IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

SECOND APPEAL NO. 461 OF 2016

Smt. Ushabai w/o Bhaskarrao Hande & anr.
vs.
Ku.Manisha Sudamrao Shirbhate
(Sau.Manisha w/o Vilasrao Gulhane)

Office Notes, Office Memorandum of Coram, appearances, Court's orders of directions and Registrar's orders	Court's or Judge's orders

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Shri. G. K. Iyer, Advocate for appellants.
Shri. D. P. Chambhare, Advocate for respondent.

CORAM : Manish Pitale J

DATED : 16.09.2019

By the present appeal, the appellants (original defendants) have challenged the judgment and orders passed by the two Courts below concurrently against them, whereby suit filed by the respondent herein for possession and removal of encroachment was decreed.

2. The respondent had filed the aforesaid suit for possession and removal of encroachment against the appellants on the basis that she was the owner of the suit plot by virtue of registered sale deed dated 21.08.1984. It was her contention that at the time of execution of sale deed, she was minor and her father had purchased the suit plot in her name. It was further contended by the respondent that during

Diwali of the year 2006, she noticed that the appellants had erected a temporary structure and they had encroached upon the suit plot. It was her case that despite requests made by her, the appellants did not remove the encroachment due to which she was constrained to approach the Court by filing the said suit.

3. The appellants opposed the contention raised on behalf of the respondent by contending that, inter alia, the suit was barred by limitation, because they were in continuous possession of the suit plot since 1971 when the father in law of appellant No.1 had purchased the suit plot from a society. It was further contended that the said transaction was benami transaction and that it was hit by provisions of the Prohibition of Benami Property Transactions Act, 1988. It was also contended on behalf of the appellants that when half portion of the suit property was sold by the father in law of the appellant No.1 on 17.02.1999, the suit filed by the respondent claiming to be owner of the suit plot was not maintainable.

4. On the basis of pleadings of parties and evidence led by them in support of their respective stands, the Court of 2nd Joint Civil Judge Junior Division, Yavatmal passed its judgment and order, rendering findings in favour of the respondent and thereupon decreed the suit. The appellants were

directed to remove the encroachment and to handover possession of the suit plot to the respondent within a month.

5. Aggrieved by the same, the appellants filed appeal before the Court of District Judge, Yavatmal, which was dismissed by the impugned judgment and order dated 20.07.2016. The appellate Court agreed with the findings of the lower Court and thereby confirmed the decree passed in favour of the respondent.

6. In this appeal by order dated 08.09.2017 notice was issued on the following substantial questions of law :-

> *(i) Whether the finding recorded that the suit filed within limitation is after considering the entire evidence on record ?*
>
> *(ii) Whether the plea that the sale deed in favour of the plaintiff was hit by the provisions of the Benami Transactions Act, 1988 has been considered in accordance with law ?*
>
> *(iii) Whether the sale deed executed in favour of the plaintiff on 21/08/1984 was hit by provisions of Section 29(3) of the Maharashtra Co-operative Societies Act, 1960 ?*

7. Mr. Ganesh Iyer, learned counsel appearing on behalf of the appellants submitted that the aforesaid specific questions of law framed by this Court deserve to be answered in favour of the appellants and the decree granted in favour of the respondent was required to be set aside. It was submitted that the suit was barred by limitation. The cause of action neither arose, nor was it proved. It was further submitted that the sale deed in question was clearly hit by the provisions of Prohibition of Benami Property Transactions Act, 1988. It was also submitted that the sale deed relied upon by the respondent was hit by Section 29(3) of the Maharashtra Co-operative Societies Act 1960, for the reason that necessary approval was not taken from the society in which the suit plot was situated.

8. Mr. D. P. Chambhare, the learned counsel appearing on behalf of respondent submitted that the substantial questions of law framed by this Court did not arise in the facts of the present case and hence, they were required to be answered against the appellants. It was submitted that two Courts below had appreciated the evidence and material on record in the correct perspective while granting decree in favour of respondent.

