

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT NAGPUR, NAGPUR.

...

SECOND APPEAL NO. 101/2023

1) Sau. Kokilabai w/o Ravindra Ghongate
and others

..Appellants

versus

Ravindra s/o Baburao Ghongate and another

..Respondents

.....
Mr. Abhay Sambre, Advocate for the appellants
.....

CORAM: ANIL L. PANSARE, J.

DATE OF CLOSING: 28.06.2023.

DATE OF PRONOUNCEMENT: 03.07.2023.

PC:

Heard Mr.Abhay Sambre, the learned counsel for the appellants, at length.

2. The present Appeal has been filed under Section 100 read with Order XLII Rule 1 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'the Code'.)

3. The appellants are/were the objectors before the executing Court. They are the legal heirs of Respondent No.1 who is/was the judgment-debtor. The Respondent No.2 is the decree-holder. The appellants will be referred to, hereinafter, as 'the objectors'; the Respondent No.1 as 'the judgment debtor/defendant' and the Respondent No.2 as 'the decree holder /plaintiff'.

4. The objectors are aggrieved by the judgment and order/deemed decree dated 29th August, 2022 passed by the learned Ad-

hoc District Judge-1, Malkapur in Regular Civil Appeal No.11/2016, whereby the first Appellate Court has confirmed the judgment and order/deemed decree dated 27th July 2016 passed by the learned Civil Judge, Senior Division, Malkapur in Special Darkhast No.10/2012 (old No. 81/1997), on an objection raised by the objectors under O.XXI R.97 of the Code and, thus, dismissed appeal.

5. The decree holder/plaintiff (Respondent No.2) had filed a suit bearing Special Civil Suit No.74/1995 for specific performance of contract of sale, which was executed on 26th November, 1994 between the decree holder/plaintiff and the judgment debtor/defendant. The subject-matter of the suit is/was a land admeasuring 2H 83R out of Gut No. 259 of village Ava, Tah.Motala, Dist Buldana (hereinafter referred to as the 'suit property'). The trial court decreed the suit on 16th July 1997. The decree-holder was directed to deposit Rs.71,000/- in the Court. The judgment debtor/defendant was directed to execute sale-deed in favour of the decree holder/plaintiff within one month. Accordingly, the decree holder/plaintiff deposited Rs.71,000/- in the trial Court. The judgment debtor/defendant did not execute the sale deed as directed and, therefore, the decree holder/plaintiff filed execution petition bearing Special Darkhast No. 81/1997.

6. The judgment debtor/defendant assailed the judgment and decree passed by the trial Court by preferring an appeal bearing Regular Civil Appeal No. 74/1995 before the first appellate Court. The Appeal came to be dismissed on 9th August, 2004. The judgment debtor/defendant, then, filed Second Appeal No.457/2006 which was dismissed on 13th August, 2007. During this period, the execution petition

remained pending only for handing over possession of the suit property because in the intervening period, the sale-deed came to be executed in favour of the decree holder /plaintiff on 17th November, 2001 with the intervention of the executing court.

7. The original execution petition being Special Darkhast No. 81/1997 was subsequently renumbered as Special Drkhast No.10/2012 due to establishment of the link court.

8. The objector no.1 is the wife, objector Nos. 2 to 5 are daughters and objector no. 6 is a minor son. The objectors filed objection petition vide Exh.62 in Special Darkhast No.10/2012 in terms of the O.21 R.97 of the Code. The objection has been raised on a plethora of grounds, that is to say, the suit was an ancestral property and the objectors had share in it; there was no legal necessity to sell the suit property, the objector nos. 2 to 6 were minors at the time of agreement to sell; the judgment debtor was mentally ill; there is bar of the provisions of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 and the relief of possession was not granted by the trial Court. The trial Court so also the first appellate Court have invalidated the objections by a comprehensive and well-reasoned judgment.

9. The appellants/objectors are aggrieved by the findings rendered by both the Courts below. The objectors have put forth various substantial questions of law akin to the objections raised but in a modified version.

10. Mr.Abhay Sambre, the learned counsel for the objectors has, however, restricted his arguments on two counts, namely, the decree passed by the trial Court was not for the possession and, secondly, the objector nos.2 to 6 were minors when agreement to sell was executed and that their age is not properly ascertained by the Courts below.

11. The learned counsel for the objectors submits that the objectors who were not the parties to the suit are/were in possession of the suit property and that therefore they could not be dispossessed, more particularly when the trial court's decree is limited to execution of sale deed and not for handing over possession to the decree holder/plaintiff.

12. I have gone through the record. Both the Courts below have taken into account the effect of partition between the judgment debtor/defendant and his father Baburao. The partition was effected in the year 1980. The evidence led before the executing court by the objectors established that when the suit property was partitioned, the judgment debtor/defendant was not married. The Courts below therefore, held that after the partition with the father, the judgment debtor/defendant became a separate owner of the suit property.

13. The first appellate Court relied upon two judgments *viz*, **Rohit Chauhan vs. Surinder Singh & others: AIR 2013 SC 3525** and, **Shiladevi vs. Lal Chand : (2006) Vol.8 SCC 581**, wherein the Apex Court held that so long a ancestral property remains in the hands of a single person, it has to be treated as separate property and such a person shall be entitled to dispose of the coparcenary property treating it to be his

separate property and that if a son is subsequently born, the alienation made before his birth cannot be questioned.

14. Accordingly, it is held by the Courts below that the judgment debtor/defendant had every right to enter into a contract and to sell the suit property.

