

(2016) 10 BOM CK 0128

In the Bombay High Court

Case No : Second Appeal No. 197 of 2013 with Civil Application No. 526 of 2013
in Second Appeal No. 197 of 2013

Shri Shaikh Mustafa Yasin

APPELLANT

Vs

Shri Sharad Ganesh Tisgaonkar

RESPONDENT

Date of Decision : 13-10-2016

Acts Referred:

Specific Relief Act, 1963 — Section 34, Section 6

Citation : (2016) 6 ALLMR 880 : (2017) 1 MhLJ 358

Hon'ble Judges : R.D. Dhanuka, J.

Bench : Single Bench

Advocate : D.M. Gupte, Advocate, for the Appellant; Jaydeep Deo, Advocate, for the Respondent Nos. 1 to 3

Final Decision : Dismissed

Judgement

R.D. Dhanuka, J. - By this appeal filed under section 100 of the Code of Civil Procedure, 1908, the appellant (original defendant) has impugned the judgment and decree dated 9th January, 2013 passed by the learned District Judge ? 5, Pune, allowing the appeal (Civil Appeal No. 102 of 2007) filed by the respondents (original plaintiffs) and setting aside the judgment and decree passed by the learned Second Joint Civil Judge, Senior Division, Pune in Special Civil Suit No. 113 of 1994 dated 20th November, 2006 and partly allowing the said suit.

2. The learned District Judge ? 5, Pune directed the appellant (original defendant) to deliver possession of 4 Khan premises situated at second floor, CTS No. 212, Nana Peth, Pune to the original plaintiffs on or before 15th April, 2015 and directed the defendant to deliver the symbolic possession of the share of Godubai to the extent of half share.

3. The first appellate Court also declared that the plaintiffs had acquired the right, title and interest in the suit property in pursuance of the Will Deed dated 13rd October, 1935 executed by Shankar Daji Tisgaonkar to the extent of half

share and the right of Godubai. The first appellate Court declared that the Will Deed dated 18th April, 1988 executed by Godubai in favour of the defendant was illegal and not binding on the plaintiffs. The first appellate Court however, dismissed the prayer for damages to the extent of Rs. 36,500/- claimed by the plaintiffs and ordered a separate enquiry for future mesne-profits under Order 20, Rule 12 of the Code of Civil Procedure, 1908. The first appellate Court also granted perpetual injunction against the defendant from alienating the portion of the house No. 212, Nana Peth, Pune. Some of the relevant facts for the purpose of deciding this appeal are as under :

4. The parties are referred in this judgment as per their original status before the trial Court.

5. It is the case of the plaintiffs that the land bearing CTS No. 212, situated at Nana Peth, Pune is the subject matter of the suit which property originally belonged to Shankar Daji Tisgaonkar. The said Shankar Daji Tisgaonkar had two wives i.e. first wife viz. Parvatibai and second wife viz. Godubai. A daughter i.e. Prayagbai was born from the wedlock of the said Shankar Daji Tisgaonkar with the first wife viz. Parvatibai. On 13th October, 1935, the said Shankar Daji Tisgaonkar executed a Will and granted life interest in ? of his suit property each in favour of Parvatibai, his first wife and Godubai, his second wife. It is the case of the plaintiffs that in the said Will, it was also provided that after the demise of Parvatibai, their daughter Prayagbai through Parvatibai will have half of the property during her life time. It is the case of the plaintiffs that thereafter the suit property was to devolve from the legal heirs and representatives of the said Shankar Daji Tisgaonkar i.e. adopted son Ganesh.

6. On 16th October, 1935, the said Shankar Daji Tisgaonkar adopted Ganesh. There was no issue out of the wedlock of the said Shankar Daji Tisgaonkar with Godubai. It is the case of the plaintiffs that after the demise of Prayagbai, who had life interest in the half of the suit property, in which the legal heirs and representatives of the said Shankar Daji Tisgaonkar i.e. Ganesh had an exclusive right, title and interest in the suit property.

