

Sequeira

*IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION*

***SECOND APPEAL NO. 431 OF 2016
Along with
CIVIL APPLICATION NO. 1468 OF 2015
(For stay)***

Mr.Vijay Digambar Darade and others .. Appellants
Vs
Mr.Dnyandeo Malhari Darade and others .. Respondents

Mr.G.B.Pawar i/b Mr.A.N.Naikwadi, for Appellants.

Mr.Surel S.Shah, for Respondent Nos.1 to 4.

***Coram : N.M.Jamdar, J.
Date : 22 January 2018.***

Oral Order :

The Appellants- Plaintiffs have challenged the concurrent judgments and orders passed by the learned Civil Judge Junior division Baramati and the learned District Judge, Baramati, dismissing the suit and appeal filed by the Appellants.

2. The Appellants filed the suit bearing No.11 of 2007 for a declaration that the sale deed executed on 22 September 2005 by the Plaintiff No.1 and his brother Santosh in favour of Defendants in respect of suit property be declared as void and nullity. The courts

did not accept the contention of the Plaintiffs that the sale deed was a nullity, and dismissed the suit and appeal accordingly.

3. Heard the learned counsel for the parties.

4. The learned counsel for the Appellants firstly submitted that the suit land was a fragment and being a fragment it could have not been sold in view of the provisions of Bombay Prevention of Fragmentation and Consolidation of Holdings Act 1947. The learned counsel for the Respondent strongly opposes this submission. There is a merit in the opposition. The submission that there is a bar under the Act of 1947 was not taken in the written statement. It was not argued in the trial Court nor taken in the appeal memo before the district Court. It was not argued in the district Court. Worse still. even in the appeal memo of the present Second appeal it is not even taken as a ground. The learned counsel has simply across the bar advances such submission. The learned counsel for the Appellants submitted that this being a pure question of law can be raised in Second appeal. Whether the land is a fragment, whether the bar applies, whether the procedure under the Act declaring it as a fragment was followed, are also the issues which are in the realm of facts. Such a submission cannot be just advanced across the bar for the first time in second appeal. The contention therefore cannot be accepted.

5. The second contention raised by the learned counsel for the

Appellants is that there was no partition and at the most a family arrangement and therefore the sale deed dated 27 September 2005 could not have been executed. Both the courts have considered this submission. The mutation entry No.1226 which was on record showed division and that both the Plaintiff No.1 and deceased Santosh had a share in the same. There is no reference to family arrangement in the said mutation entry. Apart from this position nothing else has been produced in furtherance of this submission.

6. The third ground on which the decisions of both the Courts is sought to be assailed is regarding a fraud played on deceased Santosh. This is one of the main grounds on which suit was instituted. The learned counsel for the Appellants reiterated the contentions advanced in both the Courts. He submitted that the Respondent deliberately placed deceased Santosh under the influence of liquor and got the sale deed executed. It was contended that the consideration was not adequate and the property was under mortgage to a financial institute. There is absolutely no merit in this case. The sale deed was not executed by deceased Santosh alone but also by Plaintiff No.1. Plaintiff No.1 has not come up with a theory that he was under the influence of alcohol. He is a commerce graduate. Sale deed is dated 27 September 2005 and suit is filed on 7 February 2007. Nothing has been demonstrated as to what stopped the Plaintiff No.1 from making an immediate grievance. It is difficult to believe that the Plaintiff No.1 would make no grievance or complaint

at all. Therefore both the Courts rightly came to the conclusion that the theory of placing deceased Santosh under influence of liquor, was an after-thought.

7. The learned counsel submitted that the amount was repaid by the Plaintiff in front of village elders. The learned counsel for Appellant has placed relied upon the case in *Chittoori Subbanna v. Kudappa Subbana and others – AIR 1965 Supreme Court 1325*. I have gone through the deposition of P.W.1. He does not state even the year when the meeting took place ,let alone the month and the date. At what rate of interest the amount was returned, is also not mentioned. The witness examined has also failed to provide particulars. The arguments advanced by the learned counsel for the Appellants in this regard are purely in the realm of assessing the evidence. No substantial question of law arises. There is no perversity committed by both the Courts in appreciation of evidence. Second appeal is accordingly dismissed. Civil Application stands disposed of.

(N.M.Jamdar, J.)