



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

SECOND APPEAL NO. 320 OF 1996

Namdeo Bali Gade

VERSUS

Smt.kalawatibai w/o Yeshwantrao Gade, and another

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Mr. G.N. Chincholkar, Advocate for Appellant

Mr. G. D. Kale, Advocate for Respondent No.1

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CORAM : ROHIT W. JOSHI, J.

Dated : 28TH FEBRUARY, 2025

PER COURT :-

. The present appeal is filed challenging decree of preemption passed by the learned Civil Judge Junior Division, Nanded in Regular Civil Suit No.175 of 1993 and the judgment and decree dated 15.04.1996 passed by the learned Additional District Judge, Nanded dismissing Regular Civil Appeal No.5 of 1995 arising out of the said judgment and decree. The original plaintiff Kalawatibai is sister of Venkati/defendant No.1

2. Venkati has sold the suit property to the defendant no.2/Namdev who is the appellant in the present appeal. The sale deed is dated 21.04.1992. On 29.03.1993, the

respondent No.1 plaintiff filed suit for preemption being Regular Civil Suit No.175 of 1993. The brother Venkati i.e. the vendor and the present appellant/purchaser did not appear in the suit and the suit proceeded without any contest in their absence.

3. The learned Trial Court has decreed the suit treating the suit property to be a house property. It is averred in the plaint that this property was not included in earlier suit for partition filed by the respondent No.1/plaintiff, since it was a residential house, where the defendant No.1/brother and mother were residing. After the suit was decreed the defendant No.1 vendor, who is brother of the plaintiff filed Regular Civil Appeal. However, the present appellant did not choose to assail the decree passed against him. It will be pertinent to mention that the learned Counsel for the appellant has tried to urge that he (Defendant No.2) was not properly served in the Civil Suit. However, the present appellant was also respondent in the Regular Civil Appeal. Such contention regarding not being served or improper service is not made with respect of the Regular Civil Appeal.

It is therefore clear that although, the present appellant was duly served in the appeal, he did not choose to file a substantive appeal or cross objection in the same appeal.

4. The learned counsel for the appellant has argued that since the appellant was not duly served in the Civil Suit, the impugned decrees should be set aside and the matter should be remanded to the learned Trial Court.

5. The second appeal is not admitted on the substantial question of law relating to service of summons on the appellant. Nonetheless, I was inclined to look into the matter and to verify if there is any substance in the contention. However, perusal of the record of the learned Trial Court indicates that summons were issued repeatedly through the bailiff on the appellant/defendant No.2. On one occasion, female members in the family informed the Bailiff that the appellant/defendant No.2 was not present at his residence. On another occasion, a male member has informed the Bailiff that the appellant/defendant No.2 was not present at house. In such circumstances an application for substituted service was moved which was allowed by the learned Trial Court and

accordingly the appellant/defendant No.2 was served in the suit by way of substituted service.

6. It also needs to be mentioned that the earlier attempts of service by the Bailiff, though may not strictly amount to proper service as per CPC, an inference can certainly be drawn that the family members had appraised the appellant/defendant No.2 about the Court summons.

7. Apart from this, as stated above, the appellant was also a party to the Regular Civil Appeal and there is no contention that he was not served in the said appeal. The appellant got knowledge about the adverse decree passed against him upon receiving notice in First Appeal, however, neither did he file appeal challenging the decree nor he moved application for setting aside ex-parte decree. The present appellant has admittedly not filed First Appeal assailing the decree passed by the Learned Trial Court.

8. The First substantial question of law is pertaining to filing of earlier Civil Suit being Regular Civil Suit No.134 of 1987 for partition and separate possession in which the present suit property was not included. The learned counsel

for the appellant contends that non inclusion of the present suit property would imply that the sister/original plaintiff had given up her right in the suit property and therefore, she cannot claim a right of preemption with respect to the said property. She contends that since the right to seek partition is given up in the earlier Civil Suit, it was not open for the plaintiff to file suit for preemption with respect to the suit property which was excluded in the earlier suit. Documents pertaining to the earlier suit for partition are not on record. Generally, a suit for partial partition is not maintainable. However, the said legal principle runs with rider that if the defendants do not raise any objection in this regard, then the suit will be maintainable and a decree for partition can be passed even if all properties of the family are not included in the suit. In the absence of the documents pertaining to earlier suit, one cannot say with certainty as to whether said objection was raised or not.

9. It needs to be mentioned that the plaintiff has averred in the plaint that the present suit property was not made subject matter of the earlier suit for partition because the suit property was a residential house where the defendant

no.1/brother was residing alongwith the mother. The suit was filed prior to commencement of Hindu Succession (amendment) Act, 2005. Section 23 fo the Hindu Succession Act, as it stood prior to amendment did not confer right on female legal heirs to file a suit for partition with respect to dwelling house, unless the male members decided to partition the suit property amongst themselves.

9. The learned counsel for the appellant has pointed out from the sale deed at Exhibit 27 that the suit property was not a residential house. She points out that in fact there was no dwelling structure standing on the suit property and it was an open plot.

10. I have perused the sale deed at Exhibit 27, the contention of the appellant that the sale deed is pertaining to open plot and not residential house is correct. However, as noted above, although, the property was excluded, it is not clear from the record as to whether objection regarding non inclusion of all properties in the family was taken in the suit for partition or not. If such objection was not taken then the suit for partial partition would be maintainable. There is no

material to indicate intention on the part of the plaintiff to abandon right over the suit property. In that view of the matter, the question of law at serial no.1 needs to be answered against the appellant.

11. Second question relates to the date of sale deed and date of filing of suit. The sale deed is dated 21.04.1992, the suit is instituted on 29.03.1993. The limitation for filing suit for preemption is provided under Article 97 in the schedule appended to the Limitation Act, 1963. The prescribed period of limitation is one year. The suit for preemption is filed within the prescribed period of limitation. Therefore, the second question is also answered against the appellant.

12. In result, having answered of substantial questions of law as aforesaid, the appeal deserves to be dismissed and is dismissed accordingly with no orders as to costs.

(ROHIT W. JOSHI, J)