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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 601 OF 2017
WITH
CIVIL APPLICATION ST NO. 4252 OF 2017
IN
SECOND APPEAL NO. 601 OF 2017**

Mahadev Narayan KaulgeAppellant

Vs.

Malanbai Udhav Kale and orsRespondents

**WITH
CROSS OBJECTION ST NO. 23325 OF 2018
IN
SECOND APPEAL NO. 601 OF 2017
WITH
SECOND APPEAL NO. 544 OF 2022
WITH
INTERIM APPLICATION NO. 2800 OF 2019
IN
SECOND APPEAL NO. 544 OF 2022**

Radhabai Ganapat PawarPetitioner

Vs.

Malanbai Udhav Kale and orsRespondents

**WITH
SECOND APPEAL NO. 543 OF 2022
WITH
CIVIL APPLICATION NO. 725 OF 2017
IN
SECOND APPEAL NO. 543 OF 2022**

Laxman Goverdhan PawarAppellant

Vs.

Malanbai Udhav KaleRespondent

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Mr. Dilip Bodake a/w Mr. Sharad Bhosale, and Ms. S. Pawar Advocate for the Appellant in SA 601/2017 and for respondent no. 2B in SA 543/2022

Mr. Sarang Aradhye a/w Mr. Shantanu Gurav and Ms. Shruti Kothavale for appellants in SA 543/2022

Mr. B. A. Lawate for respondent nos. 9, 10, 11 in SA 301/2017 and for appellant in SA 544/2022

Ms. Gauri Velankar for respondent nos. 8 to 11 in SA 543/2022

Mr. Ashok Tajane a/w Mr. Yogesh Thorat for respondent no. 1 in all appeals

Mr. Sachin Thorat for respondent nos. 7, 8A to 8D in Second Appeal No. 601/2017

CORAM : GAURI GODSE, J.

DATE : 7th FEBRUARY 2025

ORDER:

SECOND APPEAL NO. 601 OF 2017:

1. Heard learned counsels for the parties. This appeal is preferred by defendant no. 1B to challenge the concurrent judgments and decrees granting 1/3rd share to the plaintiff.

2. Learned counsel for the appellant submits that the appellant was brought on record in the trial Court as heir and legal representative of original defendant no. 1. He submits that the appellant was brought on record when he was a minor. He submits that one Vithal Pawar was directly shown as guardian of the appellant without following the procedure prescribed under Rule 3 of Order XXXII of Code of Civil

Procedure, 1908 (CPC). He submits that the suit property was self acquired property of Tatya. He submits that during the lifetime of Tatya, he had sold the entire suit property to Baban i.e. defendant no. 3. He submits that defendant no. 1 had purchased half of the suit property from Baban on 22nd November 1979. He, therefore, submits that the appellant is the owner of the half portion purchased by way of a registered sale deed. He, further submits that since no proper procedure was followed for appointing the guardian, the interest of the appellant, being a minor, was not properly represented before the trial Court. He further submits that even otherwise, the guardian expired during the pendency of the suit, however, no procedure was followed for appointing a new guardian.

3. Learned counsel for the appellant further submits that the trial Court's decree was challenged by the heirs of defendant no. 4. The defendant no. 4 is the purchaser from defendant no. 3. He submits that during the pendency of the first appeal, the appellant learnt about the decree and thus, filed cross objection at Exhibit 36. He submits that the first appeal being the appeal arising out of a partition decree, the appellant was entitled to file cross objection in the appeal preferred by defendant no. 4 challenging the partition decree. He submits that

though a cross objection was filed along with a written statement, the first Appellate Court erred in not taking into consideration the appellant's entitlement to contest the suit on merits on the ground that his interest was not properly represented in the suit. Learned counsel for the appellant further points out the prayers in the suit. He submits that the sale deed in favour of Baban and the sale deed in favour of defendant no. 1 was never challenged by the plaintiff. He, thus, submits that in the absence of any challenge to the sale deed executed by Tatya in favour of Baban and the subsequent sale deed by Baban in favour of defendant no. 1, the plaintiff would not be entitled to seek any relief. To support his submissions, he relied upon Section 31 and 34 of The Specific Relief Act, 1963.

4. Learned counsel for the appellant, therefore, submits that the second appeal would require consideration as the aforesaid grounds raise substantial questions of law.

5. I have perused the papers of the second appeal. It is not in dispute that the plaintiff is one of the three daughters of Tatya. Defendant no. 1 i.e. Laxmi was one of the sisters and Sindhu, defendant no. 2 was another sister. Present appellant is son of Laxmi.

