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

**SECOND APPEAL NO. 586 OF 2017
WITH
CIVIL APPLICATION NO. 11703 OF 2017**

Shantilal Haribhau Gaikwad
Age: 54 yrs, Occ: Agri.,
R/o. Pathardi, Tq.: Pathardi
Dist: Ahmednagar.

... APPELLANT
(Ori. Def. No. 2)

VERSUS

1. Dilip Bhagwan Gaikwad
Died through his L.Rs.

1-a) Nandabai Dilip Gaikwad,
Age: 45 Yrs., Occu: Household

2-b) Atul Dilip Gaikwad,
Age: Major, Occu: Business

3-c) Ajay Dilip Gaikwad,
Age: Major, Occu: Business

1-d) Dhananjay Dilip Gaikwad,
Age: Major, Occu: Business

All R/o Plot No. P-38, Nagapur
(Near Chakan Oil Mill)
M.I.D.C. Ahmednagar.

2. Sharad S/o. Bhagwan Gaikwad
Age: 49 Yrs., Occu: Commission Agent,
R/o. Sattyampura-nagar,
Hadapsar, Pune.

3. Smt. Shakuntala w/o Gorakhnath Pawar
Age: 66 Yrs., Occ: Household,
R/o. Sangamner, Tal: Sangamner,
Dist: Ahmednagar.

(2)

4. Sau. Asha w/o Shankarrao Raut,
Age: 61 Yrs., Occ: Household,
R/o. Karimpura, Infront of Balaji Mandir,
Beed, Dist: Beed.

5. Sau. Sushila w/o Aniruddha Raut,
Age: 59 Yrs., Occ: Household,
R/o. Vashimbe, Tal: Karmala,
Dist: Solapur.

6. Yashawant Ahilaji Gawali,
Age: 70 Yrs., Occ: Agri,
R/o: Rahuri Bk, Tal: Rahuri,
Dist: Ahmednagar

... RESPONDENTS
(Orig. Plaintiffs)

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Mr. R.R. Mantri h/f Mr. Sancheti Rahul R., Advocate
for Petitioner.

Mr. N.C. Garud, Advocate for Respondent No. 1.

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CORAM : NITIN W. SAMBRE, J.
DATE : 13th SEPTEMBER, 2017

ORAL ORDER :

Heard Shri. Mantri, learned counsel for
the appellant – original defendant no. 2.

2. Facts as are necessary for deciding the
present appeal are as under:

(1) Vithabai, mother of the plaintiff had
two sisters (1) Rukhminibai and (2) Vijaya.
All these three sisters succeeded to the
ancestral property by virtue of a decree for

(3)

partition passed in R.C.S No. 19/1980 and the share handed over to each of them on 19.07.2009 in Reg.Dkt.No. 56/1999, arising out of execution of the said decree.

(2) The defendant no. 1 Yashwant, husband of Vijaya, sister of Vithabai got executed General Power of Attorney, dated 28.02.2005 from late Vithabai and her two sisters Rukhminibai and Vijayabai in his favour, and he had transferred the land in favour of the present appellant-original defendant no. 2 on 22.05.2008. The said sale deed is at Exhibit-81. Vithabai, who has executed the Power of Attorney in favour of defendant no. 1, died on 20.05.2008 i.e. two days prior to the execution of the sale deed on the base of her Power of Attorney.

3. The aforesaid conduct of original defendant has prompted the plaintiffs to file a suit seeking setting aside of the sale deed dated 22.05.2008 executed by defendant no. 1 in

(4)

favour of defendant no. 2 and declaration and sale deed is not binding on the plaintiff, and decree for perpetual injunction that the defendant no. 2 should not alienate the suit property. The present appellant- original defendant no. 2 also filed the counter-claim, seeking declaration that he is lawful owner of the said property by virtue of sale deed executed in his favour by Power of Attorney Vijaya.

4. The suit of the original plaintiffs being Spl. C.S. No. 283/2009 came to be decreed on 18.10.2010 by judgment and order passed by Jt. Civil Judge, Senior Division, Ahmednagar, whereas, the counter-claim was partly decreed. The declaration sought by the appellant that he is lawful owner of the suit property was rejected, however, he is permitted to claim the consideration amount from the defendant no. 1.

(5)

5. The present appellant feeling aggrieved thereby preferred appeal being RCA No. 464/2012, in which, original defendant was impleaded as Respondent No. 6. The said appeal also came to be dismissed vide judgment and order dated 27.04.2017 passed by District Judge-7, Ahmednagar. As such, this second appeal.

