

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 514 OF 2015

Balkishan S/o Babasaheb Suryawanshi,
Aged : 45 years, Occu: Agriculture,
R/o Peth, Tq. & Dist. Latur

.. Appellant
(Orig. Defendant No.6)

VS.

- 1] Dayanand S/o Nivrutti Yadav,
Aged : 17 years, Minor Under
Guardian of his mother
Dropadi W/o Nivrutti Yadav,
Aged : 38 years, Occu.: Household,
R/o Masurdi, Tq. Ausa,
Dist. Latur
- 2] Nivrutti S/o Rangnath Yadav,
Aged : 42 years, Occu.: Service,
R/o Masrudi, Tq. Ausa,
Dist. Latur
- 3] Sow. Ranjana W/o Rajendra Garad,
Aged : 44 years, Occu.: Household,
R/o Masurdi, Tq. Ausa,
Dist. Latur
- 4] Raosaheb S/o Dnyandeo Patil,
Aged : 42 years, Occu.: Agriculture,
R/o Padoli (Akubai),
Tq. & Dist. Osmanabad
- 5] Shrimant S/o Arjunrao Yevate,
Aged : 42 years, Occu.: Agriculture,
R/o Masurdi, Tq. Ausa,
Dist. Latur
- 6] Sandeep S/o Sugriv Pimpare,
Aged : 28 years, Occu.: Agriculture,
R/o Peth, Tq. & Dist. Latur

.. Respondents
(Respondent no.1 is Orig.
Plaintiff. Respondents no.2
to 6 are Orig. Defendants
No. 1 to 5)

Mr. N.P. Patil Jamalpurkar, Advocate for the appellant

Mr. T.M. Venjane, Advocate for respondent no.1

Mr. Amol Gandhi, Advocate for respondent no.6

CORAM : SUNIL P. DESHMUKH, J.

DATE : 22-03-2017

ORDER :

1. The question that emerges substantially in the present matter is,

“ Whether the parties to the litigation deserve opportunity to plead their cases in attack and in defence, and in the facts and circumstances of the case, to remand the matter for retrial before the court of first instance ? ”

2. Appellant is defendant no.6, respondent no.1 is plaintiff, respondents no. 2 to 6 are defendants no. 1 to 5, respectively, in regular civil suit no. 79 of 2012.

3. The facts in brief in the present matter are suit land admeasuring 1 Hectare, 31 Aar from gut no. 117 situated at village Masurdi, Tq. Ausa, Dist. Latur had been purchased by grandfather of present respondent no. 1 under registered sale deed dated 13-06-2003 in the name of respondent no. 1 - plaintiff. Plaintiff's father purportedly sold 1 hectare from aforesaid property without obtaining permission from district court to defendant no. 2 on

19-07-2005. Plaintiff's father had further sold without permission of the district court, the balance 31 Aar from the said gut number to defendant no. 3 under registered sale deed dated 23-11-2006. These two pieces of lands were purchased by defendant no. 4 under registered sale deed dated 02-06-2008 and then he had sold it to defendant no. 5 on 09-02-2010, and, thereafter, defendant no. 5 had sold the same to defendant no. 6 on 16-06-2011 and since then defendant no. 6 is in possession of the property.

4. In 2011, while the plaintiff was minor, his guardian is said to have requested defendant no. 6 to give back possession of suit property, however, he is said to have flatly refused. A suit came to be instituted by plaintiff through guardian for cancellation of sale deeds of 2005 and 2006. In response to the suit summons, defendant no. 5 had filed written statement denying the contentions of the plaintiff. He had referred to that the property was sold to defendant no. 6 in 2011 and that him, defendants no. 4 and 6 are bonafide purchasers of suit land. He had referred to the mutation entries consequent upon execution of sale deeds having taken place. He had stated that defendant no. 4 – his vendor had been exclusive owner of suit land. He had averred, under legal necessity, he had sold the property to defendant no. 6. The suit went *ex parte* against defendants no. 1 and 4. The suit proceeded without written statement of defendants no. 2, 3 and 6. The trial court had

considered that property being of minor and that alienations having taken place without permission of the district court, the transactions were hit by section 8 of Hindu Minority and Guardianship Act, 1956. The transactions being so hit, the court declared title to suit land was not lost by the plaintiff and the transactions of 2005 and 2006 were not binding on the plaintiff and defendant no. 6 was directed to deliver back possession to the plaintiff.