It is appellant's contention that defendant no. 3 (Baban) had purchased the entire suit property from Tatyia on 30th August 1979. It is further claimed by the appellant that defendant no. 1 purchased half share from Baban on 22nd November 1979. It is not in dispute that defendant no. 1 i.e. Laxmi expired on 30th April 1987 during the pendency of the suit. Hence, the present appellant was brought on record as heir and legal representative of deceased Laxmi.

6. With reference to the appellant's contention that necessary procedure for appointment of guardian was not followed, the first Appellate Court has referred to the trial Court's proceedings and recorded findings that one Vithal Pawar was appointed as guardian as per the provisions of Order XXXIX Rule 3(1) of CPC. The first Appellate Court further records that summons was served upon him and he appeared on 4th October 1988 and had sought adjournment for filing written statement. The first Appellate Court further records that there was no written statement filed on behalf of the appellant and there was an order of 'No W.S.' passed on 15th April 1991. Learned counsel for the appellant submitted that the appellant attended majority during the pendency of the suit. He, further, relied upon an application at Exhibit 36 filed in the first appeal to contend that he was

unaware about the suit or the decision in the suit. He, further, submits that Exhibit 36 filed in the first appeal is in the form of cross objections. However, learned counsel was unable to point out whether the procedure for filing cross objection by making payment of Court fees was followed for considering Exhibit 36 as cross objection. Exhibit 36 is produced on record in this second appeal. I have perused the application at Exhibit 36. The application nowhere states that the appellant was unaware about order of appointment of guardian or unaware about the pendency of the suit or the decree passed in the suit. Admittedly, no steps were taken by the appellant after attaining majority to either contest the suit or challenge the decree passed by the trial Court. A perusal of Exhibit 36 nowhere indicates that it is in the form of cross objection.

7. A perusal of the trial Court's judgment indicates that defendant no. 3 who claims to have purchased entire property from Tatya, had filed written statement. However, defendant no. 3 failed to lead any evidence to support his contentions that the sale deed transferred absolute rights in his favour and that the plaintiff would not be entitled to seek her share being daughter of Tatya. It is not in dispute that defendant no. 1 i.e. Laxmi, plaintiff's sister was served with suit

summons and she appeared in the suit. However, she failed to file any written statement and oppose the suit claim. The trial Court after verifying the evidence on record held that the sale deed executed by Tatya, was not executed for legal necessity. The plaintiff's contention that the sale deed would not bind her share, was accepted by the trial Court. Thus, based on the contentions raised by defendant nos. 2 and 3, the issues were framed as to whether the sale deed in favour of defendant no. 3 was by way of legal necessity. Defendant no. 3 failed to lead any evidence to support his contentions that right, title and interest was absolutely transferred in his favour based on legally executed sale deed. Defendant No. 3 is husband of defendant no. 2. The plaintiff being daughter of Tatya, her 1/3rd share in the suit property is accepted by the trial Court. It is nobody's case that except for the plaintiffs, defendant nos. 1 and 2, there were other heirs to Tatya. Hence, the trial Court declared that the sale deed executed in favour of defendant no. 3 would not bind the plaintiff's share. Hence, the trial Court granted 1/3rd share to the plaintiff as prayed by her in the suit.

8. In the first appeal preferred by defendant no. 4, the trial Court's decree is confirmed. Defendant No. 4 claims through Baban; however, his sale deed is not brought on record. The first Appellate Court

examined the contentions raised by the appellant in Exhibit 36. By verifying the trial Court's record, the first Appellate Court has recorded finding that after following necessary procedure, the order appointing guardian was passed by the trial Court. It is further recorded that though served, there was no written statement filed on behalf of defendant no. 1 or the appellant. The first Appellate Court, thus, examined the appellant's contention raised in Exhibit 36 by verifying the trial Court's record. Admittedly, the order passed in the trial Court is never challenged by the appellant. There is no separate appeal filed by the appellant to challenge the trial Court's decree or the order passed during the pendency of the suit. Hence, the objections raised to the orders appointing guardian, for the first time in the second appeal, cannot be entertained. In view of the undisputed facts regarding original ownership of Tatya, and the plaintiff being daughter of Tatya, the findings recorded to grant 1/3rd share to the plaintiff cannot be faulted. The first appeal was filed only by defendant no. 4; however, dismissal of the appeal and confirmation of the trial Court's decree is accepted by defendant no. 4.

