

Gaurishankar Vs. Asaram and Others

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Court : Mumbai Aurangabad

Decided On : Aug-30-2016

Judge : S.S. Shinde

Appeal No. : Civil Application Nos. 5416 of 2012 & 5417 of 2012 in Second Appeal No. 356 of 2001

Appellant : Gaurishankar

Respondent : Asaram and Others

Judgement :

S.S. Shinde, J.

1. This Civil Application is filed for recalling the order dated 23.12.2011 passed in Second Appeal No.356/2001, thereby disposing of the Second Appeal in terms of compromise arrived between the parties to the Second Appeal.

2. The learned Senior Counsel appearing for the applicant submits that the applicant was not aware about the filing of Second Appeal by respondent nos.2 and 3, and respondent no.1 also did not inform the applicant about the pendency of Second Appeal. Respondent nos. 2 and 3 therein filed Regular Civil Appeal No.183/1995 before the District Court, Aurangabad. Being aggrieved by the judgment and order dated 29.06.1995 passed in Regular Civil Suit No.475/1994, the said Appeal was allowed and the judgment and decree dated 29.06.1995

passed in Regular Civil Suit No.475/1994 was set aside. Being aggrieved by the said judgment and order by the First Appellate Court, the appellant preferred Second Appeal. The Appeal was admitted.

3. It is submitted that though respondent nos.2 and 3 in Appeal were restrained from alienating the suit property, still respondent no.3 herein executed a sale deed dated 18th August, 2006 in favour of respondent nos.9 and 10 and sold 20 R. land from Gat No.88 for consideration of Rs.5 lacs. It is submitted that since respondent nos.9 and 10 were well aware about the pendency of the Second Appeal and the stay order dated 20.12.2001, still respondent nos. 8 and 9 in collusion with respondent no.3 got executed the sale deed in respect of suit land bearing Gat No.88. Therefore, respondent no.1 filed Contempt Petition No.34/2007 and prayed for taking necessary action against the concerned respondents including respondent nos.3, 9 and 10. The said Contempt Petition came up for hearing before the High Court, and the Court observed that the sale deed executed by respondent no.3 in favour of respondent nos.9 and 10 is contrary to and in violation of the order dated 20.12.2001 passed in Civil Application No.5439/2001 in Second Appeal No.356/2001. Accordingly, by order dated 02.07.2007, the High Court appointed the Court Receiver in respect of the entire suit property, including the portion sold to respondent nos. 9 and 10. The Contempt Court has also restrained respondent nos.3, 9 and 10 from alienating the suit properties including Gat No.88. The learned Senior Counsel invited my attention to the order dated 02.07.2007 passed in Contempt Petition No.34/2007.

4. It is submitted that in spite of stay order dated 20.12.2001 passed in Civil Application No.5439/2001 in Second Appeal No. 356/2001 and in Contempt Petition No.34/2007, the public proclamation for selling the suit property bearing Gat No.88 was published in daily news paper dated 25.06.2009. It was stated in the said proclamation that there is agreement to sell in respect of the said suit land and if anybody has objection, he should submit the said objections to the concerned Advocate. Since there was again violation of the interim orders passed by the High Court, therefore, respondent no.1 again filed Contempt Petition No.251/2009 in Contempt Petition No.34/2007. On 28.08.2009, the High Court issued notices in Contempt Petition No. 251/2009. It is submitted that though the

various proceedings were pending before the Court, still respondent no.1 did not inform the applicant anything about the said proceeding. The applicant was not joined as a party respondent to the said proceedings. The applicant was not aware about the said proceedings. Respondent no.1 as well as respondent Nos.2A to 2F and 3 were very much aware about the execution of sale deeds dated 26.02.1998 and 29.09.1998 in favour of the present applicant. Still the said respondents tried to compromise the matter by overlooking the right of the present applicant. The applicant came to know about the said fact in the month of November 2011, and thereafter, immediately i.e. on 07.12.2011, the applicant filed Civil Application No.15083/2011 for intervention in Second Appeal No.356/2001. However, the said Civil Application was not considered by the High Court.