7. On 19th October, 1935, the said Shankar Daji Tisgaonkar expired. In the year 1949, the said Parvatibai, the first wife of the said Shankar Daji Tisgaonkar expired. In the year 1955, the said Prayagbai, daughter of Shankar Daji Tisgaonkar and Parvatibai filed a suit against Godubai, the second wife of the said Shankar Daji Tisgaonkar for possession of the entire suit property. The second appeal arising out of the said dispute between Prayagbai and Godubai (1190 of 1964) came to be filed in this Court by Godubai. By an order and judgment dated 12th July, 1972 passed by this Court in the said Second Appeal No.1190 of 1964, the said second appeal came to be disposed of by the said judgment. In the said judgment, this Court held that the testator wanted to give ? share each to his two wives through their life time in the house property and after the death of the first wife i.e. Parvatibai's half share was to devolve to the daughter Prayagbai for life. This Court awarded a joint possession of the suit

house to Prayagbai along with Godubai. It is the case of the plaintiffs that after the said order came to be passed by this Court, the said Prayagbai was in possession of part of the suit property and Godubai was in possession of other part of the suit property.

8. On 12th March, 1982, Prayagbai handed over possession of part of the property, which was in her possession to Babar under the purported agreement. In the year 1986, the said Ganesh, an adopted son of the said Shankar Daji Tisgaonkar filed a suit against Babar for possession on the ground that Prayagbai had only life interest in the suit property and she could not have transferred any part of the suit property in her possession to Babar.

9. On 5th October, 1987, the said adopted son of the said Shankar Daji Tisgaonkar i.e. Ganesh expired. On 18th April, 1988, Godubai allegedly executed a Will in favour of the original defendant i.e. the present appellant, who had allegedly entered the suit property as a Caretaker of the said Godubai. On 21st April, 1991, the said Godubai expired. It is the case of the plaintiffs that the original defendant continued in possession of part of the suit property which was in possession of Godubai. In the year 1992, the name of the original defendant was entered as a holder of the suit property in the revenue record.

10. Some time in the year 1994, the original plaintiffs filed a suit (Special Civil Suit No. 113 of 1994) before the learned Civil Judge, Senior Division, Pune against the original defendant, seeking possession of the suit property from the original defendant, which was originally in possession of Godubai due to life interest created in her favour under the Will executed by Shankar. The original plaintiffs however, gave description of the entire building in the plaint instead of part of the premises, which was in possession of Godubai and thereafter the original defendant and applied for relief in respect of entire property. On 24th October, 1999, Prayagbai expired.

11. On 20th November, 2006, the learned Civil Judge, Senior Division, Pune, dismissed the said Special Civil Suit No. 113 of 1994 filed by the original plaintiffs on the ground of non-joinder of Prayagbai as necessary party to the suit though rendered the findings on all issues in favour of the original plaintiffs, including on the validity of Will of the said Shankar Daji Tisgaonkar and life interest of Godubai, Parvatibai and Prayagbai in the half portion of the suit property.

12. Some time in the year 2007, the original plaintiffs filed an Appeal (Civil Appeal No. 102 of 2007) before the learned District Judge. No cross-objection came to be filed by the original defendant in the said Civil Appeal No. 102 of 2007.

13. On 9th January, 2013, the learned District Judge, Pune allowed the said Appeal (102 of 2007) filed by the original plaintiffs and set aside the impugned judgment and decree dated 20th November, 2006, passed by the learned Civil Judge, Senior Division, Pune and partly decreed the said Special Civil Suit (113

of 1994). The first appellate Court also directed the original defendant to deliver possession of the property in his possession to the plaintiffs before 15th April, 2013 and granted various other reliefs.

14. Being aggrieved by the said judgment and decree dated 9th January, 2013, passed by the learned District Judge, Pune, the original defendant has filed this second appeal under section 100 of the Code of Civil Procedure, 1908.

15. Mr. Gupte, learned counsel appearing for the original defendant invited my attention to the plaint in Regular Civil Suit No. 234 of 1984, which was filed by Ganesh, an adopted son of the said Shankar Daji Tisgaonkar against Prayagbai, Siddheshwar Babar and Smt. Godubai Shankar Tisgaonkar for a declaration that Prayagbai and Godubai had only life interest in the said suit property described therein and that Prayagbai had no right to sell or dispose of the said property or any part thereof and also applied for a declaration that the Sale Deed dated 13th March, 1981 entered into between Prayagbai in favour of the defendant no.2 i.e. Siddheshwar Babar in respect of ? share in the suit property is illegal and void and not binding on the plaintiffs. He submits that though such a declaration was sought also against Smt. Godubai, the said Ganesh admittedly withdrew the suit insofar as Godubai is concerned. He submits that since the said Ganesh withdrew the suit against Godubai, the said Ganesh could not have contended subsequently that the interest of Godubai in half of the suit property was limited to the extent of life interest and no other right, title or interest of any nature whatsoever was created in her favour under the said Will of the said Shankar Daji Tisgaonkar.

