

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**SECOND APPEAL NO.435 OF 1996
WITH CIVIL APPLICATION NO.5099/1996 IN SA/435/1996**

1. Dadasaheb S/o. Shamrao Ghuge
Age: 22 years, Occupation : Agriculture,
R/o.Gunjala, Taluqua & District: Beed.
2. Dinkar S/o. Shamrao Ghuge
Age: 17 years, Occupation: Minor,
By next friend his elder brother
Dadasahbe S/o. Shamrao
appellant No.1.

Appellants
(Original Plaintiffs)

Versus

1. Mahadeo S/o. Laxman Nagargoje
Age: 35 years, Occupation: Agriculture,
R/o. Wadgaon Gundha, Taluqua: Beed,
now at Khadki Deola, Taluqua: Kaij,
District: Beed.
2. Babasaheb S/o.Vithal Saruk
Age: 34 years, Occupation: Agriculture,
R/o. Jola (Sasura), Taluqua: Kaij,
District: Beed.
- 3 Shamrao S/o Tulshiram Ghuge
Age: 53 years, Occupation : Agriculture,
R/o. Gunajala, Taluqua & District : Beed.
- 4 Taramati W/o. Shamrao Ghuge
Age: 48 years, Occupation : Household,
R/o. Gunajala, Taluqua &
District : Beed.
- 5 Tulsabai W/o. Ramkishan Mundhe
Age: 33 years, Occupation : Household,
R/o. Chikhalbid, Taluqua :Kaij,
District: Beed.

Respondents
(Original Defendants)

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Advocate for Appellants : Shri H.K.Mundhe
Advocate for Respondent No.1 : Shri A.N.Nagargoje
Respondent Nos.2 & 5 served : Absent

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...
Second Appeal is dismissed against Respondent Nos.3 & 4 vide
Additional Registrar's Order dated 18.03.1998.

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CORAM : P.R.BORA, J.

DATE: 10th August, 2018

ORAL JUDGMENT:-

1. Heard Shri H.K.Mundhe, learned Counsel for the appellants and Shri A.N.Nagargoje, learned Counsel appearing for respondent No.1.

2. For the sake of convenience, I have hereinafter referred the parties by their original status in the Civil Suit i.e. to the appellants as plaintiffs and to the respondents as the defendants.

3. The plaintiffs had filed Regular Civil Suit No.242 of 1990 in the Court of Joint Civil Judge, Junior Division at Beed against the defendants seeking perpetual injunction against them. The dispute was pertaining to the agricultural land ad-measuring three acres

from Gut No.104 situated at village Gunjala, Tq. & Dist.Beed.

4. It was the contention of the plaintiffs that they were the owner of the suit land and were in possession of the said land. It was also the contention of the plaintiffs that the suit land was belonging to their father (defendant No.3) and at the time of 'Gudipadwa' in the year 1985, defendant No.3 allotted the suit land in partition to the share of the plaintiffs. It was also the contention of the plaintiffs that accordingly, their names were mutated in the revenue record vide mutation entry No.64 effected on 03.02.1986. It was also the contention of the plaintiffs that on 15.06.1990, the defendants attempted to interfere in their possession over the suit land and at that time, it was revealed to them that defendant Nos.2 and 4 had executed the registered Sale Deed in respect of the suit land in favour of defendant No.1 on 05.07.1989. The plaintiffs also came to know that previous to that defendant No.4 had executed the Sale Deed of the suit land showing herself to be the guardian of the plaintiffs. The plaintiffs had alleged that the alienation of the suit land in favour of defendant Nos.1 and 2 were made without obtaining permission of the Court and therefore, the concerned Sale Deeds were illegal and not binding on the plaintiffs. It was also the

contention of the plaintiffs that subsequently they also came to know that there was a registered Exchange Deed between defendant Nos.1 and 5 in relation to the portion allegedly purchased by them from Gut No.104. For all above reasons, the plaintiffs had filed the suit for perpetual injunction against the defendants for restraining them from causing obstruction to their possession over the suit land.