5. It is submitted that in spite of knowledge to the respondent nos.1, 2A to 2F and 3 about the sale deeds executed in favour of applicant on 26.02.1998 and 29.09.1998, they proceeded to compromise the matter by filing compromise pursis. Neither the present applicant, nor the purchasers i.e. respondent nos.9 and 10 were made as party to the said compromise pursis. It is submitted that Civil Application No.13220/2011 came up for hearing on 04.11.2011 before this Court and accordingly the order was passed accepting the compromise. The record shows that the said Civil Application was filed on 03.11.2011. On 04.11.2011, the compromise was recorded by the learned Registrar (Judicial). On perusal of the record, it would reveal that the compromise was recorded in Civil Application No.13219/2011 filed in Contempt Petition No.34/2007. The learned Registrar (Judicial) observed in his order dated 04.11.2011 that respondent nos.9 and 10 (i.e. respondent nos.8 and 9 of Contempt Petition No.34/2007) were not parties to the compromise pursis. The Registrar further observed that respondent nos.2A to 2F (i.e. respondent nos.1 to 6 of Contempt Petition No.34/2007) were discharged from the Contempt proceedings. Therefore, it is crystal clear that the Registrar (Judicial) has recorded the compromise in Contempt Petition No.37/2007. The record shows that the compromise filed vide Civil Application No. 13220/2011 in Second Appeal No.356/2001 was not recorded.

6. It is submitted that while disposing of the Second Appeal in terms of compromise pursis, this Court has specifically observed that the compromise

entered into between the parties is at their own risk and responsibility. It is submitted that the compromise pursis filed vide Civil Application No.13220/2011 in Second Appeal No.356/2001 was not at all verified by the learned Registrar (Judicial). The record shows that the compromise filed vide Civil Application No.13219/2011 in Contempt Petition No.34/2007 was verified by the Registrar (Judicial) On 04.11.2011. It is submitted that as soon as the Second Appeal came to be disposed of by order dated 23.12.2011, respondent no.3 has executed the registered sale deed dated 26.12.2011 in favour of respondent nos.4 to 8 and sold 66 R. land from Gat No.88 for Rs.2,06,85,000/-. Respondent nos.1 and 2A to 2F are consenting parties to the said sale deed. That apart, some other persons are also consenting party to the said sale deed. On perusal of the recitals of the sale deed dated 26.12.2011, it would reveal that the sale deed was drafted in the month of November, 2011, itself. That apart, the record shows that before that the parties have entered into agreement for selling the suit property and the amount was also paid by cheques. The recitals of the sale deeds shows that the amount of consideration was paid in the month of October and November 2011 by issuing cheques. Thus, though there was stay, still respondent Nos.1, 2A to 2F, 3 and 4 to 8 have entered into an agreement and completed all the formalities for execution of the sale deed. The said fact itself shows that the respondent nos.1, 2A to 2F, 3 and respondent nos.4 to 8 have played the fraud and got executed the sale deed. It is submitted that the evidence on record clearly shows that the respondents have obtained the decree by playing fraud and thereafter got executed the sale deed by overlooking the right of the present applicant. Therefore, the said sale deeds deserves to be declared as null and void.

7. It is further submitted that respondent no.1 executed the registered sale deeds dated 26.02.1998 and 29.09.1998 in pursuance of the agreement to sell dated 16.12.1995 and sold 94 R. land from Gat No.88 to the present applicant. Respondent nos.2A, 2C and 2F, being Legal representatives of deceased respondent no.2 have also given consent to the said sale deeds. Respondent nos.1, 2A to 2F and 3 to 10 were very well aware about the right of the applicant. Still respondent no.3 executed the sale deed dated 18.08.2006 in favour of respondent nos. 9 and 10 and sold 20 R. land from Gat No.88 though there was injunction order passed by this Court. Thereafter, respondent nos.1, 2A to 2F and

3 again sold 66 R. land to respondent nos.4 to 8 by executing sale deed dated 26.12.2011. The record shows that before compromising the matter and in spite of injunction order, the said respondents entered into the transaction regarding selling of the land. By suppressing all these facts, the respondents herein have got compromise the matter. The record shows that by playing fraud the respondents have obtained the decree of compromise. Therefore, the order dated 23.12.2011 deserves to be recalled.

8. It is submitted that the applicant is having substantive right in the suit property bearing agricultural land Gat No.88. The Civil Application filed by the applicant bearing Civil Application No.15083/2011 came to be disposed of without any speaking order. When the matter was heard on 23.12.2011, the advocate of the applicant as well as the applicant was not present, and therefore, Civil Application No.15083/2011 filed by the applicant was not brought to the notice of this Court. It is submitted that by way of filing compromise pursis, the other parties have accepted the share of the respondent no. 1 in the property. Respondent no.1 had sold the suit property to the applicant by executing two sale deeds dated 26.02.1998 and 29.09.1998. However, the said aspect has not been considered at all while disposing of the Second Appeal. It is submitted that when the sale deeds were executed in favour of applicant and the applicant was put in possession of the property from Gat No.88 by respondent no.1, the question of accepting compromise without the applicant is party to the said proceedings does not arise. Therefore, the order disposing of the Second Appeal deserves to be recalled.

