

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 157 OF 1992

Manika s/o Abanrao Bhosle,
(deceased) through legal heirs

Shivaji s/o Manikrao Bhosle,
Age: 23 Years, Occ. Education,
R/o Waghi, Taluka & District Nanded,
Through Power of Attorney
Panjabrao s/o Gulabrao Bhosle,
Age: 35 Years, Occ. Private Service,
R/o Waghi, Taluka and District Nanded.

... Appellant
(Orig. Plaintiff.)

Versus

The State of Maharashtra,
through B.D.O Panchayat Samiti,
Nanded.

... Respondent
(Orig. defendant)

.....

Mrs. C. S. Deshmukh, Advocate for the Appellant.
Mr. S. P. Tiwari, AGP for Respondent-State.

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CORAM : V. K. JADHAV, J.
DATED : 14th MARCH, 2018

ORAL JUDGMENT :-

1. The appellant/original plaintiff has instituted Regular Civil Suit No. 306 of 1982 for a decree of perpetual injunction against the respondent/State and also for a declaration that the sale deed dated 14.07.1967 be declared as null and void and not

binding on the appellant/plaintiff. The appellant/plaintiff has pleaded that the suit land is the ancestral property and it is still possessed by him. In the year 1981-1982, the appellant/plaintiff has obtained 7/12 extract of his land from the concerned Talathi. At that time, he noticed that name of respondent-State of Maharashtra has been entered in the cultivation column of the land for *Sakas Ahar Yojna*. Thus, the appellant/plaintiff came to know that the said entry has been made on the basis of the sale deed dated 14.07.1967. The appellant/plaintiff has pleaded that on 14.07.1967, he was minor and as such, he was incompetent to transfer his property because of this legal disability. It is the contention of the appellant/plaintiff that he had signed the said sale deed at the instance of his father and the Sarpanch of the Village. However, he was minor at that time and unaware of the contents of the document. It has been specifically pleaded that the sale deed in question was executed in the year 1967 and the mutation entry came to be recorded in the Revenue record thirteen years thereafter. The appellant/plaintiff remained in continuous possession of the land since beginning till institution of the suit. The appellant/plaintiff, thus, constrained to institute the suit for a declaration as aforesaid and a decree of perpetual

injunction.

2. The respondent-State has strongly resisted the suit by filing written statement exhibit 17. It has been pleaded that the appellant/plaintiff was major at the time of execution of the sale deed and he was competent to execute the sale deed. The appellant/plaintiff had also received adequate consideration against the transfer of the land. It has been specifically denied that the appellant/plaintiff remained in possession of the of the suit land till the institution of the suit. It has been contended that the appellant/plaintiff is taking undue advantage of the entries remained in the Revenue record. The suit land remained in possession of the respondent/State as an owner thereof since the date of execution of the sale deed.

3. On the basis of the rival pleadings of the parties to the suit, the trial court has framed as many as six issues. The parties to the suit led their oral and documentary evidence in support of their rival contentions. By judgment and decree dated 31.08.1985, the trial court has decreed the suit with costs and declared the sale deed dated 14.07.1967 as null, void and not

binding against the appellant/plaintiff and further restrained the respondent/State of Maharashtra perpetually from interfering into the possession of the appellant/plaintiff over the suit land.

4. Being aggrieved by the same, the State of Maharashtra has preferred Regular Civil Appeal No. 233 of 1985 before the District Court at Nanded and the learned 3rd Additional District Judge, Nanded, by the impugned judgment and order dated 21.09.1991, allowed the appeal, quashed and set aside the judgment and decree passed by the trial court and dismissed the suit in toto. Hence this Second Appeal.

5. The first appellate court has considered whether the suit filed by the appellant/plaintiff is within limitation and whether he was in possession of the suit land as on the date of institution of the suit. The first appellate court has also taken the point for consideration whether the appellant/plaintiff was a minor at the time of execution of the sale deed and whether the stipulated consideration was paid by the respondent/State to the appellant/plaintiff at the time of execution of the sale deed. Except point 4, the first appellate court has recorded findings to

all the points in the negative and so far as the consideration whether the stipulated consideration was paid to the appellant/plaintiff is concerned, recorded the finding in the affirmative. In the backdrop of this, the learned counsel for the appellant/original plaintiff submits that the respondent/State has not raised a specific plea about limitation in the written statement and as such, the trial court had no occasion to consider the point of limitation. The learned counsel submits that the plea of limitation involves a mixed question of fact and law and the said question should not have been allowed to be raised for the first time in argument before the lower appellate court. The learned counsel submits that if at all the lower appellate court has considered the point of limitation, then, the lower appellate court should have framed an issue and under the provisions of Order 41 Rule 25 of the Code of Civil Procedure remitted it for finding to the trial court.

