



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

SECOND APPEAL NO.259/2007

Naokrishna Rambhau Raut,
Aged about 65 years, Occ.
Cultivator, r/o Borgaon Dori,
Tq. Achalpur, Dist. Amravati.

.....APPELLANT

...V E R S U S...

Jagannath Motiram Dhakulkar,
(Dead, thr. LRs.)

1(i) Janardan Jagannath Dhakulkar (Son)
R/o Borgaon Dori, Tq. Achalpur,
Dist. Amravati.

1(ii) Vinod Jagannath Dhakulkar (Son)
R/o Borgaon Dori, Tq. Achalpur,
Dist. Amravati (M.S.).

1(iii) Asha Taiwade (Daughter)
R/o Dhamangaon (Katpur). Tq. Morshi,
Dist. Amravati.

2. Pramila Prabhakar Tembhare,
Aged about 50 years.

3. Vidya Prabhakar Tembhare,
Aged about 30 years.

Both R/o Borgaon Dori, Tq.- Achalpur,
Dist.- Amravati.

4. Sudhakar Kisan Tembhare,
Aged about 50 years R/o Purna Nagar,
Tq. Bhatkuli, Dist. Amravati.

...RESPONDENTS

Mr. S. D. Abhyankar, Advocate for appellant.
None for respondents, through served.

CORAM:- ANIL L. PANSARE, J.
DATED :- 29.04.2024

ORAL JUDGMENT

Heard Mr. S. D. Abhyankar, learned counsel for the appellant. None appears for the respondents, though served.

2. The second appeal has been admitted on 31.10.2007, on the following substantial questions of law.

“(1) Whether the learned Additional District Judge was right in giving finding in paragraph 14 to the effect that the Will, which has been executed by the deceased, Chandrabhan has been duly proved?”

“(2) Whether the observations as contained in paragraph 14 to the effect that since the plaintiff has been permitted to join as party on the basis of Will the defendant cannot object for the participation of the plaintiff Jagannath and whether the said view can be said to be in accordance with law?”

“(3) Whether the finding as recorded by learned Additional District Judge that the present appellant has no authority to question the Will deed executed by the deceased Chandrabhan is in accordance with law?”

3. The appellant is original defendant No.1. He will be, hereinafter, referred to as “Defendant No.1”. Respondent No.1 – Jagannath has expired pending appeal and his legal representatives are brought on record. The legal representatives will be collectively referred as the, “Plaintiff”. Respondent nos. 2 to 4 are the legal representatives of the brothers of Chandrabhan.

4. As such, the original plaintiff was Chandrabhan Uddenbhan Tembhare. He expired pending suit. Jagannath came on record as his legal representative on the basis of the registered Will dated 23.05.1986. Chandrabhan had filed suit against Defendant No.1, who has allegedly purchased the property from Chandrabhan's brothers namely, Parasram and Abhiman. Both had expired and, therefore, their legal representatives were arrayed as defendant nos. 2 and 3.

5. Chandrabhan had filed the suit seeking declaration of ownership of the suit field being Survey No. 65/2, admeasuring 1 Hectare 13 R (Corrected as 1 Acre 13 R by the First Appellate Court). Chandrabhan claimed that there occurred oral partition between him and his brother. The partition was proved before the Trial Court. Accordingly, the Trial Court declared that Chandrabhan is owner of the suit field. The case of Chandrabhan that Defendant No.1 took forcible possession was, however, not believable. At the same time, the Trial Court did not find substance in the claim of Defendant No.1 that he was entitled to retain possession on the basis of lease deed for the year 1986-87. The lease deed – Article 'B', has been not proved and, therefore, cannot be relied upon.

6. The Trial Court, while permitting Jagannath to replace Chandrabhan on the basis of the registered Will, has proceeded further to hold that Jagannath has proved the Will Exh.-89 and accordingly held that Jagannath is owner of the suit field.

7. This finding has been rendered without there being any pleading in the plaint as regards execution of the Will by Chandrabhan in favour of Jagannath. The Trial Court did not even frame the issue of validity of the Will. Despite, the aforesaid finding is given.

8. The Defendant No.1 challenged the judgment and decree on the ground that, in absence of the pleading, the finding rendered by the Trial Court is perverse. The First Appellate Court took a view that since the Will was registered and proved by the attesting witness and further since the Defendant No.1 did not challenge Jagannath's impleadment as legal representative of Chandrabhan, the Will will take effect. In doing so, the First Appellate Court has ignored the valid plea raised by the Defendant No.1 that the propounder of the Will is under an obligation to plead and prove the Will. It is further well settled that in absence of pleadings, it is impermissible to lead the evidence.

9. This finding, as rendered by the First Appellate Court in paragraph 14, is thus contrary to the provisions of law of pleadings and evidence. Further, merely because the Defendant No.1 did not challenge the substitution of Chandrabhan by Jagannath, on the basis of the will executed by Chandrabhan, that by itself will not neutralize the necessity of Jagannath pleading execution of the Will and proving the same. Neither Chandrabhan nor Jagannath pleaded execution of the Will nor was there an issue formulated by the Trial Court. In absence thereof, the Courts below have committed serious error of law in permitting Jagannath to lead evidence to prove the Will.

10. So far as authority of the Defendant No.1 to challenge the Will is concerned, this question would not arise inasmuch as the principles of law are well settled that the propounder of the Will is under an obligation to plead and prove the Will to be genuine. Whether the Defendant No.1 has questioned the Will or not is altogether a different matter. The fact remains that Jagannath did not plead execution of the will and, therefore, there arises no question challenging the same. The first two substantial questions of law are accordingly answered in the negative. The third question does not arise for consideration.

11. The net result is that the Courts below have committed error of law, as noted above. However, the question, whether Defendant No.1 is entitled to retain possession, has been answered in terms of the finding given by the Trial Court on the issue. The Trial Court held that the Defendant No.1 failed to prove that the Plaintiff (Chandrabhan) leased out the suit field to him in the year 1986-87 and, therefore, the Defendant No.1 is not entitled to claim possession of the suit field. Defendant No.1, therefore, will not be entitled to retain possession of the suit field.

12. Even otherwise, what has been pleaded by the Defendant No.1 is that on the basis of lease deed executed in the year 1986-87, he would be entitled to retain possession. The lease deed has been not proved nor is there any document to indicate that subsequently either Chandrabhan or Jagannath have executed lease deed in favour of Defendant No.1. In other words, there is no document and/or cogent evidence that would entitle the Defendant No.1 to remain in possession of the suit field. In view thereof, the decree of the Trial Court that Defendant No.1 i.e. appellant shall deliver peaceful possession of the suit land to Plaintiff – Jagannath, will have to be maintained. Maybe, Jagannath cannot be declared as owner but the fact remains that

he was brought on record as legal representative of Chandrabhan, which fact has been not challenged by the Defendant No.1 and, therefore, the suit land will have to be delivered to the legal representative of Chandrabhan i.e. Jagannath. Hence, following order.

ORDER

- (i) The Second Appeal is partly allowed.
- (ii) Defendant No.1 shall deliver peaceful possession of the suit land to the legal representative of Chandrabhan i.e. Jagannath.
- (iii) An inquiry into profits under Order XX Rule 12 of the Civil Procedure Code, 1908 is directed to be held from the date of suit till delivery of possession.
- (iv) The reliefs not granted, shall stand rejected.
- (v) The appeal is disposed of in above terms.
Parties to bear their own costs.

(Anil L. Pansare, J.)

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