15. As regards, the ground that the decree is silent as to possession, the first appellate Court has relied upon the judgment of the Hon'ble Supreme Court in the case of Manickam @ Thandapani vs. Vasantha (Civil Appeal No.2726/2022) wherein the Hon'ble Supreme Court held that relief of possession is ancillary to the decree for specific performance and need not be specifically claimed. The Supreme Court further held that in the suit for specific performance, the possession is inherent in such a suit and that therefore, the decree-holders are, in fact, entitled to possession in pursuance of the sale deed executed in their favour.

16. In the present case, the sale deed has already been executed and that therefore the decree holder/plaintiff will be entitled for the possession in terms of the law laid down by the Supreme Court even if the decree is silent on the point of possession. Thus, there is no substance in the contentions of the objectors that the decree having been silent on the point of possession, the objectors cannot be dispossessed in execution of the decree.

17. So far as the second ground is concerned viz, that the objector nos. 2 to 6 were minor, the Courts below have held, on the basis

of the evidence led by the objectors, that the objector No.6 son was not even born in the year 2001. As such, the objectors have not placed on record, the birth certificate or any cogent evidence in respect of date of birth of the objector no.6. However, the Courts below took note of the fact that the objectors have mentioned the age of objector no.6 as three years in the objection petition filed on 3rd April, 2008. Accordingly, an inference has been drawn that if the objector no.6 was three years old in April 2008, he would not have taken birth prior to April, 2005. Admittedly, the sale deed has been executed by the executing court in the year 2001. Thus, the objector No.6 was born after the execution of sale deed and, therefore, there arises no question of objector no.6 taking any objection to the said sale deed.

18. As regards, the effect of births of daughters i.e. objector Nos. 2 to 5 is concerned, the Courts below have noted that the agreement to sell was executed on 26th November, 1994 and at that time, the daughters were not recognized as coparceners. The effect of Central Amendment of 2005 in Hindu Succession Act, 1956 (in short “the Act of 1956”) was considered. The parties before the first appellate court relied upon the decision of the Hon’ble Supreme Court, in the case of **Veenita Sharma vs. Rakesh Sharma (2020) 9 SSC 1.** The objectors relied upon the finding that irrespective of whether the father is alive or not and whether daughter is married or not, if the daughter is alive she would become coparcener in her own right by virtue of the amended provision of Section 6 of the Act of 1956. As against the decree holder/ plaintiff submitted that the proviso to section 6(1) of the Act of 1956 as amended in 2005 has saved the alienation which took place prior to 20th December, 2004. Accordingly, it is submitted that even if presumed that

the daughters herein got status of coparcener on commencement of amended provisions under the Act of 1956 the sale deed executed in favour of the decree-holder/plaintiff will not be affected. The Supreme Court in the above judgment has held that the rights can be claimed by the daughter born earlier with effect from 9th September, 2005 with savings as provided in Section 6(1) as to the disposition or alienation, partition or testamentary disposition which had taken place before 20th day of December, 2004. Accordingly, the first appellate Court held and rightly so, that the sale deed under question having been executed in the year 2001 which is prior to 20th December, 2004, it is saved from the application of amended provisions of Section 6 of the Act of 1956.

19. That apart, the objection as regards section 29A of the Maharashtra Amendment of 1994 in the Act of 1956 has also been considered and dealt with by the first appellate court by relying upon the judgment of this Court in the case of **Babu and others vs. Muktabai: (2021 SCC Online BOM 4588)**, wherein while considering the effect of the amendment in Section 6 as amended in 2005, the Court held that Section 29A of the Hindu Succession (Maharashtra) Amendment Act and Section 6 as amended in 2005 cannot stand together and that the law made by the Parliament would prevail over the state law in view of Article 254(1) of the Constitution of India.

20. The first appellate court then relied upon the judgment of the Supreme Court in the case of **Prataprai vs. Jayant Shah : 1996 Vol.2 Mh.L.J.885**, wherein it is held that when the suit for specific performance is ended by a final decree transferring the title, that title relates back to the date of agreement on which the suit is based and the Court will not

permit the decree to be rendered nugatory by intermediate conveyance. In the present case, the agreement of sale was executed on 26th November 1994. The sale deed has been executed by the executing court in the year 2001 and, therefore, the sale deed will relate back to the date of the agreement in terms of the law laid down in the above judgment. The first appellate court, therefore, held that even if the effect of section 29A as inserted by the Maharashtra amendment in the Hindu Succession Act, 1956 is to be considered, the objectors were under the duty that the daughters had taken birth prior to 26th November, 1994 to claim right as available to the coparcener. The first Appellate Court found that no evidence is available in this behalf. The learned counsel for the objector could not show that this finding is contrary to the evidence led before the executing Court.

21. Therefore, apart from the fact that the transaction under question will be saved by the saving clause under section 6(1) of the Act of 1956 the objectors failed to prove that daughters were born prior to the execution of agreement to sell to take any benefit, as available under section 29A of the Act of 1956.

22. So far as the objector no.1 is concerned, she being wife, the first appellate court rightly held that she would not fall within the definition of coparcener and could not raise objection for the transaction entered into by her husband in the year 1994.

23. The first appellate Court has thus considered all the objections raised by the objectors and passed a well-reasoned order. The objectors failed to point out any perversity, either in appreciation of

evidence or in applying the law to the facts of the case. The concurrent finding is based on sound reasoning. The appellants/objectors failed to point out existence of any question of law, much the less the substantial question of law in the present appeal.

24. The Appeal being devoid of merit is liable to dismissed and is accordingly dismissed, *in limine*.

[ANIL L. PANSARE, J.]

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