

Presented on : 12-04-2005
 Registered on : 12-04-2005
 Decided on : 02-08-2010
 Duration : 5Y-3M-20D

IN THE DISTRICT COURT OF WARDHA.

(Presided over by S. S. Das, District Judge-2, Wardha.)

Reg. Civil Appeal No. 53/2005.

Ex.No. 30 .

- (1) Bapurao s/o Shankarrao Tong,
aged about 68 years, occ : Cultivator,
resident of Umra, Tahsil Samudrapur,
District Wardha;
- (2) Giridhar s/o Shankarrao Tong,
aged about 63 years, occ : Cultivator,
resident of Takli (Zingabai), Tahsil
and District Nagpur;
- (3) Sau. Kusumbai w/o Dnyaneshwar Piple,
aged about 53 years, occ : Household,
resident of Tembhari, Tahsil and
District Nagpur

...

Appellants
(Ori.Plftts.)

Versus

Prabhakar s/o Uttamrao Adkine,
aged about 55 years, occ. : Cultivator,
resident of Sonagaon (Bai), Tahsil
Deoli, District Wardha

...

(Dead)
(Ori. deft.)

Through L.Rs.

- (i) Chandrakala wd/o Prabhakar Adkine,
aged about 50 years, occ. : Cultivator;
- (ii) Sandip s/o Prabhakar Adkine,
aged about 24 years, occ. : Cultivator;
- (iii) Aruna d/o Prabhakar Adkine,
aged about 20 years, occ. : Household;

- (iv) Sau. Sunita w/o Niwirutti Pathare,
aged about 27 years, occ. : Household,
resident of Daulapar, Tah. Hinganghat,
District Wardha;
- (v) Sau. Ashwini w/o Gajanan Khadse,
aged about 22 years, occ. : Household,
resident of Bhankhede, Tahsil and
District Wardha

... **Respondents**

Appeal u/s-96 of Civil Procedure Code.

Shri P.R.Kashikar, Advocate for all the appellants.
Shri A.P.Waghale, Advocate for all the respondents.

J U D G M E N T

(Delivered on this 2nd day of August, 2010.)

1. This is a regular civil appeal preferred against the decree passed by learned Civil Judge, Senior Division, Wardha, in Regular Civil Suit No.55/2000, vide which relief of declaration was decreed but relief of possession was dismissed.

2. Brief facts of the appellants'/plaintiffs' case are as follows :-

Father of plaintiffs is cousin brother of deceased Harbaji Tong. Harbaji Tong died issueless on 17.6.1986 by leaving his widow Kausalyabai only. Said Kausalyabai died in the year 1990. Deceased

Harbaji Tong and then his widow Kausalyabai left ancestral house and field properties bearing survey no.168 admeasuring 3.3 HR and field survey no.167 admeasuring 0.34 HR at Sonegaon (Bai). After the death of Kausalyabai, appellants being nearest heirs of Harbaji Tong, came into possession of those properties. They cultivated those two fields on Batai (kind of lease). However, the respondents forcibly took possession of those properties in the year 1993 by claiming that they purchased those properties from Harbaji Tong. The alleged sale-deed is bogus and is not binding on appellants. Those fields came under Lower Wardha Project and there was prohibition from Government from selling such properties without permission of Collector. Deceased Harbaji Tong did not take permission from Collector for such sale. Appellants prayed for declaration that they are nearest relatives of Harbaji Tong and they further prayed for possession of those fields and house properties.

3. Respondent contested the suit by filing his W.S. at Ex-11. He contended as follows :

Those properties are self acquired properties of Harbaji Tong. Said Harbaji Tong sold field survey no.167 as well as his house to himn by two registered sale-deeds on 22.1.1986. As Harbaji Tong was very close to the respondent, they resided together after such sale till death of Kausalyabai. Even after death of Kausalyabai, appellants

continued to possess that house and field. Respondent denied that appellants were ever in possession of those properties. He prayed for dismissal of the suit.

4. Learned trial Judge framed 5 issues at Ex-11-A. Thereafter appellants examined 5 witnesses, whereas respondent examined 2 witnesses, before closing their respective case. After hearing arguments of both the sides, learned trial Judge delivered judgment on 11.3.2005. By that judgment, suit was decreed only to the extent of giving relief of declaration that appellants are legal heirs of deceased Harbaji Tong, but dismissed relief of possession. Decree was followed accordingly.

