



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.936 OF 2016
WITH
CIVIL APPLICATION NO.1932 OF 2016
WITH
INTERIM APPLICATION NO.976 OF 2024
WITH
CIVIL APPLICATION (ST.) NO.651 OF 2018
IN
SECOND APPEAL NO.936 OF 2016

Sudam Ganpat Katwal

... Appellant.

Versus

Smt. Parvati Shankar Bhosale and Ors.

... Respondents.

Mr. Vasudeo A. Gangal a/w. Ms.Shweta Parab, Mr.Sameer Ranade,
for the Appellant.

Mr. A.A. Gharte, for Respondent No.1.

Mr.Vivek Vijay Salunke, for Respondent No.7.

CORAM : SHARMILA U. DESHMUKH, J.

DATE : FEBRUARY 12, 2024

P. C.:

1. Being dissatisfied by the judgment dated 17th March, 2016 passed by the Appellate Court allowing the Appeal and setting aside the judgment and decree dated 28th August, 2015 passed by the Trial Court in Regular Civil Appeal No.348 of 2013, the original-plaintiff is before this Court. For the sake of convenience

parties are referred to by their status before the trial Court.

2. Regular Civil Suit No.348 of 2013 was filed by the plaintiff seeking declaration and perpetual injunction in respect of the suit property being 2 H 48 R out of Gat No.332 admeasuring 10 H 12 R. It was pleaded that the suit property was bequeathed to the plaintiff by Shankar Sitaram Bhosale- the husband of the defendant No.1 and father of the defendant Nos.2 to 5. The case of the plaintiff was that the entire Gat No.332 was cultivated by Shankar Sitaram Bhosale as tenant under the provisions of the Maharashtra Tenancy and Agricultural Lands Act, 1948 (for short, the "*Tenancy Act*"). It was contended that the original landlady one Shevantabai Gulumkar was given half portion of the Gat No.332 and half property was given to Shankar Sitaram Bhosale.

3. It was pleaded that the dispute between the landlady and the tenant i.e. the deceased-Shankar Sitaram Bhosale was carried right up to the Apex Court and as the family members of the deceased Shankar Sitaram Bhosale was not looking after him he had no money to spend for the judicial expenses, a registered Power of Attorney came to be executed in favour of the plaintiff,

who had looked after him. It was pleaded that the deceased-Shankar Bhosale executed a registered Will dated 29th January, 1999 and Shankar expired on 15th September, 2003. It was pleaded that after death of Shankar, plaintiff found the Will and the plaintiff had filed Appeal against land owners upto Apex Court. It was pleaded that Probate Application No.63 of 2003 was filed by the plaintiff and the Will dated 29th January, 1999 was probated by the Civil Judge, Senior Division, Baramati. It was pleaded that the property owned by Shankar Bhosale as per the tenancy Act was bequeathed in favour of the plaintiff.

4. The suit came to be resisted by the defendants. The contention of the defendant Nos.1 to 6 was that the suit property was being cultivated by the husband of the defendant no.1 i.e. Shankar Bhosale as tenant and under a compromise, half of the property was given to the tenant Shankar Bhosale. It was contended that the Apex Court has held that the tenant i.e. Shankar Bhosale was entitled to half share of the property owned by the landlord and it was also directed that if possession was taken from the tenant it be handed over and Section 32G

proceeding be followed. It is pleaded that as original tenant had expired, possession of $\frac{1}{2}$ portion was given to the legal heirs of Shankar Bhosale and accordingly 32G proceedings were held and 32M purchase certificate was given to the legal heirs of the deceased-Shankar Bhosale in the year 2013. As regards the Will, it was contended that there was no citation served upon the defendant Nos.1 to 6. It was further contended that the Will was false and suspicious and was executed by taking advantage of the weak, mental and physical condition of Shankar Bhosale.

5. The parties went to the trial and the trial Court decreed the suit and held the plaintiff to be the owner of the property bequeathed to him by the deceased-Shankar Bhosale as per the Will dated 29th January, 1999. As against this, the defendant Nos.1 to 7 filed Regular Civil Appeal No.97 of 2015. The Appellate Court framed the following points for determination and answered the same, which reads thus:

	“POINTS	FINDINGS
1]	Whether trial Court had jurisdiction to entertain and try the suit ?	No.
2]	Whether original plaintiff has proved	No.

that he has become the owner of suit property by virtue of deed of Will dated 29.01.1999 and Probate thereof dated 03.05.2008 obtained from Court ?

