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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD**

SECOND APPEAL NO. 1271 OF 2004

MADHUKAR BABARAO CHAMBHAR
AND ANOTHER

...APPELLANTS

VERSUS

GANPATI DAULA KADAM & ORS.

...RESPONDENTS

Mr Y.P. Deshmukh, Advocate, holding for
Mr Pradeep Deshmukh, Advocate for Appellants.
Mr S.Y. Patil, Advocate, h/f Mr B.N. Patil, Adv. For R/1A to 1/G
Mrs. Sheetal Salunke, Advocate h/f Mr V.D. Salunke, Advocate,
for respondents No. 4/A to 4/F.

CORAM : N.W. SAMBRE, J.

DATE : 30th June, 2017

ORAL ORDER

Defendant No.3 i.e. present respondent No.2 alongwith his brother Goroba, were owners of land survey No. 71, out of which they agreed to sell 10 acres 34 Gunthas to Harischandra i.e. respondent No.3/original defendant No.4 in Regular Civil Suit No. 564/1985. Since the said agreement was not taken to its logical end and suit came to be filed by present respondent No.3/Harischandra being Regular Civil Suit No. 204/1966, which was decreed on November 20, 1967, by Civil Judge (Junior Division), Ausa. Since the sale deed was not executed,

(2)

respondent No.3 Harischandra filed Regular Darkhast No. 5/1968 against respondent No.2 Babarao, and accordingly sale deed was executed through Court on 17th February 1968 by putting respondent No.3 in possession of the said property.

2. The present appellants claiming to be holding undivided share in the said property, filed a suit for partition and separate possession and setting aside the said sale deed dated 17th February 1968, being Regular Civil Suit No. 564/1985 in the Court of Civil Judge (J.D.), AUSA. Said suit came to be decreed, vide judgment and decree dated August 3, 1987, in which the present respondent No.1 was added as defendant No.3. It is necessary to observe here that the suit was dismissed against present respondent No.1 i.e. plaintiff in Regular Civil Suit No. 318/1994, which decree is subject matter of challenge in the present appeal.

3. It is needless to mention here that RCS No. 564/1985 was decreed against other defendants to the said suit, namely, Harischandra, in whose favour sale deed was executed of the suit property on February 17, 1968, the real brother of present respondent No.1 and Babarao, father of appellant No.1 and husband of appellant No.2.

(3)

4. Execution came to be filed in R.C.S. No. 564/1985, in which present respondent No.1 Ganapati filed an objection, which was registered as R.D. No. 30/1991. Said Ganapati filed a suit being R.C.S. No. 318/1994 seeking declaration that the decree passed in R.C.S. No. 564/1985 is not binding on him and the same cannot be executed against him. In the said suit, though it was noticed by the learned Court of Civil Judge (J.D.), Ausa that present respondent No.1/original plaintiff is owner and possessor of the suit property and further observed that the decree in RCS No. 564/1985 dated August 3rd, 1987 is not binding on said respondent No.1 i.e. plaintiff in the present suit, however, the learned Court of Civil Judge (J.D.), Ausa, held that in view of availability of remedy under Section 47 of Civil Procedure Code, the suit initiated by respondent No.1 is not maintainable, which prompted respondent No.1 herein to file Regular Civil Appeal No. 107/1998 in the Court of District Judge, Latur. The learned District Judge, Latur, decreed the suit of present respondent No.1. As such, this second appeal.

5. The learned Counsel for the appellants would urge that the decree passed in R.C.S. No. 564/1985 is intact and executable. According to him, once there is a decree which is holding the field in favour of present appellants, in execution thereof, it was always open to

(4)

respondent No.1 to raise an objection under section 47 instead of filing the suit in question, which in the aforesaid background, was not maintainable and is rightly so held by the learned Court of Civil Judge (J.D.), Ausa. According to him, in the wake of above, the present respondent No.1/original plaintiff being representative of the defendants to the suit in question, has every right to prefer an objection instead of filing the suit. As such, according to him, the judgment of the Appellate Court is required to be upset by quashing and setting aside the same.

6. Per contra, the learned Counsel for the respondents would support the judgment and decree of the lower Appellate Court and would urge that the lower Appellate Court has rightly held that section 47 of C.P.C. is not available to present respondent No.1/decreed holder in R.C.S. no. 318/1994. According to them, the appeal is void of merit and as such, be dismissed.

7. Having considered rival submissions, it is required to be appreciated that present respondent No.1/original plaintiff came in possession of the suit property by virtue of internal partition executed amongst the sons of Daula, his father. Though the suit property was purchased by Harischandra by virtue of sale deed dated 17/02/1968, however, the same became part of common hotch property, and as

(5)

such, has come to the share of respondent No.1/plaintiff. The aforesaid fact that the suit property has come to the share of respondent/plaintiff, was well within the knowledge of present appellants before filing R.C.S. No. 564/1985 for partition and separate possession. In the said suit, the appellants have come out with a case that respondent No.1/plaintiff is in possession of the suit property by virtue of interse partition amongst his brothers. As such, he was employed as defendant No.3 in the said suit. The said suit -R.C.S. No. 564/1985 came to be dismissed against respondent No.1 i.e. defendant No.3 to the said suit. In execution of the decree dated August 3, 1987, passed in R.C.S. No. 564/1985, in which the appellants are decree holders, the same is sought to be executed against respondent No.1 i.e. defendant No.3 to the said R.C.S. No. 564/1985. Having received knowledge of the same, respondent No.1 filed R.C.S. No. 318/1994. The said suit was held to be not maintainable in the backdrop of Section 47 of C.P.C. If the said provisions are perused, the same are available to the representatives of the parties to the suit and must be in relation to the execution, discharge or satisfaction of the decree.

8. In my opinion, respondent No.1 cannot be held to be a representative of Harischandra, to whom the provisions of Section 47 of C.P.C. are available, particularly, when Harischandra himself is a party

(6)

to the suit and there exists decree against him. Apart from above, it is required to be noted that the fact about the possession of the present respondent No.1 before filing R.C.S. No. 564/1985 was well within the knowledge of appellants/plaintiffs to the said RCS No. 564/1985. The plaintiffs in said RCS No. 564/1985 i.e. present appellants have exposed themselves to the risk of being not pursuing the said suit against respondent No.1 Ganapati.

9. In the aforesaid backdrop, in my opinion, there is no question of law involved in the appeal. Appeal must fail. As such appeal stands dismissed.

10. At this stage, the learned Counsel for the appellants, in view of the fact that appellants are decree holders in RCS No. 564/1985 submit that the appellants be permitted to take such other steps for execution of the decree against judgment debtors, as are available in law. Such liberty, of course is available to the appellants subject to the permissibility under the relevant provisions of law.

(N.W. SAMBRE, J.)

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