

THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

SECOND APPEAL NO. 479/2019

Vasant Kashinath Salve

...Versus...

Moreshwar Bhujangrao Niwalkar and others

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

Court's or Judge's orders

Shri. Rohit Joshi Advocate for Petitioner

CORAM : AVINASH G. GHAROTE, J.

DATE : 14/01/2020

Heard Shri Rohit Joshi, learned counsel for the appellant.

The sale-deed dated 21.08.1974, executed by one Bhujangrao, the original defendant No.1 in favour of the present appellant, was challenged before the Trial Court on the ground that the property was ancestral property in which the sons of Bhujangrao, had a share since birth. The Trial Court, on a finding rendered that the property was ancestral, found that the sale-deed dated 21.08.1974 was not for legal necessity. The learned Trial Court, however, dismissed the suit on the ground of the same being barred by limitation. The Appellate Court by the judgment dated 12.06.2019, allowed the appeal and decreed the suit declaring that the sale-deed dated 21.08.1974 was not binding upon the

plaintiffs, as they had a right and the suit was within limitation.

It is contended by the learned counsel for the appellant that the issue about the right and entitlement of the appellant, ought to have been decided by the Appellate Court in the background of the position as emanating from the pleadings in the plaint in which there is no averment that the property in question was a coparcenary property. He submits that the Courts below ignored the basic distinction between a coparcenary property and ancestral property, which is inherited under Section 8 of the Hindu Succession Act, 1956. He further submits that the mandate of Order 41, Rule 22 of Civil Procedure Code, does not permit the filing of an appeal regarding the finding and it was permissible for the respondents to address the Appellate Court on all the findings as rendered by the Trial Court. He submits that though a plea as regards the absence of framing of proper issues has been raised as is reflected from paragraph no.14 of the Appellate Court judgment, the same has not been considered on the plea that no cross-objection was filed. In that light of the matter, the following substantial questions of law may arise for consideration.

(1) Whether in appeal it is necessary for a party to file a cross-objection in respect of an adverse finding which is rendered by the Trial

Court ?

(2) Whether Order 41, Rule 22 of Civil Procedure Code, permits the respondents to raise all pleas as are available to him, in respect of a finding rendered by the Trial Court?

(3) What is the nature of difference between a property held as a coparcener and as a person inheriting under Section 8 of the Hindu Succession Act, 1956?

Issue notice to the respondents, returnable on 11/02/2020. The learned counsel for the appellant to place on record the paper book of the First Appellate Court and all the documents as exhibited before the Trial Court. The parties are put to notice that the second appeal may be disposed of finally at the stage of admission itself.

CIVIL APPLICATION (CAS) NO.940/2019

Considering the finding as rendered by both the Courts below that the appellant is not in possession of the suit property, the counsel for appellant submits that he is not pressing the application.

The civil application stands disposed of as not pressed. No order as to costs.

JUDGE