5. Defendant No.2 filed written statement supporting the case of the plaintiffs. He contended that the transaction between him and defendant No.3 was not of sale and he had executed the Sale Deed only for the purpose of security towards the repayment of the amount which he had given to defendant No.3.

6. Defendant Nos.1 and 5 resisted the claim of the plaintiffs. The institution of the suit by the plaintiffs itself was objected to by them on the ground that at the time of institution of suit, plaintiff No.1 was not competent to act as the next friend of plaintiff No.2, who was minor at the relevant time. According to them, plaintiffs Nos.1 and 2 both were minor on the date of institution of the suit and hence were incompetent to maintain the suit. It was also contended that the mutation entry No.64 on the basis of which the plaintiffs were

claiming to be in ownership and possession of the suit land, was set aside in appeal filed by defendant No.1 and the name of defendant No.1 was mutated in the revenue record and defendant No.1 was in possession of the suit land. It was further contended by the said defendants that defendant No.3 had sold the suit land to defendant No.2 vide registered Sale Deed executed on 19.04.1985 and since that date the defendant No.2 was in possession of the suit land till the date he sold it to defendant No.1. In the background of the aforesaid facts, it was the contention of the said defendants that the suit land had not remained with defendant No.3 for effecting any partition as alleged by the plaintiffs. Defendant Nos.1 and 5 had denied that the sale transaction between defendant Nos.3 and 2 is by way of security. According to them, since defendant No.3 was the owner of the suit land when he executed the Sale Deed in favour of defendant No.2, there was no requirement of obtaining permission from the Court and the Sale Deed so executed by him was legal and valid. It was their further contention that both the Sale Deeds first executed on 19.04.1985 and subsequent executed on 05.07.1989 were binding on the plaintiffs. According to the said defendants, defendant No.3 had sold the suit land to defendant No.2 for legal necessity and for benefit of family. It was also contended by the said

defendants that defendant No.1 was the bonafide purchaser of the property for the value without notice.

7. On rival pleadings of the parties, total eight issues were framed by the learned Civil Judge. Though the learned Civil Judge answered majority issues in favour of the plaintiffs, ultimately dismissed the suit on the ground that at the time of institution of the suit, plaintiff No.1 was also minor. The plaintiffs therefore, filed Regular Civil Appeal No.39 of 1994 in the District Court at Beed. The District Judge, reversed the findings which were recorded by the Trial Court in favour of the plaintiffs and though it held that the suit by minor without the guardian was tenable in law, ultimately, confirmed the dismissal of the suit on other grounds. Aggrieved by the said Judgment dated 09.01.1996 passed by the IInd Additional District Judge in Regular Civil Appeal No.39 of 1994, the plaintiffs preferred the present Second Appeal.

8. Shri H.K.Mundhe, learned Counsel appearing for the appellants – plaintiffs assailed the Judgment of the First Appellate Court on various grounds. The first objection raised by the learned Counsel was that it was beyond the competence of the First Appellate

Court to set aside the findings recorded in favour of the appellants – plaintiffs without their being any appeal preferred by the defendants against the said findings. The learned Counsel further submitted that the First Appellate Court did not take into account the fact that in his deposition before the Court, defendant No.2 had candidly admitted that the Sale Deed of the suit land dated 19.04.1985 was executed in his favour towards the security of the repayment of the land, which was advanced by him to defendant No.3.

9. The learned Counsel submitted that while admitting the matter vide order passed on 03.10.1996, this Court (Coram: A.D.Mane, J.) had framed the substantial question of law to the effect that 'as to what would be the effect of the Sale Deeds if no partition is proved'. The learned Counsel submitted that the plaintiffs had successfully proved the partition, which had taken place in the year 1985 on the basis of which the plaintiffs had become the absolute owner of the suit land. The learned Counsel in the circumstances prayed for setting aside the order passed by the First Appellate Court and consequently to decree the suit filed by the plaintiffs.

