



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

SECOND APPEAL NO.316 OF 2009

Prakash S/o Namdeorao Changole
Aged about 41 years, Occ: Service,
R/o Butibori, P.S. Butibori, Dist. Nagpur.

...APPELLANT
(Orig. Deft. No.2 on RA)

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

1. Shriram S/o Namdeorao Changole
Aged about 49 years, Occ: Service,
Police Line Takali, Jamdan, Quarters,
Nagpur.

(Orig. Plaintiff on RA)

2. Nilkanth S/o Namdeorao Changole,
Aged about 50 years, Occ: Service,
R/o Police Line Takali, Building no.6,
Quarter no.169, Nagpur.

(Orig. Deft. No.1 on RA)

3. Kewaldas S/o Namdeorao Changole,
Aged about 45 years, Occ: Service,
R/o Bhupesh Nagar, Plot no.17,
Borgaon (Gittikhadan), Nagpur.

(Orig. Deft. No.3 on RA)

4. Gyaneshwar S/o Namdeorao Changole,
Aged about 45 years, Occ: Service,
R/o Bhupesh Nagar, Plot no.17,
Borgaon (Gittikhadan), Nagpur.

(Orig. Deft. No.4 on RA)

5. Smt. Manda W/o Arvind Ghode,
(since deceased through her LRs)

(Orig. Deft. No.5 on RA)

5-a. Arvind S/o Mahadeo Ghode,
Aged about 48 years, Occ: Service

5-b. Ku. Sarita D/o Arvind Ghode
Aged about 21 years, Occ: Student

- 5-c. Ku. Leena D/o Arvind Ghode,
Aged about 19 years, Occ: Student.
- 5-d. Ku. Newton D/o Arvind Ghode,
Aged about 15 years, Occ: Student.
- 5-e. Ku. Swapna D/o Arvind Ghode,
Aged about 13 years, Occ: Student.
- 5-f. Ku. Diwyani D/o Arvind Ghode,
Aged about 12 years, Occ: Student

Respondent nos.(5-d) to (5-f) being
minors through their father and natural
guardian Arvind Mahadeo Ghode

Respondent nos.(5-a) to (5-f) all
R/o Near Buddha Vihar, Ambedkar
Nagar, Ward No.7, Narkhed, Tah. Narkhed,
Dist.Nagpur.

6. Smt. Lalitha W/o Harikisan Ingle
Aged about 37 years, Occ: Household
R/o Tikar Road, Near Old Telephone Exhcange,
Baitul (M.P)

(Orig. Deft. No.6 on RA)

...RESPONDENTS

Mr. A.V. Khare, Advocate for Appellant.
Mr. R.K. Pillai, Advocate for respondent no.3.

CORAM :- M.W. CHANDWANI, J.

ARGUMENTS WERE HEARD ON :- 21.08.2024.

JUDGMENT IS PRONOUNCED ON :- 12.11.2024.

JUDGMENT:

1. Correctness of the judgment and decree dated
18.01.2008 passed by the Civil Judge, Junior Division, Nagpur in

Regular Civil Suit No.1758/2003 and modified by the judgment and decree dated 13.03.2009 by the District Judge, Nagpur in Regular Civil Appeal No.211/2008 is under challenge in this second appeal.

2. Appellant and respondents are real brothers and sisters being born to Namdeorao and Mirabai (since deceased). The suit property was originally owned by deceased Namdeorao and Mirabai jointly. They constructed six rooms on the suit property. Namdeorao died prior to Mirabai. To pay the loan and development charges, Mirabai sold half portion of the terrace above the six rooms for a consideration of Rs.80,000/- to her son respondent no.1 by registered sale-deed dated 15.04.2002 and again she sold remaining half portion of the terrace to respondent no.3 by registered sale-deed dated 16.03.2002. After purchasing the suit property, respondent nos.1 and 3 made construction on the terrace out of their own funds. Mirabai, by will-deed dated 16.03.2002 bequeathed one room each to her sons i.e. appellant and respondent nos.1 to 4 and one room to both her daughters i.e. deceased Manda and respondent no.6 – Lalitha. After the death of Mirabai, the appellant and respondent no.4 – Gyaneshwar started collecting rent from the tenant of the room which was given to

respondent no.1. Therefore, respondent no.1 filed a suit bearing Regular Civil Suit No.1758/2003 for partition and separate possession. The appellant and respondent no.4 denied the claim of respondent no.1 and came up with a case that deceased Mirabai did not have an exclusive right to dispose of the rooms by will-deed dated 16.03.2002 as well as to dispose of the terrace by way of sale-deeds. Respondent no.3 supported the claim of respondent no.1. The trial Court decreed the suit and declared that appellant and respondent nos.1 to 4 and 6 as well as deceased Manda are entitled for 1/6th share of the suit property alongwith possession and appointed a Court Commissioner to effect the partition.