5. Being aggrieved by decree of dismissal of suit to the extent of possession, appellants preferred this appeal on the following grounds.

Learned trial Judge failed to properly appreciate the evidence placed on record and came to wrong conclusion. Learned trial Judge erred in holding that those sale-deeds are proper. Learned trial Judge further failed to hold that respondent forcibly took possession of suit fields and the suit house. Learned trial Judge failed to appreciate the fact that Harbaji Tong did not obtain permission of Collector before such sale and therefore so called sale has no value. Appellants prayed for setting aside the decree to the extent of

possession and to decree the impugned suit in its entirety.

6. Shri P.R.Kashikar Advocate argued for the appellants on the aforesaid line as mentioned in the previous para. He prayed for allowing the appeal. Shri A.P.Waghale Advocate argued for the respondents. He relied on the views of learned trial Judge as expressed in the judgment. He further contended that respondents by way of additional evidence in this appeal, proved that deceased Harbaji Tong sold suit house as well as field property having survey no.168 by way of registered sale-deed. Shri Waghale Advocate further argued for dismissal of suit for declaration by allowing the cross-objection of respondents. He prayed for dismissal of the appeal.

7. On the basis of claims and contentions of rival parties, following points arise for determination and I proceed to record my findings against them with reasons as mentioned below.

<u>Points</u>	<u>Findings</u>
1) Whether appellants are nearest ... relatives of late Harbaji Tong and his widow late Kausalyabai ?	<u>Yes.</u>
2) Whether suit house and suit field survey no.168 were properly sold by deceased Harbaji Tong in favour of respondent ?	<u>Yes.</u>
3) Whether appellants are entitled to ... relief of declaration as prayed ?	<u>Yes.</u>
4) Whether appellants are entitled to ... relief of possession ?	<u>No.</u>

- 3) Whether decree passed by learned ... No.
trial Judge deserves to be set aside ?

Reasons for the findings

8. **Regarding Point no. 1** :- PW-1 Gajanan Tong is son of appellant no.1. He deposed that his father Bapurao (appellant no.1) and so also other appellants are cousin brothers and sisters of late Harbaji Tong. According to him, father of Bapurao and father of Harbaji Tong were real brothers. He proved two marriage invitation cards Exs-38 and 39 in which Harbaji Tong was shown as nearest relative of them. Except offering denial, no serious challenge in this regard was made to PW-1 Gajanan, while he was in the witness box. Therefore, evidence of PW-1 Gajanan is reliable to that extent. Apart from this, appellants' other witnesses i.e. PWs-2 to PW-4 also deposed that appellant no.1 used to come to the house of Harbaji Tong and used to refer Harbaji as uncle. PW-2 is also cousin of Harbaji Tong from the maternal side of Harbaji. Therefore also, he must be knowing about relationship between Harbaji and appellants. As against this, nothing was brought by respondents to challenge said evidence. Due to all these, I hold that appellants proved that they are nearest relatives of Harbaji Tong and his widow late Kausalyabai. Therefore, I answer this point in affirmative.

9. **Regarding Point No. 2** :- Learned counsel for the

appellants laid much stress on the fact that field survey no.168 comes under Lower Wardha Project and therefore Government prohibited sale of fields in that area and that late Harbaji Tong allegedly sold that field without permission of Collector and therefore the so called sale is null and void. In this regard, appellants relied on Government Circular dated 29.5.2000, vide which it was promulgated that those properties came under Lower Wardha Project. Appellants further relied on refusal order Ex-33 (as mentioned in mutation register), vide which Tahsildar refused to mutate the name of respondent in place of Harbaji Tong, as said area was not purchased after permission of Collector. It further appears that regarding mutation, both the rival parties fought up to Minister level and ultimately the Hon'ble Minister hold that there should be fresh inquiry. Said order of Hon'ble Minister was passed after filing of this appeal i.e. on 16.10.2009 which was accepted as additional evidence. In this order, it was held by Hon'ble Minister that late Harbaji Tong possessed 4.57 HR of land of which he already sold 1.20 HR to one Sau. Thakre and therefore Harbaji was left with 3.37 HR land. It was further held that out of this, Harbaji further sold 3.03 HR to Prabhakar Adkine (respondent) and so what was remained is 0.14 HR as levy, which is below 0.20 HR and therefore against the Government rules. Hon'ble Minister by holding so, the matter was remanded to District Collector for further inquiry. In that