9. I do not find any illegality or perversity in the reasons recorded by both the Courts.

10. The second appeal does not raise any substantial question of law. Hence, the second appeal is dismissed.

SECOND APPEAL NO. 543 OF 2022:

11. Heard learned counsel for the appellant. This appeal is preferred by heirs and legal representatives of defendant no. 4 to challenge the same judgment and decree impugned in Second Appeal No. 601 of 2017. Learned counsel for the appellant submits that in the first appeal, an application Exhibit 24 was filed praying for setting aside 'No WS' order against the appellant and permission to file written statement. He submits that the first Appellate Court ought to have considered the application and granted opportunity to the appellant to contest the suit on merits. He submits that he relies upon paragraphs 15 and 17 of the first Appellate Court's judgment to contend that the appellant's prayer for setting aside 'No W.S.' order ought to have been considered by the first Appellate Court. He further submits that admittedly Tatya owned two properties i.e. Gat No. 52 and Gat No. 152. He submits that the plaintiff admitted in the evidence that Gat No. 152 was already sold to which she has consented. He, thus, submits that there could not have been any partial partition only in respect of Gat No. 52 without considering shares of other two sisters in respect of

Gat No. 152. He, therefore, submits that second appeal would raise substantial questions of law on the aforesaid grounds.

12. I have perused the papers of the second appeal for examining the grounds raised on behalf of the appellant. Defendant no. 4 expired during the pendency of the suit and, thus, the appellant was brought on record in the trial Court. The first Appellate Court has considered the contentions raised in the application filed at Exhibit 24. The first Appellate Court held that though various opportunities to defendant no. 4 as well as heirs and legal representatives were given, no steps were taken to file any written statement. The first Appellate Court has also referred to number of opportunities given to the appellant to file written statement after he was brought on record. The first Appellate Court has recorded particulars regarding appellant's appearances in the trial Court and opportunities given to him to file written statement and contest the suit. Perusal of the reasons recorded by the first Appellate Court indicates that all the contentions of the appellant on the application at Exhibit 24 have been considered, based on the evidence on record and the trial Court proceedings. The plaintiff has pleaded that Tatya had sold Gat No. 152. Hence, the suit for partition is filed in respect of Gat No. 52. The pleadings and evidence led by the plaintiff

have gone uncontroverted. The trial Court therefore, based on the pleadings and evidence considered all the rival contentions and the plaintiff is held entitled to 1/3rd share in the suit property. The grounds raised on behalf of the appellant would therefore, not require any consideration as all the contentions are dealt with by the first Appellate Court after verifying the record and proceedings of the trial Court. Arguments raised on behalf of the appellant do not raise any substantial questions of law. Hence, the second appeal is dismissed.

SECOND APPEAL NO. 544 OF 2022:

13. This appeal is preferred by defendant no. 7 to challenge the same judgment and decree as assailed in the aforesaid second appeals. Learned counsel for the appellant supports the grounds raised in Second Appeal No. 543 of 2022. In addition to the grounds raised in the said appeal, learned counsel for defendant no. 7 submits that she is a purchaser through defendant no. 5 who had purchased part of the suit property from defendant no. 3. He submits that defendant no. 7 purchased part of the suit property on 20th June 1990. He further submits that defendant no. 7 alongwith defendant no. 1B had filed an application at Exhibit 36 for permission to set aside the order of 'No WS' and permit her to file written statement.

14. I have verified the record for examining the contentions raised on behalf of the appellant. The application filed by defendant no. 7 at Exhibit 36 alongwith defendant nos. 1A and 1B is considered by the first Appellate Court. For want of any sufficient reasons, the first Appellate Court has rejected the application at Exhibit 36. Nothing is shown on record to indicate what steps were taken by defendant no. 7 after filing written statement in the trial Court. It is not in dispute that defendant no. 7's claim is based on the sale deed executed during the pendency of the suit. Hence, the transaction in favour of defendant no. 7 is hit by principles of bar of Section 52 of The Transfer of Property Act, 1882. In the absence of any pleadings and evidence to support that she was a bonafide purchaser for value without notice, no fault can be found in the rejection of her application at Exhibit 36. None of the arguments raised on behalf of defendant no. 7 raise any question of law.

15. Hence, the second is dismissed.

16. In view of dismissal of second appeals, all pending applications are disposed of as infructuous. Since the second appeals are dismissed at admission stage, as they raise no question of law, there

is no question of deciding the cross objections. Hence, all cross objections are dismissed.

17. At this stage, learned counsel for the appellants request for extension of interim relief granted by this Court by order dated 13th July 2017 in Civil Application Stamp No. 18973 of 2017 in Second Appeal 601 of 2017. Learned counsel for the appellants submit that this Court had stayed the execution of the decree.

18. Learned counsel for the plaintiff opposes extension of any interim relief on the ground that the same was vacated on a subsequent date.

19. The decree is for partition and separate possession. The second appeals are dismissed as there is no substantial question of law involved in the second appeals. Hence, proceedings for division of the property as per the impugned decree shall proceed. However, to enable the appellants to approach the Hon'ble Apex Court, if any warrant for possession is issued, the same shall not be executed for a period of eight weeks, from the date of uploading this order.

[GAURI GODSE, J.]