

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

SECOND APPEAL NO.730 OF 2018

Manik Laxman Kendre

... Versus ...

Pushpa w/o Uttamrao Kendre and another

...

Mr. A.A. Nimbalkar, Advocate for the appellant

Mr. P.N. Nagargoje, Advocate for the respondent No.1

respondent No.2 – (served) absent.

...

CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 20th MARCH, 2019.

PER COURT :

1 Present appeal has been filed by original defendant challenging the Judgment and Decree passed in Regular Civil Appeal No.30/2010 by District Judge-1, Ambajogai, Dist. Beed dated 01.02.2018, wherein his appeal came to be dismissed. In the said appeal he had challenged the Judgment and Decree in Regular Civil Suit No.2/2005 passed by 2nd Joint Civil Judge Junior Division, Ambajogai dated 12.02.2010. The said suit was for permanent injunction and it was decreed. (Parties are referred by their

original nomenclature before the Trial Court.)

2 What is not in dispute is that the plaintiff is the sister-in-law of defendant. Defendant was employed in Military from 1979 to 1996. Their ancestral village is Kendrewadi. Further, it is not in dispute that immovable property Sy. No.346 admeasuring 81 Ares was purchased in the name of plaintiff by sale deed dated 12.03.1996 from one Mohammad Afsarkhan Mohammad Dulekhan Kadri. There was an agreement dated 01.11.1995 prior to the said sale deed.

3 The plaintiff had come with the case that she and her husband shifted to Ambejogai in 1975 and started business in purchasing and selling wood, chilly powder, jowar etc.. Initially they had purchased one house from one Harun Chaus in Mangalwar Peth, Ambajogai. Thereafter, they purchased the said immovable property Sy.No.346 for a consideration of Rs.1,50,000/-, at that time they had sold the house, which was in Mangalwar Peth. They constructed house consisting of six rooms, about six months prior to the suit and since then plaintiff is residing in the said house along with family. She has specifically contended that defendant had no right, title or interest in the suit property. However, by pressurizing her family members and harassing her he has got executed Gift Deed for an area of 35 Ares out of 81 Ares land. Thereafter, she has raised objection in respect of the said Gift Deed.

However, defendant is claiming ownership over the same and resides there. It is also contended that the defendant is obstructing her possession over the suit property. He is damaging the tress and on 30.12.2004 he gave threats to plaintiff that she should vacate the premises and hence the suit was filed.

4 Defendant resisted the claim of the plaintiff by filing written statement. He denied that plaintiff and her husband shifted Ambajogai in 1975 and started earning. It is contended that the house property has been purchased and constructed from joint family income in respect of house at Mangalwar Peth. The said property was in the name of husband of the plaintiff only as representative of the family. He had contributed by sending amount when he was employed in military to his brother and father. The suit plot has been purchased by his contribution also, but with ulterior motive plaintiff's husband has got it purchased in the name of plaintiff. After admitting that the suit property is joint family property, plaintiff has executed Gift Deed in respect of 35 Gunthas land on 02.12.2003. Since after his retirement he is residing in the suit property. Plaintiff's husband, another elder brother and father as well as defendant decided to construct house at Ambajogai. All of them have constructed 8 rooms. He is occupying four rooms and plaintiff is occupying four rooms. Plaintiff is not the sole owner of the suit property and therefore, he prayed for dismissal of the suit.

5 After the issues came to be framed, both the parties have led oral as well as documentary evidence and after considering the evidence on record the learned Trial Court has decreed the suit. Defendant has been restrained from disturbing the possession of the plaintiff over 36 Ares land towards North of 81 Ares land from Sy.No.346/2.

6 As aforesaid the defendant challenged the said Judgment and Decree passed by the learned Lower Court in Regular Civil Appeal No.30/2010, which came to be dismissed on merits. Hence, this Second Appeal.

