



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

911 SECOND APPEAL NO. 458 OF 2010

Jijaba Rakhmaji Wagaskar
Age – 80 years, Occ : Agriculture,
R/o Surodi, Taluka – Shrigonda,
Dist. Ahmednagar.

..APPELLANT

-VERSUS-

1. Sojabai Kashinath Wagaskar
Age – 70 years, Occ : Labourer,
2. Meerabai Kashinath Wagaskar
Age- 48 years, Occ – Household,

Both R/o Pishore Khurd,
Tq. Shrigonda, Dist. Ahmednagar
3. Mandabai Jijaba Wagaskar
Age- 43 years, Occ – Household,
R/o Surodi, Tal- Shrigonda,
Dist. Ahmednagar.

..RESPONDENTS

...
Advocate for Appellant : Mr. Gawali Amol K.
Advocate for Respondent Nos.1 and 2 : Mr. Shriraj R. Wakale

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CORAM : ROHIT W. JOSHI, J.

DATE : 27th FEBRUARY, 2025

ORAL JUDGMENT :

1. The present Second Appeal was admitted on 21.07.2010,
on the following substantial questions of law :-

“(i) Whether the Trial Court and the First Appellate
Court have rightly held that Kashinath cannot be

presumed to be dead on the date of the suit and for that purpose whether Sections 107 and 108 of the Evidence Act are properly considered ?

(ii) Whether the Trial Court rightly held that Block No.140 was ancestral property, inspite of there being evidence of previous partition in the year 1940 ?

(iii) Whether the First Appellate Court was right in holding that Section 53-A of the Transfer of Property Act is not applicable and as such the present appellant is not entitled to protection of the same ?

2. The appellant in the present appeal is the original defendant no.2. The defendant no.1 was the mother, who has expired after filing of the suit. The plaintiff no.1 Sitabai is paternal aunt of defendant no.2. The defendant no.2 is daughter-in-law of plaintiff no.1 and plaintiff no.3 is the daughter of plaintiff no.2. One Hari Bagaskar had two sons namely Rakhmaji and Rangnath. Rangnath is the husband of plaintiff no.1 – Sitabai, father-in-law of plaintiff no.2 and grandfather of plaintiff no.3. Rangnath has on 13.05.1971 executed a sale deed in favour of defendant no.2-Jijaba, who is son of his brother Rakhmaji. This Jijaba is defendant no.2 in the suit. Sale Deed pertains to 1/4th portion of land bearing Gat No.140 admeasuring 6 Hector 98

Aars of village Surodi, Tq. Shrigonda, Dist. Ahmednagar. Thereafter, Rangnath has executed agreement of sale dated 16.05.1975 in favour of defendant no.2 Jijaba in respect of remaining 3/4th portion of above land. Rangnath has expired after a period of around 2-3 weeks from the date of agreement to sale dated 19.05.1965. Rangnath had died a homicidal death and there was suspicion against his own son Kashinath that he had committed the said offence. Kashinath went absconding after the demise of his father Rangnath.

3. The present respondents have filed the Civil Suit against the appellant and his deceased mother, being Regular Civil Suit No.115/1983 claiming a declaration that Kashinath had died civil death since he was not heard for a period of around 8 years, they challenged the sale deed dated 13.05.1971 executed by Rangnath in favour of defendant no.2 Jijaba with respect to above property and also made a prayer for possession of the entire land bearing Gat No.140 referred above. Apart from this, they also claimed possession of half portion of the residential house, which is referred in the suit as property no.1. This house property was also standing in the name of deceased Rangnath, who is husband of plaintiff no.1.

4. The present appellant, original defendant filed written

statement dated 09.09.1987 claiming that the half portion of the suit property was legally purchased vide sale deed dated 13th May, 1971. As regards remaining 3/4th portion of Gat No.140, he has come up with a case that the deceased Rangnath had executed agreement for sale dated 16.05.1975 in his favour and accordingly, he was in possession of the entire Gat No.140, 1/4th on the basis of sale deed and remaining 3/4th pursuant to the agreement to sale. It will be pertinent to mention here that as regards the possession of 3/4th portion of land in Gat No.140, it is the case of the defendant no.2/appellant that possession was taken after execution of the agreement when part of the sale consideration was paid to two individuals namely Shri Kohali and Shri Wagaskar on the instructions of Rangnath. The case of defendant is that in the partition, the entire house property was allotted to the defendant. Based on the rival pleadings, the issues were framed in the suit and parties led their respective evidence and after hearing the respective arguments, the learned Trial Court was pleased to decree the suit partly. The sale deed dated 13.05.1971 is upheld, it is held that the plaintiffs/respondents herein are owners of remaining 3/4th portion of land bearing Gat No.104. As regards the house property, the plaintiffs have been given a decree for possession of half portion of the said house property. Apart from this, a declaration is also granted that Kashinath has died a civil death. Being aggrieved by the aforesaid

decree, the defendants preferred Regular Civil Appeal No.75/2005. The said appeal has been dismissed, vide judgment and decree dated 20.04.2010. The original defendant has preferred Second Appeal being aggrieved by the aforesaid decree passed against him. As stated above, the present appeal was admitted on three substantial questions of law and I now propose to deal with the same serially.