10. Shri A.N.Nagargoje, learned Counsel appearing for the

contesting respondent i.e. original defendant No.1 resisted the contentions raised on behalf of the appellants – plaintiffs. The learned Counsel supported the Judgment passed by the First Appellate Court. The learned Counsel submitted that since beginning there was no case for the plaintiffs. The learned Counsel submitted that the mutation entry No.64 executed on 03.02.1986, which was much emphasized by the plaintiffs to prove the partition and subsequent ownership and possession of the plaintiffs over the suit land, was challenged by the defendant No.1 and in the appeal, the said mutation entry was set aside. The learned Counsel submitted that this fact has been fully proved by the defendant No.1 by putting on record all necessary documents. The learned Counsel submitted that the defendant No.1 is in continuous possession of the suit land since the date he purchased it. The learned Counsel further submitted that the plaintiffs had filed temporary injunction application in the Civil Suit and the same was allowed by the Trial Court vide order passed on 13.03.1991. The learned Counsel submitted that defendant No.1 preferred Miscellaneous Civil Appeal No.43 of 1991 against the said order and the learned District Judge while allowing Miscellaneous Civil Appeal so filed by the defendant No.1 set aside the order passed by the Trial Court on 17.08.1992.

The learned Counsel submitted that the plaintiffs had preferred Civil Revision Application No.304 of 1993 against the order passed by the District Judge, however, the said Civil Revision Application was dismissed by the High Court vide order passed on 12.03.1993.

11. The learned Counsel further submitted that defendant No.1 purchased the suit land from defendant No.2 by a registered Sale Deed executed by said defendant No.2 in his favour on 05.07.1989 and on the same day the possession was handed over of the suit land to the defendant No.1. The learned Counsel further submitted that it is no where the case of the plaintiffs that possession was not handed over to defendant No.2, though Sale Deed was executed in his favour. The learned Counsel submitted that in such circumstances, suit for simpliciter injunction was not maintainable without seeking any consequential relief.

12. The learned Counsel further submitted that it was the case of the plaintiffs that the partition was effected on the basis of the written agreement on a Stamp paper, however, the said document was never produced on record. The learned Counsel further submitted that though the Appellate Court has held that the suit filed by the plaintiffs was maintainable since during the pendency of the

said civil suit, plaintiff No.1 attained majority, the basic defect had remained and it needs to be considered whether the suit itself could have been instituted by the minors alone.

13. In reply to the objection raised on behalf of the appellants that without there being any appeal against the finding recorded by the Trial Court, the Appellate Court could not have reversed the said finding, Shri Nagargoje, learned Counsel submitted that it was well within the competence of the First Appellate Court to reverse the finding recorded by the Trial Court in view of Sub-Rule (1) of Rule 22 of Order 41 of the Code of Civil Procedure. To support his contention, the learned Counsel relied upon the Judgment of this Court in the case of *Lalji Ramnath Pande Vs. Hawabi Abdulla Shaikh 2004 (4) Mh.L.J., 1020*.

14. The learned Counsel further submitted that before filing of the suit by the plaintiffs, the lands were exchanged between defendant No.1 and defendant No.5, and defendant No.1 was thus in possession of the land, which was in possession of defendant No.5.

15. The learned Counsel submitted that the Courts below have

rightly dismissed the suit filed by the plaintiffs and no case is made out by the appellants for grant of any relief as was claimed in the suit. The learned Counsel, therefore, prayed for dismissal of the appeal.