9. It is submitted that since the applicant is a aggrieved person, the application for recalling/review is maintainable. The learned Senior Counsel invited my attention to the reported judgment in the case of Shapoorji Data Processing Ltd. Vs. Ameer Trading Corporation Ltd. (AIR 2003 Bombay 228)and submits that in the said judgment, the High Court has taken a view that for filing review application party must be aggrieved party and must file petition within time limit. Though the person is not party to proceedings but is aggrieved person, can file the review petition. Learned Senior Counsel also invited my attention to the judgment of the High Court in the case of Dinkar Indrabhan Kadaskar and Ors. Vs. Grampanchayat Bhagwatipur and Ors. (2009 (1) Bom.C.R. 39)and submits that, in that case also

the High Court held that the applicants therein are aggrieved persons being interested in affairs of trust, therefore, review application is maintainable though they were not parties to proceedings. Relying upon the judgment of the Supreme Court in the case of A.Nawab John and others Vs. V.N.Subramaniam (2012] 7 SCC 738)and in particular para 22 thereof, it is submitted that a pendent lite purchaser s application for impleadment should normally be allowed or considered liberally . The learned Senior Counsel further pressed into service exposition of law in the case of Dhanlakshmi and others Vs. P. Mohan and others (2007] 10 SCC 719)and in particular para 5 thereof and submits that in that case also the Court has taken a view that the appellants therein were necessary parties to the suit. He also invited my attention to the reported judgment in the case of T.G.Ashok Kumar Vs. Govindammal and another (2010] 14 SCC 370). He further placed reliance in the case of A.V.Papayya Sastry and others Vs. Govt. of A.P. and others (2007] 4 SCC 221)and submits that fraud vitiates all judicial acts whether in rem or in personam hence judgment, decree or order obtained by fraud has to be treated as non est and nullity, whether by court of first instance or by the final court. It can be challenged in any court, at any time, in appeal, revision, writ or even in collateral proceedings. For the said preposition, he further pressed into service exposition of law in the case of T.Vijendradas and Anr. Vs. M. Subramanian and Ors. (2008 [1] All MR 446). Therefore, relying upon the averments in the application, grounds taken therein, annexures thereto, relevant documents and the aforesaid judgments cited during the course of hearing, the learned Senior Counsel appearing for the applicant submits that the application deserves to be allowed.

10. The learned counsel appearing for respondent no.1 relying upon the averments in the affidavit-in-reply and also additional affidavit-in-reply made following submissions:

11. The present controversy is flowing from Regular Civil Suit No.475/1994 filed by the original plaintiff-appellant Asaram for effecting the partition and possession of the property belong to HUF. The controversy about the right of intervener-applicant under the alleged sale deeds to the extent of the property mentioned therein, therefore, the dispute sought to be raised by him is outside the scope of

the suit for partition. The character of a suit for partition cannot be converted into a suit by a stranger like the applicant herein, based on title for the recovery of possession as (i) The cause of action for such a subsequent proceeding would be different; (ii) The pleadings of the two proceedings would not go hand in hand; (iii) The reliefs claimed by the parties would be altogether different; (iv) The points in issue, the evidence, both oral as well as documentary in the two proceedings would be at variance with each other; (v) All the issues or matters referred to above involve disputed questions of fact which cannot be gone into a Second Appeal by the High Court at the behest of a stranger to a proceeding and (vi) so also the source of rights claimed by the parties would be totally different. The learned counsel appearing for respondent no.1 pressed into service exposition of law in the case of Kasturi Vs. Iyyamperumal and others (2005] 6 SCC 733) and submits that in the facts of that case the Supreme Court has taken a view that a party who is approaching the Court by invoking Order 1 Rule 10 for becoming a party to the proceedings must satisfy two tests firstly, there must be a right to some relief against such party in respect of controversies involved in the proceedings, or, secondly, no effective decree can be passed in his absence. It is submitted that the review applicant has alleged that the original plaintiff in Regular Civil Suit No. 475/1994 the appellant in the Second Appeal and respondent in the application for review had executed two sale deeds dated 26.02.1998 and 29.09.1998 in his favour in respect of two portions, admeasuring 63 and 32 R. respectively, in the suit property bearing Gat No.88. The alleged sale deeds under consideration are executed after the decree of the trial Court in Regular Civil Suit No. 475/1994 was stayed by the Appellate Court, Aurangabad. in a substantive appeal i.e. Regular Civil Appeal No.183/1995 filed by Shankar and Babasaheb original defendants. The learned District Judge, Aurnagabad, was pleased to pass an order below Exhibit-5 i.e. the Stay Petition in Regular Civil Appeal No. 183/1995 on 20.07.1995, by which the stay was granted to the execution of the decree in Regular Civil Suit No.475/1994 until further order. Therefore, the original plaintiff appellant gets no right of disposition to the suit property and had no authority in the eyes of law to execute the alleged sale deeds dated 26.02.1998 and 29.09.1998, thus, the alleged sale deeds are executed by incompetent person, who had no right over the suit property, thus no right divested to the