Substantial Question No.(i) :-

5. Mr. A.K. Gavali, learned counsel for the appellant has strenuously urged that the learned Courts have erred in interpreting Sections 107 and 108 of the Indian Evidence Act. He also argues that the statement in the written statement that tentatively six months after demise of Rangnath, his son Kashinath had visited defendant no.2 to assure that he will execute the sale deed in compliance of agreement dated 16.05.1975 is misinterpreted to mean that the defendants had come up with a positive case that they had heard and seen about Kashinath within a period of seven years. The learned Advocate contends that it is not his case that he had seen or heard about Kashinath preceding a period of seven years from the date of filing of the suit. He therefore contends that situation is covered by Section 107 of the Evidence Act and not by Section 108. The contention of the learned Advocate is that since the plaintiffs were contending that

Kashinath had died civil death and admittedly, he was known to be alive within period of 30 years prior to institution of the suit, burden of proving his death was upon the plaintiffs in view of Section 107 of the Evidence Act.

6. It is not in dispute that Kashinath was seen and heard and in fact residing with the plaintiffs within a period of 30 years prior to the date of institution of suit. It is also not in dispute that Kashinath and the present appellant are cousins being sons of real brothers. Interpretation of Sections 107 and 108 falls for consideration in the peculiar facts of the case. The plaintiffs have come up with categorical case that they have not seen or heard about Kashinath for a period of seven years and above prior to filing of the suit. This contention of the plaintiffs is not challenged. It is also not in dispute that the defendants have not seen or heard about Kashinath for a period of seven years prior to institution of the suit. Likewise both sides have seen Kashinath alive within a period of 30 years prior to institution of suit.

7. Section 107 of the Evidence Act prescribes that in cases where a question arises as to whether a person is dead or alive, the burden of proving his death is on the party who alleged that he had died. Provided that the person is shown to be alive within a period of

30 years prior to the date on which such question arises. Section 108 is in the nature of exception to Section 107. In the present case, the plaintiffs and defendants both are persons who would have normally seen Kashinath or at least heard about him if he was alive. However, both sides state that they have not seen or heard about Kashinath for a period of over seven years prior to the date of filing of suit. Undisputed factual position that has emerged on record is covered by Section 108 of the Evidence Act. I, therefore, hold that the burden of proving that Kashinath was alive was squarely on the defendants. In fact the case of the defendants that they had not heard about Kashinath as was canvassed during the course of hearing coupled with the case of the plaintiffs throughout that they had not seen or heard about him for a period of seven years conclusively brings the matter within four corners of section 107. Issue is rightly answered by the learned trial Court as well as First Appellate Court.

8. It will be also worthwhile to mention that the said issue has assumed significance because the owner of the property was Rangnath. The suit filed by his widow Sitabai, daughter-in-law and grand-daughter of deceased Rangnath. Sitabai had died shortly after filing of the suit and suit was continued by Sojabai and Mirabai, who are daughter-in-law and grand-daughter of deceased Rangnath. The

contention of Advocate Mr. Gavali is that if Kashinath was alive then Sojabai and Mirabai being daughter-in-law and grand-daughter could not have continued the suit, in as much as, the property would be inherited by Kashinath alone since he was legal heir of Sitabai. The right of Sojabai and Mirabai to contest suit hinges upon the issue as to whether Kashinath was dead or alive. Although submission of the learned Advocate for the appellant appears attractive and impressive at the first blush, in my considered view, the contention also deserves to be rejected on a deeper scrutiny. Sitabai instituted suit for possession along with her daughter-in-law and grand-daughter. On her demise, the right to continue the suit shall vest upon her legal representative and not necessarily upon the legal heirs. The term, 'legal representative' is wider as compared to the term, 'legal heirs'. In the present case, Sitabai's son Kashinath had admittedly gone missing. Sojabai and Mirabai are her daughter-in-law and grand-daughter. The property originally belonged to Rangnath and it was thereafter inherited by Sitabai and Kashinath. Being wife or may be widow and daughter of Kashinath, they had certainly right of maintenance over the property. They were therefore legal representatives of deceased Sitabai qua this property, although they may not be legal heirs assuming that Kashinath was alive and not dead. Apart from the right of maintenance when Kashinath was not available to take charge of his property or the suit as

a wife and daughter of Kashinath, Sojabai and Mirabai, both will have right to contest the suit as legal representatives of his mother Sitabai.

