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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR.

SECOND APPEAL NO.260 OF 2003

APPELLANTS:
(Orig. Plff)
(On R.A.)

1. Smt. Malabai w/o Bhimrao Ghotal, aged about 46 years, Occupation-household work,
2. Prafulla S/o Bhimrao Ghatol, aged about 30 years, Occupation-student,
3. Ku. Sunita d/o Bhimrao Ghatol, aged about 26 years, Occupation – student,
4. Atul S/o Bhimrao Ghotal, aged about 23 years, Occupation-student,
5. Rahul S/o Bhimrao Ghatol, aged about 16 years, Occ. Student, being minor through natural guardian appellant No.1 Malabai.

All Residents of Mozari, Tq. Tiwasa,
District – Amravati.

-VERSUS-

RESPONDENTS:
(Orig. Defts. On
R.A.)

1. Shankarrao S/o Raibhanji Ghatol, aged about 67 years, Occupation-Retired Dy. Engineer and Agriculturist, R/o at present Mohan Colony, Camp Road, Amravati, Tq. & Distt. Amravati.
2. Sau. Shalini w/o Dinkarrao Bele, aged about 42 years, Occupation-household work and Agriculturist, R/o Mozari, Tq. Teosa, District – Amravati.
3. The State of Maharashtra, through Collector, Amravati, Tah. & Distt. Amravati.

None for the respondents.

CORAM: A.S. CHANDURKAR, J.

DATED: 12th JUNE, 2017.

ORAL JUDGMENT :

1. The appellants are the legal heirs of the original plaintiff Bhimrao who had filed Regular Civil Suit No.735 of 1991 for declaration that defendant no.2 had no right to fetch water from the well situated in field No.230/1. The suit as filed was dismissed by the trial Court and the appellate Court confirmed the said judgment.

2. It is the case of the original plaintiff that he had two brothers Shankar and Sadashiv. The ancestral property was partitioned on 13-12-1984 and in that partition 3 hectares 0.07R from field Survey No.230/1 came to his share. The remaining land from field Survey No.230/1 was given to the defendant no.1 and it was renumbered as 230/2. According to the plaintiff, there was no well in the field allotted to him and a well was constructed in the year 1985. The defendant no.1 sold his share of Survey No.230/2 to the defendant No.2 on 24-4-1991. In the sale deed a right was given to defendant no.2 to fetch water from the well in Survey No.230/1. As defendant no.2 tried to interfere with the right of the plaintiff to the said well, the suit came to be filed seeking aforesaid declaration.

3. In the written statement filed by the defendant no.1 a stand was taken that the well had been jointly constructed and he had half share in the same. In the written statement filed by defendant no.2 it was stated that right to fetch water was on the basis of sale deed dated 24-4-1991 and hence, the plaintiff had no right to restrain him from taking water.

4. After the parties led evidence, the trial Court dismissed the suit holding that the defendant no.1 had half share in the said well and hence, the defendant no.2 was entitled to fetch water from the same. The appellate Court confirmed this judgment and hence, the plaintiff has filed the present second appeal.

5. The second appeal was admitted on the following substantial questions of law:

(1) Whether the trial Court erred in relying on Ex.57 when the signature on it was denied by merely comparing the signatures by itself and holding that the document Exh.57 was executed by the deceased brother?

(2) Whether the trial Court erred in passing the decree on the basis of the alleged admission contained in Ex.57?

(3) Whether lower appellate Court erred

in relying on the document Ex.57 without recording the finding that it was signed by the deceased brother and whether the judgment of the lower appellate Court is perverse?

6. Smt. S. W. Deshpande, learned Counsel for the appellants submits that the document at Exhibit-57 which was a communication issued to the Tahasildar referring to taking mutation entry with regard to the well was never signed by the original plaintiff. She submitted that the contents of Exhibit-57 were not proved by leading any evidence and merely because it was marked as an Exhibit it could not have been relied upon. She submitted that this document was brought on record on the basis of an application below Exhibit-55 calling upon the Talathi to produce relevant records. According to her, it was not open for the trial Court to compare the signatures on Exhibit-57 especially when its contents were not proved. She submitted that only on the basis of this document the plaintiff had been non suited. She referred to other material on record to indicate that when the partition took place there was no well existing in field Survey No.230/1 which fact was also admitted by the defendant no.1. She placed reliance upon the judgment of learned Single

Judge in *Bama Kathari Patil Vs. Rohidas Arjun Madhavi and another* 2004(2) Mh.L.J.752.

7. There was no appearance on behalf of the respondents on 9-6-2017. Today also there is no appearance on their behalf. With the assistance of the learned Counsel for the appellants, I have perused the record and I have given due consideration to her submissions.

8. Perusal of record of the case indicates that initially the original plaintiff was examined at Exhibit-38. After his deposition, the defendant no.2 filed an application for production of original records from the Talathi. This application was allowed on 28-12-1993 and various documents including an application for taking mutation entries came to be produced. The defendant no.2 was subsequently examined at Exhibit-81. The record indicates that the documents produced by the Talathi came to be marked as exhibit which included Exhibit-57. The contents of this document at Exhibit-57 were not put to the original plaintiff as he had already been examined. There was no opportunity for the original plaintiff to meet the said document. This document was exhibited as soon as it was received from the office of the Talathi. It is well settled that

merely marking a document as an Exhibit cannot straightway amount to proof of its contents. Reference in that regard can be made to the decision in *Bama Kathari (supra)*.

9. Perusal of the judgment of the appellate Court indicates that the appellate Court has principally on the basis of this document proceeded to hold against the plaintiff. In absence of the contents of Exhibit-57 being proved the contents thereof could not have been straightway accepted. Similarly, in these circumstances comparison of the signatures was also not warranted. I find that the appellate Court was not justified in relying upon this document while holding against the appellant. Accordingly, the substantial questions of law are answered by holding that the appellate Court was not justified in relying upon Exhibit-57 for reasons stated herein above.

10. It is also to be noted that it was admitted by defendant no.1 that the well was constructed after the partition in 1984 and it was situated in field Survey No.230/1. All these aspects were, therefore, required to be considered in the proper perspective. In that view of the matter, I find that the proceedings deserve to be remanded to the appellate Court for fresh consideration in accordance with law as it is

necessary to have relevant findings on the aforesaid facts.

11. In the result, the judgment of the appellate Court in Regular Civil Appeal No.300/1995 dated 22-11-2001 is quashed and set aside. The proceedings are remanded to the appellate Court for fresh adjudication in accordance with law. It would be open for the appellate Court to consider the sufficiency of evidence on record and decide the appeal in that background.

12. As the appeal is of the year 1995, same shall be decided expeditiously and by the end of October, 2017.

13. The record and proceedings be sent to the appellate Court forthwith.

14. The second appeal is partly allowed in aforesaid terms with no order as to costs.

JUDGE

/MULEY/