HIGH COURT OF JUDICATURE AT BOMBAY

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

SECOND APPEAL NO.852 OF 2018 WITH
CIVIL APPLICATION NO.13292 OF 2018

Ashok Aaba Wadkar & anr. ...APPLICANTS

VERSUS

Sau. Mahananda w/o Virbhandra Sakhare
and others ...RESPONDENTS

.....

Ms Madhuri U. Kakde, Advocate for appellants
Shri R.K. Temkar, Advocate for respondent No.8

.....

CORAM: A.M. DHAVALE, J.

DATED : 26th October, 2018.

ORAL ORDER :

1. This is appeal by original defendants No.1 and 2. Defendant No.2 is wife of defendant No.1 and the original plaintiffs who are respondents No.1 and 2 are real sisters of defendant No.1. As per the plaint, the two sisters claimed partition and separate possession of their shares in the property left by their ancestors. It was claimed that, defendant No.1, on 26.3.1999, sold 1 Hector of land to his wife defendant No.2. The said sale is not challenged. The subsequent sale of 2 Hectors of land by respondent No.1 to defendant No.3 on 15.1.2001 is challenged on the ground of want of legal necessity and want of

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consideration. The plaintiffs claimed partition and separate possession of their shares in the property including the property sold to defendant No.3.

2. The defendant No.1 appeared in the suit but did not file written statement. The learned trial Judge, on the basis of evidence led, held that the plaintiffs have 8/36th share (2/9th) while defendant No.1 was entitled for 20/36th share (i.e. 5/9th). The sale transaction by defendant No.1 to defendant No.3, dated 15.1.2001 was declared bogus. This judgment was assailed before District Judge, Ahmednagar by way of Regular Civil Appeal No.227/2012 by defendant No.3 Meerabai. The appellate Court modified the judgment and decree of the trial Court, holding that the sale of land by defendant No.1 in favour of defendant No.3 was binding only to the extent of share of defendant No.1. It was held that, the land sold to defendant No.1 shall be allotted to the share of defendant No.1 for doing equity to the buyer.

3. Learned Advocate for the appellant submits that, the said sale transaction was not proved, the original sale deed was not filed, the attesting witnesses were not examined and there was no consideration. In this regard, I find that, admittedly defendant No.1 has not appeared and has not filed written statement. Though original sale deed was not filed, certified copy of the sale deed was produced. When the sale transaction

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was not challenged by filing written statement by defendant No.1, as per provisions of Order 8 Rule 5 and Order 8 Rule 10, on the basis of certified copy of the sale deed, the learned trial Judge was justified in holding that the sale transaction is proved. Even otherwise, as registered sale deed has presumptive value, in this regard I rely upon the judgment of the Supreme Court in the case of **Vimal Chand Gheverchand Jain & ors. Vs. Ramakant Eknath Jajoo** reported in **[2009 AIR (SCW) 3624] and Prem Singh & ors. Vs. Birbal & ors.**, reported in **[2006 AIR (SC) 3608]**.

4. In the absence of any written statement, this factual finding cannot be challenged by appellant on factual aspects. The learned trial Judge has committed mistake in holding the said transaction as entirely valid, but it is corrected by first appellate Court and the said sale transaction has been held valid by him only to the extent of defendant No.1' share.

5. The learned first appellate Court erred in allotting the said land to defendant No.1. It is not right of the buyer to claim equity and to get the same land when defendant No.1 has no right to sell the land from undivided share. In this case, the plaintiffs would be aggrieved persons and they should have filed the appeal, they have not filed appeal, defendant No.1 cannot complaint about the same.

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6. It is also urged that, no opportunity was given to defendant No.1. No facts are brought on record to show that the reasonable and just opportunity of hearing was denied by the trial Court to the defendant No.1. If the defendant No.1 has remained absent without any fault on the part of the trial Court, this Court cannot interfere. If he had any sufficient cause, he should have filed application under Order 39 Rule 13 of the Civil Procedure Code. I find no reason to interfere with the concurrent findings of both the courts below that the sale deed dated 15.1.2001 by defendant No.1 in favour of defendant No.3 is binding on the defendant No.1 to the extent of his share. In view of these facts, no substantial question of law is raised. Hence, the Appeal deserves to be dismissed and the same is accordingly dismissed in limine.

7. In view of dismissal of the Second Appeal, Civil Application also stands dismissed.

(A.M. DHAVALE)
JUDGE

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