

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

SECOND APPEAL NO. 241 OF 2016

Shivaji S/o. Eknath More,
Age : 57 years, Occu. Agri.,
R/o. Golapangri, Tq. & Dist. Jalna. ... Appellant

VERSUS

1. Sanjay S/o. Babanrao More,
Age : 29 years, occu. Agri.,
through GPA Manoj S/o. Raosaheb More,
Age : 31 years, Occu. Agri.,
R/o. Golapangri, Tq. & Dist. Jalna.
2. Lalu S/o. Babanrao More,
Age : 25 years, Occu. Agri.,
R/o. Golapangri, Tq. & Dist. Jalna.
3. Sakhubai W/o. Sonaji Garad,
Age : 35 years, Occu. Agri & Household,
R/o. In front of Kitlay Garden,
Chakradhar Dalvi Bungalow No. 207,
N-7, CIDCO, Aurangabad. ... Respondents

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Mr Milind M. Patil (Beedkar), Advocate for the appellant
Mr J. C. Badve h/f Mr S. M. Gunjal, Advocate for respondent
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CORAM : A. M. DHAVAL, J.
DATE : 26TH OCTOBER, 2018.

ORAL ORDER:-

1. Heard Mr Milind M. Patil (Beedkar), learned counsel for the appellant.

2. The respondents herein are the original plaintiffs. They had filed RCS No. 356/2009 against the present appellant, who is his

distant uncle. The suit was for possession on the basis of the title. The plaintiffs claimed that, the land of 81 R from Block No. 90, Mouja Golapangri was allotted to plaintiff no. 1 in family partition, while remaining land of 40 R was in possession of plaintiff Nos. 1 and 2. There was no joint family of plaintiffs and defendant. There was partition between the plaintiffs' father and defendant's father long back and the suit land at Block No. 90 was allotted to the brother of plaintiff's grand-father. The plaintiffs' father and mother died and later the plaintiffs realised in 1994, that the defendant has obtained the suit land of 81R from the plaintiffs mother by virtue of a document signed as partition deed. The plaintiff's mother acted as guardian for the plaintiff No. 1 and executed the said unregistered deed dt.01.11.1994 which purportedly shows that, in partition the suit land was given to the defendant in consideration of Rs. 50,000/-. The plaintiffs asked the defendant to return the suit land but as the defendant refused, the suit for possession was filed. The defendant by written statement Exh. 11 claimed that, Shantabai More as a natural guardian for plaintiff no. 1 and Babanrao More-the father of the plaintiffs, by document dt. 24.10.1994 executed a partition deed in favour of the defendant and the possession thereof was also delivered. The defendant's name was mutated in the revenue record and he was put in possession for 16 years from November-1994 to

November-2009. It is a legal transfer for consideration. The defendant has become owner thereof.

3. On these pleadings, the issues were framed. The parties led their evidence and the learned trial Judge by judgment dt. 16.08.2013 ventured to hold that the document Exh. 56 was a transaction of sale which was illegal. The learned trial Judge decreed the suit and directed the defendant to deliver vacant possession to plaintiff no. 1. The aggrieved defendant filed Reg. Civil Appeal No. 169/2003. Learned District Judge-2, Jalna dismissed the appeal with costs, however, directed the plaintiffs to refund the amount received by them barring Rs. 25,000/- which were awarded to them towards the costs of the proceedings. Hence, this appeal.

4. Mr Milind Patil, learned counsel for the appellant/orig. defendant argued that, since there was transfer of the suit land by the parents of the plaintiffs', the suit for possession simplicitor was not maintainable and a declaration for setting aside the alienation was essential. In this regard, he relied on Nagappan Vs. Ammasai Gounder (2004) 13 SCC 480 and Vishwambhar Vs. Laxminarayana (Dead) through L.Rs' AIR 2001 SC 2607. In these judgments, it is laid down that, when a guardian of a minor sales the property of a

minor or the share of minor to third party, the said transaction is voidable at the instance of minor and, if he has any objection, he must within limitation seek setting aside the alienation and suit for possession simplicitor would not be maintainable. Mr Patil also argued that, the defendant was in possession of suit land for 16 years and his name was mutated in the revenue record. The document was either a partition deed or a sale deed. In the circumstances, the suit for possession simplicitor should not have been decreed.

5. Heard learned counsel Mr Barde for respondent.

6. On carefully going through the agreement marked at Exh. 56, it is difficult to define whether it is a partition deed or it is a sale deed. In either case, it required execution of document on stamp paper of appropriate amount as per the consideration and should have been registered. It is not a list of partition. In absence of registered document, it cannot be treated as a partition. Besides, the payment of consideration of Rs. 50,000/- is against the concept of partition. As it is not registered document, it cannot be even treated as sale. As per the provisions of Indian Stamp Act and the Registration Act, the said document could not have been read in evidence as a sale transaction. The nature of transaction cannot be

said to be a collateral purpose but it is the direct purpose for which the document is required to be executed on stamp paper and required to be registered.

7. At the most, the defendant could have claimed that it was a agreement to sell with either payment of part consideration or full consideration but it is not his case. He has therefore not drafted the written statement to claim any protection under the doctrine of part performance.

8. As far as the judgments relied upon by Mr Patil, the learned counsel for appellant/orig. defendant are concerned, those relate to transfer of property as contemplated under the Transfer of Property Act by registered sale deed. There can be no dispute when the transfer is effected by registered sale deed or registered partition deed, it is necessary, that a minor whose interest is transferred, has to seek a declaration that, the voidable transaction is not binding on him. In the present case, there is no transfer of interest in the eyes of law. In absence of any registered document on a sufficient stamp paper of sufficient value, the document will not create any transfer of interest and it is not necessary to claim any declaration for setting it aside.

9. There is no case of adverse possession claimed. The suit is filed on the basis of title under Article 65. Considering the nature of defence raised, the defendant cannot dispute the title of the plaintiff No. 1 as he is claiming title through plaintiff No. 1 on the basis of the document executed by his mother and father which unfortunately creates no right as it is not properly stamped and registered. As the defendant has not claimed adverse possession, he has to show some right to retain the possession. No such right has been shown. The doctrine of part performance would not be applicable in absence of specific pleadings. In the result, no substantial question of law is raised.

10. No doubt, the learned trial Judge as well as the appellate Judge might have committed some mistakes which may raise questions of law but as those do not go to the root of the matter to change the decisions, those cannot be considered as substantial question. If the substantial question of law is not raised, the Second Appeal is not maintainable. Hence, it deserves to be dismissed and is accordingly dismissed.

11. At this stage, learned advocate for the appellant, on instructions from the appellant present in the court, submits that he

is filing SLP before the Supreme Court. In view of the statement, the interim relief operating is extended by a period of two months subject to the appellant furnishing undertaking that he would approach the Apex Court to file SLP and if he does not do so, he would pay Rs.25,000/- to the other side. The undertaking shall be filed within a week from today.

12. Mr Patil, learned counsel for the appellant also submitted that, the suit would be governed by Article 60 and the suit is beyond limitation but this is a suit based on title and hence it is governed by Article 65. As no adverse possession is claimed, there is no question of any bar of limitation.

13. In view of dismissal of appeal, nothing is left for consideration in the connected civil application and same stands disposed of.

[A. M. DHAVAL]
JUDGE

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