

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

5 SECOND APPEAL NO.680 OF 2016

ABASAHEB KHANDU BORUDE
VERSUS
SHESHNARAYAN BABU BORUDE AND ORS

...

Mr. N.C. Garud, Advocate for the appellant

...

CORAM : SMT. VIBHA KANKANWADI,J.

DATE : 18th MARCH, 2019

PER COURT :

1 Present appeal has been filed by the original plaintiff challenging the Judgment and Decree in Regular Civil Appeal No.394/2012 (old First Appeal No.2282/2010 before this Court) dated 21.08.2015, thereby the appeal filed by the present appellant came to be dismissed. In the said appeal before the First Appellate Court, the appellants had challenged the Judgment and Decree passed in Special Civil Suit No.37/2007 (old Regular Civil Suit No.63/2004) by Civil Judge Senior Division, Ahmednagar on 04.08.2010.

2 In the said suit the plaintiffs were seeking right of preemption under Section 22 of the Hindu Succession Act. Plaintiffs had come with the

case that plaintiffs and defendant Nos.1 and 2 had common ancestor. Plaintiff No.1 and predecessor of defendant Nos.1 and 2 deceased Babu were the real brothers. The suit property i.e. agricultural land bearing Sy.No.169/1E admeasuring 2 Hectares 80 Ares, Sy.No.111/1/2 area admeasuring 78 Ares, Sy.No.110/6 area admeasuring 16 Ares, Sy.No.110/4 area admeasuring 3 Ares including common well in Sy.Nos.110/4 and 169/1E were the Joint Hindu Family properties. Those lands were mutated in the name of deceased Babu, who was elder brother of plaintiff No.1. Plaintiff No.1 had filed R.C.S. No.166/1978 for injunction. In the said suit deceased Babu was restrained from alienating the suit lands. Further, he was directed to sell the suit lands to plaintiff No.1, if he offers the price as per the market rate. Plaintiff No.1 had also filed another suit i.e. R.C.S. No.165/1991 for partition. The said suit came to be decreed. As per the said decree, the half share in the ancestral properties was carved out, which went to the share of plaintiff No.1. It is stated that the details of the partition how effected has also been given. It is also stated that some of the property went to the share of deceased Prayagbai, Radhabai and Gayabai, who were the heirs of deceased Khandu and Anusayabai. However, Prayagbai had bequeathed her share to plaintiff No.1. Plaintiff No.1, Radhabai and Gayabai had got the land mutated in the name of plaintiff No.4 vide Mutation Entry

No.6911. It has been contended that plaintiffs have right of preemption to purchase the said land as the defendant Nos.1 and 2 intended to sale out the land. Plaintiff Nos.1 to 4 had met them on 27.04.2004 and offered price. However, the defendant Nos.1 and 2 did not respond. They have sold out the said properties to defendant Nos.4 and 5. It is stated that defendant Nos.1 and 2 were residing at a different place and the entire suit properties were held by plaintiffs. Therefore, defendant Nos.4 and 5 have not received possession of the suit lands. Under such circumstance, they say that the sale deed in favour of defendant Nos.4 and 5 is not binding on them. They have right to purchase the said land and hence suit.

3 Defendant Nos.1 and 2 have filed their written statement. It has been contended that they have executed the sale deed out of legal necessity in order to meet the expenses. It is stated that the decrees which were obtained against Babu are not binding on them. Defendant Nos.4 and 5 have filed their separate written statements. It was denied that the suit properties were ancestral or Joint Hindu Family properties and the plaintiffs are still the co-owners. It was also contended that the plaintiffs are not class-I heirs with respect to defendant Nos.1 and 2 to have their rights executed against defendant Nos.1 and 2. It was also

denied that the sale deeds are not hit by provisions of the Bombay (Prevention of Fragmentation and Consolidation of Holdings) Act.

4 Taking into consideration the rival contentions, issues came to be framed, parties have led oral as well as documentary evidence on record. Taking into consideration the evidence on record and after hearing both parties, the learned Trial Court has dismissed the suit. The original plaintiffs had filed said Regular Civil Appeal No.394/2012. It was heard by learned District Judge-3, Ahmednagar and it has been dismissed on 21.08.2015. Hence, present Second Appeal.

5 Heard learned Advocate appearing for the appellant. It is not even necessary to issue notices to the respondents. Since the Second Appeal has been filed under Section 100 of CPC and there are concurrent findings of the Courts below. Unless the appeals even prima facie shows that there is substantial question of law involved in this case, it was thought fit not to even issue notice to the respondents. In order to substantiate contentions the learned Advocate appearing for the appellant submitted that both the Courts have not considered the evidence as well as legal point properly. In R.C.A. No.166/1978 which was filed by the present appellant/plaintiff No.1 deceased Babu was restrained from alienating the suit lands and therefore, question that was

posed by both the Courts was - as to whether the injunction would operate against person or against the property. In the said suit a right was given to the plaintiff No.1 to purchase the suit lands, if he offers price at market rate. Thereafter, the suit for partition of the properties was also decreed in favour of plaintiff No.1 and his share has been carved out. Thereafter, Babu expired and therefore the plaintiffs have no alternative but to claim their right under Section 22 of the Hindu Succession Act against defendant Nos.1 and 2. Therefore, the substantial question of law is centered around the right under Section 22 of the Hindu Succession Act and therefore, Second Appeal deserves admission.

