IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.616 OF 2019
WITH
CIVIL APPLICATION NO.13815 OF 2019
IN SA/616/2019

LEELABAI SARJERAO UNDE
VERSUS
SAYYED AHMEDALI CHANDALI (DEAD)
THROUGH L.RS. AND OTHERS
…..

Advocate for Appellant : Mr. V. R. Dhorde
Advocate for Respondent No.14 : Mr. D. R. Adhav
…..

CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 24-08-2021.

ORDER :

1. Present appeal has been filed by the original plaintiff challenging the concurrent Judgment and findings of Courts below. She had filed Regular Civil Suit No.104 of 2007 before Civil Judge, Junior Division, Rahuri, for declaration that decree passed in Regular Civil Suit No.43 of 1987 by the said Court is obtained by practicing fraud upon the Court, illegal and not binding on her. Another declaration was prayed that the suit property described in paragraph No.1-A of the plaint has become the separate property of the plaintiff and for deletion of the same from the partition in the decree passed in Regular Civil Suit

No.43 of 1987. The said suit came to be dismissed on 16-03-2018 and the appeal filed by the present appellant Regular Civil Appeal No.144 of 2018 has been dismissed by learned Adhoc District Judge-4, Ahmednagar on 15-10-2019. Hence, this second appeal.

2. Heard learned Advocate Mr. V. R. Dhorde for appellant and learned Advocate Mr. D. R. Adhav for respondent No.14.

3. It has been vehemently submitted on behalf of the appellant that both the Courts below have not considered the legal effects as well as facts in chronology and the consequences of not making the present plaintiff as party to said suit for partition Regular Civil Suit No.43 of 1987 in spite of having knowledge about sale of the same in favour of the plaintiff. Both the Courts below have misinterpreted the provisions of Section 52 of the Transfer of Property Act. The plaintiff had purchased the suit property from original defendant No.8. Original defendant No.8 had purchased the suit property described in para 1-A of the paint from four brothers i.e. defendants No.1 to 4 on 10-01-1975. The registered sale deed in favour of plaintiff is dated 22-03-1991. In fact, the original property belong to defendants No.1 to 4 and one Akhtar Ali. It was partitioned prior to 1975 and each brother was allotted 1/5th share and, therefore, the

property described in para No.1-A and 1-B were created out of that the said property described in para 1-A was sold by the four brothers to defendant No.8. Land Survey No.186/4B was allotted to defendant No.1 as his 1/5th share. In spite of that, defendant No.1 illegally filed Regular Civil Suit No.43 of 1987 for partition and separate possession. That suit came to be decreed and in fact the defendant No.1 had knowledge that the present defendant No.8 had sold the suit property to the plaintiff, yet she was not added as party to the said proceedings and, therefore, the plaintiff was contending that the said decree in Regular Civil Suit No.43 of 1987 has been obtained by practicing fraud upon the Court. That decree was not binding on the plaintiff and as such the property sold to the plaintiff now deserves to be excluded from partition as the said decree is put to execution in Regular Darkhast No.18 of 2006. Substantial questions of law are arising in this case. The learned Advocate for the appellant has produced the photo copies of the documents which he wanted to rely and they are mainly about 7/12 extract, Taba Pavti i.e. possession receipt, sale deed which was executed by defendant No.1 in favour of one Vijay Machindra Dhokane during the pendency of the suit before the Trial Court. The paper book of the First Appellate Court is also made available.

4. Per contra, the learned Advocate appearing for the respondent No.14/original defendant No.14 supported the reasons given by both the Courts below.

5. It is to be noted that both the Courts below have held that plaintiff has become owner of the suit property, however, she has failed to prove that Regular Civil Suit No.43 of 1987 was obtained by practicing fraud on the Court. She has failed to prove that the said decree in Regular Civil Suit No.43 of 1987 is not binding on her and the said property needs to be excluded from Regular Darkhast No.18 of 2006. This is mainly on the basis of the fact that admittedly when the plaintiff had purchased the suit property from defendant No.8 on 22-03-1991, Regular Civil Suit No.43 of 1987 was pending. Learned Trial Judge has correctly considered the scope of Section 52 of the Transfer of Property Act. Reliance was placed on the decision in *Pralhad Jagannath Jevale and others vs. Sitabai chandar Nikam and others, reported in 2011(4) Mh.L.J.137* and *Shivaji Bhausaheb Bankar vs. Jijabai Prabhakar Alvane and others, reported in 2016 (4) Mh.L.J. 939*. In both these decisions this Court has categorically held that the registration of the notice of *lis pendens* is not required under Section 52 of the Transfer of Property Act to those properties

which are situated in other parts of State of Maharashtra (other than Mumbai). Even if we accept that defendant No.1 would have knowledge about the sale transaction between defendant No.8 and plaintiff, yet since the plaintiff could be purchaser of a purchaser, her rights would be subject to the rights which defendant No.8 can transfer in the suit property. When registration of the notice was not compulsory for defendant No.1, plaintiff cannot say that the decree that has been passed in favour of defendant No.1 was obtained by practicing fraud on Court. The purchaser i.e. defendant No.8 was party to that proceedings. It was for the defendant No.8 to disclose it to the Court that he has sold out the property. Secondly, the plaintiff has not stated as to what precautions she had taken before purchasing the property from defendant No.8. Defendant No.8 was in fact duty bound to give clear title to the plaintiff, however, there is equal duty on the plaintiff to see that the property which she is purchasing is free from any encumbrance or not. What precautions she had taken has not been told. In fact, she has examined only the power of attorney to support her averments. What kind of search was taken by the plaintiff, in other words, what kind of precautions were taken by her before entering into the sale transaction was within the personal knowledge of the plaintiff.

Therefore, in view of *Janki Vashdeo Bhojwani & Anr. vs. Indusind Bank Ltd. & Ors, reported in AIR (2004) 3 SCC 584*, the evidence on behalf of the plaintiff of her power of attorney will have to be negatived. It will have to be held that there is absolutely no evidence led by the plaintiff to support her averments and, therefore, the finding given by both the Courts below that plaintiff has failed to prove that the decree in Regular Civil Suit No.43 of 1987 has been obtained by practicing fraud, deserves to be upheld and that finding is not leading to any substantial question of law as contemplated. As defendant No.8 was party to that suit, the decision in that suit was binding on defendant No.8 and consequently, when the plaintiff has purchased the property from defendant No.8, the said decree is binding on the plaintiff.

6. 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, hence the second appeal stands dismissed at the stage of admission. Pending Civil Application stands disposed of.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-