

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

SECOND APPEAL NO. 323 OF 2019

Purshottam S/o Tukaram Ambarwele
Aged about 80 years, Occ.Retired
R/o 51, Shriramwadi, Ayodhya Nagar,
Nagpur (Maharashtra State)

...Appellant

// VERSUS //

1. Mahadeo S/o Tukaram Ambarwale
(dead)
- 1A. Smt. Durga Wd/o Mahadeo
Ambarwale, Aged 55 years,
- 1B Shri Gajanan S/o Mahadeo Ambarwale,
aged 40 years,
- 1C Deepak S/o Mahadeo Ambarwale,
Aged 37 years,
- 1D Vilas S/o Mahadeo Ambarwale
All residents of C/o Shri Gajanan
Mahadeo Ambarwale Laxmi Credit
Society, Near laxmi Talkies,
Hinganghat, District Wardha
2. Sau. Chhabutai W/o Wasudeorao
Mandawakar, Aged-Major, Occupation
Household R/o Nandori, Tahsil
Bhadravati, Dist. Chandrapur
(Maharashtra State)
- 2a. Arun S/o Wasudeorao Mandavkar
(son), Aged about 50 years, Off. Add.
Madhyavarti Sahakari Bank, Branch
Ghodpeth, Tal.Chandrapur, Dist.
Chandrapur
- 2b. Gopal S/o Wasudeorao Mandavkar

(son), Aged about 47 years, R/o
Nandori Tah. Bhadravati, Dist.
Chandrapur

2c. Pushpa W/o Vijayrao Chaudhari
(daughter) aged about 40 years R/o
Warora, Dist. Chandrapur and both (b)
and (c) R/o Ghodpeth, Tal.
Chandrapur, Dist. Chandrapur

3. Ku. Saloni Dipak Dalia,
Aged : Major, Occ. Cultivator &
Education
R/o Kotwali Ward, Tahsil & Dist.
Chandrapur (Maharashtra State)

4. M/s Rohini Textile Industries Pvt. Ltd.,
through its Director Shri Senthil
Kumar, Ragini Garden, Kangayam
Road, Tirampur, Koimbatore, Tamil
Nadu

... Respondents

Shri A.V.Khare, Advocate for the appellant.

Shri A.S.Dhore, Advocate for the legal representatives of respondent no. 1.

CORAM : ANIL S. KILOR, J.

DATED : 3rd FEBRUARY, 2023.

ORAL JUDGMENT :

For non-payment of requisite Court fees, the plaint was rejected and it was upheld by the First Appellate Court. Thus, the appellant by way of present second appeal has raised the question to the correctness and validity of the judgment and order dated 10th April, 2019 passed by the learned District Judge-1, Hinganghat in Regular Civil Appeal No. 191 of 2017, confirming the order below Exhibit 1 passed by the Joint Civil Judge, Junior Division, Samudrapur in Regular Civil Suit No.55 of 2013.

2. The facts in short are as under (parties are referred as per the status before the trial Court).

The plaintiff/appellant filed a suit for partition, separate possession and declaration of permanent injunction against the defendant/respondent and thereby claimed share in the suit property. The suit was dismissed for want of prosecution and in the meantime, the defendant no.1 executed a sale-deed dated 1st December, 2011 and thereafter the purchaser further sold out it to the defendant no.3 vide sale-deed dated 15th July, 2015. Thus, after restoration of the suit amendment was carried out and prayer clauses 1(a) and 1(b) were added. The prayers made in the suit after amendment were as follows:

1-a) Declare that the alleged sale-deed executed by defendant no.1 in favour of defendant no.3 dated 1st December, 2011 be declared as illegal and null and void and hence it is liable to be cancelled;

1-b) Declare that the alleged sale-deed dated 15th July, 2015 in favour of defendant no.4 by defendant no.3 is not binding on the present plaintiff.

3. Accordingly, the learned trial Court vide order below Exhibit 1 dated 21st September, 2016 directed the plaintiff to value the suit and pay court fees in terms of Section 6(iv)(ha) of Maharashtra Court Fees Act for the relief of declaration as regards the sale-deeds dated 1st December, 2011 and 15th July, 2015, within seven days from the date of order. As the plaintiff failed to comply the said order, the learned trial Court vide order below Exhibit-1 dated 21st January, 2016, rejected the plaint under Order VII Rule 11(b) of Code of Civil Procedure.

4. The plaintiff being aggrieved by the same went in appeal by filing the Regular Civil Appeal No. 191 of 2017 which came to be dismissed by upholding the order passed by the trial Court by rejecting the plaint. Hence, this second appeal.

5. This Court vide order dated 19th July, 2019 framed the following substantial questions of law.

1] Whether the Courts below were justified in rejecting the plaint ?

2] Whether the judgment and decree passed by both the Courts below could stand to the scrutiny of law in view of the law laid down by the Hon'ble Apex Court in case of Suhrid Singh @ Sardool Singh Vs. Randhir Singh and others, reported in AIR 2010 SC 2807 and also on the law laid down by this Court in case of Common Piru Caudhari Vs. Babubai Chendu Redhiwale and others reported in 2017(5) Mh.L.J. 388 ?