6 As aforesaid, the present appeal has been filed under Section 100 of CPC and there is concurrent findings by both the Courts below. Therefore, before considering the point of admission of the Second Appeal few pronouncements of the Hon'ble Supreme Court are necessary to be borne in mind.

A) **Ishwar Dass Jain vs. Sohan Lal, (2000) 1 SCC 434,**

wherein it has been observed that -

“Under Section 100 CPC, after the 1976 amendment, it is essential for the High Court to formulate a substantial question of law and it is not permissible to reverse the judgment of the first appellate court without doing so. There are two situations in which

interference with findings of fact is permissible. The first one is when material or relevant evidence is not considered which, if considered, would have led to an opposite conclusion. The second situation in which interference with findings of fact is permissible is where a finding has been arrived at by the appellate court by placing reliance on inadmissible evidence which if it was omitted, an opposite conclusion was possible. In either of the above situations, a substantial question of law can arise.”

B) **Kondiba Dagadu Kadam vs. Savitribai Sopan Gujar,**
(1999) 3 SCC 722, wherein it has been held that

“In a Second Appeal under Section 100 of CPC, the High Court cannot substitute its own opinion for that of the First Appellate Court, unless it finds that the conclusions drawn by the lower Court were erroneous being :

- (i) Contrary to the mandatory provisions of the applicable law;
OR
- (ii) Contrary to the law as pronounced by the Apex Court;
OR
- (iii) Based on in-admissible evidence or no evidence.

7 Now, turning towards the facts of the case, the first and the foremost facts, with which the plaintiffs themselves are coming that plaintiff No.1 had filed R.C.S. No.166/1978 and it is stated that it was for injunction. The said suit came to be decreed in 1988. Deceased Babu

was directed to restrain from alienating suit land to the other defendants therein and instead of that he was directed to sale out the suit land to plaintiff No.1 herein, if he offers price as per market rate. The said decree was produced in this case at Exh.42. Interestingly the plaintiffs have not given the date of death of Babu. In the pleadings instead of putting that decree to execution after a long gap of so many years in the year 2004 the present suit was filed. At the same time, we are also required to consider the fact that plaintiff No.1 had also filed R.C.S. No.165/1991 for partition against deceased Babu. The decree was produced at Exh.43. It shows that the said suit for partition came to be decreed in 1991. The details of, how the partition was effected as per the said decree, has been in the plaint itself. Therefore, in fact, before the carving out of the share of Babu as per decree in R.C.S. No.166/1978, he was restrained from alienating the suit land to other defendants, but instead of that, he was directed to offer the suit land to the plaintiff No.1 and if plaintiff No.1 would have agreed to the market price, then Babu was bound to sale out the said land to plaintiff No.1. In other words, it can be said that after R.C.S. No.166/1978 which was only for injunction when the parties were still joint the relief of injunction was granted, so also almost the relief under Section 22 of the Hindu Succession Act was granted to plaintiff No.1 and thereafter, the shares of the parties i.e.

plaintiff No.1 and Babu were carved out by way of partition in R.C.S. No.165/1991. We may not go through the merits and demerits of the decree passed in R.C.S. No.166/1978 because it had become final since Babu did not prefer any appeal. One thing is certain that during the life time of Babu, plaintiff No.1 did not offer market price and did not take any step to purchase the land as per the said decree in R.C.S. No.166/1978.

8 Now, in the year 2004 the plaintiffs have come with a case that they have preferential right to purchase the suit properties. Admittedly, plaintiff Nos.2 to 4 appears to be not party to R.C.S. No.166/1978. Under such circumstance, the basic question is, whether they can take advantage of that decree. Now, after the partition was effected on the basis of suit filed by plaintiff No.1 in R.C.S. No.165/1991, it can be certainly said that plaintiff No.1 as well as Babu became owner of their respective shares. Now, after demise of Babu it cannot be said that the plaintiffs are the class-I heirs of Babu, who could claim preferential right under Section 22 of the Hindu Succession Act. Definitely, the directions, which were given in R.C.S. No.166/1978, were the directions to Babu and we may also for the sake of argument presume that it was by virtue of Babu as well as plaintiff No.1 being the legal heirs

of Khandu. Section 22 of Hindu Succession Act was applied while giving that direction. But when plaintiff No.1 did not put that decree to execution, it can be said that those directions have come to an end simultaneously with death of Babu. The rights under Section 22 of Hindu Succession Act cannot be carried forward to the next generation, in case, when for the first generation i.e. the class-I heirs, such directions to sell out the land was granted. Under such circumstance, both the Courts below have properly appreciated the facts as well as law. No substantial question of law arises in this matter. Hence, the Second Appeal is disposed of as not admitted.

(Smt. Vibha Kankanwadi, J.)

agd