6. The learned counsel submits that even though the alleged sale deed came to be executed in the year 1967, for near about 13 years, no entry was taken in the Revenue record and further, the appellant/plaintiff remained in possession of the suit land till

the institution of the suit. The appellant/plaintiff has examined one teacher of the Zilla Parishad High School, Waghi, Taluka and District Nanded to prove the contents of the school leaving certificate exhibit 43 issued by the Head Master, Zilla Parishad High School, Waghi, Taluka and District Nanded. The said teacher has brought the original register before the court and the appellant/plaintiff has succeeded in proving his date of birth as recorded in the school leaving certificate as 06.04.1950. The school leaving certificate exhibit 43 has been issued by the school on 18.06.1972 i.e. about ten years prior to the institution of the suit. The learned counsel submits that it is thus clear that at the time of execution of the sale deed, the appellant/plaintiff was minor and as such, he was incompetent to execute sale deed. The trial court has rightly decreed the suit, however, the first appellate court has allowed the appeal erroneously even considering the point of limitation for the first time in the appeal without remanding the matter to the trial court for framing the issue of limitation which is a mixed question of fact and law.

7. The learned counsel for the appellant/plaintiff, in order to substantiate her contention, placed her reliance on the decision

in the case of *Banarsi Das vs Kanshi Ram and Ors.*, reported in *AIR 1963 SC 1165*.

8. The learned AGP for the respondent/State submits that in terms of Section 3 of the Limitation Act, 1963, it is for the court to determine the question as to whether the suit is barred by limitation or not, irrespective of the fact that as to whether such a plea has been raised by the party. Such jurisdictional fact need not, thus, be pleaded. The learned AGP submits that the age of the appellant/plaintiff was shown as 21 years at the time of execution of the sale deed. The appellant/plaintiff has not placed on record the original document i.e. the extract of Birth and Death Register maintained by the concerned Grampanchayat. It is also pertinent that the appellant/plaintiff has not examined his father even to substantiate his case that as on the date of execution of the sale deed, he was minor. The learned AGP submits that as against the contents of the sale deed, the appellant/plaintiff cannot be permitted to lead any other evidence in absence of any other agreement. The learned AGP submits that even if it is assumed that on the date of execution of the sale deed, the appellant/plaintiff was minor, in terms of the

provisions of Article 58 of the Limitation Act, 1963, the suit ought to have been instituted within three years from the date when the appellant/plaintiff ceased the legal disability as per the provision of Section 6 of the Limitation Act. The learned AGP submits that the amount of consideration has been paid by cheque and the receipt has been produced to that effect on record. The learned AGP submits that the suit land was purchased by the Government for implementation of a nutritious program and the mutation was sanctioned by the Revenue authorities. The appellant/plaintiff was disturbing the possession of the respondent/State and therefore, a police complaint also came to be lodged against him. The learned AGP submits that the appellant/plaintiff, by taking undue advantage of the entries in the Revenue record, instituted the suit to the false cause of action. The first appellate court has therefore rightly dismissed the suit instituted by the appellant/plaintiff. This Appeal is also liable to be dismissed since no substantial question of law is involved in this Appeal.

9. The learned AGP, in order to substantiate his contention, placed reliance on the decision in the case of *Gannamani*

Anasuya and Ors. vs. Parvatini Amarendra Chowdhary and Ors., reported in ***AIR 2007 SC 2380***.

10. On careful perusal of the pleadings and the judgment and decree passed by the trial court, as well as the judgment and order passed by the lower appellate court, it appears that the trial court has not given thought to the point of limitation. In terms of the provisions of Section 3 of the Limitation Act, 1963, it is for the Court to find out whether the suit has been instituted within limitation, although limitation has not been set up as a defence. It also appears that the trial court has not considered that the consideration has been paid to the appellant/plaintiff by cheque and there is a record available with the respondent/State to that effect and that is produced and proved before the court. There is a recital in the sale deed about handing over of the possession for implementation of an nutritious scheme in the village. However, the trial court has also not considered the same.

11. The first appellate court has considered two important questions, firstly, whether the appellant/plaintiff was minor at

the time of execution of the said sale deed and secondly, whether the suit is filed by the appellant/plaintiff within limitation.

12. On perusal of the sale deed, it appears that the age of the appellant/plaintiff is shown as 21 years in the sale deed. Admittedly, there is a Grampanchayat at village Waghi and from the Grampanchayat record, date of birth of the appellant/plaintiff could have been ascertained as against the age specifically shown in the sale deed, when the burden was entirely on the appellant/plaintiff to prove his minority at the time of execution of the sale deed. Needless to say that when a minor is admitted in the school, the extract of the original Birth and Death register is produced before the school authorities to record the date of birth. The appellant/plaintiff has neither brought before the court any such application submitted at the time of his admission, nor produced the extract of the Birth and Death register maintained by the Grampanchayat. The appellant/plaintiff has entirely relied upon the school leaving certificate exhibit 43. In the backdrop of these facts, the first appellate court has rightly observed that the father of the

appellant/plaintiff could have been one of the best witness to prove his minority. The first appellate court has thus recorded the finding in the affirmative and held that at the time of the execution of the sale deed, the appellant/plaintiff was not minor and his age was shows in the sale deed as 21 years.