6. I have heard learned counsel for the respective parties.

7. Shri Khare, learned counsel for the appellant submits that the prayers made in the plaint are only to the extent of share of the plaintiff and not beyond that. It is pointed out that even the pleadings made in the plaint suggests that the plaintiff is seeking declaration to the extent of his share, he, therefore, submits that Section 6(iv)(ha) of the Maharashtra Court Fees Stamp Act, will not apply to the case of the appellant and both the Courts below have committed error in asking the appellant to pay the Court fees as per Section 6(iv)(ha) of Maharashtra Court Fees Act.

8. Shri Khare, learned counsel for the appellant further submits that at the stage of first appeal a pursis was filed by the appellant seeking permission to pay the Court fees, in view of the prayer clause 1(a) whereby the plaintiff is seeking declaration that the sale-deed dated 1st December, 2011 is illegal and is null and void and liable to be cancelled. It is submitted that, the said request was not allowed by the Appellate Court.

9. On the other hand, Shri Dhore, learned counsel for the legal heirs of the original defendant no.1 supports the impugned judgment and order. Whereas, other respondents have supporting the case of the appellant.

10. In the backdrop of rival submissions made by the learned counsel for the respective parties, I have perused the record and impugned judgment and order.

11. The prayer clause 1(a) clearly shows that the appellant is seeking declaration that the sale-deed executed by the defendant no.1 in favour of the defendant no.3 dated 1st December, 2011 is illegal and null and void and the same is liable to be cancelled. Whereas, in the prayer clause (b), the plaintiff is seeking declaration that sale-deed dated 15th July, 2015 executed in favour of the defendant no.4 by defendant no.3 is not binding on the plaintiff.

12. From the language of prayer clause 1 (a), it can be said that the plaintiff wanted declaration that the sale-deed dated 1st December, 2011 be declared as illegal, null and void and further it be cancelled.

12. In the case of Suhrid Singh @ Sardool Singh v. Randhir Singh and others¹ has held thus:

6. Where the executant of a deed wants it to be annulled, he has to seek cancellation of the deed. But if a non-executant seeks annulment of a deed, he has to seek a declaration that the deed is invalid, or non-est, or illegal or that it is not binding on him. The difference between a prayer for cancellation and declaration in regard to a deed of transfer/conveyance, can be brought out by the following illustration relating to 'A' and 'B' -- two brothers. 'A' executes a sale deed in favour of 'C'. Subsequently 'A' wants to avoid the sale. 'A' has to sue for cancellation of the deed. On the other hand, if 'B', who is not the executant of the deed, wants to avoid it, he has to sue for a declaration that the deed executed by 'A' is invalid/void and non-est/illegal and he is not bound by it. In essence both may be suing to have the deed set aside or declared as non-binding. But the form is different and court fee is also different. If 'A', the executant of the deed, seeks cancellation of the deed, he has to pay ad-valorem court fee on the consideration stated in the sale deed. If 'B', who is a non-executant, is in possession and sues for a declaration that the deed is null or void and does not bind him or his share, he has to merely pay a fixed court fee of Rs. 19.50 under Article 17(iii) of Second Schedule of the Act. But if 'B', a non-executant, is not in possession, and he seeks not only a declaration that the sale deed is invalid, but also the consequential relief of possession, he has to pay an ad-valorem court fee as provided under Section 7(iv)(c) of the Act. Section 7(iv)(c) provides that in suits for a declaratory decree with consequential relief, the court fee shall be computed according to the amount at which the relief sought is valued in the plaint. The proviso thereto makes it clear that where the suit for declaratory decree with consequential relief is with

1 AIR 2010 SC 2807

reference to any property, such valuation shall not be less than the value of the property calculated in the manner provided for by clause (v) of Section 7.

7. In this case, there is no prayer for cancellation of the sale deeds. The prayer is for a declaration that the deeds do not bind the "co-parceners" and for joint possession. The plaintiff in the suit was not the executant of the sale deeds. Therefore, the court fee was computable under section 7(iv)(c) of the Act. The trial court and the High Court were therefore not justified in holding that the effect of the prayer was to seek cancellation of the sale deeds or that therefore court fee had to be paid on the sale consideration mentioned in the sale deeds.

13. From the observations made by the Hon'ble Supreme Court of India and considering the prayer clause 1(a), I have no hesitation to hold that the impugned judgment and order passed by the learned Appellate Court and the order passed below Exhibit 1 by the trial Court are just and proper and no need of interference as far as prayer clause 1(a) is concerned.

14. As far as prayer clause 1(b) is concerned, I am of the opinion that as per the law laid down by the Hon'ble Supreme Court of India, in the case of *Suhrid Singh @ Sardool Singh Vs. Randhir Singh and others* (supra), Section 6(iv)(ha) of the Bombay Court Fees Act, will not apply. Accordingly, I have answered the substantial question of law framed by this Court.

15. So far as the statement made by the learned counsel for the appellant that the appellant is ready to pay the Court fees, in view of prayer clause 1(a), I am of the opinion that for this purpose, liberty shall

be granted to the appellant to approach to the trial Court for extension of time to pay the Court fees. Accordingly, I pass the following order.

Order is
corrected
as per
order dated
10.03.2023

i. Second appeal is partly allowed with liberty to the appellant to approach to the trial court by filing application for extension of time to pay Court fees.

ii. The trial Court is directed to consider the application on merit as per the law keeping in view the time consumed by the plaintiff in availing further remedies.

[ANIL S. KILOR, J.]

SACHINDANAND
K NAIR

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by
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