

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 694 OF 2013

ALONGWITH

CIVIL APPLICATION NO. 1649 OF 2013

IN

SECOND APPEAL NO. 694 OF 2013

Shankar Maruti Patil & Ors.

..... Appellants

VERSUS

Bhau Parsu Hunginale & Ors.

..... Respondents

Mr.Vineet B. Naik, Senior Advocate, a/w. Mr.S.R.Kulkarni for the Appellants.

Mr.B.A.Pawar for the Respondent nos. 1, 2-A, 5 and 6.

CORAM : R.D. DHANUKA, J.

DATE : 27th AUGUST, 2019

P.C.

By this appeal filed under section 100 of the Code of Civil Procedure, 1908, the appellants (original plaintiffs) have impugned the judgment and decree dated 21st April, 2012 passed by the learned District Judge filed by the appellants confirming the judgment and decree dated 26th March, 2009 passed by the learned trial judge dismissing the suit filed by the appellants *inter alia* praying for declaration and possession in respect of the suit property.

2. The appellants are descendants of Maruti and the respondents are descendants of Parsu. Maruti and Parsu were two sons of Bayappa Patil. On 22nd November, 1961, there was a deed of partition between Bayappa Patil and Maruti Patil. It is the case of the appellant that under the said deed of partition the disputed properties came to the share of Maruti. On 1st September, 1975 Bayappa Patil executed a Will

bequeathing his entire property to sons of Parsu who were the defendants in the suit.

3. In view of the execution of the said deed dated 1st September, 1975, the appellants filed a Regular Civil Suit No.87 of 1982 *inter alia* praying for declaration and for injunction. The said suit was partly decreed by the trial court in favour of Maruti Patil. Both the parites filed separate appeals. On 26th November, 1993, the appeal preferred by the respondents herein was allowed. The appeal filed by Maruti came to be dismissed. This court dismissed the second appeal bearing no.29 of 1994 by an order dated 1st April, 2002 filed by the appellant.

4. On 17th January,2003 the Supreme Court disposed of the Civil Appeal Nos. 494-495 of 2003. The Supreme Court recorded the statement made by both the parties that the order passed by the High Court as well as the first appellate court be set aside and that the proceedings before the trial court be restored. Supreme Court also referred to the order dated 17th January,2003 passed by the Supreme Court while granting the relief in the special leave petition filed by the appellant to the effect that though the decree passed by the trial court was for declaration, the appellant to handover possession of the property to the respondents which were not allotted to him in the partition deed and bequeathed in favour of the grandchildren. Supreme Court recorded the finding that since the possession of the properties which fell to the share of the respondents have been delivered to them, all disputes in relation to the suit properties settled between the parties. The appellants were already in possession of the properties which are fallen in their share. The parties shall enjoy the properties which have fallen to their respective shares thereafter in absolute.

5. The appellant filed a fresh suit in the year 2005 against the defendants inter alia praying for declaration and possession in respect of the three properties bearing Survey No.208 (Gat No.159) Survey No.178 (Gat No.1702) and Survey No.175 (Gat No.1736). It was the case of the appellants that in the said suit the appellants were not granting possession of these three properties by the respondents (original defendants) and had executed a sale deed dated 12th May, 1978 in favour of a third party. The suit filed by the appellant was resisted by filing written statement by the defendants. The learned trial judge framed five issues. After considering the oral and documentary evidence, the learned trial judge held that the appellants have failed to prove their ownership in the suit properties. The appellants also failed to prove that the sale deed dated 12th May, 1978 executed by the defendants was shame and bogus. The defendants had proved their absolute ownership and possession over the suit properties. The learned trial judge also rendered a finding on the issue of limitation against the appellants.

6. Being aggrieved by the said judgment and decree passed by the learned trial judge on 26th March, 2009, the appellants preferred an appeal bearing Regular Civil Appeal No.22 of 2009. The appellate court after considering the oral and documentary evidence led by the parties dismissed the said appeal hence this second appeal.

7. Mr.Naik, learned senior counsel for the appellant invited my attention to the averments made in the first suit filed by his clients which was required to be filed in view of the execution of the Will by Bayappa in respect of some of the properties which were claimed by the appellants. He submits that these three properties bearing Survey

Nos.208, 178 and 175 were not the subject matter of the first suit filed by his clients. He further submits that the partition deed was upheld before the Hon'ble Supreme Court and thus the appellants were entitled to seek possession of these three properties from the respondents.

8. Learned senior counsel does not dispute that these three properties were not the subject matter of the first suit. The order passed by the Hon'ble Supreme Court recording the compromise between the parties for possession of the several properties which were subject matter of the first suit therefore would obviously not apply to these three properties bearing Survey Nos.208, 178 and 175.

9. Admittedly, the appellants' case is that since 1961, the appellants were not handed over possession of the three properties bearing bearing Survey Nos.208, 178 and 175. The trial court has rightly considered the issue of limitation in addition to the issues about declaration of the ownership and held that the suit for possession was *ex-facie* barred by law of limitation. It is held by the trial court that though the appellants have come to know about the alleged sale deed dated 12th May, 1978 in the year 1982, the suit was filed in the year 2005. Learned senior counsel for the appellant could not demonstrate any perversity in this finding rendered by the learned trial court.

10. Insofar as the other findings rendered by the trial court about the proving of ownership by the appellants (plaintiffs) and whether the sale deed dated 12th May, 1978 executed by the defendants was shame and bogus, the learned trial judge after considering the oral and documentary evidence has rightly held that the plaintiffs had failed to

discharge the onus cast on them on both these issues.

11. The first appellate court also has considered the oral and documentary evidence independently and has rendered various findings of fact confirming the findings rendered by the learned trial court.

12. Insofar as submission of Mr.Naik, learned senior counsel for the appellant that even if the finding of the learned trial judge in respect of the land bearing no.175 is correct, finding in respect of the ownership of the defendants in respect of the land bearing survey nos. 178 and 208 is perverse is concerned, in my view there is no substance in this submission of the learned senior counsel for the appellants. This issue is dealt with in great detail in paragraphs 14 and 15 of the impugned order passed by the learned trial judge. The plaintiffs had failed to discharge the onus.

13. The findings rendered by the two courts below being not perverse, cannot be interfered with by this court in this second appeal filed under section 100 of the Code of Civil Procedure, 1908. No substantial question of law arises in this appeal. Appeal is devoid of merits. I, therefore, pass the following order :-

- (a) Second appeal is dismissed.
- (b) In view of the dismissal of the second appeal, Civil Application Nos.1649 of 2013 does not survive and is accordingly dismissed. No order as to costs.

[R.D.DHANUKA, J.]