



IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

APPEAL FROM ORDER NO. 15 OF 2024
WITH CA/4678/2024 IN AO/15/2024

1. Dnyandev @ Dnyaneshwar S/o. Nathrao
Khiste

... APPELLANT
(Ori. Defendant No.2)

VERSUS

1. Kishor S/o. Murlidharrrao Ghuge,
2. Mohal S/o. Murlidharrao Ghuge,
3. Seema W/o. Bhagwan Sanap,
4. Sujata W/o. Rajeshrao Jaibhaye,
5. Varsha W/o. Sharad Mundhe,
6. Murlidharrao S/o. Satwarao Ghuge,
7. District Forest Officer,
8. The State of Maharashtra

... RESPONDENTS

(Resp. Nos.1 to 5 – Ori. Plaintiff & Resp. No.
6 to 8 – Ori. Defendant Nos.1, 3 & 4 respectively)

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Mr. Suraj R. Bagal – Advocate for Appellant
Mr. S.V. Mundhe – Advocate for Respondent Nos.1 to 5
Mr. D.B. Bhangе – AGP for Respondent Nos.7 and 8, State

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CORAM : SANDIPKUMAR C. MORE, J.

DATE : 30th July, 2024

ORDER :

1. Heard finally with consent of the parties at admission stage.

2. The appellant who is original defendant No.2 in Regular Civil Suit No. 206 of 2012 has challenged the judgment and order dated 09.01.2020 passed by the learned Principal District Judge, Parbhani (*hereinafter referred to as, “the learned First Appellate Court”*) in Regular Civil Appeal No. 116 of 2014 in the present Appeal from Order. Under the impugned order the learned First Appellate Court by setting aside the judgment and decree in the aforesaid Regular Civil Suit No. 206 of 2012 dated 09.07.2014 and remitted the matter back to the learned Civil Judge Senior Division, Parbhani (*hereinafter referred to as, “the learned Trial Court”*) for fresh consideration and particularly by allowing the parties to amend their pleading, lead additional evidence etc.

3. Learned Counsel for appellant submits that, the suit is filed by original plaintiffs who are present respondent Nos.1 to 5, for partition and declaration that the sale-deed executed by their father – Murlidharrao i.e. respondent No. 6 in favour of present appellant being not binding on them, has already been dismissed by the learned Trial Court by framing proper issues and after giving findings thereon. However, the learned First Appellate Court having being concurred with the observations of the learned Trial Court on the disputed aspects unnecessarily remanded the matter

back to the learned Trial Court for fresh consideration. According to him, it was not at all necessary for the learned First Appellate Court to direct the parties to amend their pleading and to lead additional evidence. Learned Counsel for respondent Nos.1 to 5 i.e. original plaintiffs supported the impugned judgment passed by the learned First Appellate Court whereas the learned A.G.P. appearing on behalf of respondent Nos.7 and 8 prayed for passing suitable order. Respondent No. 6 despite service remained absent.

4. It is significant to note that, the original plaintiffs i.e. present respondent Nos.1 to 5 filed suit for partition and separate possession of the suit property only land survey No. 29/2 admeasuring 13 acres 30 gunthas situated at village Kehal, Tq. Jintur, Dist. Parbhani and also for declaring the sale-deed executed by respondent No. 6 i.e. their father in favour of present appellant/defendant No. 2 being illegal and not binding upon them. Defendant No.2 i.e. present appellant had only resisted the suit by contending that, all the family members and joint family properties were not joint and that respondent No. 6 i.e. father of the plaintiffs had sold him the part of suit land for consideration of Rs.1,00,000/- (rupees one lac only) vide sale-deed dated 17.11.1993 to meet the marriage expenses of his daughter and to

repay the loan taken from other societies. On going through the judgment of the learned Trial Court it appears that, the learned Trial Court has dismissed the suit by observing that, the suit is bad for non-joinder of necessary parties and also for non-joinder of all joint family properties. The learned Trial Court has also dismissed the claim of the plaintiffs that the sale-deed dated 17.11.1993 is null and void and not binding on the plaintiffs. For this purpose, the learned Trial Court has observed that, the sale-deed and evidence of the plaintiffs could not establish that, it was nominally executed and it was actually a mortgage by conditional sale. The learned Trial Court also observed that, the said sale-deed was executed by respondent No. 6 – Murlidhar out of his legal necessity i.e. to meet the marriage expenses of his daughter and for repayment of private loan. For that purpose, the learned Trial Court has relied upon the observation of this Court in the case of The Designers Co.-Op. Hsg. Soc. Vs. Udhav S/o. Murlidhar Rasne and Ors. reported in *2011(1) ALL MR 346*.