order, Hon'ble Minister further held that version of respondent Prabhakar should be considered that he is ready to give other land. From these, it is clear that said sale-deed is not void for want of prior permission of Collector, but it was voidable. Again mood of Government seems to be not to derecognize such sale, in view of observation of Hon'ble Minister in an appeal before him. Therefore, such sale without permission of Collector cannot affect the right of respondents visa vis the appellants.

10. Respondents proved certified copy of sale-deed Ex-54 which shows that Harbaji Tong purchased field survey nos.139 and 150, total area 3.46 HR from one Janba Hari Dhurat on 26.4.1953. Therefore, prima facie that property seems to be self acquired property of Harbaji Tong. Appellants did not show anything to show how that suit house and that suit field are ancestral properties of Harbaji Tong. Therefore, I hold that those properties are self acquired properties of Harbaji Tong. At any rate, appellants being not lineal decedent of Harbaji Tong, it is immaterial whether suit properties are ancestral properties or self acquired properties of Harbaji Tong.

11. Respondent examined DW-2 Baba Ingle to prove two sale-deeds, one for sale of house and another for sale of field survey no.168, made by late Harbaji Tong in favour of respondent, by way of registered sale-deed. However, at that time, only certified copies of

sale-deeds were showed to the attesting witness DW-2. Now, such lacuna remains no more, as the respondents by way of additional evidence got proved those sale-deeds by recalling DW-2 as additional evidence before this appellate Court. DW-2 Baba did prove that late Harbaji Tong sold house property by way of a registered sale-deed and further sold field survey no.168 by way of another sale-deed, both on 22.1.1986, in his presence. There is nothing in his cross-examination to disbelieve him. Indeed, there is little variation about quantum of consideration, as this witness deposed that Rs.200/- more was given to Harbaji than the sale amount of field of Rs.1000/-. But, this variation is not of much use, as it is a common phenomena that actual price and sale price mentioned in the sale-deed, many a times vary. Therefore, such sale-deeds seem to be valid. Therefore, respondent is in possession of that suit house and field survey no.168 from the date of sale-deeds.

12. Various 7/12 extracts are placed on record of trial Court at Exs-70, 71 and so also Ex-27 and importantly additional evidence in the form of 7/12 extract shows that respondent is in possession of field survey no.168 even since the time of Harbaji Tong and thereafter during the life time of Kausalyabai and appellants were never in possession of that field. PWs-2, 3 and 4 deposed that appellants actually possessed field survey no.168, but their oral testimony is not

supported by 7/12 extract. Moreover, once respondent purchased suit field, no question arise that he will meekly give possession of the suit properties to the appellants. Due to all these, I hold that appellants were never in possession of suit house and suit field and same were in possession of respondent only as owner of the same. Due to all these, I hold that respondent proved that he purchased suit house and suit field survey no.168 from Harbaji Tong and is possessing the same. It is further interesting to note that appellants did not apply for cancellation of registered sale-deed and so made half hearted claim to get back suit properties, which is not permissible as per law.

Due to all these, I answer point no.2 in affirmative.

13. **Regarding Point No. 3** :- As I answered point no.1 in affirmative, appellants are entitled to relief of declaration that they are legal heirs of deceased Harbaji Tong and his widow late Kausalyabai. Therefore, I answer this point in affirmative

14. **Regarding Point no. 4** :- As I answered point no.2 in affirmative and as I further discussed that respondent is in possession of suit house and suit field survey no.168, as owner of the same, appellants are not entitled to possession of the same. Hence, I answer this point in negative.

15. **Regarding Point No. 5** :- As I answered point no.1 in

favour of applicants and answered other points against applicants, I agreed with the findings of learned trial Judge. Therefore, decree passed by learned trial Judge, is just and proper. Therefore, that decree need not be set aside. Hence, I answer this point in negative.

In sequel, I proceed to pass the following order.

Order

Appeal is hereby dismissed with costs.

Dt. 02.08.2010 :

(S. S. Das)
District Judge-2,
Wardha