applicant under the alleged sale deeds, therefore, the applicant has no right, interest, title, ownership and possession over the suit property. Further, the suit property was then owned and possessed by Babasaheb i.e. the respondent no.2, who is the brother of the original plaintiff, Asaram-appellant. Therefore, the appellant had no right to execute the alleged sale deeds in favour of the applicant.

12. It is submitted that Regular Civil Appeal No.183/1995, which was filed by the original defendant nos.1 and 2 i.e. respondent no.2 in this application, was allowed by the Appellate Court on 20.06.2001 and the suit was dismissed. It is submitted that the entire litigation is about the partition in the joint family which consisted the plaintiff and the defendants in the suit and the suit property had fallen in the share of the original defendant no.2. The applicant was never put in possession of the subject matter of the alleged two sale deeds, therefore, the recitals are contrary to the fact and record. It is the contention of the applicant that there was rise in the share of Asaram by virtue of the alleged relinquishment of their share by the sisters of Asaram is imaginary and amounts to superseding and modifying the decree passed by the District Court, Aurangabad, that too, without suffering any adjudication in that behalf. The learned counsel appearing for respondent no.1 invited my attention to the averments in the affidavit-in-reply and submits that it is stated that respondent no. 1 Asaram had been addicted to liquor. He was, therefore, always in dire need of money almost every day. The applicant has taken undue advantage of the vices of the appellant and has obtained his signatures on the blank papers and converted the same into the alleged sale deeds in his own favour. It is submitted that both these documents are forged and bogus. The alleged agreement of sale deed dated 16.12.1995 regarding an area of 62 R. out of Gat No.88, the alleged sale deed dated 26.02.1998 in that behalf and the alleged sale deed dated 29.09.1998 in respect of an area of 32 R. are void for want of certainty and identity of the subject matter of transactions because admittedly the decree for partition and separate possession passed by the trial Court was stayed by the District Court and the said decree was a preliminary decree and the final decree was not then drawn. Assuming for the sake of argument that the appellant was entitled to sell an area of 62 R. out of Gat No.88 to the extent of his alleged 1/3rd share therein, as it then stood, he was prohibited from exercising his right to do so by virtue of the stay order of the District Court in

Regular Civil Appeal No. 183/1995, operating against the decree of the trial Court. Further, the alleged second sale-deed is equally illegal for one more reason that the same was executed by the appellant over and above his alleged and presumed entitlement to the extent of 1/3rd share in the suit property. The so-called sale deeds dated 26.02.1998 and 29.09.1998 which are being relied on by the intervener have seen light of the day for the first time in the year 2012. The said documents were not acted upon for over a period of 13 years. In the natural course of things, a bona fide purchaser for a valuable consideration would have and ought to have exhibited and asserted his title by some manifestation, one way or the other, however, the applicant has not acted bona fide, which proves beyond doubt that the alleged sale deeds are false and never meant to be executed.