13. Even assuming that as per the school leaving certificate exhibit 43 his date of birth is 06.04.1950, the appellant/plaintiff had attained majority on 06.04.1968 and as such, on 14.07.1967, when the sale deed came to be executed, he was a minor. The appellant/plaintiff has brought before the court the school leaving certificate and the same has been proved through the school authorities where his date of birth is specifically mentioned as 06.04.1950. Even considering the appellant/plaintiff's case as it is, it was incumbent upon the trial court in terms of the provisions of Section 3 of the Limitation Act, 1963, to consider whether the suit was within limitation. In terms of Section 6 of the Limitation Act, 1963, where a person entitled to institute a suit or make an application for the execution of a decree is, at the time from which the prescribed period is to be reckoned, a minor or insane or an idiot, he may institute suit or

make application within the same period after the disability has ceased, as would otherwise have been allowed from the time specified therefor in the third column of the schedule. It is not disputed that in terms of the provisions of Article 58, the period of limitation would be three years from the right to sue first accrues. In the instant case, as per the appellant/plaintiffs case is accepted as it is so far as his age is concerned, the appellant/plaintiff should have instituted the suit within three years after attaining the majority on 06.04.1968. However, the suit came to be instituted in the year 1982. The first appellate court has therefore rightly recorded the finding to the effect that the suit is barred by limitation.

14. On careful perusal of the 7/12 extract of the year 1968-1969 and also of the year 1969-1970 i.e. immediately after execution of the sale deed, the concerned Block Development Officer is shown in possession of the suit land. In the sale deed, the reason behind the purchase of the land is shown as the Government of Maharashtra wanted to implement the scheme of *Sakas Aahar Yojna* and the Government wanted to grow fruit bearing trees in the suit land. There is specific recital in the sale

deed that possession of the suit land was handed over to the State Government immediately. The mutation in respect of the suit land came to be effected in the year 1979 and the appellant/plaintiff's name was deleted from the record on 28.12.1979. The said mutation entry is filed on record marked at exhibit 30. It further appears that though immediately after execution of the sale deed, name of the Block Development Officer has been shown in the cultivation column for the year 1968-1969 and 1969-1970, there is only entry thereafter in the cultivation column as "self" without mentioning the name of cultivator. The first appellate authority has therefore rightly observed that the appellant/plaintiff, by taking undue advantage of the incorrect entries in the cultivation column, states about his possession over the suit property.

15. The respondent/State of Maharashtra has examined witness no.1 Ahmedullah Khan. In the year 1967, he had worked as a cashier in the office at Nanded. He has given all the details of payment of consideration by cheque to the appellant/plaintiff and further, the appellant/plaintiff has signed in token on the receipt of the cheque and the father of the appellant/plaintiff

has signed on the said receipt as a witness. A true copy of the same is produced on record and marked at exhibit 58 after comparing with the original record.

16. In the case of *Banarsi Das vs Kanshi Ram and Ors* (supra), relied upon by the learned counsel for the appellant/plaintiff, in the facts of the said case, the Supreme Court has observed that a new plea of limitation not purely one of the law, but a mixed question of law and fact, should not have been allowed to be raised for the first time at the stage of arguments in the Second Appeal by the High Court especially when it was raised by the non-contesting defendant who had not filed a written statement even in the suit. In the facts of the said case, the Supreme Court has observed that if the High Court felt overwhelmed by the provisions of Section 3 of the Limitation Act, it should at least have given an opportunity to the parties which supported the decree of the trial court to meet the plea of limitation by amending their pleadings.

17. In the instant case, the facts are altogether different. The point of limitation is purely a question of law in this case. It is

the case of the appellant/plaintiff himself that as on the date of execution of the sale deed, his date of birth was 06.04.1950 and in order to substantiate the same, he has also produced on record the extract of the school leaving certificate exhibit 43. Thus, there is no dispute on the part of the appellant/plaintiff about his own date of birth and in view of the same, the question that would arise for consideration is whether, after the disability of minority ceases, the appellant/plaintiff has instituted the suit within three years in terms of the provision of Article 58 of the Limitation Act, 1963?.

18. In the case of *Gannamani Anasuya and Ors. vs. Parvatini Amarendra Chowdhary and Ors.* (supra), relied upon by the learned AGP, in para 27 of the judgment, the Supreme Court has observed that in terms of Section 3 of the Limitation Act, it is for the court to determine the question as to whether the suit is barred by limitation or not irrespective of the fact that as to whether such a plea has been raised by the parties. Such a jurisdictional fact need not, thus, be pleaded.

19. In view of the above discussion, I find that the first

appellate court has rightly allowed the appeal by setting aside the judgment and decree passed by the trial court. There is no substantial question of law involved in this Second Appeal. The Second Appeal is thus liable to be dismissed. Hence the following order.

The Second Appeal is hereby dismissed with costs.

(V. K. JADHAV, J.)

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