16. I have duly considered the submissions made on behalf of the learned Counsel appearing for the respective parties. I have perused the Judgments passed in Regular Civil Suit No.242 of 1990 as well as Regular Civil Appeal No.39 of 1994. I have also gone through the oral and documentary evidence available on record. The suit was dismissed by the learned Trial Judge on the ground that the plaintiffs, being minor on the date of institution of the suit, were not competent to file and maintain the said suit. It is the matter of record that the other issues were answered by the Trial Court in favour of the plaintiffs though the suit was ultimately dismissed by it on the aforesaid ground. Aggrieved by the said Judgment and decree, the plaintiffs filed the Regular Civil Appeal before the District Court. The learned District Judge maintained the decree of the dismissal passed by the Trial Court but on the different grounds than it was dismissed by the Trial Court. It is interesting to note that the issue, which was decided in negative by the Trial Court and which

had ultimately resulted in passing the decree of dismissal, has been reversed by the First Appellate Court and the other issues which were answered in the affirmative by the Trial Court are reversed by the First Appellate Court.

17. In the aforesaid factual background, it was the first submission of the learned Counsel for the appellants that the course adopted by the First Appellate Court was impermissible and without any challenge to the findings recorded by the Trial Court in favour of the plaintiffs, the First Appellate Court could not have set aside the findings recorded by the Trial Court in favour of the plaintiffs. I am, however, not convinced with the argument so made. Order 41 Rule 22 of the Code of Civil Procedure provides that any respondent, though he may not have appealed from any part of the decree, may not only support the decree but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross objection to the decree, which he could have taken by way of appeal.

18. The learned Counsel for the respondents has relied upon the Judgment of this Court in the case *Lalji Ramnath Pande Vs. Smt.Hawabi Abdulla Shaikh* [2004 (4) Mh.L.J., 1020] wherein it

is held that,

“Under Sub-rule (1) of Rule 22 of Order 41 of the Code of Civil Procedure the respondent, though he might not have appealed from any part of the decree, the respondent is entitled not only to support the decree but may also state that the finding against him in the Court below in respect of any issue ought to have been given in his favour. For doing so, he is not required to file any cross objections. This is clear from the wording of Sub-rule (1) of Rule 22 of Order 41 of the Code. A landlord in whose favour a decree has been passed on one or more of the several grounds, may not only support the decree for possession on the grounds on which it has been passed, but may also contend that the finding on the issues decided against him ought to have been given in his favour. In other words, he can support the decree not only on the ground on which the decree was passed but also on the other grounds which have been decided against him by the trial Court. Therefore, there is no merit in the contention that in the absence of cross objections the appellate Court could not have passed a decree on the ground of default.”

19. In view of the law laid down in the aforesaid Judgment, I see no substance in the objection raised on behalf of the appellants/plaintiffs. It was permissible for the original defendants to state that the findings recorded by the Trial Court against them were erroneous and deserve to be set aside and it was within the competence of the First Appellate Court to consider the submission so

made and reverse the findings recorded by the Trial Court, when it was convinced that the findings recorded were unsustainable.

20. It was the case of the plaintiffs that there was a partition of the suit land i.e. Gut No.104 as well as the other Gut numbers belonging to their father Shamrao (defendant No.3) at the time of 'Gudipadwa' of 1985. It was the further contention of the plaintiffs that in the said partition, the suit land was allotted to their share and mutation entry No.64 was accordingly effected. It is, thus, evident that entire claim of the plaintiffs was based on the fact of partition allegedly effected by their father in the year 1985. The learned Trial Court had framed a specific issue in that regard “*whether plaintiffs prove that there was partition at the time of Gudipadwa of 1985 and suit land was allotted to them by their father ?*” The Trial Court answered the said issue in the affirmative. First Appellate Court, however, has set aside the aforesaid finding.

21. The material on record shows that a specific plea was taken by the plaintiffs that the partition in the year 1985 was effected in writing and on a Stamp paper. It is the matter of record that the plaintiffs did not place on record the said Stamp paper. The witness

examined by the plaintiffs namely Bhausahab (PW-2) has deposed before the Trial Court that the deed of partition was on a Stamp paper. It was also the contention of the plaintiffs that on the basis of said Stamp of partition, the mutation entry No.64 was effected. As against it, it was the contention of the defendants that no such partition was ever effected nor there was any such Stamp executed by defendant No.3 Shamrao. In view of the rival pleadings, the plaintiffs were under an obligation to bring on record the said Stamp so as to prove the partition allegedly effected by defendant No.3 amongst his sons. Admittedly, the plaintiffs did not produce the said document on record. As has been observed by the First Appellate Court, it was not the case of the plaintiffs that the said written Stamp of 1985 had lost or was not in their possession or was in possession of somebody else or was destroyed. The plaintiffs had thus failed in bringing on record the best possible evidence to substantiate the contention raised by them that the suit land was allotted in their favour by their father in the year 1985 by a written partition deed on the Stamp paper.