16. Learned counsel appearing for the original defendant also invited my attention to few paragraphs of the judgment of this Court dated 12th July, 1972 in Second Appeal No. 1190 of 1964 filed by Prayagbai and Godubai and would submit that this Court has held that the issue as to whether Godubai had life interest or not in the Will of said Shankar Daji Tisgaonkar is vague. He submits that the said judgment of this Court thus would not assist the case of the original plaintiffs insofar as their contention that the said Godubai had only life interest in half of the suit property and did not have any other interest therein is concerned.

17. Learned counsel for the original defendant invited my attention to the prayers in the suit filed by the original plaintiffs and would submit that admittedly there was no prayer for partition of the suit property. He submits that the defendant is in possession of the entire property. He submits that the defendant has also parted with possession in respect of part of the property in favour of Siddheshwar Babar. He submits that the suit bearing No. 2341 of 1986, which was filed by Ganesh against Prayagbai, Babar and Godubai ultimately is decreed. The first appeal against the said judgment and decree is pending.

18. It is submitted by the learned counsel that when the original plaintiffs filed the suit against his client the said Prayagbai was admittedly alive and she expired on 24th October, 1999 i.e. during the pendency of the said suit. It is

submitted that though the plaintiffs were fully aware of the transfer of the half share of the property by Godubai in favour of his client, the plaintiffs however, did not implead Godubai to the suit. The suit was rightly dismissed by the learned trial Judge on the ground of non-joinder of necessary party.

19. Learned counsel appearing for the defendant submits that both the wives of said Shankar Daji Tisgaonkar were admittedly in possession of their respective half share in the suit property till their death. He submits that after the death of Parvatibai, the first wife of said Shankar Daji Tisgaonkar, Godubai, the second wife of the said deceased Shankar Daji Tisgaonkar became entitled to full fledged rights in the suit property even as a legal heir and representative of the said deceased Shankar Daji Tisgaonkar. He submits that no relief of possession could be claimed by the plaintiffs against Godubai.

20. Learned counsel for the defendant invited my attention to paragraph 33 of the impugned judgment and decree passed by the first appellate Court that it had come on record in the evidence of the plaintiffs as well as the defendant that Prayagbai had sold her half share to Babar and the plaintiffs had filed a suit (Regular Civil Suit No. 234 of 1996) against Babar impleading the said Godubai as a party in the said suit. It is held that Babar had purchased half undivided share and in his suit, his right will have to be decided.

21. Mr. Deo, learned counsel appearing for the original plaintiffs invited my attention to the findings recorded by the learned trial Judge in the judgment and decree dated 20th November, 2006 and would submit that though the learned trial Judge rendered the findings on all the issues in favour of the plaintiffs, the suit was dismissed erroneously on the ground of non-joinder of necessary party. He submits that both the wives of the said Shankar Daji Tisgaonkar and the daughter of Parvatibai had merely life interest in the suit property to the extent of half of the property bequeathed under the Will each. He submits that after the demise of two wives of the said Shankar Daji Tisgaonkar and Prayagbai, the daughter of Parvatibai, entire property was inherited by Ganesh, he being adopted son of the said Shankar Daji Tisgaonkar under the said Will. He submits that since there was specific bequest in favour of two wives of the said Shankar Daji Tisgaonkar and in favour of Prayagbai for life interest, the said two wives and the daughter of said Shankar Daji Tisgaonkar could not have claimed any other share or interest in the suit property of the said deceased Shankar Daji Tisgaonkar.