Question No.(ii) :

9. The next question that falls for consideration as to whether the suit property Gat No. 140 was ancestral property in the hands of Rangnath or his self acquired property. The said issue also assumes significance because Rangnath has executed the sale deed dated 13.05.1971 and the disputed agreement dated 16.05.1975. If the property is held to be absolute property of Rangnath, the plaintiffs will have no right to raise any objection in the manner in which he dealt with the property. However, if the property is held to be ancestral property, Rangnath would act as Karta and his right to alienate the property will be subject to restrictions such as legal necessity, discharge of debt, pious obligation etc. The contention of the learned counsel for the appellant is that Gat No.140 was purchased jointly by Rangnath and his brother Rakhmaji. He contends that since Rangnath and Rakhmaji purchased the property jointly after partition of ancestral properties between them the property will be self acquired property of Rangnath. He contends that there cannot be any quarrel about the fact that the property was purchased after partition in as much as the same is reflected from the plaint averments. It is admitted position on record that property received by Rangnath in the partition was only source of

income of Rangnath. It is obvious from the record that the property Gat No.140 although purchased by Rangnath and his brother Rakhmaji, Rangnath had no source of income other than income from the properties received by him in partition. The properties received in partition are admittedly his ancestral properties. Therefore, land bearing Gat No.140 is property which is acquired from ancestral nucleus. It is therefore obvious that Gat No.140 was also ancestral property of Rangnath.

Question No.(iii) :-

10. Deceased Rangnath had entered into agreement of sale dated 16.05.1975 with respect to 3/4th portion of land Gat No.140. This document is proved and exhibited. As per this document, out of total sale consideration of Rs.7,800/-, Rs.2,500/- was paid by Jijaba-appellant to Rangnath on the date of said agreement. The agreement contains a specific recital that possession of the property would be delivered on the date of sale deed. The contention of the appellant is that on instructions of Rangnath further amount of Rs.4,000/- was paid by the appellant to Mr. Kohali and Mr.Wagaskar. The learned counsel for the appellant contends that upon such payment being made, the appellant was placed in possession of the property in part performance of contract. The learned counsel for the respondents-original plaintiffs strongly disputes this contention. He has drawn my attention to the

cross examination of appellant – defendant no.2 at page 103 of the paper book, wherein the defendant no.2 – appellant has admitted that he had taken possession of the agricultural land which is subject matter of the agreement since there was no male member in the family of the plaintiffs/respondents. He contends that possession of the property was never delivered by the plaintiffs or deceased Rangnath. The learned counsel for the appellant however retorts that the said statement is in the nature of stray admission, which may not have much evidentiary value. He contends that the defendant no.2 – appellant is admittedly in possession of the entire suit property bearing Gat No.140 and possession is relatable to the agreement in question. It is undisputed that the agreement was executed on 16.04.1975 and Rangnath died within a period of 2-3 weeks thereafter i.e. somewhere in first week of May or last week of April. The appellant had filed receipts on record under which the payments are allegedly made to above named two creditors of Rangnath. It is contention of the appellant that these payments are made on instructions of Rangnath. These receipts are at Exhibit-73 to 75. The learned trial Court has recorded that although Rs.2,600/- is stated to be paid to Shri Kohali, receipt at Exhibit-72 discloses payment of Rs.2,200/- only. As regards receipts Exhibit-73 and Exhibit-74, it is stated that under the said receipts amount of Rs.1200/- and Rs.3,000/- respectively is shown to be paid to Shri

Wagaskar. Although the amount is shown to be paid to Shri Wagaskar, the receipts is written by Shri Kohali. Dates of receipts are also relevant. The receipts are dated 09.03.1976 and 29.03.1976. The dates are after period of around 9-10 months from the date of demise of Rangnath. Therefore, the dates of these receipts and story of the appellant that the payments were made on instructions of Rangnath also appears to be improbable. Receipts have been rightly discarded by the learned Courts. I am, therefore, of firm opinion that the plaintiffs have not delivered possession of the suit property covered under the agreement of sale to the appellant- defendant. The appellant – defendant, therefore cannot seek shelter under Section 156-A to protect his possession. Question no.(iii) is answered accordingly.

11. In view of the above, no substantial questions of law arises for consideration. Therefore the appeal is dismissed. Rule stands discharged accordingly.

[ROHIT W. JOSHI]
JUDGE

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