

5.8.2019

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 8693 OF 2016

Narayan Ramji Harak & anr. ...Petitioners

V/s.

1. Roopchand Gopala Jagtap
and Ors. ...Respondents

* * * *

Mr. Sanjay Prabhakar Shinde, Advocate for the
petitioners.

Mr. Mahesh R. Joshi, Advocate for respondents
no.5 to 7, 9 to 11 and 14 to 17.

CORAM : SANDEEP K. SHINDE, J.

DATE : 5TH AUGUST, 2019.

ORAL JUDGEMENT :

1. Respondents no.1 to 3 were original
defendants no.2, 3 and 4 in the suit for
partition being Regular Civil Suit No. 59 of

1997. Pending suit, defendants no.1 to 6 agreed to sell their undivided share in the suit property to Narayan Ramji Harak and Laxmibai Narayan Harak, the petitioners herein. On 1st July, 2004 defendants no.1 to 6 in the suit, executed a sale-deed in favour of the petitioner. On 9th August, 2004, mutation entry no.24818 was passed and names of the petitioners came to be recorded in the revenue record. In the meantime, the partition suit was decreed and against which defendants no.1 to 4 had preferred Civil Appeal No. 187 of 2008. In this Appeal, the petitioners applied for their impleadment vide an application preferred under Order 1 Rule 10 of the Code of Civil Procedure, 1908. The Appellate Court dismissed the application on 28th June, 2016.

2. It appears from the record, the

appellants in Civil Appeal No. 187 of 2008 did not pursue the appeal and therefore on 24th June, 2016, Civil Appeal No. 187 of 2008 was also dismissed. The order reads as under :

“ Civil Appeal No.187 of 2008 is dismissed for want of prosecution ”.

3. The petitioners have challenged the order of dismissal, as well as, the order refusing to implead them as a party respondents in Civil Appeal No.187 of 2008.

4. Heard learned Counsel for the parties.

5. As on today, the fact remains that, there is no appeal on the file of the learned Appellate Court and since the order dated 28th June, 2016 dismissing the Appeal has not been challenged by the appellants therein and therefore unless the Regular Civil Appeal No.187 of 2008 is revived and restored to the

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file, the petitioners request to implead themselves as appellants cannot be considered. Obviously, the petitioners have no right to challenge the order of dismissal of the Appeal passed by the Appellate Court on 28th June, 2016.

6. The learned Counsel for the petitioner has relied on the judgment of the Apex Court in the case of **Kasturi v. Iyyamperumal reported in 2005(5) Bom.C.R. 801 (S.C.)** and the judgment of this Court in the case of **Shrikrushna Narayan Tupkari v. Mahadeo Bansilal Dahale and anr. Reported in 2014 (4) Bom. C.R. 415** and relied upon paragraph-11 thereof which reads thus :

“Upon perusal of paragraph 41 of the aforesaid judgment of the Hon’ble Supreme Court, in my view, there is no straight-jacket formula in respect of such cases whether to allow or disallow a subsequent purchaser on record of the

suit or appeal as necessary or proper party to the suit. In the light of the dictum laid down by the Hon'ble Supreme Court in the suit for specific performance of contract for which I have supplied the emphasis above, and in the light of the facts of the present case, in my opinion, the petitioner is a person who was clearly deceived by respondent no.2 by contracting with him merely because the respondent no.2 was getting double the price that was agreed with the original plaintiff or respondent no.1 herein Mahadeo. The petitioner prima-facie did not have knowledge when the sale-deed was executed in his favour, either of the pendency of the suit in the trial Court or of passing of the decree in favour of respondent no.1 but was caught in a trap laid by the respondent No.2 who accepted the total consideration and executed sale-deed in his favour on 26.2.2013. As per the doctrine of lis pendense under Section 52 of the T.P. Act the sale deed in favour of the petitioner does not automatically become void or illegal but the decree

passed in the list may be binding on the petitioner. But then the rights of the person like the petitioner who stood deceived, can certainly be worked out by the Court ultimately by passing the decree instead of asking such person to go and to file another suit. In my opinion, that would also save the multiplicity of litigation or an avoidable second litigation. As a matter of fact, such a person like the petitioner in that event, would be able to put up his case for a bona fide purchaser for value without any notice or knowledge and of deception practised on him. It is not that Section 52 of the T.P. Act closes the doors of justice to such a person in the litigation merely because he came to know late about passing of the decree, of pendency of the suit or the appeal, as the case may be. In the backdrop of the above referred facts in the instant case and in the light of the observations made by the Hon'ble Supreme Court as quoted by me above, I think the petitioner should have been allowed by the lower Appellate Court to

participate in the proceedings of appeal which is pending before it instead of driving him out of the Court."

7. In my view, the ratio laid down in the aforesaid judgment has no application to the facts of the case in hand.

8. In the case cited above, the suit was for specific performance and pending suit, property was alienated to third person. It is under those circumstances, this Court has held that "as a matter of fact, such a person like the petitioner in that event, would be able to put his case for bonafide purchaser for value without any notice or knowledge and of deception practised on him.

10. In the case at hand, the petitioners are the purchasers of undivided share in the joint family property during the pendency of the suit

for partition and therefore they may have to adopt appropriate remedy for protecting their interest, as advised.

11. In view of the facts of the case and for the reasons stated, the petition deserves no consideration. It is dismissed.

(SANDEEP K. SHINDE, J)