22. It is submitted by the learned counsel for the original plaintiffs that the issues whether the said two wives of the said Shankar Daji Tisgaonkar and the daughter of Parvatibai viz. Prayagbai had life interest in the suit property or not has been already concluded finally in Second Appeal No. 1190 of 1964 decided by this Court in the proceedings filed by Prayagbai against Godubai upon interpretation of the Will executed by the deceased Shankar Daji Tisgaonkar. He submits that it is categorically held by this Court in the said second appeal that each of wife of the said Shankar Daji Tisgaonkar had life interest in half share of

the suit property and that after the demise of Parvatibai, her daughter Prayagbai will have life interest in the half portion of the suit property. He submits that the defendant, who claims to be the purchaser of the portion of the suit property cannot be allowed to urge any submissions contrary to the judgment of this Court in second Appeal No. 1190 of 1964.

23. Insofar as the submission of the learned counsel for the defendant that the plaintiffs having withdrawn the suit i.e. Regular Civil Suit No. 1206 of 1984 filed by the plaintiffs against Godubai and others insofar as Godubai is concerned, for a declaration that the two wives of the said Shankar Daji Tisgaonkar had life interest in the suit property and thus the plaintiffs cannot be allowed to urge that two wives and daughter Prayagbai had life interest in the property is concerned, it is submitted by the learned counsel for the plaintiffs that since this Court has already rendered a finding upon the interpretation of a Will of the deceased Shankar Daji Tisgaonkar, two wives had life interest to the extent of half share each in the suit property and after the demise of Parvatibai, her life interest would go to Prayagbai, the plaintiffs were advised to delete the name of Godubai from the cause title of Regular Civil Suit No. 1206 of 1984. He submits that Godubai, who was a party to Second Appeal (1190 of 1964), the said order and judgment passed by this Court was binding on Godubai and all persons claiming through her. He submits that the alleged Will of Godubai propounded by the defendant was not proved and was thus rightly discarded. He submits that since Godubai expired in the year 1991, the plaintiffs rightly filed a suit in the year 1994 in view of the alleged third party rights fraudulently created by the said Godubai and Prayagbai.

24. It is submitted by the learned counsel for the plaintiffs that the plaintiffs had prayed for recovery of possession of the entire property, the first appellate Court however has moulded the relief and has directed the defendant to deliver the possession of only 4 Khans premises and to deliver symbolic possession to the share of Godubai to the extent of half share in the suit premises. He submits that there is thus no substance in the submissions made by the learned counsel for the defendant that since the plaintiffs had prayed for possession of the entire property, no decree for possession could have been passed by the first appellate Court even in respect of part of the property. He submits that if anybody else is illegally put in possession by the defendant against whom a decree for possession is passed by the first appellate Court, the plaintiffs would file appropriate proceedings for removal of obstructionist.

25. There is no dispute that the suit property originally belonged to Shankar Daji Tisgaonkar, who had executed his last Will dated 13th October, 1935. The said Shankar Daji Tisgaonkar had two wives viz. Parvatibai and Godubai. Parvatibai was his first wife, whereas Godubai was his second wife. There was no issue out of the said wedlock between Shankar Daji Tisgaonkar and Godubai. The daughter was born out of the wedlock between Shankar Daji Tisgaonkar and Parvatibai viz. Prayagbai.

Reasons and Conclusions

26. There is no dispute that the suit was filed by Prayagbai, step daughter of Godubai against Godubai for a declaration, possession and mesne-profits. The learned trial Judge had passed a decree in the said suit filed by Prayagbai. The dispute ultimately went upto this Court and was the subject matter of Second Appeal No.1190 of 1964, which was filed by the said Godubai. A perusal of the order and judgment dated 12th July, 1972 passed by this Court in the said second appeal (1190 of 1964) filed by Godubai indicates that Prayagbai claimed her right, title and interest in the suit property under the said Will dated 13th October, 1935 executed by the said Shankar Daji Tisgaonkar and filed a suit for possession of the whole house from Godubai. The learned trial Judge in the said suit held that Prayagbai had no possession within 12 years and Godubai had become the owner by adverse possession. The learned trial Judge however, recorded the finding on the question of title in favour of Prayagbai and against Godubai. Prayagbai thereafter preferred an appeal. The first appellate Court allowed the said appeal filed by Prayagbai and remanded the suit for a fresh trial. Upon remand the trial court rendered a finding that Prayagbai had proved her title but had failed to prove her possession within 12 years before the date of the suit. The first appellate Court came to a conclusion that the defendant therein i.e. Godubai was not in adverse possession of the suit house and allowed the said claim and passed a decree in favour of Prayagbai and against Godubai for possession and mesne-profits.

