

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CIVIL REVISION APPLICATION NO. 149 OF 2019

Ravindra s/o William Gaikwad
& another

Applicants

Versus

Komal d/o William Gaikwad
& others

Respondents

Mr. V.D. Sapkal, Advocate for the applicants.

Mr. B.S. Shinde, Advocate for respondents no. 1 to 4.

Mr. S.R. Sapkal, Advocate for respondent no.5.

CORAM : M.S. KARNIK, J.

DATE : 9th August, 2019.

PER COURT :

1. Applicants have filed this revision application against the judgment and order dated 24.06.2019 passed by the learned District Judge - 7, Ahmednagar in Review Application No. 4/2018.

2. Applicants are the original plaintiffs. Plaintiffs had filed suit before the 2nd Jt. Civil Judge, Senior Division, Ahmednagar, for declaration and possession. The trial Court, by judgment and order dated 10.11.2016, was pleased to decree the suit and declare plaintiffs and defendant no. 5 as owners of the suit property, being heirs of deceased Helan. It is further declared by the trial Court that the sale-deed dated 07.05.2008 executed by Dr. William in favour of defendants no. 1 to 3 in respect of the suit property is void and illegal. Further reliefs are also granted by the trial Court directing defendants no. 1 to 4 to handover possession of the suit

property to the plaintiffs.

3. Defendant no. 1 challenged the order passed by the trial Court by filing appeal before the learned District Judge, Ahmednagar. The appellate Court partly allowed the appeal and passed the following order :

ORDER

1. Appeal is partly allowed with costs.
2. Judgment and decree passed by 2nd Jt. Civil Judge, Senior Division, Ahmednagar; in Spl.C.S. no. 02/2015 is set aside and modified, to the extent of possession and ownership of the suit property.
3. A sale deed dtd.07/05/2008 executed by Dr. William in favour of defendant nos. 1 to 3 in respect of the suit property is declared as void and illegal and not binding upon the plaintiffs.
4. It is hereby declared that the plaintiffs and defendant no. 5 are having their 17/63rd (each) share in the suit property. They are entitled for separate possession of their above share in the suit property.
5. It is further declared that defendant nos. 1 to 4 are having 1/21st (each) share in the suit property. They are entitled for separate possession of their said share in the suit property.
6. Partition of the suit property be effected and possession of separate share be given to the plaintiffs and defendants, as above, by appointing a court commissioner to that regard.

7. Decree be drawn accordingly.

8. R & P be sent to learned trial Court along with copy of this judgment, as per rules.

4. Review petition came be filed against the judgment and decree of the appellate Court by the original plaintiffs on the ground that the appellate Court has virtually converted the suit for declaration into a suit for partition. The appellate Court, vide the impugned order, was pleased to dismiss the review petition.

5. Learned counsel for the revision applicants - original plaintiffs submitted that though in the review petition specific grounds are raised that the suit filed by plaintiffs for declaration could not have been converted by the appellate Court into a suit for partition as the decree of the appellate Court would indicate, however, none of the grounds raised are considered by the appellate Court. He would further submit that even the trial Court had not proceeded to frame any issue in this respect nor appropriate points were framed by the appellate Court for consideration.

6. Learned counsel for respondents no. 1 to 4 supported the order passed by the appellate Court in review.

7. I have gone through the order passed by the appellate Court. Though a specific ground was raised in the review petition that the appellate Court was not justified in converting the suit for declaration into the one for partition, the said submission has not been dealt with. There is some substance in the contention of

learned counsel for the applicants that the appellate Court though before dealing with the issue of deciding shares of the parties, has not heard the applicants. I find force in the submission of the learned counsel for the applicants that the appellate Court has dealt with the issues as if dealing with a suit for partition as the reliefs granted by appellate Court indicate. In this view of the matter, in my opinion, instead of sending the matter back to the appellate Court for hearing of review petition, it would be in the interest of justice if the appeal itself is heard afresh on merits by the appellate Court.

8. The order passed in review as well as the judgment and decree dated 18.09.2019 are set aside. The appellate Court to rehear the appeal after considering the objections of the applicants that the appellate Court has no power to convert the suit for declaration into the one for partition. All contentions are kept open. I may not be understood to have expressed any opinion on merits. Needless to mention it is always open for the appellate Court to exercise powers under Order 41 Rule 34 of the Code of Civil Procedure.

9. Civil Revision Application accordingly stands disposed of in above terms.

(M.S. KARNIK, J.)

dyb/