



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

SECOND APPEAL NO. 130 OF 2013

**GRAMSEVAK SAHEB, KANHUR PATHAR AND ANR
VERSUS
SAKHARAM HARIBA THUBE AND ORS**

Mr. R. K. Temkar, Advocate for the appellants
Mr. H. V. Dhage, Advocate for respondent No.1.

CORAM : R. M. JOSHI, J.
DATE : 31st JANUARY, 2024

P.C. :-

1. Heard.
2. This appeal under Section 100 of the Code of Civil Procedure, takes exception to the judgment and decree dated 11/07/2012 passed in RCA No. 11/2008 confirming the decree passed in RCS No. 386 of 2006.
3. Parties are referred as plaintiff, defendants for the sake of convenience.
4. Original Plaintiff filed suit bearing RCS No. 386/2006 taking exception to the sale deed 11/01/1971 in respect of the suit property. It is his contention that at the relevant time he was minor and owner of the suit property. It is alleged that without obtaining leave of the competent Court suit property was sold to the defendant Grampanchayat. There is

specific pleading to the effect that till receipt of notice dated 24/09/2003 for removal of encroachment, the plaintiff did not have knowledge of the sale deed dated 11/01/1971. After acquiring said knowledge suit came to be filed for seeking declaration in respect of sale deed being not binding on him.

5. Defendants though were duly served with the summons of the suit and also appeared but failed to file written statement and contest the suit. Plaintiff examined himself at Exhibit 24. His contention on oath has gone unchallenged for want of cross-examination by defendants. Learned Trial Court therefore has decreed the suit by declaring the sale deed dated 11/01/1971 in respect of the suit property to be illegal and further cancelled the same. Being aggrieved by the said order passed by Trial Court appeal was preferred unsuccessfully by defendants.

6. Learned counsel for the defendants submits that the sale deed is executed in the year 1971 whereas the plaintiff has attained majority in the year 1980. Thus, according to him the suit is filed beyond period of limitation. It is also contended that number of structures are constructed on the suit property by the Grampanchayat and hence the Grampanchayat needs to be given an opportunity to file written statement to contest the suit. For this reason he seeks remand of the suit to the Trial Court. Learned counsel for the plaintiff supported

impugned judgments.

7. Plaintiff has filed suit with specific pleading that the in the year 1971 while he was minor sale deed was executed in respect of property owned by him without seeking permission of the competent Court. There is further specific pleading to the effect that the said sale deed was not within his knowledge and it was came to his notice only in the year 2003 when a notice for removal of encroachment was received by him from the Grampanchayat. Thus, from the pleadings of the plaint it does not appear that the suit is barred by limitation. Admittedly this pleading has gone unchallenged and as such there was no occasion for the Trial Court to consider issue of limitation and to record any findings thereon. The contention of the learned counsel for the defendants about the suit being barred by limitation on account of plaintiff attaining majority in the year 1980 is not pure question of law which can be permitted raised at any stage of the proceeding. This being mixed question of fact of law ought to have been raised pleaded by filing written statement. Admittedly, there is no pleading filed by the defendants before the Trial Court. Not only no written statement was filed but also the ocular evidence of plaintiff has gone uncontroverted. In such circumstances no fault can be found with the judgment and decree passed by the Trial Court.

8. Though now it is sought to be contended on behalf of the defendants that an opportunity needs to be given to the defendant Grampanchayat for filing written statement, but admittedly in memo of appeal filed before the First Appellate Court no explanation was provided by defendant for not filing written statement and not contesting the suit. In absence of any such case is sought to be made out before the First Appellate Court, now it is not open for the defendants to seek remand of the suit for retrial. Defendants therefore to suffer for the inaction on their part.

9. Having regard to the facts and circumstances of the case and considering the uncontroverted pleadings and evidence of the plaintiff, no perversity is found in the judgment and decree passed by the Trial Court. This Court finds no substantial question of law being involved in this appeal in order to entertain the same. Hence, appeal stands dismissed.

(R. M. JOSHI, J.)

ssp