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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO. 100 OF 2002
WITH
CIVIL APPLICATION NO. 645 OF 2017

Gangaben W/o Gopalji Vishram Ganatra & Ors ...Appellants
Versus
Madhusudan Jethmal Chande & Ors ...Respondents

Mr Cyrus Ardeshir, with K Lalchandani, i/b OM Kuilkarni, for the
Appellants.
None for the Respondents.

CORAM: G.S. PATEL, J
DATED: 2nd August 2017

PC:-

1. The appeal was admitted on 24th January 2002. It was listed for hearing and final disposal today. The Respondents were directly served through the bailiff and by hamdast. Mr Ganatra who had earlier appeared for the Respondents said that he had returned the papers and he had no contact with them.

2. The matter is shown at Sr. no. 28 on the daily board of today. Name of the Respondents is correctly shown. Service details are correctly noted. This board was notified several days in advance.

3. The suit was filed by one Monghibai Jethmal Chande. The 1st Defendant to that suit was her brother Gopalji Vishram Ganatra. Monghibai has passed on, as has Gopalji. Monghibai's allegedly adopted son Madhusudan Jethmal Chande prosecuted the suit. Gopalji's heirs were impleaded as Defendants Nos. 1(A) to 1(F). Although they entered appearance, and were once represented by an Advocate, who waived service of the writ of summons, they filed no written statement.

4. The suit sought a declaration that the Plaintiff, Monghibai, was the owner of 1,452 sq yards of Survey No. 282; that the Defendants had no right, title or interest in this land; and a permanent injunction against the Defendants.

5. The entirety of the case was based on writing dated 31st December 1968 allegedly executed by the Plaintiff, her brother, the original 1st Defendant Gopalji and others. This was said to be a retirement deed in respect of a partnership firm registered on 27th April 1962. The original partnership deed is of 23rd August 1968. Monghibai was said to be a partner of this firm, named, Janata Medical & General Stores.¹ That apart, the plaint says in paragraph 3 (appeal compilation page 50) that the understanding regarding retirement was recorded in a writing of 31st December 1968 and was executed by all partners.

6. That writing was produced. One look at that writing demonstrates that no decree could have been passed on that basis.

1 At another place the firm is described as Ganatra Medical & General Stores. That appears to be an error.

The writing is on a stamp paper and it is issued to Janata Medical & General Stores, Mulund through one Shivram Bhiku on 20th February 1969. There could no agreement of 31st December 1968 on a stamp paper of 20th February 1969.

7. The impugned order was passed, if not strictly speaking *ex parte* (i.e., without service or notice), in the absence of the Defendants who did not contest or appear. That still does not mean that the Court could have passed a decree in this fashion on the basis of a document that on the face of it is untenable and possibly back-dated, fraudulent or otherwise legally vulnerable. Even if the Defendants did not file a written statement they could have cross-examined the Plaintiff on the basis of the statements made in the plaint. At best the Defendants would not have been able to put to the Plaintiffs an affirmative case. It does not seem to be at all clear whether this opportunity was ever afforded to the Defendants or whether fresh notice was issued to them.

8. Even otherwise, the order under appeal cannot be sustained because it is entirely based on this document alone. The first sentence of paragraph 4 makes this clear, for it says that the Court has satisfied itself as to the deed of retirement referred to and which is in Gujarati. The attention of the Court was obviously not drawn to the discrepancy I have noted above. There could have been no such deed of retirement, because it is only by way of that deed of retirement that the Plaintiff was able to derive a claim to title. If that document falls, so does the Plaintiff's claim. Nothing further requires to be examined.

9. If the Defendants did not appear in the Trial Court, it is now the Plaintiff who does not appear before me.

10. The appeal succeeds. The impugned order is set aside. In consequence, the decree is set aside and the suit is dismissed.

11. The appeal is disposed of in these terms. There will be no order as to costs.

(G. S. PATEL, J)