IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIRCUIT BENCH AT KOLHAPUR
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 463 OF 2018
WITH
CIVIL APPLICATION NO. 1049 OF 2018
IN
SECOND APPEAL NO. 463 OF 2018

Shri. Dattatraya Nivruti Dune and Another — Appellants / …Applicants

V/s.

Smt. Fulabai Kom. Damu Nanaware — …Respondent

Mr. Ashok B. Tajane a/w Mr. Narayan D. Dhavale, Mr. Balaji P. Shinde and Mr. Sanket Rajmane for the Appellants.
Mr. Prasad P. Kulkarni a/w Mr. Amol S. Deshinge a/w Mr. Arbaz R. Nadaf for the Respondent.

CORAM : SHARMILA U. DESHMUKH, J.
DATED : OCTOBER 22, 2026

P.C.:

1. The Second Appeal has been preferred by the original Defendant Nos.1 and 2 challenging the concurrent findings of the Trial Court and the Appellate Court decreeing the suit filed by the Plaintiff seeking declaration of exclusive ownership of the suit property and cancellation of the Sale Deed dated 15th October 1999, and for partition and separate possession.

2. The case of the Plaintiff in Regular Civil Suit No.141 of 2000 was that the land of Plaintiff was adjacent to the the suit property bearing Gat No.347/1/1 admeasuring 20 R. The suit property was owned by Defendant No.1 – Dattatraya, who approached the Plaintiff

expressing his intention to sell the suit property and agreed that he would obtain consent of his wife i.e. Defendant No 2. The Plaintiff agreed to purchase the suit property at the sale consideration of Rs.30,000/-. It is pleaded that the sum of Rs.30,000/- was paid and the Sale Deed dated 15th October 1999 was executed and possession was handed over to the Plaintiff. The Plaintiff erected a house on the suit property with the help of Defendant No 1, who thereafter had change of mind and on 20th June, 2000 started obstructing the work of putting tin sheet roof on the structure. The Plaintiff gave intimation to the Talathi about the execution of the sale deed dated 15th October, 1999, who recorded the transfer in respect of part of the suit property and upon inquiry, the Plaintiff learnt that the Defendant No 1 and 2 fraudulently under the guise of giving consent of Defendant No 2, inserted the name of Defendant No 2 as purchaser alongwith the Plaintiff. Hence the suit came to be filed seeking the relief of cancellation of sale deed dated 15th October, 1999 and declaration of Plaintiff's exclusive ownership of the suit property and for partition and possession.

3. Defendant Nos.1 and 2, though served, did not appear in the suit, and by order dated 30th November, 2000, the suit proceeded *ex parte* against Defendant Nos.1 and 2. The Trial Court framed the necessary issues and answered the same in favour of the Plaintiff. The suit came to be decreed, as against which Regular Civil Appeal

No.280 of 2008 came to be filed by Defendant Nos.1 and 2. The Appellate Court concurred with the findings of the Trial Court and dismissed the appeal.

4. Mr. Tajane, learned counsel appearing for the Appellants has taken this Court through the judgment of the Trial Court as well as the Appellate Court and would submit that the Sale Deed dated 15th October 1999 was not proved by the Plaintiff as no attesting witness was examined. He would further submit that the case of fraud was not proved and points out Paragraph - 8 of the judgment of the Trial Court. He would submit that the relief which was sought in the plaint was of cancellation of the Sale Deed, and the property being an ancestral property, without seeking partition, no claim of exclusive ownership could have been granted. He would further submit that the Appellate Court was swayed by the fact that the Defendants had not appeared before the Trial Court. He submits that Defendant Nos. 1 and 2 had challenged the judgment of the Trial Court by filing an appeal and it was necessary for the Appellate Court to re-appreciate the evidence, which has not been done. He submits that as the findings recorded by the Trial Court cannot be supported by the evidence produced on record, substantial question of law arises in the present case. He submits that this is a fit case of remand in order to afford an opportunity to the Defendants to file their written statement and contest the proceedings.

5. I have considered the submissions and perused the judgment of the Trial Court dated 28th February, 2001 and of the Appellate Court dated 28th April, 2017. Dealing first with the aspect of remand, the provisions of remand are governed by Order XLI Rule 23 and Rule 23A of the Code of Civil Procedure, 1908. It is only when the decree is to reversed in appeal and a retrial is considered necessary, where the case is disposed of otherwise than on a preliminary point, that a remand can be ordered. In the present case, it is not disputed that the Defendants were duly served with the summons and, despite thereof, chose not to appear before the Trial Court and participate in the proceedings. The *sine qua non* for an order of remand is of reversal of decree and finding of necessity of retrial. The statutory provisions governing the remand cannot be exercised for the purpose of giving fresh opportunity to the Defendants who, though served with the copy of the summons, had not participated in the proceedings.