5. In the circumstances, defendant no. 6 – present appellant had been before appellate court in regular civil appeal no. 111 of 2013, taking up grounds, *inter-alia*, that appellant's advocate had neither informed appellant about the stage of matter nor filed written statement which has caused injustice to him. The appellant is rustic agriculturist, had no knowledge of the procedure. Further contending that required documents and information had been handed over to the advocate, however, he had not filed written statement nor conducted the matter protecting the interest of the appellant who is a bonafide purchaser without notice.

6. Perusal of the appellate court's judgment shows, it had been considered that evidence of the witnesses of the plaintiff went unchallenged. None of the witnesses had been cross-examined despite having sufficient opportunity to the defendants. None of the defendants except defendant no. 5 had filed any written statement.

The appellate court as well reiterated that the transaction is hit by section 8 of the Hindu Minority and Guardianship Act, 1956, and, under the circumstances no fault can be found with the decision given by the trial court. The court considered that the proceedings could be said to be maintainable at the behest of the guardian. The court purported to rely on Allahabad high court decision in the case of *K. Kumar Vs. Onkar Nath*, reported in *AIR 1972 Allahabad 81*.

7. Learned counsel for the appellant Mr. N. P. Patil Jamalpurkar vehemently submits that the appellate court has missed out on the vital aspect involved in the matter and contentions on behalf of appellant that no information in respect of the progress of the suit had ever been provided or intimated by the trial court lawyer and despite the documents and information being given, yet, it transpires that written statement had not been filed, and, as such, the matter was decided in the absence of any written statement on behalf of defendant no. 6.

8. He further submits that the courts hitherto have missed out on another aspect that although there is reference to subsequent sale deeds, yet, no declaration in respect of the same had been sought, and, as such, the suit was liable to be thrown out taking into account the provisions of relevant enactments, particularly, the provisions of Specific Relief Act.

9. He further purports to rely on a decision of this court in the case of *Narayan Laxman Gilankar Vs. Udaykumar Kashinath Kaushik and others* reported in *AIR 1994 BOMBAY 152*, whereunder it has been considered thus;

“7. For consideration of question No.2, sub-secs. (2) and (3) of S. 8 are relevant. Sale transaction without permission of the Court is not void ab initio, but is voidable at the option of the minor or any person claiming under him. Scheme contemplates challenge only after the minor attains majority and not during his minority. After all natural guardian has dealt with the property and under S. 11 of the Act de facto guardian's right to dispose of or deal with the property of a Hindu minor is taken away and the transaction by him is treated to be void ab initio. Any action or result therefrom during minority can on certain grounds be again challenged by a minor on attaining majority and persons bona fide entering into transaction cannot be subjected to endless litigation. Many times transactions are challenged with the blessings and inspiration of the natural guardian with a view to derive advantage arising out of several situations including fluctuations in the market price. Hence, I hold that transaction would not have been challenged on behalf of minor Babulal.”

10. He further contends that, it is not a case wherein it can be said that the property exclusively belongs to the plaintiff, purchase having made from a source referable to co-parcener/ancestral property. In the circumstances, head note (A) of the judgment as well needs to be taken into account, which is reproduced hereinbelow;

“(A) Hindu Minority and Guardianship Act (32 of 1956), S.8- Applicability – Joint family property – Disposal of minor's undivided interest by natural guardian – Held, S. 8 would not apply.”