6. Shri. R.R. Mantri, the learned counsel for the appellant-original defendant would raise following ground in the form of substantial question of law:

“(1) Whether the judgments of the both the courts below could be held contrary to the provisions of Section 3 of the Power of Attorney Act, 1882, particularly when the death of Vithbai was not within the knowledge of the present appellant.”

7. So as to substantiate these contentions Shri. R.R.Mantri invited attention of this

(6)

court to few of the factual matrix viz, the variation of cause of death of Vithabai, her religion Hindu/Christian, place of residence of the appellant which is almost 40 k.m away from the place of residence of deceased Vithabai i.e. Ahmednagar. He also submits that both the courts below have committed an error apparent on the face of record as the appellant should have been treated as a bonafide purchaser.

8. Per contra, Mr. N.C. Garud, the learned counsel for the LRS of respondent-original plaintiff no. 1 would oppose the claim. He submits that all these issues are gone into by both the courts below and the interest of the present appellant qua entitlement to the amount of consideration paid to defendant no. 1 is already taken care of. He submits that the appeal against concurrent finding is liable to be dismissed.

(7)

9. It is required to be noted that admittedly the sale deed is executed by Power of Attorney holder of late Vithabai in favour of present respondent no. 6-original defendant no. 1 thereto after her death. Vithabai died on 20.05.2008, whereas the sale deed was executed on 22.05.2008.

10. Though, Shri. R.R. Mantri, learned counsel for appellant from the record, has tried to demonstrate that the very date of death of Vithabai is not properly proved, however, it is required to be appreciated that the death certificate of Vithabi was brought on record and plaintiffs have examined two witnesses in support of which, one is Shaikh Iqbal Gulab Mohammad at exhibit 48. He has produced on record the information from the official record of the Corporation, wherein, the death of Vithabai was recorded. Since, the appellant disputed the said issue, in my

(8)

opinion, both the Courts below have rightly shifted burden on the present appellant-original defendant no. 2 to prove the correct date of death, place and religion of deceased Vithabai. Admittedly, appellant has not examined any witness in support of the defence, so as to prove the aforesaid issue.

11. In view of above, the fact remains that the death of Vithbai was rightly held to be proved, thereby declaring that she died on 20.05.2008. Admittedly, the appellant is claiming his right over the suit property by virtue of sale deed dated 22.5.2008 i.e. Exhibit-81, which was executed subsequent to the death of Vithabai. Once, Vithabai expired on 20.05.2008, the Power of Attorney executed in favour of defendant no. 1 will not hold any legality, particularly for passing of the title on the subsequent date i.e. 22.05.2008 in favour of the appellant.

(9)

12. So far as the claim of the present appellant i.e. bonafide purchaser of the suit property is concerned, and the fact of as regards death of deceased Vithabai was not within the knowledge is concerned, it is an admitted fact on record that appellant got sale-deed executed in his favour, which is at Exhibit-81, through Power of Attorney holder i.e. defendant no. 1. Both the courts below have rightly observed that in such an eventuality, it was the duty of the appellant to conduct proper inquiry before purchasing the property. The claim of the appellant that he has purchased the suit property without noticing the fact that Vithabai has expired on 20.05.2008 is not at all established, rather the fact remains that defendant no. 1, from whom he has purchased the suit property, was well within the knowledge about the death of Vithabai. Fact remains that appellant has not demonstrated on record that he has conducted

(10)

any inquiry about whereabouts of Vithabai before transferring the property in his name.

13. In the aforesaid backdrop, in my opinion, the plea of the appellant that he is purchaser of the suit property without notice is also liable to be rejected.

14. It is noted that the trial court, so did the appellate court, have already protected the interest of the appellant by giving him liberty to recover the amount of consideration paid by him to defendant no. 1. As such, it can not be said that interest of appellant and his grievance is not redressed.

15. So far as, the issue as regards Section 3 of the Power of Attorney Act, 1882 is concerned, in view of the aforesaid finding, it is really difficult to record that the provisions of Section 3 are available to the

(11)

appellant, particularly in the backdrop of his conduct depicted and recorded herein before and also by both the courts below.

16. The appeal, which is against concurrent findings, in my opinion, lacks any substantial question of law, deserves dismissal and is accordingly dismissed.

17. Consequently, Civil Application is dismissed.

(NITIN W. SAMBRE, J.)

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