

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

Second Appeal No.115 of 2015
(Pradeep Avchitrao Morkhade and another v. Avchitrao Gulabrao Morkhade
and another)

Office Notes, Memoranda of Coram,
appearances, Court's orders or directions Court's or Judge's orders
and Registrar's order

Shri R.S. Parsodkar, Advocate for Appellants.
Shri A.V. Bhide, Advocate for Respondent Nos.2 and 3.

Coram : R.K. Deshpande, J.

Date : 8th June, 2016

On 2-3-2015, this Court passed an order as under :

“ *Issue notice to the respondents on the following substantial questions of law:*

1] *Whether the sale deed dated 11.04.2002 executed in favour of respondent no.2 is bad in law as it was executed when order of injunction was operating in Regular Civil Suit No.116 of 2001?*

2] *Whether the suit could have been dismissed in spite of recording finding that property in question was ancestral property?*

Notice returnable on 31.03.2015. Hamdast granted.

Civil Application No.171 of 2015: *Issue notice to the non applicants returnable on 31.03.2015.*

Civil Application No.205 of 2015: *Issue notice of this civil application to the proposed respondent sought to be added in the Second Appeal returnable on 31.03.2015.”*

In response to the aforesaid order, although the respondent No.1 does not appear in the matter, the respondent No.2, who is purchaser and in possession of the suit property, has appeared in the matter. Though the proposed substantial questions of law have been framed, the matter is yet to be admitted, and hence it is open for this Court to consider as to whether the aforesaid substantial questions of law arise in the present matter or not.

Regular Civil Suit No.74 of 2003 for partition and separate possession was dismissed by the Trial Court by its judgment and order dated 7-4-2007 on two grounds - (i) that the mother of the plaintiffs was entitled to share in the partition of the joint family property and she was not joined as party in the suit; and (ii) that the entire property belonged to the joint family has not been included in the suit for partition. Regular Civil Appeal No.24 of 2007 has been dismissed by the lower Appellate Court on 28-10-2014 concurring with the findings of fact recorded by the Trial Court. Hence, the original plaintiffs are before this Court in this second appeal.

The undisputed factual position is that the suit property was the ancestral property in the hands of the respondent No.1, the original defendant No.1-Avchitrao Gulabrao Morkhade, in which the plaintiffs and their mother had a share. The defendant No.1 sold this property to the defendant No.2-Sarangdhar Gopalrao Morkhade by the registered sale-deed dated 11-4-2002. This sale-deed is not the subject-matter of challenge in Regular Civil Appeal No.74 of 2003 filed for partition and separate possession. The suit claims the declaration that the plaintiffs have 1/3rd share in the suit property and accordingly the property should be partitioned and separate possession should be delivered. The suit was filed on 3-5-2003, i.e. subsequent to the execution of the sale-deed.

Both the Courts below have concurred in recording the finding that apart from Gat No.94, admeasuring 2 H and 54 R, which is the subject-matter of the suit, there were other ancestral properties, viz. the residential house at Takaleshwar in Tahsil Sangrampur, District Buldana, and the land Gat No.5, admeasuring 1 H and 90 R, which have not been included in the suit for partition. In spite of raising the objection of non-joinder of necessary party, the mother of the plaintiffs, though had a share in the partition, was not joined in the suit for partition.

Shri Parsodkar, the learned counsel appearing for the appellants/original plaintiffs, now seeks permission of this Court

to cure the defects found by both the Courts below and to permit the plaintiffs to add the other properties, which were left out in the suit for partition and also to add their mother in the said suit. He further seeks remand of the matter on this ground. He submits that this Court has framed the substantial question of law as to whether the sale-deed dated 11-4-2000 executed in favour of the respondent No.2 is bad in law, as it was executed when the order of injunction was operating in Regular Civil Suit No.116 of 2001.

The aspect of the sale-deed being executed contrary to the order of injunction, has been dealt with by the lower Appellate Court in para 21 of its judgment, which is reproduced below :

“21. It may be noted that defendant no.2 Sarangdhar Gulabrao Morkhade was not party in said suit. Nothing is brought on record to show that he had knowledge about the injunction order. More over it is seen that Reg. Civil Suit No.116/2001 was proceeded ex-parte against the defendant no.1. It is further seen that plaintiffs did not prosecute that suit and after passing temporary injunction order said suit was allowed to be dismissed in default. It may also be noted that this suit was also proceeded ex-parte against the defendant no.1. This appeal is also

proceeded ex-parte against defendant no.1. Hence it is clear that Reg. Civil Suit No.116/2001 and other proceedings are filed by the plaintiffs in collusion with defendant no.1. In the circumstances there is strong probability in this case that defendant no.2 is bonafide purchaser of the suit field and transaction between him and defendant no.1 was genuine transaction. Point no.3 is, therefore, answered in affirmative.”

In view of the aforesaid findings, the proposed substantial question of law at serial no.1 framed by this Court does not at all arise for consideration.

So far as the substantial question of law at serial no.2 is concerned, merely because the Court has held that the suit property is the ancestral property, that does not mean that the suit has to be decreed for partition and separate possession. If the suit suffers from certain material defects, which cannot be permitted to be cured at the second appellate stage, it will have to be dismissed. The lower Appellate Court has considered the admissions given by Pradip Avchitrao Morkhade, the plaintiff No.1, in his cross-examination, which are in para 24 of its judgment and the same are reproduced below :

“24. P.W.2 Pradip Avchitrao Morkhade, plaintiff no.1, admitted in his cross examination that when his father sold house at Balsad and field to Ramratan Morkhade his mother took objection. He admitted that said property is not included in present suit. He also admitted that other remaining ancestral property of his father is also not included in the suit for partition.”

There is a definite stand taken by the defendant No.2-Sarandhar Gopalrao Morkhade in the written statement that all the properties belonging to the joint family have not been included in the suit for partition, and hence the substantial question of law at serial no.2 also does not at all arise.

The second appeal is dismissed.

Judge.

Lanjewar