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| 3] | Whether original plaintiff is entitled to declaration and ownership of suit property, as prayed ? | No. |
| 4] | Whether original plaintiff has proved alleged obstruction at the hands of defendants ? | No. |
| 5] | Whether original plaintiff is entitled to remedy of perpetual injunction as prayed. | No. |
| 6] | Whether Probate dated 3.5.2008 of Will dated 21.1.1999 is null and void ? | No. |
| 7] | Whether original plaintiff is entitled to relief of possession of suit property? | No. |
| 8] | Whether Judgment and decree of the learned Trial Judge is just and proper ? | No. |
| 9] | What order ? | As per final order” |

6. The Appellate Court considered the issuance of probate and noted the medical certificate annexed to the Will which did not certify the deceased to be in actual condition to make statement and held that the said aspect was not taken into consideration by the trial Court. The Appellate Court has also held that the probate has been wrongly granted by the trial Court as it

proceeded ex-parte and the plaintiff had not led any evidence to prove execution of the Will. The Appellate Court further considered the provisions of the Tenancy Act and the decision of the Apex Court in the case of *Sangappa Kalyanappa Bangi (dead) through LRs. vs. Land Tribunal, Jamkhandi and Ors. [(1998) 7 SCC 294]* and held that the Competent Authority under the Tenancy Act had restored the possession of the suit tenanted land to the legal heirs of the deceased-Shankar Sitaram Bhosale, as also certificate was issued under 32M and once the certificate under 32M of the Tenancy Act is issued then the tenant cannot be evicted from the land by filing suit for possession and held that the Civil Court has no jurisdiction to grant the relief of possession.

7. Heard Mr. Gangal, learned counsel for the Appellant, Mr.Gharte, learned counsel for Respondent No.1 and Mr.Salunke, for Respondent No.7.

8. Learned counsel for the plaintiff would submit that the substantial question of law which arises in the present case is whether the Appellate Court could have gone into the issue of validity of probate without noticing that the probate operates *in*

rem and it was not open for the Appellate Court, in the absence of any application for revocation of the probate to consider the validity of the probate and give a finding that the probate is not legal and valid. He would further submit that once the Will has been proved by filing of a probate application, the plaintiff became owner of the suit property by virtue of the Will. He further submits that by order of the Apex Court, Shankar Bhosale was held entitled to half share of the suit property under the Tenancy Act and as such, he has testamentary capacity to bequeath his share of the property to the plaintiff. In support of his submission, he relies on the decision of the Apex Court dated 4th October, 2019 in the case of ***Ramesh Nivrutti Bhagwat v. Dr. Surendra Manohar Parakhe*** in ***Civil Appeal No. 1399 of 2010***.

9. Per contra, learned counsel appearing for the respondents submits the no substantial question of law arises and even if the execution of the Will is proved, the decision of the Apex Court in the cases of ***Sangappa Kalyanappa Bangi*** (supra) relied upon by the Appellate Court will indicate that the provisions of Section 27 of the Tenancy Act specifically bars assignment of the tenanted

property. He has tendered a compilation of the decisions as under:

- (a) *Kashinath Laxman Waghmare and Ors. v. Ganpat Tukaram Kashmire and Ors. [2003(3) Mh.L.J. 229];*
- (b) *Sangappa Kalyanappa Bangi (dead) through LRs. vs. Land Tribunal, Jamkhandi and Ors. [(1998) 7 SCC 294];*
- (c) *Narayan Motiram Raut and Ors. vs. Rajani Uddhav Mahajan and Ors. [2018 SCC OnLine Bom 17400];*
- (d) *Vinodchandra Sakarlal Kapadia v. State of Gujarat and Ors. [(2020) 18 SCC 144];*
- (e) *Kanwarjit Singh Dhillon v. Hardyal Singh Dhillon and Ors. [(2007) 11 SCC 357].*

10. Considered the submissions and perused the record.

11. The trial Court had decreed the suit by considering that the Plaintiff had obtained the probate of the Will dated 29th January, 1999 executed by Shankar Bhosale, which was not revoked and as such, was in existence. Based on the Probate which was granted, the trial Court held that the plaintiff was entitled to be declared as the owner of the suit property and as such, has decreed the suit. The Appellate Court while reversing the findings of the trial Court have entered into the issue of the validity of probate which was impermissible in the proceeding filed seeking

declaration of ownership. However, it needs to be noted that the Court while exercising testamentary jurisdiction does not decide the issue of right, title and interest in the suit property which is required to be decided in the separate proceedings and while exercising testamentary jurisdiction, the only issue which arises for consideration is the validity of the Will which has been executed. Even if it is accepted that the Will has been validly executed in favour of the plaintiff, the bar of Section 27 of the Tenancy Act would apply which prohibits sub-division, subletting and assignment of the tenanted property.

12. The assignment referred to in Section 27 of the Tenancy Act has been subject matter of the decision of the Apex Court in the case of ***Sangappa Kalyanappa Bangi*** (supra) which was dealing with the issue under the provisions of the Karnataka Land Reforms Act, 1961, which provisions are *para materia* with Section 27 of the Tenancy Act. Closer home, learned Single Judge of this Court in the case of ***Narayan Motiram Raut and Ors.*** (supra), had an occasion to deal with a similar issue in which the rights were being claimed on the basis of registered Will executed in respect of the

tenanted property. The learned Single Judge considered the decision of the Apex Court in the case of *Sangappa Kalyanappa Bangi* (supra) and held that the legatee under the Will cannot claim any right in the tenanted property under the Will, as the tenant cannot assign tenancy rights in agricultural land by way of Will and such assignment would be in contravention of Section 27 of the Tenancy Act.

13. Considering that the issue is no longer *res integra* and has already been settled by the decision of the Apex Court as well as of this Court, no substantial question of law arises. Appeal is dismissed. In view of the dismissal of the Appeal, Civil/Interim Applications do not survive for consideration, same stand disposed of.

(Sharmila U. Deshmukh, J.)