013, the learned trial Judge directed the defendants to maintain status quo to the extent of alienation of the suit property till their appearance. Despite this order, the sale deed *was* executed in favour of respondents No.1 to 5 on 5.4.2013. It is contrary to the order passed by the learned trial Judge. He submitted that all these aspects were not considered by the learned District Judge while granting leave to file appeal as also while staying the execution of the trial Court's decree. He, therefore, submitted that the Petition requires consideration.

6. On the other hand, Mr. Deshmukh supported the impugned order. He has taken me through the trial Court's

judgment dated 10.1.2014. He further submitted that plaintiff No.1 Baburao Chotave has registered notice of *lis pendens* in respect of R.C.S. No.89/2013, albeit in respect of Gat No.33/2 admeasuring 75 Ares. However, the suit was withdrawn on 13.3.2013 and respondents No.1 to 5 purchased 25 Ares out of Gat No.33/2 on 5.4.2013. In other words, respondents No.1 to 5 purchased this property after withdrawal of the suit on 13.3.2013. The plaintiffs have not registered *lis pendens* in respect of R.C.S. No.307/2013. He submitted that the suit instituted by the plaintiffs for cancellation of the sale deed dated 18.4.1983 itself was barred by limitation as is evident from paragraph-7 of the plaint. In paragraph-7 of the plaint, the plaintiffs contended that the cause of action for filing suit arose on 18.4.1983 and thereafter on 29.12.2012 when the defendant No.1 failed to execute the registered cancellation deed of sale dated 18.4.1983. He submitted that the cause of action accrued on 18.4.1983 and the suit is filed on 14.3.2013. The learned trial Judge ought to have dismissed the suit on the ground of limitation. He also relied upon Section 3 of the Limitation Act, 1963.

7. I have considered the rival submissions advanced by

learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, the plaintiffs have instituted the suit for cancellation of the sale deed dated 18.4.1983. The suit is instituted on 14.3.2013. Section 3(1) of the Limitation Act, 1963 reads thus :

“3. Bar of limitation.---- (1) Subject to the provisions contained in sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence.”

8. Perusal of the above extracted Section shows that every suit instituted after the prescribed period shall be dismissed, although limitation has not been set up as a defence. With the assistance of the learned Counsel appearing for the parties, I have perused the order passed by the learned trial Judge while decreeing the suit. Perusal of paragraph-3 of the judgment shows that although service of summons was served on the defendants, they failed to appear in the Court. The suit proceeded ex parte against the defendants. In paragraph-7, the learned trial Judge noted that on behalf of the plaintiffs PW-1 adduced evidence. There was no cross-examination by the

defendants. His sole testimony remained unchallenged and unshattered. Apart from these facts, perusal of the order of the trial Court does not even remotely indicate that the learned trial Judge has considered whether the suit was within limitation or not. Aggrieved by this order, apparently the defendants did not file appeal. It is respondents No.1 to 5 who filed appeal on the ground that they purchased 25 Ares out of Gat No.33/2 on 5.4.2013 and they are likely to be affected by the orders passed by the trial Court. Mr. Kulkarni submitted that while granting leave, no notice was issued to the plaintiffs and the plaintiffs were not heard. Even the order granting leave to file appeal is not a reasoned order.

9. I do not find any merit in any of the submissions advanced by learned Counsel for the petitioners for the reasons already recorded earlier. The learned trial Judge while decreeing the suit did not consider whether the suit filed by the plaintiffs was within limitation. Having regard to the fact that respondents No.1 to 5 have purchased 25 Ares from Gat No.33/2 which is also subject matter of the Suit, they are vitally affected persons. In view thereof, I do not find that any case is made out for interfering with the order. The learned District

Judge while granting leave to appeal should have issued notice to the plaintiffs and also should have heard them by passing a speaking order. However, in the peculiar facts and circumstances of the present case, the order granting leave to file appeal cannot be faulted with.

10. Mr. Kulkarni submitted that the *lis pendens* notice was registered on 7.2.2013. Despite that respondents No.1 to 5 purchased the land on 5.4.2013. It is not possible to accept this submission. Admittedly the plaintiffs withdraw R.C.S. No.89/2013 on 13.3.2013. Thereafter respondents No.1 to 5 purchased the land on 5.4.2013.

11. Mr. Kulkarni relied upon order dated 18.3.2013 passed by the learned trial Judge below Exhibit-5 in R.C.S. No.307/2014. By that order, the learned trial Judge directed the defendants therein to maintain *status quo* to the extent of alienation of the suit property till their appearance. In the first place, the plaintiffs have not brought any material on record to indicate that even after appearance of the defendants the *status quo* was continued by the trial Court. Secondly, even assuming in favour of the plaintiffs that after appearance of the

defendants, the learned trial Judge continued the *status quo* to the extent of alienation of the suit property, this aspect can be gone into by the District Court while deciding the appeal.

12. That brings me to the challenge to the order dated 18.8.2014 passed by the learned District Judge below Exhibit-5 in Civil Appeal No.175/2014. The learned District Judge granted stay to the execution of the trial Court's decree. After perusing the order, I do not find that any case is made out for interfering with that order. For the reasons recorded in paragraphs-4 and 7, no case is made out for interfering with that order. Hence Writ Petition fails and the same is dismissed.

(R. G. KETKAR, J.)

Deshmane (PS)