7 Heard both sides. The learned Advocate appearing for the appellant vehemently submitted that both the Courts below have not considered the evidence and law properly. Both the Courts have not appreciated the contents of the Gift Deed executed by the plaintiff in favour of defendant, in which she has clearly admitted that the suit property is a joint family property. Plaintiff had failed to prove that the suit property was purchased out of her income. On the contrary, there was no partition amongst the brothers and therefore, whatever property was purchased at Mangalwar Peth from the joint family income was sold and then the present 81 Ares land was purchased. Therefore, it becomes joint family property. The suit was bad for non joinder of necessary parties. The father of the

plaintiff's husband and their brother, who are the members of the joint family were necessary parties. There is no proper compliance of Order 41 Rule 31 of the Code of Civil Procedure, 1908 by the learned First Appellate Court. The admissions given by plaintiff's witness were not considered. Under such circumstance, when there is perverse finding, substantial questions of law are arising.

8 Per contra, the learned Advocate appearing for the respondents supported the reasons given by both the Courts below. It was submitted that plaintiff has proved that she is the owner and possessor of the property. The said property was purchased out of her income. The fact of execution of Gift Deed would show that defendant had accepted that plaintiff is the owner of the suit property. Now, a separate suit has been filed for getting the said Gift Deed cancelled, since the plaintiff's claim is that, it has been obtained by harassment and undue influence. When plaintiff proved possession over 36 Ares land from the Northern side in 81 Ares land of Sy.No.346/2, her possession has been rightly protected. Therefore, no substantial question of law is arising.

9 The first and the foremost fact, that is required to be considered is that the sale deed in respect of Sy.No.346/2 is admittedly in the name of plaintiff. Defendant has come with the case that he had contributed to the

consideration amount. The consideration amount is Rs.1,50,000/-. Even if it is admitted that defendant was employed in military between 1979 to 1996, yet it was for him to prove as to how much contribution he had given at the time of purchase of the said property. The plaintiff has contended and proved that the house which was in Mangalwar Peth was sold and the said amount of consideration has been utilized in purchasing the suit property. According to defendant, the said property at Mangalwar Peth was a joint family property. The fact is admitted that the said property in Mangalwar Peth has been sold, but it has not been brought on record that who sold it. But it appears that it was in the name of husband of the plaintiff and he has sold it. If defendant had share in the said property then he had allowed it to be sold, is a question, which has not been answered by defendant. Another question, that has been left unanswered by the defendant is that, according to him, he retired from military in the year 1996 and the sale deed in respect of suit property is also of 1996. Then whether the property was purchased prior to his retirement or after retirement has not been brought on record. But then if it is after his retirement, then and as per the theory he had contributed to the consideration amount, then why he had alleged the property to be purchased in the name of sister-in-law. The natural conduct would have been to allow it to be in the name of brother. Further fact which

gives in a way death blow to the contention of the defendant that he is relying upon the Gift Deed dated 02.12.2003. The learned Courts below have rightly considered that the effect of acceptance of Gift Deed is that the defendant is accepting the ownership of plaintiff alone. Then his theory about contribution to the consideration amount fails. If it would have been a joint family property and the fact was admitted to the plaintiff then they could have gone for partition deed and not a gift deed. Since the gift deed is appears to be a subject matter in another suit, it will not be proper to go much deep into that aspect.

10 The burden was on the defendant to prove that the family is still joint, however, he has failed to produce evidence regarding the same. On the contrary, evidence has come that since many years plaintiff and her husband are residing separately at Ambejogai. Further it appears that though the open plot was purchased by plaintiff in the year 1996, yet she claims that the rooms were constructed six months prior to the suit. The suit was filed on 03.01.2005. If all the family members i.e. plaintiff's husband, defendant, another brother and their father had decided to construct house on the suit plot has not been explained by the defendant. Therefore, taking into consideration the evidence, which has been scanned by both the Courts below in detail, it is justified for both the Courts below to come to the

conclusion that plaintiff is the owner and possessor of the suit property. Definitely, plaintiff has proved that defendant is obstructing her possession over the suit property and therefore the discretion with the Courts below have been properly used. No substantial question of law has been pointed out. Hence, Second Appeal is disposed of as "**Not admitted**".

(Smt. Vibha Kankanwadi, J.)

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