5. However, it is significant to note that, the learned First Appellate Court even after confirming the observation of the learned Trial Court, remanded the matter back to the learned Trial Court for fresh hearing. On going through the judgment of the

learned First Appellate Court it is clearly evident that, the learned First Appellate Court has agreed for observation of the learned Trial Court that, respondent No. 6 had sold the part of suit property to the appellant out of legal necessity. Further, the learned First Appellate Court has also admitted the findings of the learned Trial Court and observed that suit is bad for non-joinder of necessary parties and all joint family properties. It is extremely important to note that, in paragraph No. 17 of the impugned judgment the learned First Appellate Court has observed as follows:

“17. Actually, the evidence available on record and discussed in the foregoing paras, if considered, then it can be observed that the same is sufficient enough to hold that the appellants have failed to prove the suit claim.”

Thus, it appears that the learned First Appellate Court has found the evidence on record sufficient to hold that, respondent Nos.1 to 5 i.e. plaintiffs failed to prove the suit claim.

6. Even after that the learned First Appellate Court has remitted the matter back to the learned Trial Court for framing necessary issues in respect of limitation and on the aspect of legal necessity. It is important to note that, the limitation issue is not at all agitated by the present appellant. Moreover, the learned Trial

Court dismissed the claim of the plaintiffs in respect of the sale-deed on the ground that, the recitals of the same proved that it was a transaction of sale only and not a mortgage by conditional sale. Nothing is discussed about the limitation aspect while giving such findings. Learned Counsel for appellant/defendant No.2 vehemently argued that, when the limitation issue was not raised by appellant before the learned Trial Court it was not necessary at all for the learned First Appellate Court to observe that, there was necessity of framing an issue of limitation. According to him, otherwise also suit of the plaintiffs is already dismissed on other counts and therefore, such remand would only add one more ground for dismissal of the suit, which is not at all required. I find substance in the submission of learned Counsel for appellant because the learned First Appellate Court has already held that the evidence on record was enough to hold that the plaintiffs failed to prove their claim.

7. The learned First Appellate Court has also insisted for framing specific issue on legal necessity. It is surprising to note that, the learned First Appellate Court has given finding on this aspect by observing that, due to marriage expenses and repayment of loan, respondent No. 6 had sold the suit property to

appellant/defendant No. 2. Moreover, it is also observed that, though the aspect of legal necessity as decided by the learned Trial Court was impliedly accepted by the learned First Appellate Court, but it appears that the learned First Appellate Court found it necessary to frame specific issue on that aspect merely because specific findings have not been recorded by the learned Trial Court. It is to be noted here that, the learned Trial Court by relying upon the judgment of this Court in the case of **The Designers Co.-Op. Hsg. Soc.** (*supra*) specifically observed that, the recitals of sale-deed indicated legal necessity which being admissible in the evidence carries some weight in the facts and circumstances in which the transaction has taken place. It is already established on the strength of sufficient evidence that, the plaintiffs failed to show that it was conditional sale and therefore, the legal necessity of respondent No. 6 as mentioned in the sale-deed was established in selling the suit land to appellant. Thus, the issue of legal necessity is definitely answered by the learned Trial Court on the basis of evidence on record though an issue to that effect was not framed.

8. It is extremely important to note that, the learned First Appellate Court despite being agreed with the findings of the learned Trial Court on the issue of legal necessity, has erroneously

remitted the matter back and that to by directing the parties to amend the pleadings which is not at all permissible as the learned Trial Court has already decided the matter considering the pleadings of the parties on record. Such enlargement of scope of dispute between the parties without there being any demand from either of the parties, is not permissible. Further, there was no necessity of framing the issue of limitation as it was never agitated by appellant. Under such circumstances the learned First Appellate Court should have decided the matter on its own merits and on the basis of evidence on record which according to it sufficient to decide the suit claim. In view of the same, the appeal is hereby allowed and the impugned judgment and order dated 09.01.2020 passed by the learned First Appellate Court i.e. learned Principal District Judge, Parbhani in Regular Civil Appeal No. 116 of 2014 is hereby set aside and the learned First Appellate Court is directed to decide the appeal on its own merit and on the basis of evidence on record.

9. The Appeal from Order is accordingly disposed of alongwith pending Civil Application No. 4678 of 2024.

[SANDIPKUMAR C. MORE, J.]