

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 717 OF 2016

Shivram s/o Raghunath Barbole,
Age 63 years, Occupation Agriculturist,
R/o : Walmiki Nagar, Khadgaon
Taluka and District Latur.

...Appellant.
(Orig.Deft.No.1)

VERSUS

1) Prabhakar s/o Rajaram Kale,
Age 64 years, Occupation Agriculturist,
R/o : Ekurga Taluka Omerga,
District Osmanabad.

2) Kavita Bai w/o Girish Mahindrakar
@ Mainderkar, Age 46 years,
Occupation Medical Practitioner,
R/o : Main Road, AUSA, Taluka AUSA,
District Latur.
At Present Mahindrakar Hospital,
Kawa Road, Latur.

3) Balasaheb s/o Narsoba Katore,
Age 45 years, Occupation Agriculturist,
R/o : Wanwada Taluka AUSA
District Latur.

...Respondents.
(No.1 is Ori.Plaintiff.
Nos.2 and 3 are Ori.
Defts.No.2 and 3)

Mr. C. R. Deshpande, Advocate, for Appellant.
Mr. S. S. Manale, Advocate, for Respondent No.2.
Mr. R. M Gaikwad and Mr. C. D. Biradar for respondent
No.1. (Absent)
Respondent No.3 -Served (Absent).

CORAM : SMT.VIBHA KANKANWADI, J.
Date : 11-06-2019.

JUDGMENT :

1. Present appeal has been filed by original defendant No.1
challenging the Judgment and decree passed in Regular Civil Appeal

No.38 of 2013, by learned District Judge-4, Latur, dated 30-06-2016, whereby after setting aside the decree passed by the Trial Court, the suit filed by present respondent No.1 came to be decreed.

2. The factual matrix leading to this appeal are that ;

The present respondent No.1 - original plaintiff filed Regular Civil Suit No.93 of 2012 for possession before 4th Joint Civil Judge, Senior Division, Latur contending that, a plot admeasuring 50 feet East-West and 60 feet South-North situated at village Khadgaon Dist. Latur in Survey No.49 was a self acquired property of one Maruti Namdeorao Katare, resident of Wanwada Tq. Ausa. He had purchased it from one Vithal Pawar on 06-11-1976. After death of Maruti, the plot was owned by his widow Saraswatibai as absolute owner. It is stated that, plaintiff is the real brother of Saraswatibai. Saraswatibai was issueless. She was maintained by the plaintiff in her old age. She expired on 05-08-1997 and prior to that she had executed will on 17-07-1997 in favour of plaintiff bequeathing a suit plot. It is stated that, his name was recorded to the Municipal record and then he had gone to his native place Ekurga Tq. Omerga, and therefore, the plot was vacant. When he returned after about two months prior to the filing of the suit for supervision, he found that, the defendants in the plot, and therefore, he asked defendant No.1 about the same, whereupon it was told that, defendant No.1 is the owner of the suit plot. It is stated that, he had gone to the suit plot eight to ten days after 'Sankranti' Festival of 2001. He, thereafter,

made enquiry and then came to know that, the suit plot was given separate Municipal No.3996/1 and it was shown to be in the name of Balasaheb Narsoba Katare. It is stated that, in order to grab the property, the documents have been prepared and forcible possession has been taken. Hence, he filed the suit for possession and mandatory injunction to dismantle the illegal construction.

3. The suit was resisted by defendant No.1 by filing written statement. It was stated that, the suit plot was in fact joint family property of Maruti Katare and his brother Narsoba Katare and other family members, though it was purchased in the name of Maruti alone. Maruti had obtained permission to make construction on the suit plot on 23-10-1983, however no construction was made and he expired on 03-12-1989. He was having undivided share in the plot so his wife succeeded to that undivided share. Defendant No.3 is son of Maruti's brother. Defendant No.3 was looking-after Saraswatibai. After her death, defendant No.3 had filed Regular Civil Suit No.549 of 1997 against his brother, mother and sister for partition and separate possession of the joint family properties including the suit plot. The suit was compromised on 30-11-1997. In the said compromise, the suit plot was given to defendant No.3. It is stated that, the sister of the defendant No.3 had relinquished their right, title and interest from the joint family properties. Therefore, defendant No.3 was the exclusive owner of the property and he had obtained N.A. permission on 06-12-1997. He then sold the plot to

Kavita Girish Maindarkar on 20-08-1998 and then Kavita sold said suit plot to defendant No.1 on 03-03-1999. Defendant No.1 had made construction in the suit plot on 07-10-2000. At any point of time, the plaintiff never raised any objection, and therefore, he is estopped from raising any obstacle. It is stated that, after getting knowledge of the compromise decree, the defendant No.3 has prepared / managed to forge anti-dated document styled as Will. Saraswatibai never executed any Will. She was not in sound disposing state on the date of the Will. At the most, she could have executed Will to the extent of 1/2 share or undivided share from the suit plot.

4. Defendants No.2 and 3 also filed written statements which were on the same line of the written statement filed by defendant No.1.

5. Taking into consideration the rival contentions, issues were framed, parties have led oral as well as documentary evidence. Taking into consideration the evidence on record, the learned Trial Court has come to the conclusion that, the suit plot was the self acquired property of Maruti. His wife Saraswatibai had become absolute owner and possessor of the suit plot after the demise of Maruti. However, it is held that, plaintiff has failed to prove that, Saraswatibai had executed the Will dated 17-07-1997 in his favour. Plaintiff failed to prove that, he was put in possession and then

illegally dispossessed, and therefore, it was held that, plaintiff is not entitled to get any relief as claimed. Hence, the suit was dismissed.