22. Secondly, the thrust of the plaintiffs was on mutation entry No.64 to support their contention that partition was effected in the

year 1985 and the suit land was allotted to their share. As has been submitted by the learned Counsel appearing for the respondents, said mutation entry No.64 was challenged before the Sub-Divisional Officer, Beed and the Sub-Divisional Office set-aside the said mutation entry. Nothing has been brought on record by the plaintiffs that in any further appeal or revision, mutation entry No.64 has been restored. Thus, the plaintiffs had failed in proving both the facts on the basis of which they had claimed ownership over the suit land. I do not see any infirmity in the observation made and the finding recorded by the First Appellate Court in that regard.

23. It is significant to note that mutation entry No.64 dated 03.02.1986 was challenged by defendant No.1 and the Sub-Divisional Officer accordingly set aside the said mutation entry and defendant No.1's name was mutated as owner of the said land in the revenue record. Defendant no.1 has come out with a specific case that since then, he is in possession of the suit land. As I noted above, no contrary record has been produced by the plaintiffs to show that the decision of the Sub-Divisional Officer on the basis of which name of defendant No.1 is mutated in the revenue record, has been set aside or quashed.

24. It was further brought to my notice by learned Counsel appearing for the respondents that the plaintiffs had filed the temporary injunction application before the Trial Court seeking the injunction restraining the defendants from interfering the possession of the plaintiffs over the suit land and though the same was allowed, in the Miscellaneous Civil Appeal No.43 of 1991, the learned District Judge set aside the said order on 17.08.1992. The learned Counsel submitted that against the order passed by learned District Judge, the plaintiffs had preferred Civil Revision Application No.304 of 1993 before the High Court but the same was dismissed on 12.03.1993.

25. From the record, it is thus evident that there was no interim relief in favour of the plaintiffs and defendant No.1 continued in possession of the suit land. The material on record further reveals that defendant No.3 sold the three Acres by way of registered sale deed to defendant No.2. The sale deed is at Exh.111 in the record of the Trial Court. The recitals of the sale deed speak that the possession of the said land was handed over to defendant No.2 on the date of execution of the sale deed. The material on record further shows that defendant No.2 sold the said land to defendant No.1 on

05.07.1989 and also handed over the possession of the said land. Defendant No.2 is admittedly is in relation with the plaintiffs. It is no where contention of the plaintiffs or no such case was made out by the plaintiffs that the possession was never handed over to defendant No.2 though the sale deed is executed in his favour.

26. Failure on part of the plaintiffs to prove the factum of partition in the year 1985 on the basis of a written Stamp paper leads to an inference that no such partition took place and defendant No.3 continued to be the owner of the said land. The material on record shows that before executing the sale deed in favour of defendant No.1 and defendant No.5, the permission was obtained by defendant No.4 from the District Court. The material on record also shows that the application so filed in the District Court seeking permission to sell the said land was supported by defendant No.3. The District Court had accordingly granted the permission. The order of the District Court has never been challenged by the plaintiffs.

27. Considering the facts as aforesaid, it is transpired that the plaintiffs have utterly failed in proving their title as well as possession over the suit land and the learned First Appellate Court

has therefore, rightly dismissed the appeal filed by the plaintiffs. I do not see any infirmity in the Judgment and order so passed. The Second Appeal being devoid of any substance, deserves to be dismissed and is accordingly dismissed. Civil applications pending, if any, stand disposed of.

(P.R.BORA)
JUDGE

SPT