

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

SECOND APPEAL NO.537/2017

Ajay Keshavrao Hinge ..vs.. Sau. Leelabai Pandurangji Bhende & Ors.

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's Orders.

Court's or Judge's orders.

Mr. Amol Mardikar, Advocate for appellant.

CORAM : V.M. DESHPANDE, J.

DATED : NOVEMBER 28, 2017

1. Heard Mr. Mardikar, learned counsel for the appellant.

2. The present appeal is filed by original plaintiff. The suit filed by the plaintiff for declaration that the judgment and decree in Special Civil Suit No.21/1976 delivered by Civil Judge Senior Division, Wardha is the outcome of fraud and collusion in between the plaintiffs and defendants in the said civil suit. The suit seeking said declaration was dismissed by the Joint Civil Judge Senior Division, Wardha on 05.12.2012.

3. Being dissatisfied with said outcome, the appellant filed Regular Civil Appeal No.8/2013 which also met the same result vide judgment and decree dated 30.03.2017 at the hands of learned District Judge-1, Wardha. Hence, this second appeal.

4. Mr. Mardikar, learned counsel for the appellant submitted that the present appellant was joined as defendant in the suit of 1976. That time, his age was only seven years and therefore it was obligatory on the part of the learned Judge of trial Court conducting the said suit to apply the provisions of Order XXXII Rule 3 of the Code of Civil Procedure. In his submission, there is a breach of said mandatory provision and according to him that is the substantial question of law. He further submitted that he promptly filed a suit to protect his possession after getting knowledge in his individual capacity and therefore the prays that the judgment and decree passed by both the Courts below are erroneous.

5. The suit of 1976 was filed by the sisters of the present appellants' father against their brother for partition. When the suit was filed, on the said day, the appellant was not born. When he was seven years old, he was joined as defendant no.12 in 1976, he was represented in the said suit by his maternal uncle who was shown as next friend of the present appellant.

6. It is not in dispute that the suit of 1976 firstly reached to this Court and at the stage of Letters Patent Appeal, the present appellant represented his father in the said suit as his power of attorney. Not only that, it is also an admitted position that thereafter the matter was reached to the Hon'ble Apex Court and before the Hon'ble Apex Court

also, the present appellant participated in the proceeding as power of attorney holder of his father. The decree granted in the suit of 1976 is ultimately confirmed by the Hon'ble Apex Court and this decree the appellant wants to show that is bad and obtained by fraud.

7. The submission of the learned counsel for the appellant that he was not represented in those proceedings in his individual capacity but as power of attorney holder of his father and therefore he has a right to challenge the decree by filing the separate suit, is highly misconceived and devoid of any substance. Not only that, he was defendant no.12 in the said suit. Further, in the proceedings before this Court in Letters Patent Appeal and before the Hon'ble Apex Court, he participated in those proceedings. Therefore, it cannot be said that he has participated for and on behalf of his father alone.

The present suit is nothing but to obstruct the plaintiff of the 1976 suit from enjoying the fruits of the decree. Hence, the appeal is dismissed with costs of Rs.5,000/-.

JUDGE