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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO. 398 OF 2016
WITH
CIVIL APPLICATION NO. 774 OF 2016**

Shri Maruti Shripati Charwad
(since deceased through LRS)

... Appellant/
Applicant
(Org. Defendant)

V/s.

Mr. Dattatray Namdev Pol and Ors.

... Respondents
(Org. Plaintiffs)

.....

Mr. Prasad S. Dani, Sr. Advocate a/w Mr. Prashant M. Patil, Advocate for the Appellant/Applicant.

Mr. Rajendra B. Jagtap a/w Mr. Aniesh S. Jadhav i/by Mr. Ashok B. Tajane, Advocate for the Respondent Nos. 1 to 4.

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CORAM : R.D. DHANUKA, J.

DATE : 26th AUGUST, 2019.

P.C.:

. By this Second Appeal filed under Section 100 of the Code of Civil Procedure, 1908, the appellants (original defendants) have impugned the decree passed by the learned 4th Ad-hoc District Judge and Asst. Session's Judge, Pune on 8th December, 2015 and confirming the decree dated 20th December, 2007 passed by the learned Civil Judge, Senior Division, Pune in the suit for possession, declaration and perpetual injunction in respect of the suit property, filed by the respondents (original plaintiffs).

2. It was the case of the plaintiffs that the suit properties were purchased by Baijabai Raghunath Mohankar from Sundarabai Ganpati Barate by virtue of Sale Deed dated 1st December, 1945 for consideration of Rs.250/-. On 7th February, 1969, the said Baijabai bequeathed the suit properties as well as few other properties in favour of the plaintiffs. In so far as the defendant is concerned, he is claiming to be a maternal uncle of plaintiffs. The father of the defendant was allowed to cultivate the suit properties, in view of his relationship with Baijabai.

3. After demise of the Baijabai, the plaintiffs claim to be owners of the suit properties by virtue of Registered Sale Deed and filed a suit for possession, declaration and perpetual injunction against the defendant. The suit for possession was resisted by the defendant by filing a written statement. The plaintiffs examined the witnesses. The defendant did not enter the witness box.

4. The learned Trial Judge framed various issues for determination and rendered findings of fact in favour of the plaintiff. The learned Trial Judge passed a decree of possession in favour of the plaintiff and directed the defendant to handover the possession of the suit property.

5. The District Judge, framed four points for determination and held that the plaintiff have proved that they were the owners the suit property by Registered Sale Deed dated 7th February, 1969 and the defendant had failed to prove that he was the owner of the suit property.

6. Mr. Dani, learned Senior Counsel for the defendant invited my attention to the documents annexed to the second appeal and would submit that the plaintiff had failed to produce the sale deed in favour of the Baijabai and thus the learned Trial Judge could not have considered the Baijabai as the owner of the suit property. He further submits that the plaintiff could not be declared as the owner of the suit property whether on the basis of the Will or otherwise. He submits that none of the attesting witnesses were examined by the plaintiff. Merely, by examining a third person under Section 69 of the Indian Succession Act, 1925, the learned Trial Judge could not have rendered a finding about execution and attestation of the said Will.

7. It is submitted by the learned Senior Counsel that the defendant was a tenant in respect of the suit property. Proceedings thus could be filed only under provisions of the Maharashtra Tenancy and Agricultural Lands Act, 1948 and not before the Civil Court.

8. Learned Counsel for the original plaintiff on the other hand invited my attention to the averments made in the plaint and also the written submission. He submits that the plaintiff has specifically referred to the sale deed executed by the predecessor of Baijabai in favour of Baijabai. He submits that in the written statement filed by the defendants, the sale deed in favour of the Baijabai not disputed. It is submitted that in view of this position even if the plaintiff had not produced the sale deed before the Trial

Court, the learned Judge rightly declared the plaintiff as the owner of the suit property on the basis of other documents produced by the plaintiff before the Trial Judge. Learned Counsel for the plaintiff submits that the defendant did not enter the witness box and did not discharge the onus cast on him before the Trial Court.

9. In so far as the issue of Will not having been proved urged by the learned Senior Counsel for the defendant is concerned, it is submitted by the learned Counsel for the plaintiff that since both the attesting witnesses had expired, under Section 69 of the Indian Evidence Act, handwriting of one of the attesting witnesses and signature of the person executing the document can be proved in the manner prescribed.

10. In so far as the mutation entry in the name of the Baijabai is concerned, it is submitted by the learned Counsel that the defendant had made an application for recording his name as owner of the suit property though neither any certificate under Section 32M of the Maharashtra Tenancy and Agricultural Lands Act, 1948 nor any sale deed was produced by the defendant before the Revenue Authorities.

11. It is submitted by the learned Counsel that the will executed by the Baijabai in favour of the plaintiffs was not even disputed by the defendant in the written statement. He submits that only case of the defendant in the written statement in so far as Will is concerned, was that Baijabai had committed fraud upon the defendant.

12. A perusal of the record clearly indicates that there was a reference to sale deed made in the plaint by the original plaintiffs. There was no denial of the sale deed by the defendant in the written submission. In this circumstances, in my view, the learned Trial Judge was right in rendering a finding of ownership in favour of the Baijabai and thereafter in view of the Will having been executed by the Baijabai in favour of the plaintiffs proved, the respondent became the owner of the suit property.

13. It is not in dispute that though the onus was based on the defendant to prove that the defendant had become the owner of the suit property, the defendant did not enter the witness box. The learned Trial Judge accordingly rightly rendered a finding that the defendant failed to prove his ownership in respect of the suit property.

14. In so far as the submission of Mr. Dani, learned Senior Counsel for the defendant that in view of the Baijabai being widow, the deemed date of tenancy was postponed under Section 33(B) is concerned, Mr. Dani, learned Senior Counsel did not dispute that even after death of the said widow within one year, no rights were exercised to claim the deemed tenancy under the said provision within the time prescribed.

15. The District judge has independently considered the evidence laid by the plaintiffs and the pleadings and documents forming part of the record and has rendered the findings that the defendant has failed to prove that he was the owner of the suit property. He has further held that the

plaintiff had become owner of the suit property. The Appellate Court has considered the fact that the sale deed was executed by the predecessor in title of Baijabai in her favour and was entitled to bequeath her ownership rights in favour of the plaintiff by a Will.

16. Findings of facts rendered by the two Court below being concurrent and not perverse, cannot be interfered by this Court. No substantial question of law arises in this second appeal. Second Appeal is devoid of merits and is accordingly dismissed. In view of the dismissal of the second appeal, nothing survives in the civil application no. 774 of 2016 and is accordingly dismissed. No order as to costs.

(R.D. DHANUKA, J.)