27. Being aggrieved by the said judgment and decree passed by the first appellate Court, Godubai filed second appeal before this Court (1990 of 1964). This Court considered the Will executed by Shankar Daji Tisgaonkar while considering the claims made by Prayagbai. This Court held that the said Will executed by Shankar Daji Tisgaonkar provided that after his death, his first wife Parvatibai will assume the management and pay certain amount by way of maintenance to the second wife of Shankar Daji Tisgaonkar i.e. Godubai. This Court held that Shankar Daji Tisgaonkar wanted to give ? share to his two wives during life time and had created life interest therein.

28. In my view, the said judgment of this Court delivered in Second Appeal No.1190 of 1964 on 12th July, 1972, which was between Prayagbai and Godubai in which the Will of the said Shankar Daji Tisgaonkar was interpreted by this Court and it has been held that the two wives of said Shankar Daji Tisgaonkar had life interest in the suit house is binding on Prayagbai and Godubai and the persons claiming through them. A perusal of the order passed by the first appellate Court indicates that the first appellate Court has specifically dealt with this issue at great length in the impugned judgment and decree and after advertng to the judgment of this Court dated 12th July, 1972 in Second Appeal No. 1190 of 1964 filed by Prayagbai has held that this Court has already specifically held that two wives of the said Shankar Daji Tisgaonkar had acquired half share in the suit property through their life time and it was no where held

that they had acquired full title as the owners thereof. This Court had granted a decree of joint possession of the suit property to Prayagbai along with Godubai. The first appellate Court accordingly rendered a finding that Ganesh being the legal heir of said Shankar Daji Tisgaonkar had acquired right, title and interest over the suit property after the death of Godubai and became entitled to possession of the property held by Godubai in view of her demise and upon such demise, her minority share in the property came to an end.

29. Insofar as possession of the defendant is concerned, it is held by the first appellate Court that in the cross-examination of the defendant, he deposed that he was in possession of 4 Khan premises on the second floor and remaining portion of the second and third floor was entirely in possession of Babar and that there was one tenant on the ground floor. The defendant was occupying 4 Khans premises in his possession and was also claiming right, title and interest to the extent of half share of Godubai. The first appellate Court has held that the plaintiffs had proved the fact that after the death of Godubai, the Ganesh had inherited the suit property on the basis of the Will of said Shankar Daji Tisgaonkar and the plaintiffs being his legal heirs have right, title and interest in the suit property.

30. I am thus not inclined to accept the submission of the learned counsel for the defendant that this Court in the judgment dated 12th July, 1972 in Second Appeal No.1190 of 1964 has not declared that Parvatibai and Godubai had merely life interest in the suit house. There is no substance in the submission of the learned counsel for the defendant that even if Godubai had life interest in the suit property, after the demise of Godubai, the persons claiming through Godubai would claim right, title and interest in the suit property to the extent of her half share.

31. In my view, since Godubai herself had life interest in the suit property, after her demise, no party could claim any right, title and interest even in respect of half of the suit property through Godubai. A party who had life interest in the property cannot create any right, title or interest of any nature and more particularly transfer of the alleged ownership in favour of any third party. In my view, the judgment of this Court dated 12th July, 1972 passed in the Second Appeal No.1190 of 1964 is binding on the parties, including the defendant, who is claiming through Godubai, who was admittedly the appellant in the said Second Appeal No. 1190 of 1964. The said judgment which squarely applies to the facts of this case is binding on this Court.

32. A perusal of the order passed by the learned trial Judge indicates that though the learned trial Judge rendered all findings, including adoption of Ganesh by Shankar Daji Tisgaonkar, existence and validity of the Will dated 13th October, 1935 executed by the deceased Shankar Daji Tisgaonkar and rejected the claim of adverse possession made by the defendant, the learned trial Judge erroneously dismissed the suit filed by the original plaintiffs on the ground of non-joinder of necessary party. The suit was filed by the plaintiffs against the

defendant, who claimed to be in possession of the part of the property. The Will executed by the said Shankar Daji Tisgaonkar was already interpreted by this Court in Second Appeal No.1190 of 1964. The Will was also interpreted by the learned trial Judge in favour of the plaintiffs. Admittedly there was no cross-objection filed by the defendant challenging the findings record by the learned trial Judge in favour of the plaintiffs.

