

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

***SECOND APPEAL NO. 245 OF 2015
ALONG WITH
CIVIL APPLICATION NO. 533 OF 2015***

Shri Vasant Shankar Waghmare

& ors.

v/s

... Appellants/applicants

Shri Nitin Madhukar Bhosale & ors.

... Respondents

Mr.Ashutosh Kulkarni for the appellants/applicants.

Mr.G.S.Godbole along with Ms.Gauri Godse for Resp. No.1.

Mr.P.K.Dhakephalkar, senior advocate along with Vishwajeet Sawant
i/by Prabhakar Jadhav for Resp.No.7.

Coram: N.M. Jamdar, J.

Dated: 13 July, 2016

ORAL ORDER:

The Appellants challenge the concurrent judgments and orders passed by the learned Civil Judge, Senior Division, Pune, decreeing the suit filed by the Respondents/Plaintiffs and dismissing the appeal filed by the Appellants.

2 In the present appeal, Respondent Nos.1 to 4 have been

transposed as Respondents and the present appeal is presented by the original Appellant No.5, who is a purchaser of the suit property.

3 The suit was filed by the Respondents/Plaintiffs seeking partition and separate possession of the 1/5 share which has been granted by the learned Civil Judge by the judgment and decree dated 7 October 2002. The learned Civil Judge has also declared that the sale deed dated 4 May 2000 executed by the Defendant No.1, who is the transposed Respondent, in favour of the Appellants to the extent Plaintiffs' 1/5 share, is not binding on them. The appeal filed by the Appellants in the District Court, Pune, is dismissed by the judgment and order dated 7 August 2014.

4 Heard learned counsel for the parties.

5 Learned counsel for the Appellants advanced two submissions. Firstly, he submitted that the present suit is barred under the provisions of Order II Rule 2 of the Code of Civil Procedure since the Appellants had earlier filed the suit bearing Regular Civil Suit No.1063 of 2000 in which only relief of injunction was prayed and even though the sale deed executed on 4 May 2000 was prior to the filing of the suit, no declaration for cancellation of the sale deed nor any relief of partition of the property, was sought for. This submission cannot be accepted. As the plaint of Regular Suit No.1063 of 2000 would show that the suit was filed for simplicitor

injunction as the Plaintiffs were apprehending that the Respondents would dispose of the joint family properties and, therefore, it was necessary to restrain them from disposing of the property. Written statement was filed by Defendant Nos.1 to 4 wherein it was disclosed by them that they have already disposed of the property after obtaining necessary permission from the Collector. The learned Civil Judge came to the conclusion that the sale deed is already executed and the suit for simplicitor for injunction is not tenable. Though there may be some observations made by the learned Civil Judge in the judgment on which the learned counsel for the Appellants seeks to rely upon, ultimately, the suit was disposed of by allowing the application filed by Defendant Nos.1 to 4 holding that the Court had no pecuniary jurisdiction to entertain the suit. Therefore, the suit was disposed of on the ground of lack of jurisdiction by the Court and the suit has become infructuous as the sale deed has already been executed. In the circumstances, the view taken by both the Courts that the bar of Order II Rule 2 does not apply, cannot be stated to be an incorrect view. Even though the learned District Judge has not given the detailed finding on this aspect, the learned District Judge has confirmed the conclusion reached by the learned Civil Judge on the basis of examination of the earlier proceedings.

6 The second point urged by the learned counsel for the Appellants was that the partition deed, which was an admitted document, was wrongfully discarded by both the Courts insisting on

examination of witnesses and other requirements for its proving in evidence. Even this submission cannot be accepted. It cannot be said that the partition deed was accepted and was an admitted document. A question was put to the witness of the Respondents/Plaintiffs who has denied the existence of the partition deed. In this partition deed, deceased Sharada was not included as she had expired prior to the execution of the deed and, therefore, her heirs i.e. Plaintiffs were not party to the deed. It is also recorded as a finding of fact that the partition deed was not disclosed in an earlier point of time and it is only during these proceedings that the deed has surfaced. Both the courts therefore rightly insisted upon proving this document which the appellant has failed to do. No other questions was urged. The submissions advanced do not lead to any substantial question of law.

7 The second appeal is dismissed.

8 In view of disposal of the second appeal, the civil application does not survive and is disposed of.

(N. M. Jamdar, J.)