

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**912 SECOND APPEAL NO.106 OF 2020
WITH
CIVIL APPLICATION NO.2869 OF 2020**

RAOSAHEB GANGA KOKARE

VERSUS

NAVNATH RANGNATH DHAKANE AND OTHERS

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Mr. H.D. Deshmukh, Advocate for the appellant

Mr. C.V. Dharurkar, Advocate for the respondent No.1

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 02nd DECEMBER, 2021

ORDER :

1 Present Second Appeal has been filed by the original Decree Holder challenging the Judgment and Decree passed by learned District Judge-1, Shrirampur, Dist. Ahmednagar in Regular Civil Appeal No.43/2018 (Old Regular Civil Appeal No.62/2011 and Regular Civil Appeal No.194/2014) dated 02.08.2019, wherein the Judgment and order passed below Exh.66 in Final Decree Application No.5/1994 dated 25.01.2008 was challenged. The said appeal was dismissed on 02.08.2009. It will not be out

of place to mention here that earlier the said appeal was partly allowed by the learned District Judge-1, Newasa on 22.09.2017. However, the original third party raising objection to the execution proceeding had approached this Court by filing Appeal From Order No.3 of 2018 with Civil Application and after setting aside the order passed on 22.09.2017 the appeal was restored for giving proper opportunity to the parties to make submissions. Thereafter Civil Transfer Applications were made to the learned Principal District Judge, Ahmednagar and then by order dated 06.09.2018 the appeal was withdrawn from the file of District Judge-1, Newasa and was transferred to the file of District Judge-1, Shrirampur, Dist. Ahmednagar. Thereafter, District Judge-1, Shrirampur dismissed the appeal on 02.08.2019.

2 The history of the litigation goes back to 1985 when the appellant had filed Regular Civil Suit No.159/1985 for partition and separate possession of his half share in the suit properties bearing Gat No.147 and 195 situated at village Antarwali, Tq. Newasa, Dist. Ahmednagar. It appears that there was no dispute about the fact that appellant's father had entered into an agreement to sell dated 13.06.1986 to sale out 01 H 22 R land from Gat No.147 to respondent No.2. Thereafter, during the pendency of the suit itself the sale deed was executed on 12.08.1986. Respondent No.2 was not made party to the civil suit. In view of the sale deed respondent No.2 was put in

possession of the land and even the mutation entry was recorded in his name. Regular Civil Suit No.159/1985 came to be decreed on 30.04.1988. It has also thereafter come on record that the respondent No.2 had then filed Regular Civil Suit No.138/2004 seeking perpetual injunction against the appellant-original plaintiff and that suit was decreed in favour of respondent No.2 on 25.10.2010. It appears that the said decision has received finality. Thereafter the present appellant had filed Final Decree Application for execution of the decree passed in Regular Civil Suit No.159/1985, wherein he had added the respondent No.2 as party. Under such circumstance, the respondent No.2 filed application at Exh.66 and raised objection stating that the Judgment and Decree, that has been obtained in Regular Civil Suit No.159/1985 is by way of collusion and it will not be barred under Section 52 of the Transfer of Property Act. It was also stated that since he is a bona fide purchaser for value, the said Judgment and Decree was not binding on him. Though the appellant was knowing the fact of sale; yet, he had not taken pains to add the respondent No.2 as party.

3 The Executing Court after hearing both sides allowed the application and concluded that the final decree proceedings stood dismissed, to the extent of land bearing 01 H 16 R plus 6 Acres barren land out of suit property Gat No.147 situated at village Antarwali, Tq. Newasa.

4 As aforesaid, the said order was challenged in Regular Civil Appeal No.43/2018 and it came to be dismissed by learned District Judge-1, Shrirampur on 02.08.2019.

5 Heard learned Advocate Mr. H.D. Deshmukh for the appellant, learned Advocate Mr. C.V. Dharurkar for the respondent No.1 and perused paper book, made available.

6 It is required to be seen, as to whether the present appellant has made out case for framing substantial question of law, as contemplated under Section 100 of the Code of Civil Procedure. Perusal of the copy of the Judgment in Regular Civil Suit No.159/1985 would clearly show that the fact was on record in that suit itself that the original defendant in that suit i.e. the father of the appellant had sold out both the suit lands during the pendency of the suit, but it was held that no relief is claimed against the subsequent purchaser and there is no harm in proceeding with the suit for want of their impleading as parties. Thus, inspite of knowledge that the title has been transferred, the plaintiff abstained not to add the subsequent purchaser as party to the proceeding. No doubt, whether the transaction was hit by Section 52 of the Transfer of Property Act could have been considered, but here the additional factor is that the present respondent No.2 had then filed Regular Civil Suit No.138/2004 seeking perpetual injunction against the

appellant. That suit came to be decreed on 25.10.2010 showing that the said purchaser is in possession of the land. The appellant could have raised the point regarding bar under Section 52 of the Transfer of Property Act in that suit, however, it appears that it has not been raised. Application, which was filed at Exh.66, was for the purpose that the Court cannot proceed with the execution of the proceeding. What was passed was a preliminary decree and then the decree. The execution proceedings, those were filed, were stated to be for the execution of the final decree. Further fact reveals that learned Civil Judge Junior Division by order dated 25.01.2008 below Exh.1 in Final Decree Application No.5/1994 stated that it has no jurisdiction to pass final decree, as the power to execute the same lies with Collector. Though the respondent No.2 was added as party to the proceeding, no notice was served on him. But thereafter, he appeared and filed objection at Exh.58 and also moved the application Exh.66 under Order XXI Rule 97, 98, 100 and 101 of the Code of Civil Procedure. Both the Courts below have taken note of the fact that the Judgment and Decree passed in Regular Civil Suit No.138/2004 dated 25.10.2010 is still in force and has not been set aside by any Appellate Court, then, the decree in the form, that is, prayed for execution cannot be put to execution. It is also to be noted that in the said proceedings i.e. Regular Civil Suit No.138/2004, the Court of competent jurisdiction had come to the conclusion that the sale deed executed by the father of the

appellant in favour of respondent No.2 is not hit by the principles of lis pendens. Conversely both the Courts below were justified in arriving at a conclusion that the respondent No.2 is a bona fide purchaser for value without notice and since he was not party to Regular Civil Suit No.159/1985 that decree is not binding on him. Interesting point to be noted is that for Exh.66 say has been filed by the present appellant at Exh.70 and the said say is very much cryptic. It is only stated that the sale deed was executed by his father in favour of the defendant i.e. the respondent No.2 during the pendency of the suit and, therefore, that sale deed is not binding on him. In fact, when another competent Court had decided this point; yet, only those four lines have been stated by the appellant. It can also be seen that since 1988 appellant (though prior to that the appellant/plaintiff in Regular Civil Suit No.159/1985) was having knowledge about the transaction, but had not taken pains to challenge the sale deed and also to get the purchaser added as party. In view of this legal position, especially the Judgment and Decree of competent Court, still in force, both the Courts were justified in allowing the application Exh.66 and dismissing the appeal challenging that order, this Court does not find that there is any scope to interfere.

7 No substantial question of law, as contemplated under Section 100 of the Code of Civil Procedure, is arising in this case, requiring admission

of the Second Appeal. It deserves to be dismissed at the threshold. Accordingly, it is dismissed. Civil Application stands disposed of.

(Smt. Vibha Kankanwadi, J.)

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