6. Before the Trial Court, the Plaintiff examined herself as PW-1 and deposed in consonance with the contents of the plaint. She has specifically deposed about the payment of Rs 30,000/ to the Defendant No 1 and that Defendant No 2 has not paid any amount towards purchase of the suit land. PW-1 produced the Sale Deed dated 15th October, 1999 executed between the Plaintiff and Defendant No 1. The evidence of PW-1 as regards execution of the sale deed was corroborated by PW-2 Naganth Damu Nanavare, the

son of the Plaintiff who was present at the time of the sale deed and had signed on the sale deed. The contention that sale deed was not proved as attesting witness was not found is unacceptable as law does not mandatorily require the sale deed to be attested by witnesses. The proviso to Section 68 of The Indian Evidence Act, 1872 does not apply and there was no denial to the execution of the sale deed as the Defendant Nos 1 and 2 chose not to participate in the proceedings. The evidence of Plaintiff remained uncontroverted and the Plaintiff by leading oral and documentary evidence established the purchase of the suit property through the sale deed dated 15th October, 1999.

7. The fraud which was alleged was of insertion of name of Defendant No 2 as joint purchaser with Plaintiff and not that there was any interpolation or alteration in the Sale Deed. The case of fraud was that under the guise of seeking the consent from Defendant No.2, the name of Defendant No.2 has been inserted, which has been proved from the oral evidence adduced by the Plaintiff. The Sale Deed which was produced on record would indicate that the name of Defendant No 2 has been inserted at Sr No 1 and the name of Plaintiff is reflected at Sr No 2. There is no material on record to demonstrate that any part of consideration was paid by the Defendant No 2 and the Trial Court has rightly considered that the Defendant No 2 is wife of Defendant No 1 and there is no explanation

for sale of suit land when Defendant No 1 and 2 are residing jointly and cultivating their remaining land jointly. In the absence of any pleading or evidence by Defendant No 2 demonstrating payment of part of sale consideration and in the absence of any explanation for sale of suit land by the husband to the wife jointly with Plaintiff, who was stranger to the family, the insertion of name of Defendant No 2 in the sale deed was clear case of fraud. The Trial Court has rightly appreciated the evidence and decreed the suit directed the sale deed to be rectified by deletion of name of Defendant No 2 from the sale deed and the revenue records.

8. The Appellate Court considered the arguments canvassed on behalf of the Plaintiff and Defendants. One of the submissions canvassed was as regards the passing of the decree *ex-parte* without granting an opportunity to Defendants to appear and file their written statement. The submission canvassed was that the impugned judgment of Trial Court be set aside and matter be remanded to Trial Court with direction to accept the written statement and afford opportunity to parties to adduce their evidence. Accordingly, one of the issue framed by the Appellate Court was in respect of the suit being decreed *ex-parte*. It is in that context, that the Appellate Court noted that the summons was duly served upon the Defendants and despite thereof they failed to file appearance. It further noted that the application for condonation of delay was filed alongwith the

appeal which came to be rejected and in Writ Petition, came to be allowed. Despite thereof, the Defendants delayed taking up the appeal on board and the appeal was registered in the year 2008, which shows the negligent attitude of Defendants. The Appellate Court has observed that the judgment of Trial Court is legal and proper and there is no need to interfere with the same.

9. The Appellate Court has considered the submissions which have been canvassed. It is observed that though the Defendants were served, the suit proceeded *ex-parte* against them. It further noted that after the appeal was filed in the year 2002, the appeal was registered in the year 2008 after lapse of six years, which shows the negligent approach of the Defendants. It has held that there was no need to interfere with the judgment and decree of the Trial Court. There is an observation of the Appellate Court as regards the scrutinizing the oral and documentary evidence which has come on record.

10. The findings of the Trial Court are findings of fact, which have not been interfered with by the Appellate Court. For substantial question of law to arise, it must be demonstrated that the findings of fact suffer from perversity based on no evidence, which is not the case here. The evidence has been rightly appreciated by the Trial Court and does not demonstrate any perversity. There is no warrant for interference with the concurrent findings of fact.

11. Resultantly, no substantial question of law arises. The Second Appeal stands dismissed.

12. In view of dismissal of Second Appeal, Civil Application does not survive and stands disposed of.

(SHARMILA U. DESHMUKH, J.)