3. Feeling aggrieved with the decree of the trial Court, the appellant preferred an appeal before the District Judge. By judgment and decree dated 13.03.2009, District Judge-5, Nagpur though upheld the findings of the trial Court but held that the trial Court has not distributed the share of the parties properly. The District Judge modified the decree by holding that the appellant and respondent nos.1 to 4 and 6 and legal heirs of deceased Manda are entitled for 1/7th share in the suit property i.e. six rooms and accordingly partly allowed the appeal. The appellant was not satisfied with the finding of the trial Court as well as the

appellate Court that deceased Mirabai had a right to sell the property to the extent of more than what falls in her share. Therefore, this second appeal came to be filed.

4. The second appeal has been admitted on the following substantial question of law.

“(1) Whether a co-owner has a right to sell more property than which falls to his share with the implied consent of the other co-owners?”

5. Having heard learned counsels for the respective parties and having gone through the record and proceedings of the Courts below as well as the impugned judgment and decree, it transpires that after the death of Namdeorao, co-owner of the suit property Mirabai not only sold the entire terrace to respondent nos.1 and 3 by registered sale-deed but also bequeathed entire six rooms by executing will-deed dated 16.03.2002. Both the Courts below have concurrently held that the mother was competent to sell entire terrace to respondent nos.1 and 3 and also held that will-deed executed by Mirabai has been duly proved. While admitting the appeal, the only question framed is with regard to the authority of Mirabai to sell the terrace to respondent nos.1 to 3 of more area than that owned by her.

6. Thus, the question arising here is that, after the death of co-owner Namdeorao, whether Mirabai could sell undivided share of co-owners in the terrace to respondent nos.1 and 3. Section 41 of the Transfer of Property Act enumerates about the transfer by ostensible owner. For ready reference Section 41 is reproduced as under:

“41. Transfer by ostensible owner.—Where, with the consent, express or implied, of the persons interested in immovable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be violable on the ground that the transferor was not authorised to make it:

Provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.”

7. Section 41 envisages that if an ostensible owner of such property transfers the same for consideration, the transfer shall not be violable on the ground that the transferor was not authorised to make it. Evidently, Mirabai, the co-owner had 50% undivided share in the terrace area 1500 sq.fts. above the six rooms. After the death of co-owner Namdeorao, his interest in the terrace i.e. 750 sq.fts. devolved upon the appellant and

respondent nos.1 to 4 and 6 and deceased Manda. Even Mirabai got 1/8th share in 750 sq.fts. of the terrace apart from her share in 750 sq.fts. Meaning thereby, after the death of Namdeorao, appellant, respondent nos.1 and 4, deceased Manda and respondent no.6 were co-owners of the terrace as well as six rooms alongwith Mirabai. It is matter of record that after the death of deceased Namdeorao, the entire property was mutated in the name of Mirabai. No objection was taken either of the parties to the suit. Even no objection was taken either by the appellant or respondent nos.2 and 4 or respondent no.6 or deceased Manda at the time when sale-deeds were executed by Mirabai in favour of respondent nos.1 and 3. Thereafter, respondent nos.1 and 3 constructed rooms on the terrace, which was never objected either by the appellant, respondent nos.2 and 4 or deceased Manda and respondent no.6. Till the date of filing of the written statement, sale-deeds executed by Mirabai in favour respondent nos.1 and 3 were never challenged. Rather, it is respondent no.1, who filed the suit for partition of six rooms wherein, by way of defence the authority of Mirabai to sell the terrace has been challenged. Thus, it can be gathered from the conduct of the appellant, respondent no.2, 4, 6 and deceased Manda, as well as the circumstances of

the case that the co-owners of the undivided share of 750 sq.fts. in the terrace had given therein implied consent to Mirabai to transfer their undivided share to respondent nos.1 and 3. Therefore, the said transfer cannot be challenged on the ground that Mirabai was not authorised to transfer the entire terrace to respondent nos.1 and 3. The substantial question of law is answered accordingly. No interference is required in the finding recorded by the first appellate Court with regard to execution of transfer of entire terrace by Mirabai in favour of respondent nos.1 and 3. Consequently, the appeal fails. Pending civil application(s), if any, stand(s) disposed of.

JUDGE

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