

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL No. 566 OF 2012
WITH
CIVIL APPLICATION No. 238 OF 2012 IN S.A. No. 566 OF 2012

Krishna Vithoba More ... Appellant/Applicant

Vs.

Tanubai w/o. Dattu Dhamankar & Ors. ... Respondents

Mr. Sandesh D. Patil a/w. Ms. Anusha Amin, Advocate for the appellant/applicant.

Mr. S.S. Redekar, Advocate for respondent No. 1 to 3.

CORAM: MRS.MRIDULA BHATKAR, J.

DATE: 26th March, 2018.

P.C.:

This Second Appeal is directed against the judgment and order dated 22nd December, 2010 passed by the learned District Judge, Gadhinglaj thereby partly allowing Regular Civil Appeal No. 32 of 2003. The appellant is a plaintiff, who has filed Regular Civil Suit No. 119 of 1994 for partition, separate possession, mesne profit and also for perpetual injunction against the defendants, out of which, defendant nos. 1 and 2 are his real sisters. It is an admitted fact that the relationship is admitted so also the fact that the suit property is an ancestral property which is claimed through their mother Kondubai, who has become the full owner of the property after demise of her husband. The appellant/plaintiff claimed equal share in the suit

property, i.e., Gat No. 464, Gat No. 756 wherein house No. 340 is built. The trial Court decreed the suit with apportionment of 1/3rd share between the appellant and defendant nos. 1 and 2/sisters. The said judgment was challenged by Tanubai/defendant No. 2, her son/defendant No. 3 and defendant No. 5 who claimed to be purchaser of Gat No. 756 and House No. 340. The First Appellate Court has accepted the contention of defendant No. 2/Tanubai that she has purchased Gat No. 756, House No. 340 by registered sale deed dated 19th May, 1962 (Exhibit 85) from her mother Kondubai who was in need of money at the relevant time. It was contended by respondent No. 1/Tanubai i.e., defendant No. 2 that as she has purchased the property, i.e., Gat No. 756 and House No. 340 during the lifetime of Kondubai, the said property cannot be in the common hotchpotch but is independently owned by Tanubai, who has absolute right to dispose of the said property. Thus, there remained only Gat No. 464 and the First Appellate Court has set aside the judgment and order of the trial Court in respect of Gat No. 756, House No. 340 and restricted the apportionment of 1/3rd share each to the appellant, respondent nos. 1 and 2 to the extent of land bearing Gat No. 464 of Village Dhamane, Taluka Ajara. Hence, this Appeal.

2. The learned counsel for the appellant has submitted that the sale deed of May, 1962, which is allegedly executed between Kondubai and Tanubai, is sham and bogus document. The contents in the said document are not proved. The view taken by the trial Court is correct and the learned Judge of the First Appellate Court ought to have accepted the discussion of the learned trial Judge on this issue and should not have set aside the judgment and decree passed by the trial Court. The learned counsel has further submitted that the First Appellate Court has erred in not considering the limited presumptive value under section 90 of the Evidence Act. The learned counsel has submitted the substantial question of law is:

“Whether absence of pleading was fatal to the case of the appellant especially when the parties have led evidence to that effect and both the parties have led evidence by understanding the case of each other.”

3. The learned counsel for the respondents opposed this Appeal and has supported the order passed by the First Appellate Court. He has submitted that the appellant/original plaintiff did not challenge the sale deed of 1962 by making necessary averments by amending the plaint. He submitted that the fact of purchase of portion of suit land

by registered sale deed was disclosed by respondent nos. 1 and 2 in the written statement.

4. Read both the orders and the plaint. Considered the submissions. The sale deed of 1962 is purchased by defendant No. 2/Tanubai. Defendant No. 2/Tanubai has entered the box to prove the said registered sale deed, as she is the purchaser of the property. At the time of purchase, Tanubai was 21 years old and was major. She was having some source of income. It is immaterial whether she was spinster or married at the relevant time. Kondubai has executed this registered sale deed during her lifetime and she died in the year 1978. The appellant/plaintiff has not lead any evidence on the point of possession, whether the possession remained with him, whether Kondubai was staying in the said house till her death. Moreover, if at all the said registered sale deed is challenged as sham and bogus, the burden shifts on the appellant/plaintiff to prove the said fact as and when the burden is discharged by defendant No. 2/Tanubai by leading specific evidence on the point of proof of the contents of the said document. Under such circumstance, I am of the view that no substantial question of law is made out to admit the Appeal, hence dismissed.

5. In view of dismissal of Second Appeal, Civil Application does not survive and the same is also accordingly disposed of.

(MRIDULA BHATKAR, J.)