6. As aforesaid, the original plaintiff challenged the said Judgment and decree in Regular Civil Appeal No.38 of 2013, and after hearing both sides the learned First Appellate court has allowed the appeal and decreed the suit by setting aside the decree passed by the learned Trial Court. Plaintiff was held to be entitled to recover the suit plot by demolishing the construction on the suit plot within three months.

7. This Court on 18-10-2016 before issuing notice to the respondents had taken note of the question raised on behalf of the appellant and then when the appeal was admitted on 20-06-2017, detailed order was passed, however substantial question of law was not framed. However, taking into consideration the tenor of both orders, it can be said that, following substantial questions of law this Court intended to frame ;

- (i) Whether in absence of proof of Will; plaintiff was entitled to recover the possession of the suit property, that too by demolishing the existing structure ?
- (ii) Whether the learned First Appellate Court was justified in invoking Section 15 and 16 of the Indian Succession Act, when the parties had not raised such plea ?
- (iii) Whether the First Appellate Court was justified in setting aside the Judgment and decree passed by the learned Trial Court ?

8. Heard learned advocate Mr. C. R. Deshpande for the appellants and learned advocate Mr. S. S. Manale for respondent No.2. Learned advocate Mr. R. M Gaikwad and Mr. C. D. Biradar for respondent No.1 were absent. Respondent No.3 though served, remained absent.

9. It has been vehemently submitted on behalf of the appellant that, the learned First Appellate Court failed to consider that, when the plaintiff had failed to prove the Will allegedly executed by Saraswatibai in his favour, then he was not entitled to get any relief claimed for. Though the learned First Appellate Court also held that, the said Will is not proved yet went wrong in passing a decree in favour of plaintiff on some other ground which was not pleaded at all by the plaintiff. Learned First Appellate Court failed to see that, the plaintiff was claiming title only on the basis of the Will which he could not prove, therefore, the ultimate result ought to have been to dismiss the suit.

10. Learned advocate for respondent No.2 supported the submissions made by the learned advocate for the appellant and submitted that, she had purchased the suit plot after considering the clear title of original defendant No.3. She had then sold the said plot to defendant No.1 i.e. present appellant.

11. The first and the foremost fact that is required to be considered is that, the learned Trial Court on the basis of evidence before it, had

come to the conclusion that the plaintiff had failed to prove that, Saraswatibai left Will dated 17-07-1997 in his favour. Important point to be noted is that, though the Trial Court had held that, the suit plot was self acquired property of Maruti and after his death, the plot was exclusively held by Saraswatibai, it was on the basis of challenge to the Will, the burden was on the plaintiff to prove the said Will, in which he had failed. The First Appellate Court also held that, the suit plot was the self acquired property of Maruti and that Saraswatibai had not executed any Will dated 17-07-1997 in favour of plaintiff. In fact when plaintiff had filed the said suit based upon the title which he was claiming through the said Will, and he failed in establishing the said Will i.e. title to the suit plot, then the ultimate result would have been only the dismissal of the suit, not else. To whom that property would have gone and whether the defendant No.3 could not been said to be the owner of the property or not, was not at all the question which could have been gone into in this case. There was no dispute between the defendants interse or the title of defendant No.3 was not directly challenged. On the contrary, the plaintiff who was claiming title through Will and it was challenged by the defendants; therefore, it was for him to prove the said Will. This Court need not go into the assessment of the fact that, whether the Will was proved by plaintiff or not for the simple reason that, both the Courts have concurrently held that, Will is not proved by the plaintiff. The plaintiff has not challenged the said finding by way of

appeal. Under such circumstance, when the plaintiff failed to prove the Will which was a basis for claiming title in him, the Trial Court had correctly dismissed the suit. The learned First Appellate Court unnecessarily framed issues No.2, 4 and 5 which were not at all in question or could not have been said to be arising as a fact in issue.

12. Unnecessarily the Judgment has been devoted to those points which were not relevant and which were not in issue, and therefore, ultimately a wrong conclusion has been drawn. Under such circumstance, the substantial question of law needs to be answered in favour of the appellant. In fact there is absolutely no necessity to go into the oral evidence led by the parties in this case for the simple reason that, on the basis of the Judgments itself it can be said that, the learned First Appellate Court took a wrong and erroneous decision as aforesaid on irrelevant points. There was no question of invoking Indian Succession Act that too Section 15 and 16. The parties appear to be governed by Hindu Succession Act. Even if we consider that, there was a typographical mistake in the Judgment and the learned First Appellate Court intended to refer to Section 16 of Hindu Succession Act, yet as aforesaid it can be said that, the title of defendant No.3 was never challenged by the plaintiff in specific terms and unless he has some interest, he had no *locus standi* to challenge the title of the others. The learned First Appellate Court was totally unjustified in taking note of the provisions of either Indian Succession Act or Hindu Succession Act, and further invoking Order

VII Rule 7 of Code of Civil Procedure. Hence, all substantial questions are answered in the negative. As a result of the same, the appeal deserves to be allowed. Following order is therefore, passed ;

ORDER

- 1) Second appeal is hereby allowed.
- 2) The Judgment and decree passed in Regular Civil Appeal No.38 of 2013 passed by learned District Judge 4, Latur dated 30-06-2016 is hereby set aside and the Judgment and decree passed in Regular Civil Suit No.93 of 2012 (Old Special Civil Suit No.59 of 2001), by learned 4th Joint Civil Judge, Senior Division, Latur dated 17-01-2013 is restored.
- 3) No order as to costs.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.