



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

SECOND APPEAL NO.69 OF 2024

Tirupati S/o. Raoji Rathod and others

.VS.

Mohd. Rasul S/o. Mohd. Ibrahim and others

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions Court's or Judge's orders.
and Registrar's Orders.

Mr S. D. Abhyankar, Advocate for the appellants

CORAM : G.A. SANAP, J.

DATE : APRIL 26, 2024.

Heard learned Advocate for the appellants at the stage of admission. Perused the record and proceedings.

2. Learned Advocate for the appellants submitted that the Courts below have failed to properly appreciate the evidence on record and as such, the findings rendered by the Courts are perverse. Learned Advocate further submitted that the Courts below have declared the sale deed executed in favour of the original defendant Nos.2 and 3 as null and void in entirety. It is the submission of the learned Advocate for the appellants that original plaintiff Nos. 1 and 2 and defendant No.1 have been found entitled to get an equal share in the suit property

and as such, the Courts below should not have declared the sale deed null and void to the extent of the share of original defendant No.1. Learned Advocate submitted that the issue of oral gift of the suit property by Najirbee in favour of defendant No.1 has not been properly addressed. Learned Advocate further submitted that the locus of original plaintiff No.3, being the constituted attorney of original plaintiff Nos. 1 and 2, was challenged by the defendants and the same has not been properly appreciated. In short, it is submitted that under the power of attorney, he was not authorized to sign the plaint etc. on behalf of the plaintiff Nos. 1 and 2. Learned Advocate submitted that the questions of law as set out in the memo of appeal, arise in this appeal and therefore, the appeal needs to be admitted on those substantial questions of law.

3. Background facts:

The suit property was owned by Najirbee, who died on 17.10.1968. The original plaintiff Nos. 1 and 2 and defendant No.1 are the maternal brothers of the deceased Najirbee. According to the plaintiffs, after the death of Najirbee, plaintiff Nos. 1 and 2 and defendant

No.1 inherited the property of Najirbee as per the Mohammeden Law. According to the plaintiffs, defendant No.1 did not grant them their share in the property. Plaintiff Nos. 1 and 2, therefore, filed the suit for declaration and possession of their respective share in the suit property.

4. Defendant No.1, during the pendency of the suit, on 29.01.2002 executed a sale deed of the suit property in favour of the original defendant Nos. 2 and 3/appellants in this appeal. The plaintiffs also prayed for a decree of a declaration to declare the sale deed as null and void.

5. The suit was contested by defendant No.1 by filing his written statement. Defendant No.1 contended that Najirbee, during her life, gifted the suit property by oral gift to him and on the basis of the oral gift of the property in his favour he became the absolute owner of the property. As far as the rights of plaintiff Nos. 1 and 2, in the absence of the gift deed, are concerned there was hardly any challenge to the same. It is undisputed that

plaintiff Nos. 1 and 2 and defendant No.1 are brothers and Najirbee was their maternal sister. She died issueless.

6. Defendant Nos. 2 and 3, the appellants herein, also filed their written statement. Defendant Nos.2 & 3 contended that defendant No.1 was the absolute owner of the property. According to them, the sale deed executed by defendant No.1, being an absolute owner of the property, was legal and valid. They have further contended that before purchasing the property, they had taken a search of the record and in the revenue record, defendant No.1 alone was recorded as the owner of the property on the basis of the oral gift in his favour by Najirbee.

7. The parties adduced evidence before the trial Court. The Courts below have concurrently held that original plaintiff Nos. 1 and 2 had an equal share with defendant No.1 in the suit property. The Courts below have concurrently held that the sale deed dated 29.01.2002 executed by original defendant No.1 in favour of original defendant Nos. 2 and 3 during the pendency of the suit is not binding on them. The Courts

below have further concurrently held that defendant No.1 has failed to prove absolute ownership of the property on the basis of the oral gift. The Courts below have held that the basic requirements of the oral gift required to be established to make the said gift a valid gift under Mohammedan law are not established.

8. As far as the equal right of plaintiff Nos. 1 and 2 with defendant No.1 in the suit property, being the material brothers of Najirbee is concerned, it was hardly disputed. Defendant No.1, on the basis of the purported oral gift, claimed absolute right or ownership of the suit property. This contention has been rejected by both Courts. The Courts below have found that once the plea of defendant No.1 as to the right on the basis of the gift deed is addressed against him, the position in the absence of the gift deed would stand restored and as per the said position, plaintiff Nos. 1, 2 and defendant No.1 would be entitled to get an equal share in the suit property. After going through the record and proceedings, I am satisfied that the Courts below have properly appreciated the evidence to record these findings.

9. Admittedly, defendant No.1 has been held entitled to a 1/3rd share in the suit property, being the legal heir of Najirbee. The Courts below have declared the entire sale deed as null and void and not binding on the plaintiffs. It is to be noted that the original defendant No. 1 did not challenge the judgment and decree passed by the trial Court. He was a pro forma respondent in the appeal filed before the District Court. It is undisputed that defendant Nos. 2 and 3, the appellants herein, did not plead in their written statement that they are the bonafide purchasers. Similarly, defendant No.1, by way of alternate plea, did not plead that by adverse possession to the knowledge of plaintiff Nos. 1 and 2, he became the owner of the property. In my view, therefore, in the absence of the appropriate pleadings on the part of the appellants/defendant Nos. 2 and 3, the issue that they were the *bona fide* purchasers could not be framed. Similarly, this ground was not urged before the first appellate Court. It is pertinent to mention that since the defendant Nos. 2 and 3/appellants purchased the suit property during the pendency of the suit, they were expected to raise an appropriate defence and substantiate the same. But, they have failed to do so. It is not their

case that the opportunity to lead the evidence and prove such a contention was not granted to them. In my view, therefore, the submissions advanced by the learned Advocate for the appellants that this appeal involves substantial questions of law cannot be accepted. After going through the reasons recorded by the Courts below in the judgments, I am satisfied that the Court below have properly appreciated the evidence. There is no perversity or illegality of any kind in the findings of facts recorded by the Courts below. As such, the appeal stands dismissed.

10. The second appeal disposed of accordingly. Pending applications, if any, also stands disposed of.

(G. A. SANAP, J.)

Namrata