9. Heard learned counsel for the rival parties on the aforesaid substantial questions of law and perused the material on record.

10. In the present case, the suit was filed by the respondent on the basis that she was the owner of the suit plot by virtue of registered sale deed dated 21.08.1984, executed in her favour by the husband of appellant No.1. The execution of the sale deed was not denied by the appellants, but it was denied that the said transaction was hit by the provisions of the Prohibition of Benami Property Transactions Act, 1988. It is significant that execution and existence of the aforesaid registered sale deed was not disputed at all by the appellants and that it is a matter of record that there was no counter claim filed on behalf appellants challenging the said sale deed. Insofar as the sale deed being hit by the provisions of the Prohibition of Benami Property Transactions Act, 1988, it is evident from the provisions of the said Act, as also the position of law clarified by the Hon'ble Supreme Court in the case of **Nand Kishore Mehra vs. Sushila Mehra [1995(2) Mh.L.J.(S.C.)639],** wherein it has been held that said transaction would not be hit by the provisions of the said Act, when it was executed in favour of wife or unmarried daughter and further that if the said transaction was challenged on the ground of violation of provisions of the said Act, the person making such claim was required to further prove that the said transaction was, in fact, not for the benefit of the wife or unmarried daughter.

11. In the present case, it is an admitted position that there were neither pleadings nor any

evidence placed on record by the appellants to that effect. Therefore, there is absolutely no substance in the contentions raised on behalf of the appellants in respect of sale deed executed in favour of the respondent being hit by the provisions of the aforesaid Act. Therefore, question No.(ii) framed by this Court is answered against the appellants and in favour of the respondent.

12. As regards the aforesaid sale deed being hit by the provisions of Section 29(3) of the Maharashtra Co-operative Societies Act, 1960, a perusal of the said provision would show that it would have no applicability to the facts of the present case. The said provision pertains according to a situation concerning the rights of a member of society when the transaction in question concerns the society and transfer share capital. Admittedly, none of these aspects arise in the present case and therefore, the aforesaid question No.(iii) would not arise in the present case, in view of that it could not be said that the sale deed in question was hit by Section 29(3) of the Maharashtra Co-operative Societies Act, 1960. Therefore, the said question also answered in favour of the respondent.

13. As regards question No.(i) regarding the suit filed by the respondent being barred by limitation, it was contended on behalf of appellants that since they had been in continuous possession of

the suit plot since the year 1971 and there was nothing to show that the respondent had came into possession of the suit plot pursuant to sale deed dated 21/08/1984, the suit filed in the year 2006 was hit by the bar of limitation.

14. The Courts below have considered the said contention raised on behalf of the appellants by appreciating the pleadings and the material on record. In the plaint, the cause of action has been specifically pleaded on behalf of the respondent to have arisen during Diwali of the year 2006, when the respondent noticed the encroachment in the suit plot by the appellants.

15. It was sought to be argued on behalf of the appellants that there was no clause in the sale deed in question in respect of transfer of possession of the suit plot in favour of the respondent and that therefore it was evident that the appellants were in continuous possession of the suit plot since 1971. But the Courts below have taken note of the fact that the sale deed dated 21/08/1984 (Exh.80) specifically states on its 3rd page in the last paragraph that the possession of the suit plot was indeed handed over to the respondent. The Courts below have also taken note of that earlier suit filed by the respondent against the owner of adjacent plot regarding encroachment, which had been decreed, thereby, further demonstrating that the claim of the appellants

they had been in continuous possession since 1971 was unsustainable. The learned counsel for the appellants was not be able to show as to why the said findings rendered by the Courts below concurrently could be said to be unsustainable. Therefore, it becomes clear that the claim made by the appellants that the suit filed by the respondent was barred by limitation, is without any substance and hence substantial question of law No.(i) framed by this Court is also answered in favour of the respondent and against the appellants.

16. In view of the above, it is found that the present appeal is without any substance and it deserves to be dismissed. Accordingly, it is dismissed and the decree passed by the two Courts below stands confirmed. No order as to costs.

JUDGE

KOLHE