11. He submits that, if an opportunity would have been made available, all these aspects could have been brought forth before the court, however, for the lapse which may not be attributable to the appellant, the same could not be brought to the notice of the courts hitherto. He submits that despite grounds having been taken particularly grounds no. 4 and 5, it had been incumbent on the appellate court to have referred to the same and ought to have rendered a decision thereon. Yet, not even by a whisper, the said grounds although having been taken and argued, find place in the body of the judgment of the appellate court.

12. Learned counsel for the respondent no. 1 – original plaintiff, Mr. T. M. Venjane submits that the plea of not having proper opportunity to defend the case, is an illusory plea in the present matter despite ample opportunities coming the way of the defendants, they had wasted and lost the same and had not diligently prosecuted the matter. He submits that the proceeding sheet (*roznama*) sufficiently depicts that several adjournments had been sought by the counsel on behalf of respondent no. 6 for filing written statement and for taking instructions, yet, the same had not

been filed. He, further, on merits, contends that, it is apparent that the suit property belongs to minor plaintiff and that the same came to be dealt with without due permission from the district court. In the circumstances, no fault can be found with the findings recorded by trial as well as appellate courts, concurrently holding the transactions to be void. He submits that father - defendant no. 1 had in fact no role to play in the matter and, yet, he purportedly to make up for the expenses of his vices, has dealt with the property unauthorisedly. In the circumstances, no valid title could be passed on to the purchaser of the property.

13. He submits that the contention of the appellant that the purchase of the property had been from source of ancestral property, is a vacuous plea being taken before this court. There is no such pleading nor any evidence has been adduced in respect of the same. He therefore submits that there is no substance in the second appeal and it deserves to be dismissed in *limine*.

14. Although, Mr. Venjane submitted so, it does appear that despite the grounds having been taken as referred to in paragraphs no. IV and V of the memorandum of appeal referring to loss of opportunity and putting up defence and giving reasons for the same, the decision of the appellate court does not reflect upon or does not deal with or dwell on those two grounds. These grounds and non-

consideration of the same are claimed to have caused grave prejudice to defendant no.6's case. This aspect ought to have received consideration.

15. It further emerges that the pleadings of plaintiff do refer to the subsequent sale deeds after 2005 and 2006, and, yet it appears that no relief has been claimed against them. The trial court has granted relief in respect of sale deeds of 2005 and 2006. In the circumstances, as to whether, it would carry fruitful purpose for the plaintiff, specially having regard to sections 31 to 34 of Specific Relief Act. The suit was filed through purported guardian. Now, plaintiff appears to be a major.

16. In the circumstances, it emerges that it would be expedient that in order to do justice to the parties, it would be worthwhile to relegate the parties to trial court to prosecute the matter afresh. Since, the plaintiff now claims to have become major which also removes the barrier as contended to appear to have been posed under the judgment in the case of "*Narayan Gilankar*" (supra). It appears to be in the interest of justice and parties, the matter be remanded to the court for re-trial afresh.

17. In the circumstances, the judgments and decrees passed by the courts hitherto stand set aside and the matter stands

remanded to trial court for re-trial from stage of filing written statement of respondent no.6 and amendments to pleadings by parties, if any, in accordance with law by giving opportunity to parties concerned. All points are kept open for the parties. Till the disposal of suit, the parties would not create third party interest or encumbrances on the suit property.

18. The re-trial shall take as expeditiously as possible, and, preferably be disposed of within a period of fifteen (15) months.

19. In the process, the inconvenience caused to the plaintiff who had been a decree holder hitherto, can be met with, by awarding suitable costs. Costs are quantified at Rs.25,000/- (Twenty Five Thousand). Costs may be paid in three suitable instalments, within a period of one (1) year from today.

20. Second appeal stands disposed of accordingly.

21. Consequently, civil application no. 12110 of 2015, seeking stay to the impugned judgments and decrees, also stands disposed of.

[SUNIL P. DESHMUKH]
JUDGE

arp/