

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 717 OF 2017

Laxman Sukhdeo Bhumber (Died through LRs)
& Anr. ...Appellants

Versus

Ramkisan Sukhdeo Bhumber (Died through
LRs) & Anr. ...Respondents

.....

Ms. Sunita S. Rajejadhav, Advocate for Appellants.

Mr. Girish Nagori, Advocate holding for Mr. Sandip
Rathod, Advocate for Respondents.

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 15-02-2019.

ORDER :

01. Present appeal has been filed by original defendant No. 3 and legal representatives of original defendant No. 1. Present respondent No. 1A to 1C are the legal representatives of original plaintiff, who had filed R. C. S. No. 219 of 1998 before Civil Judge, Junior Division, Partur, Dist. Jalna for partition and separate possession. The said suit came to be decreed. The Judgment and decree passed by the Trial Court was challenged by present appellants in R. C. A. No. 199 of

2006 before the District Court, Jalna. Appeal was heard by learned Ad-hoc District Judge-2, Jalna and it has been dismissed on 19.8.2015.

02. The original plaintiff had come with a specific case that defendant No. 1 is the step brother of plaintiff and defendant No. 2 is his step sister. Defendant No. 3 had purchased the suit property from defendant No. 1. It was contended that the plaintiff's mother Radhabai was the legally wedded wife of one Dajiba Bhumbar. Dajiba performed second marriage with one Sakhubai and during the life time of Radhabai and thereafter, Radhabai and plaintiff were driven out of the house. Radhabai expired about 20 years prior to the suit. In the meantime, Sukhdeo also died and defendant No. 1 had sold the property to defendant No. 3 without any legal necessity. Plaintiff claims that he has share in the suit property and therefore, suit for partition and separate possession has been filed.

03. Defendants No. 1 and 3 have resisted the suit claim by giving common written statement. It is denied that Sukhdeo had performed marriage with Radhabai. It is stated that in fact Sakhubai was legally wedded wife of deceased Sukhdeo. They admitted that the suit property is

ancestral and after the death of Sukhdeo defendant No. 1 Laxman has become absolute owner and possessor of the suit property. He had executed the sale deed on 14.8.1987 and 7.9.1988 in favour of defendant No. 3. Accordingly, the mutation entries were granted in favour of defendant No. 3 and since then the defendant No. 3 is the absolute owner of the suit properties. Defendant No. 3 claims that he is a bona fide purchaser for value without notice.

04. On the rival contentions, issues came to be framed. Parties have led oral as well as documentary evidence. The suit came to be decreed. It was held that plaintiff is having 1/3rd share in the suit property and he is entitled to get it separated. As aforesaid the appeal preferred by original defendants No. 1 and 3 came to be dismissed.

05. Heard learned Advocate Ms. Sunita Rajejadhav for appellants and Mr. Girish Nagori, learned Advocate holding for Mr. Sandip Rathod, learned Advocate for respondent No. 1A to 1C. It will not be out of place to mention here that original defendant No. 2 and present respondent No. 2 did not contest the suit.

06. It has been argued on behalf of the appellants that both the Courts below have not considered the oral as

well as documentary evidence on record properly. Though, it is admitted that the suit properties were the ancestral properties of Sukhdeo, yet, the relationship of the plaintiff with the defendant No. 1 has not been proved. In fact, defendant No. 1 had sold the properties to defendant No. 3 way back in 1987-1988, yet, no action was taken by the plaintiff till 1988 when the suit was filed. When the marriage between Sukhdeo and Radhabai has not been proved, it can not be said that the plaintiff had share in the suit properties. Further, the defendant No. 3 could not get any information regarding the same and after it was noticed by him that after death of Sukhdeo, Laxman had become the sole owner of the property, he had purchased the same. Under such circumstance, both the Courts ought to have held that defendant No. 3 is a bona fide purchaser for value without notice. The calculation of the share is not proper. In fact, plaintiff was entitled to get only $16 \frac{1}{2}$. The substantial questions of law are involved and therefore, she submitted that the second appeal deserves to be admitted.

07. Per contra, the learned Advocate appearing for the respondents No. 1A to 1C submitted that both the Courts have concurrently held that the relationship between the plaintiff and Sukhdeo has been established.

He has examined 2 witnesses to prove that Radhabai was the first wife of Sukhdeo and he is the son of Radhabai. The witnesses, who were examined by the plaintiffs were resident of the village of defendants. Under such circumstance, they had the knowledge about the family history of the plaintiff and defendants. The shares are also carved out properly and therefore, no substantial question of law is involved.

08. It is to be noted that on factual aspect both the Courts have concluded that there is evidence on record to prove that Radhabai was the wife of Sukhdeo. In fact, admission was taken from plaintiff that defendant No. 1 had given Wheat and Jawar 4 years prior to the institution of suit. If, there was no relationship between defendant No. 1 and plaintiff, why defendant No. 1 would give share to the plaintiff? This fact has been extracted by way of such admission. In order to prove that Radhabai had married to Sukhdeo and plaintiff is his son begotten from Sukhdeo, plaintiff has relied on the testimony of PW-2 Vishwanath and PW-3 Sakharam. They both have stated that Sukhdeo had 2 wives and the chronology of the marriage is also stated that Radhabai married to Sukhdeo first and then Sukhdeo married to Sakhubai later. There was nothing in their cross-examination to discard the said fact.

Further, these 2 witnesses have also stated that plaintiff used to visit village Ellora to meet defendant No. 1 and take share from the suit property. Such fact is also extracted from the cross-examination of both the witnesses examined by the plaintiff. This fact is sufficient to support the contention of the plaintiff. Further, documentary evidence on record produced on behalf of plaintiff would show that since about more than 30 years he has posed himself as son of Sukhdeo. Therefore, the said documentary as well as oral evidence was sufficient to establish the relationship.

09. When the relationship is established it follows that plaintiff had share in the suit property. Even, if we consider notional partition, on the death of Sukhdeo, plaintiff would get 1/3rd share. In fact, it is in question as to whether the defendants No. 1 and 2, who are the children born to the second wife i.e. the voidable marriage would be entitled to get any share in the ancestral property or not. But, no such claim is raised by plaintiff himself. On the contrary, he has come with a case that he has only 1/3rd share. He is not claiming the exclusive ownership and another fact is that it has not come on record that Sukhdeo got married to Sakhubai after 1956. Therefore, it will have to be considered that

Sukhdeo's marriage with Sakhubai was also legal and therefore, defendants No. 1 and 2 had share in the suit property. Under such circumstance, the plaintiff is entitled to get 1/3rd share. Both the Courts below have not committed any error either on the facts or in law. Therefore, no substantial question of law is arising. Hence, the second appeal is dismissed / not admitted. In view of the fact that the second appeal is not admitted, civil application No. 14345 of 2017 stands disposed of.

[SMT. VIBHA KANKANWADI]

JUDGE

Dahibhate/-