33. A perusal of the impugned order passed by the first appellate Court indicates that the first appellate Court framed six points for determination and independently considered the oral and documentary evidence led by both the parties. The first appellate Court held that the plaintiffs had proved the adoption of Ganesh by the said Shankar Daji Tisgaonkar and also proved that the plaintiffs had acquired title over the suit property through their father as per the Will of Shankar Daji Tisgaonkar. The defendant failed to prove that the deceased Godubai had become full owner of the suit property and had alleged to have executed a Will dated 18th April, 1988 in favour of the defendant.

34. Insofar as the submission of the learned counsel for the defendant that though the plaintiffs had applied for a declaration in the Regular Civil Suit No. 234 of 1984 that Prayagbai and Godubai had only life interest in the suit property and had admittedly withdrawn the said suit insofar as Godubai is concerned and thus cannot be allowed to urge that Godubai had life interest in the suit property is concerned, in my view, since this Court had already adjudicated upon the said issue in a separate suit filed by Prayagbai against Godubai which culminated in the order passed by this court in Second Appeal No. 1190 of 1964, even if the plaintiffs had withdrawn the suit (234 of 1984) against Godubai, the rights of the plaintiffs in the suit were not affected. The said issue was not required to be determined once again in view of the said issue already having attained finality in the Second Appeal No. 1190 of 1964.

35. Insofar as the submission of the learned counsel for the defendant that the plaintiffs could not have applied for recovery of possession of the entire property without impleading the other parties, who were in possession of the suit property and thus the suit was bad for non-joinder of necessary parties is concerned, in my view, even if the plaintiffs had prayed for larger reliefs, the Court has ample power to mould the reliefs and grant smaller relief. Since the defendant had admittedly claimed to be in possession of only 4 Khans premises situated on the second floor of the suit property, the first appellate Court was right in passing a decree of possession against the defendant to the extent of the suit property illegally possessed by the defendant. In my view, since Godubai did not have any interest more than life interest in the half share of the suit property which life interest came to an end upon her demise, the first appellate Court thus rightly held that the defendant had no right, title of interest of any nature whatsoever in the suit property in his possession and has accordingly directed to hand over possession to the plaintiffs.

36. In these facts and circumstances, the plaintiffs were not required to implead

any other parties to the suit. Godubai had no legal heir. The defendant was not claiming through Prayagbai and thus impleadment of Prayagbai was thus not necessary. In any event, Prayagbai expired during the pendency of the suit filed by the plaintiffs. The life interest of Prayagbai in half of the suit property claiming through Parvatibai also came to an end upon her demise. I therefore, do not find any substance in this submission of the learned counsel for the defendant.

37. In my view the finding of the learned trial Judge that the suit was bad for non-joinder of necessary parties is totally perverse and thus has been rightly set aside by the first appellate Court. The finding recorded by the learned trial Judge on other issues in favour of the plaintiffs not having been challenged by the defendant by filing cross-objection attained finality and thus those findings cannot be challenged by the defendant in this second appeal.

38. In my view, the first appellate Court has considered the oral and documentary evidence in right perspective and has rightly followed the judgment of this Court delivered on 12th July, 1972 in the Second Appeal No.1190 of 1964 and the findings being not perverse, cannot be interfered with by this Court in this second appeal filed under section 100 of the Code of Civil Procedure, 1908.

39. In my view, the appeal is totally devoid of merits. No substantial question of law arises in this second appeal.

40. I therefore, pass the following order :-

(a). Second Appeal No.197 of 2013 is dismissed.

(b). In view of dismissal of the second appeal, Civil Application No.526 of 2013 does not survive and is accordingly dismissed.

(c). No order as to costs.

(R.D. Dhanuka, J.)

At this stage, learned counsel for the appellant seeks continuation of the ad-interim order passed by this Court on 12th September, 2013. Mr.Deo, learned counsel appearing for the respondent nos.1 to 3 continues the statement made before this Court on 12th September, 2013 for a period of eight weeks from today. The statement is accepted.