IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 195 OF 2020
with
CIVIL APPLICATION NO. 4119 OF 2020

Maruti s/o Pandurang Yelikar = **APPELLANT**
(orig.Plaintiff)

VERSUS

1) Govind s/o Pandurangn Yelikar
and Ors. = **RESPONDENTS**
(orig.Defendants)

Mr.ND Kendre,Advocate for Appellant

CORAM : SMT.VIBHA KANKANWADI,J.
DATE : 6th SEPTEMBER, 2021.

PER COURT :-

1. Present appeal has been filed by appellant - original plaintiff, challenging the concurrent judgment and decrees of both the Courts below. The appellant is original plaintiff, who filed Regular Civil Suit No.13 of 2000 in the court of learned Civil Judge, Senior division, Nilanga, seeking partition and separate possession. The said suit came to be dismissed by learned Trial Judge on 12.8.2010. Aggrieved by the decision of the Trial Court, dismissing the suit, the plaintiff-appellant filed Regular Civil Appeal No.49/2010 in the court of District Judge-1, Nilanga. The said appeal has

been dismissed by the appellate court on 19.7.2018. Hence, this Second Appeal.

2. Heard learned Advocate appearing for the appellant.

3. In view of the decision in the case of *Ashok Rangnath Magar Vs. Shrikant Govindrao Sangvikar – (2015) 16 SCC 763,* it is not necessary that the respondent/s should be heard at the time of admission of the Second Appeal. If the substantial questions of law are arising and they are framed then only the Respondent/s are required to be called upon by issuing notice.

4. It has been vehemently submitted on behalf of the appellant that both the Courts below have not properly considered the evidence and the law points involved in the case. Both the Courts below erred in dismissing the suit without any cogent reason. Both the Courts below did not apply their mind to the facts of the case and they failed to appreciate the pleadings of the parties in proper perspective. Two significant issues viz. Whether the plaintiff-appellant has share in the suit property and whether the plaintiff is entitled to division and separate possession were not framed

by the Courts below. The nature and character of the properties in the suit was not examined. The reasoning and findings arrived at by the Courts below in respect of alleged Will are not factually correct and sustainable in the eye of law. When there is no evidence brought on record on behalf of the defendants/respondents, Exhibit-136 i.e. Will can it be termed as Will. The findings of both the Courts below do not depict as to whether the Will at Exh. 136 is binding on the plaintiff. The Will has not been proved by the defendants as per Section 63(C) of the Indian Succession Act read with Section 68 of the Indian Evidence Act. Both the Courts below arrived at a wrong finding that the suit property was purchased by deceased Mandabai when the defendants-respondents failed to prove that the suit property was purchased by deceased Mandabai from her own income and there was no evidence to that effect.

5. The learned Advocate relied on following authorities to support his contentions.

1. *(2015) 11 SCC 269 — Shasidhar and Ors. Vs. Ashwini Uma Mathad and Anr.;*

2. *(2003) 2 scc 91 — Janki Narayan Bhoir Vs. Narayan Namdeo Kadam.*

6. At the outset, it can be seen that there is concurrent findings of both the Courts below that the suit properties are not joint family properties of the plaintiff and the defendants. This may be mixed question of law and fact. But, when the fact has been assessed properly and it is not giving rise to point of law, then this Court may not enter into the arena of re-assessment of facts. However, cursorily it can be said that as regards one property is concerned, i.e. land Survey No.82/2, admeasuring 2 hectares and 13 R., situated in village Talikhed standing in the name of original deft.No.3, the plaintiff contended that, in fact, his father had purchased it on 6.7.1966 in the name of deft.No.3. However, he has not produced the documentary evidence in the form of sale-deed and, therefore, the learned Trial Judge has certainly refused to accept the contention of the plaintiff.

7. As regards another property, i.e. Gut No. 396, admeasuring 2 hectares and 61 R. is concerned, admittedly, it was standing in the name of Mandabai, who was grand-mother of the plaintiff and defendants. According to the plaintiff, it

was purchased in her name by his father and father's brother viz. Pandurang and Daulatrao for the maintenance of Mandabai. No supporting evidence has been led by the plaintiff to prove the same. But, in fact, it had come on record in the form of cross-examination of the plaintiff himself that, his father and uncles got their properties partitioned in 1958 through a decree of Court. If that is so, then the property, of which sale-deeds have been produced at Exhibit-80 and 84, i.e., in fact, Exh.80 is the land Survey No. 82/2 which was purchased on 24.11.1972, that is the property which is now standing in the name of deft.No.3, and as regards Gut No.396 is concerned, it is stated to have been purchased in the year 1972. At the cost of repetition, it can be said that if the plaintiff and his brothers had got separated by way of decree passed by the Court in the year 1958 itself, then why they would purchase the land commonly for the maintenance of their mother. Another fact to be noted is that, when such evidence has not come that the property was purchased out of joint income, then it has been rightly held by both the Courts below that the

property was self-acquired property of Mandabai. Further, the plaintiff could not have taken such averments, which amount to Benami transaction in the name of grand-mother Mandabai in view of prohibition under Section 4 of the Benami Transaction (Prohibition) Act. When it was the self-acquired property of Mandabai, she had every right to dispose it off.

8. Another point that was canvassed was, the Will was executed on 10.6.1974. However, according to the plaintiff, Mandabai was not alive on that day, as she expired on 7.12.1973. In order to prove the same, the plaintiff led evidence. Death Certificate and other documents have been produced at Exhibits-90, 91 and 92. The learned Trial Judge as well as the first Appellate Court have rightly considered that the said Certificate and Register maintained at the Gram panchayat disclose death about one Mandabai Maruti Surwase on 16.8.1973. That means, though the plaintiff contended the date of her death as 7.12.1973, the evidence that was adduced was in respect of date of death 16.8.1973. Further, full name of grand-mother of the plaintiff and

defendants is “Mandabai Sadashiv Yelikar” and not “Mandabai Maruti Surwase”. So apparently the lady appears to be different, who expired on 16.8.1973. Further, it is to be noted that deft.Nos. 3 and 4 tried to establish that Mandabai expired on 24.4.1978. One witness Tatyarao examined by them deposed that, Mandabai had written a letter to Daulatrao Yelikar, i.e. father of deft.Nos. 3 and 4 (Daulatrao was another son of Mandabai), when Daulatrao was studying in Manchester University. The postal remarks have been considered and the said letter has been accepted to be a genuine letter. Therefore, it is stated that deft.Nos.3 and 4 have proved that Mandabai was alive on 8.4.1975 when the said letter was issued. She had left the Will on 10.6.1974. Therefore, taking into consideration all these facts and also the proof of the Will, there was no evidence, which could be said to be believable, adduced by the plaintiff to support his contention.

9. The decision in the case of *Janki Narayan Bhoir (cited supra)* cannot be denied. However, it can be said that in view of the said requirements,

in the ratio laid down by the Hon'ble Apex Court, the Will has been proved. Further, the ratio in the case of *Shashidhar and Ors. (supra),* will not be applicable, as for the aforesaid reasons, the plaintiff has failed to prove that he is a co-owner.

10. No substantial question of law, as contemplated under Section 100 of CPC, is arising in this case. When the above said facts and circumstances have been properly considered and the law points are also dealt with by both the Courts below and they are not giving rise to any substantial question of law. Hence, the Second Appeal deserves to be dismissed and it is accordingly dismissed. Pending civil application, if any, stands disposed of.

(SMT. VIBHA KANKANWADI)
JUDGE

BDV