

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 73 OF 2017
WITH
CIVIL APPLICATION NO. 191 OF 2017

Husenee Gopal Hotkar (deceased through ... Appellant/Applicant.
LRS) Shivaji Husenee Hotkar

V/s.

Mahadev Gopal Hotkar and Ors. ... Respondents

Mr. Atul Damle, Senior Counsel I.by Mr. A.B.Tajane for the Appellant/
Applicant

Mr. Anand Shrikant Kulkarni for the respondents.

CORAM : SMT. SADHANA S. JADHAV, J

DATED : 17th FEBRUARY 2020

PC. :

. The appellant impugns the judgment and order passed by the Principal District Judge, Solapur in Regular Civil Appeal No. 108 of 2010 dated 17th June 2016 thereby dismissing the appeal and confirming the judgment passed by the Civil Judge Junior Division, Akkalkot in Regular Civil Suit No. 151 of 1995 dated 15th April 2010 thereby, dismissing the suit.

2. The facts of the case are as follows:-

That, the present appellant happens to be the plaintiff in Regular Civil Suit No. 151 of 1995. The said suit was instituted on 29th September 1995 seeking the relief of perpetual injunction against the

respondents. It is a matter of record that on 9th March 1995 the defendant in Civil Suit No. 151 of 1995 had filed a suit for partition and separate possession which was registered as Regular Civil Suit No. 60 of 1995 seeking partition of Gat No.176. It is a matter of record that Gat No. 176 was purchased by the father of the plaintiff and defendant in the name of plaintiff on 10th April 1942. At that stage, the age of the plaintiff was shown as 15 years.

3. It is a matter of record that the issues were framed by the learned Civil Judge Junior Division, as to whether the plaintiff had proved that the suit property is self acquired property of the plaintiff no.1.

4. It is observed by the learned Trial Court that the plaintiff had not pleaded to the effect that there was cause of action seeking perpetual injunction and in fact, a finding was recorded that the suit for perpetual injunction is filed to defeat the prayer of partition and separate possession filed by the original defendant no.1 who happened to be the brother of Plaintiff.

5. The learned counsel for the appellant submits that Regular Civil Suit No. 60 of 1995 was dismissed on 17th April 2002. The said suit was dismissed for want of prosecution. An appeal challenging the dismissal of the Suit was pending before the District Court at Solapur. On 18th October 2010 the appeal was dismissed. That is subsequent to the institution of Regular Suit No. 151 of 1995.

6. The learned counsel for the respondents submits that on 27th November 2019 the respondent i.e. the original plaintiff had filed a suit for partition and possession and the said suit is registered as Regular Civil Suit No. 74 of 2019.

7. The learned counsel for the appellant submits that on the date when the Regular Civil Appeal was decided by the First Appellate Court the Appeal arising out of the dismissal of the Regular Civil Suit No. 60 of 1995 was already disposed of as the First Appeal was decided on 17th June 2016.

8. The points which would fall for determination are as follows:-

“1. Whether a suit seeking perpetual injunction deserves to be allowed in the absence of pleadings that the plaintiff has a title to the suit property or is in exclusive possession of the suit property”.

“2. Whether the suit for perpetual injunction disclosed a cause of action or whether it was filed to contradict – a suit for partition and possession”.

“3. Whether a property can be held to be a self acquired property in the absence of capacity to earn, especially when it is purchased from the common nucleus of the family”.

9. It is a matter of record, that at the time of purchasing the suit property, the age of the plaintiff was hardly 15 years old. The sale deed was also executed under guardianship of Gopal who happens to be the father of the plaintiff and defendant. It appears that there was

no pleading to the effect that it was a self acquired property. There was neither a pleading that the plaintiff was in exclusive possession of the suit property, on the date of the institution of the suit and moreover, the plaintiff had knowledge that a suit for partition has been filed by the defendant in respect of suit property. The intention of the parties has to be considered. It is more than clear that the said suit was filed only to contradict the prayer for partition and possession. Moreover, the learned Trial Court has rightly recorded the finding that “it is a general rule of law that first plead and then lead”.

10. In the absence of any pleading, there was no reason to consider the prayer for perpetual injunction during the pendency of a suit for partition and possession. The original plaintiff had expired and the substantive evidence of the legal heirs of the plaintiff was full of contradictions. There were inherent inconsistencies in the pleading and the evidence of the plaintiff.

11. In view of this, the suit for perpetual injunction in the absence of specific pleadings, that he was the exclusive owner of the suit property deserved to be dismissed.

12. It is a matter of record, that the suit for partition and possession was only dismissed for want of prosecution and not on merits. Irrespective of the fact that the appeal was dismissed the Appellate Court has appreciated the evidence on record and has arrived at a conclusion that in fact there was no pleading that the plaintiff was the exclusive owner of the suit property or that he was in

exclusive possession of the suit property. The pleading, that was a self acquired property had to be turned down taking into consideration, the age of the plaintiff. Moreover, the said property was purchased from common nucleus of the family. The suit property was purchased by Gopal, who happens to be the father of the plaintiff and defendant.

13. The revenue records would not decide the title to the suit property. The probative value of 7/12 extracts and other revenue records is only to ascertain the agricultural cess and the identification of the crops that are under cultivation in the suit property.

14. As far as issue nos. 1 and 3 are concerned, they deserve to be answered in the negative and as far as issue no.2 is concerned, it has to be held that the plaintiff's suit for perpetual injunction did not disclose a cause of action.

15. In view of the above discussion, the second appeal being sans merits deserves to be dismissed. However, it is made clear that the observation recorded in this second appeal shall not be considered in Regular Civil Suit No. 74 of 2019 and the said suit be decided uninfluenced by the observation made hereinabove. The Second appeal stands disposed of. The Civil Application is accordingly disposed of.

(SMT. SADHANA S. JADHAV, J)