

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.533 OF 2012
WITH CA/5468/2010 IN SA/533/2012
WITH CA/12438/2012 IN SA/533/2012

SUKHDEO S/O BHAGWAN RATHOD AND OTHERS
VERSUS
BABAN S/O LIMBAJI MORE AND OTHERS

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Mr. A. V. Lavte h/f Mr. S. J. Salunke, Advocate for appellants.
Mr. A. K. Chitnis and Mr. P. N. Mule, Advocate for respondent Nos.2 to 4.
Mr. P. D. Jarare h/f Mr. S. S. Thombre, Advocate for respondent Nos.5 to 7.

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 21.09.2021

ORDER :-

. Present second appeal has been filed by the original defendants challenging the concurrent findings and decree by the Courts below.

2. Present respondent Nos.1 to 3 are the original plaintiffs, who had filed Regular Civil Suit No.27 of 1990 before the learned Civil Judge Junior Division, Majalgaon, Dist. Beed for declaration of ownership, possession and perpetual injunction. The said suit came to be decreed on 06.10.1995. Plaintiff Nos.2 and 3 were declared as owners and possessors of agricultural land bearing Survey No.165 to the extent of 10 Acres 18 Gunthas from the southern side situated at village Kari, Tq.

Majalgaon, Dist. Beed. It was also declared that the compromise decree passed in Regular Civil Suit No.77 of 1987 on 22.07.1988 is void in respect of those plaintiff Nos.2 and 3 only. The claim of plaintiff No.1 was dismissed and it was said that the said compromise decree was binding on him. The present appellants – original defendant Nos.2 to 7 filed Regular Civil Appeal No.07 of 2004 (Old No.193 of 195) before the learned Adhoc Additional District Judge-1, Majalgaon and after hearing both the parties, the said appeal came to be dismissed. Hence, this second appeal.

3. Heard learned Advocate Mr. A. V. Lavte holding for learned Advocate Mr. S. J. Salunke for appellants, learned Advocate Mr. A. K. Chitnis and learned Advocate Mr. P. N. Mule for respondent Nos.2 to 4 and learned Advocate Mr. P. D. Jarare holding for learned Advocate Mr. S. S. Thombre for respondent Nos.5 to 7. In order to cut short it can be said that all of them have made submissions in support of their respective contentions.

4. At the outset, it is to be noted that the fact is admitted that there was Regular Civil Suit No.77 of 1987 filed by present plaintiffs against defendant Nos.1 to 7 for partition and separate possession of the present suit property and also the other ancestral properties of defendant No.1.

There was compromise in that suit and accordingly, terms of compromise were produced on 25.04.1988. Present plaintiff Nos.2 and 3 were minors and were party to that proceedings through their natural guardian. In this suit, they contended that the said compromise was not in their favour and, in fact, there were two compromise pursis on record in that matter. The second compromise dated 22.07.1988 was without seeking cancellation of first compromise and was not read over and explained to the natural guardian. After that suit was decreed as per the compromise terms, the sale deeds were executed between the defendants *inter se* on the same day i.e. 22.07.1988. Those sale deeds are not binding on the plaintiffs and they are still owners of the suit land.

5. Though both the Courts have held that the plaintiffs are having title and possession to the extent of 10 Acres 18 Gunthas on land Survey No.165 to the extent of southern side and the compromise decree in Regular Civil Suit No.77 of 1987 is void to the extent of plaintiff Nos.2 and 3 only, the fact that is required to be considered is that even when the said compromise terms were presented before the Court, plaintiff Nos.2 and 3 were minors. Even in this suit also they were minors. Then the question is, whether the same guardian/next friend, by way of a separate suit, can challenge the said decree. Further, even plaintiff No.1,

who was major and party to the earlier suit was made plaintiff No.1 in this suit. Then, whether the suit was suffering from misjoinder of parties ought to have been considered. Merely dismissal of the suit as against plaintiff No.1 would take away the rights of the defendants is also required to be considered. Another fact is that after the sale deeds were executed in pursuant to the compromise decrees, whether the suit was barred by the principle of estoppel is definitely required to be considered in view of the fact that whether the purchasers, believing in the compromise, had entered into the transaction. Further, it is to be noted that even the next friend/guardian of the minors was party to the sale deeds and has acknowledged the payment of consideration. The Courts below have considered that the guardian/next friend of the minors had not taken care of protecting the interest of minor while executing compromise agreement. If this is so, then whether she could have represented those minors in the present suit also is a question and definitely, for that purpose, substantial questions of law are arising in this case. Second appeal stands **admitted**. Following are the substantial questions of law :-

- I) Whether the Courts below failed to consider scope of Order XXXII Rule 4 and 7 of the Code of Civil Procedure and came to the wrong conclusion that the said compromise is void and not binding on the minor plaintiffs?

II) Whether the same guardian, who had allegedly not taken care of the interest of the minors while entering into the compromise agreement in Regular Civil Suit No.77 of 1987 could have represented the plaintiffs in present suit?

III) Whether the suit was bad for misjoinder of party i.e. plaintiff No.1?

IV) Whether the suit was barred by principle of estoppel?

V) Whether the purchasers – defendants can be said to be the *bona fide* purchasers for value without notice?

VI) Whether the Courts below were justified in holding that the plaintiffs are still in possession of the part of the suit property and clamping injunction against the defendants from disturbing the possession of the plaintiffs over the suit land to the extent of area decreed ?

VII) Whether the Courts below erred in not considering the point that whether the guardian can dispose of the property for the interest and benefit of the minors?

6. Issue notice to the respondents after admission. Learned Advocate Mr. A. K. Chitnis waives notice for respondent Nos.2 to 4. Learned Advocate Mr. P. D. Jarare holding for learned Advocate Mr. S. S. Thombre waives notice for respondent Nos.5 to 7.

7. Call record and proceedings.

8. Civil Application No.5468 of 2010 is for stay to the impugned judgment and decree. In view of the admission of the second appeal, there shall be stay in terms of prayer clause 'B' of Civil Application No.5468 of 2010 till the hearing and final disposal of the second appeal. Accordingly, Civil Application No.5468 of 2010 stands allowed and disposed of.

9. Civil Application No.12438 of 2012 is for amendment to add grounds i.e. substantial questions of law. Already this Court has framed the above substantial questions of law. The substantial questions of law in this application are not happily worded and, therefore, it is not necessary that the appeal memo should be allowed to be amended. Civil Application No.12438 of 2012 stands rejected, however, liberty is granted to point out any left out substantial question of law in view of Section 100 of the Code of Civil Procedure.

[SMT. VIBHA KANKANWADI, J.]

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