

Pooja K.

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CIVIL APPLICATION NO.12349 OF 2011
IN
SECOND APPEAL (ST) NO. 26613 OF 2011
AND
SECOND APPEAL (ST) NO. 26613 OF 2011
WITH
CIVIL APPLICATION NO. 1664 OF 2014
WITH
CIVIL APPLICATION NO. 3889 OF 2012
IN
SECOND APPEAL (ST) NO. 26613 OF 2011

Laximan Baburao Tanpure	... Appellant
<i>Versus</i>	
Kamalbai Narhari Kulkarni (died) Thr LRs Shalini @ Shaila Narhari Kulkarni @ Shalini Vilas Pratap and Ors.	... Respondents

...
Mr. K.R. Doke – Advocate for Appellant
....

CORAM : GAURI GODSE, J.
DATE : 6th February, 2023

PER COURT :

CIVIL APPLICATION NO.12349 OF 2011

1. This application is filed for condonation of delay of 338 days in filing the Second Appeal. The learned advocate for the applicant states that all the respondents are served. He states that, there is no affidavit-in-reply filed for opposing the present Civil Application.

2. I have perused the Civil Application. The reasons stated in the application are satisfactory and condonable. Hence, for the reasons stated in the application, delay is condoned and application is allowed in terms of prayer clause 'B', which reads as under :

“B. The delay of 338 days caused in filing the second appeal may kindly be condoned in the interest of justice and matter may kindly be heard on its own merits.”

SECOND APPEAL (ST) NO. 26613 OF 2011

3. The Second Appeal is taken up for hearing on admission. Heard the learned advocate for the appellant. This Second Appeal is preferred by a third party purchaser who was added as respondent no.11 in Regular Civil Appeal No. 110 of 1991. Regular Civil Appeal No. 110 of 1991 was preferred by original plaintiffs as their suit for partition and separate possession was not decreed with respect to survey nos.78, 33/A and house no.399/4. By the judgment and decree dated 7th January, 1991 the Joint Civil Judge Junior Division, Paranda, decreed the suit filed by the respondent nos.1A to 1C for partition and separate possession only with respect to one suit property out of four

properties. Hence, the plaintiffs had preferred the appeal before the District Court.

4. During the pendency of the suit defendant no.1 had executed sale deed in favour of present appellant with respect to 81R out of 5 Acres of survey no.33/A. Hence, appellant was added as party respondent no.11 in the appeal filed in the District Court. The first appellate court by judgment and decree dated 2nd August, 2010 allowed the appeal preferred by the plaintiffs and decreed the suit for partition and separate possession also in respect of suit property survey no.33/A in addition to the decree of partition granted by the trial court. The first appellate court in paragraph no.7 of the impugned judgment has observed that, an area of 81 R of land survey no.33/A is sold by defendant no.1 to respondent no.11 (appellant) and since then he is in illegal possession of the said land.
5. The judgment and decree of first appellate court is challenged by the present appellant who is a third party purchaser, added as party respondent no.11 in the Civil Appeal. Learned counsel for the appellant submitted that, the first appellate court could not have decreed the suit in respect of survey no. 33/A, without

there being a specific finding recorded in respect to whether the sale was for the purpose of legal necessity. Learned advocate for the appellant further submitted that the first appellate court failed to frame proper points for consideration for the purpose of modifying the decree that was passed by the trial court.

6. Learned advocate submitted that it is a settled position of law that, only because sale has been effected during the pendency of the suit, the transaction cannot be held to be illegal on the principles laid down in Section 52 of the Transfer of Property Act. In support of his submissions he relied upon the judgment of Hon'ble Supreme Court in the case of *Hardev Singh Vs. Gurmail Singh (dead) by LRs.*¹. In support of his submissions on the point of framing proper points for consideration as per Rule 31 Order XLI of the Code of Civil Procedure 1908 ("CPC"), learned counsel relied upon the judgment of Hon'ble Supreme Court in the case of *B.V. Nagesh and Anr. Vs. H.V. Sreenivasa Murthy*².

7. I have considered the submissions made on behalf of the appellant. It is not in dispute that the present appellant

¹2007 DGLS (Soft.) 88

²2010 DGLS (Soft.) 652.

purchased some part of the suit property during the pendency of the suit. Hence, it is clear that the transaction in favour of present appellant is undoubtedly hit by the principles laid down in Section 52 of the Transfer of Property Act. Hence, there is no merit in the submission made on behalf of the appellant that the appellate court was required to frame an issue and record findings as to whether the sale in favour of the appellant was for the purpose of legal necessity. The sale effected in favour of present appellant during the pendency of the suit remains valid subject to the result of the suit. The pendente lite purchaser would be entitled to or suffer the same legal rights and obligations of his vendor as may be eventually determined by the court. It is not the case of the appellant that any leave was taken for the purpose of executing the transfer in his favour by the defendant no.1. It is not even the case of the appellant that, the suit property purchased by him exclusive stood in the name of defendant no.1. In such circumstances, I do not find any reason as to why the first appellate court was required to deal with an issue as to whether the sale in favour of the present appellant was executed for the purpose of legal necessity.

Hence, the decisions relied upon by the learned advocate for the appellant is of no assistance to the appellant.

8. The present appellant claims right in part of survey no.33/A on the basis of the sale deed executed by defendant no.1. The trial court had refused to grant decree for partition in respect of survey no. 33/A. However, the first appellate court in paragraph nos.5 and 7 of the judgment has dealt with the contentions raised in respect of survey no.33/A. The contention of defendant no.4 that part of survey no.33/A was purchased by her father in her name is disbelieved by the first appellate court. The first appellate court has also recorded findings that there was nothing on record to show any exclusive possession of defendant no.4. The case of defendant no.1 that there was sale-deed in favour of defendant no.1 in respect of survey no.33/A is also not believed by the first appellate court. Hence, the first appellate court after examining the oral as well as documentary evidence has held that the trial court could not have excluded survey no.33/A from the decree of partition.

9. The first appellate court being the last fact finding court, has recorded finding of facts based on appreciation of evidence. There is no illegality or perversity found in the reasonings

recorded by the first appellate court. The sale in favour of the appellant is during the pendency of the suit and therefore hit by the principles laid down in Section 52 of the Transfer of Property Act, hence, the decree that is passed against defendant no.1 will also be binding on the appellant.

10. The appellant being a purchaser pendente lite, at the highest can agitate his grievance against his vendor. There is no reason to interfere in the findings of facts recorded by the first appellate court. The Second Appeal do not raise any substantial question of law. Hence, Second Appeal is dismissed.
11. In view of the disposal of the Second Appeal, pending Civil Applications stand disposed of.
12. At this stage, learned counsel for appellant seeks stay of the execution and operation of the decree for partition. The suit for partition and separate possession is of the year 1991. The decree passed by the trial court is of the year 2010. Hence, I do not see any reason to stay to the execution and operation of the decree for partition, hence, prayer is rejected.

**[GAURI GODSE]
JUDGE**