



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 342 OF 2016

Shri. Nivrutti Shripati Kharat and Others. ...Appellants.

Versus

Shri. Jagannath Babu Arjun
Since deceased through legal heirs :
and Others. ...Respondents.

*Mr. Y. B. Lengare i/b Mr. Suman Y. Lengare for the appellant.
Mr. Kuldeep Nikam for respondent nos. 1.1 and 1.2.*

Coram : Sharmila U. Deshmukh, J.

Date : March 13, 2024.

P. C. :

1. Being dissatisfied by the judgment dated 19th January 2016 passed by the Appellate Court in Regular Civil Appeal No. 270 of 2008 dismissing the appeal preferred by original defendant nos.20 to 22 against the judgment and decree dated 30th June 2008 passed by the Civil Judge, Junior Division, in Regular Civil Suit No. 66 of 1999, original defendant nos. 20 to 22, are before this Court. For the sake of convenience, parties are referred to by their status before the Trial Court.

2. RCS No. 66 of 1999 was preferred by the plaintiffs for partition

and separate possession of suit properties. In this suit, defendant nos. 20 to 22 were impleaded as defendants being the purchasers of 15 anna share in the Well water from 3-Are Well situated in Gat No. 1358, which was one of the properties of which partition and separate possession was sought. During the pendency of suit on 25th April 2000, sale deed was executed between defendant no.1, i.e., the father of plaintiff and the defendant. The trial Court framed the issues as regards the sale deed dated 25th April 2000 being hit by the principle of "*lis pendens*" and whether defendant nos. 20 to 22 are the bona fide purchasers for value without notice and whether the sale deed is executed for legal necessity. The issues came to be answered against defendant nos. 20 to 22 and the trial Court decreed the suit holding that the plaintiff is entitled to half share in the suit properties and defendant nos. 2 to 19 are entitled to equitable partition on payment of requisite Court fees. As against this, original defendant nos.20 to 22 whose sale deed was held to be hit by doctrine of *lis pendens*, preferred an appeal before the appellate Court being RCA No.270 of 2008. The Appellate Court upheld the findings of trial Court and dismissed the appeal.

3. Heard Mr. Lengare, learned counsel appearing for the Appellant and Mr. Kuldeep Nikam, learned counsel appearing for respondent

nos. 1.1 and 1.2.

4. Learned counsel appearing for the Appellant would submit that defendant nos. 20 to 22 have purchased the share of defendant no.1 in respect of the Well water from 3-Are Well situated on Gat No. 1358. He submits that as the Appellant was purchaser of the undivided share of co-parcenary property, the share which is allotted to defendant no.1 is required to be adjusted against the undivided interest purchased by the Appellant. He submits that substantial question of law arising in the present case is that there is no bar under Section 52 of the Transfer of Act, 1882 to sell the property during the pendency of proceedings and the sale deed has been executed for valuable consideration and as such defendant nos. 20 to 22 are bona fide purchasers.

5. *Per contra* Mr. Nikam, learned counsel appearing for respondent no.1 would submit that defendant nos.20 to 22 had purchased the property during the pendency of proceedings and there are concurrent findings that they are not bonafide purchasers for value without notice. He would further submit that there is no perversity demonstrated by the appellants.

6. Considered the submissions and perused the record.

7. Heard. **Admit** on the following substantial questions of law :

(I) *Whether the provisions of section 52 of the Transfer of Act, 1882 prohibit the transfer/alienation of property during the pendency of proceedings ?*

(II) *Whether the undivided share of defendant no.1 which was purchased by the Appellants was required to be adjusted against the share allotted to defendant no.1 upon partition as decreed by the trial Court ?*

8. Learned counsel for the parties are *ad idem* as limited issue is involved, appeal be taken up for final hearing. Private paper book is already on record. Therefore, with the consent of learned counsel, appeal is taken up for final hearing.

9. Learned counsel for the parties submit that the submissions above may be considered as submissions for final disposal.

10. As the sale-deed is held to be hit by principle of "*lis pendens*", it will be necessary to reproduce Section 52 of the Transfer of Property Act, 1882, which reads thus :

"52. Transfer of property pending suit relating thereto.—During the pendency in any Court having authority within the limits of India excluding the State of Jammu and Kashmir or established beyond such limits by the Central Government, of any suit or proceeding which is not collusive and in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or

proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose."

11. Plain reading of the provision indicates that the prohibition contained therein operate against transfer of property so as to affect the rights of any party thereto under any decree of order which may be made.

12. The provisions of section 52 of the Transfer of Property Act, 1882 do not prohibit the transfer or creating any third party right in the suit property and all that section provides is that subsequent transferee will be bound by the outcome of suit. It is settled that the scope of Section 52 of the Transfer of Property Act, 1882 is only to subject the transfer to the rights of other parties as decided in the suit.

13. In the present case, it is an admitted position that the appellants have purchased 15 anna share in the Well water situated in Gat No.1358, in which their vendor, i.e., defendant no.3 had a share. The suit was filed for partition and separate possession of the suit properties which included the property purchased by the defendant nos. 20 to 22. Once it is held that defendant no.1 is also entitled to a share in the suit property and there is no challenge to the sale deed,

upon partition of the suit properties, the share of defendant no.1 is liable to be adjusted against the share purchased by defendant nos.20 to 22. The trial Court as well as the appellate Court on misappreciation of evidence have come to a finding that the alienation by defendant no.1 is bad as the same has taken place during the pendency of proceedings. It is well settled that a coparcener is entitled to alienate his undivided share in the property and in such an event, the portion which falls to the share of defendant no.1 is required to be adjusted against the share purchased by the purchaser.

14. In the present case, the trial Court and the appellate Court in view of the no-objection of plaintiff to the alienation in favour of defendant nos. 2 to 19, held that defendant nos. 2 to 19 are entitled to equitable partition on payment of requisite Court fees. As defendant nos. 20 to 22 were also the alienees of property falling to the share of defendant no.1, defendant nos. 20 to 22 are also entitled to the share alienated to be adjusted against the share allotted to defendant no.1 upon partition.

15. Having regard to the discussion above, finding of the trial Court as well as the appellate Court that there was total prohibition on the transfer of undivided interest of coparcener in view of section 52 of the Transfer of Property Act, 1882, is an incorrect reading of the law.

Section 52 of the Transfer of Property Act does not prohibit the alienation during the pendency of proceedings. It merely provides that the subsequent transferee will be bound by the decision of suit. As such the sale deed is not hit by the doctrine of *lis pendens*. As the sale deed is legally sustainable, defendant nos.20 to 22 are entitled to 15 anna share in Well water from 3-Are Well situated on Gat No. 1358, to be adjusted against the portion allotted to defendant no.1 upon partition. Substantial questions of law are answered accordingly. Appeal stands allowed in above terms.

16. In view of the disposal of second appeal, civil/interim application taken out in this second appeal does not survive and the same is disposed of.

[Sharmila U. Deshmukh, J.]