13. The very fact that the appellant original plaintiff had filed the original suit for partition and separate possession of his alleged share in the suit property, shows that he was never in possession of the suit property. As a sequel to it, he could not deliver possession of the same to the applicant. It, therefore, negatives not only the veracity of the recitals regarding delivery of possession of the properties under the sale deeds to the applicant, but also of the legality and validity of alleged sale deeds. It further proves appellant's version that the two alleged transactions were not genuine. It can be said with a very high degree of certainty that whenever any sale-deed is without delivery of possession of the property it becomes unconscionable and gives rise to a presumption against its veracity and genuineness. The applicant was not an agriculturist on the date of the alleged transactions and the same are void on that count also. The applicant has never made attempt to file application for impleading him party in Regular Civil Appeal No. 183/1995. In fact, the recital of the alleged sale deed clearly makes mentioned about Regular Civil Suit No.475/1994, and therefore, the contention of the applicant cannot be accepted that he was not aware about pendency of Regular Civil Appeal. It is submitted that the claim of the applicant is barred by limitation. The Civil Application, which was filed by the applicant in the year 2011 in the Second Appeal, was never prosecuted and the applicant was never made party in the Second Appeal. It is submitted that the validity of the compromise cannot be challenged by the applicant, who was not party either to the suit/Regular Civil Appeal or in the Second Appeal. No stranger can be allowed to foist a compulsion

on the erstwhile parties to any proceeding, who have arrived at an amicable settlement, to once again litigate amongst themselves at the behest of a non-party to the proceeding. It is submitted that all parties to the Second Appeal entered into compromise, and therefore, it cannot be said that the parties to the Second Appeal have played fraud on the Court. The compromise was verified and also the Court ascertained that the said compromise is without any coercion or with free will. None of the parties to the compromise has ever raised any doubt about the genuineness of the compromise. The applicant has no locus standi to raise any question mark on the veracity of the compromise, its endorsement and the location of the endorsement. In support of the aforesaid contention, the learned counsel appearing for the respondent no.1 pressed into service exposition of law in the cases of Khalil Haji Bholumiya Salar and Anr. Vs. Parveen w/o. Sayyeduddin Razak and Ors. (2012 (12) LJSOFT 417), Ramkrishna Shridhar and Ors. Vs. The Court Receiver and Ors. (2011 (1) All MR 623), Shyam Lal and another Vs. Sohan Lal and others (AIR 1928 Allahabad 3), Amarnath and others Vs. Deputy Director of Consolidation, Kanpur and another (AIR 1985 Allahabad 163), Siddalingeshwar and others Vs. Virupaxgouda and others (AIR 2003 Karnataka 407), Horil Vs. Keshav and Another (2012) 5 SCC 525 and Hussainbhai Allarakhbhai Dariaya and others Vs. State of Gujarat and others (2010) 8 SCC 759). It is submitted that the applicant is raising disputed questions of facts inasmuch as he wishes to prove the sale deed executed in his favour in Review Application filed in the Second Appeal. Such controversy, which is beyond scope and purview of the Second Appeal, cannot be gone into by this Court.

14. The learned counsel appearing for the other non applicants/respondents in the Second Appeal submits that they adopt the argument of the learned counsel appearing for respondent no.1. The learned Senior Counsel appearing for respondent nos.4 and 8 also invited my attention to the various documents and also to the various judgments and submits that the review application is not maintainable since the same raises disputed questions of fact, and such consideration would fall outside the purview of the controversy involved in the Second Appeal.

15. I have given careful consideration to the submissions of the learned Senior Counsel appearing for the applicant, the learned counsel appearing for the respondent nos.1 and 2 and the learned Senior Counsel appearing for the respondent Nos.4 and 8. With their able assistance, perused the averments in the application, annexures thereto and the entire original record pertains to the Second Appeal No.356/2001. Upon careful perusal of the averments in the application for review, it is abundantly clear that the applicant was not party to the suit/Regular Civil Appeal or in Second Appeal. The contention of the learned senior counsel appearing for the applicant that the applicant filed Civil Application for intervention / for impleading him as party in the Second Appeal came to be disposed of without any adjudication, and therefore, the present application for review, deserves to be entertained, has no force. Merely because the applicant filed application for impleading him party in the Second Appeal in the year 2011, and same was kept pending without prosecuting the same, would not entitle the applicant to file review application when he was not impleaded as party respondent in Second Appeal. Upon perusal of record it appears that, the Advocate, who filed such application on behalf of the applicant, was not present on the date of disposal of the Second Appeal, or even on earlier dates whenever Second Appeal was listed before the Court for hearing. The said Civil Application came to be disposed of in view of disposal of Second Appeal without passing any specific orders and as a result the applicant was not made party to the Second Appeal till disposal of the appeal. There is two fold contention of the applicant; firstly, the review application can be entertained at his instance since he is a aggrieved person and secondly, two sale deeds dated 26.02.1998 and 29.09.1998 executed in his favour by the appellant Asaram, are genuine transactions, and therefore, he has right over the suit property in Gat No.88 to the extent of the share of appellant Asaram sold in his favour. In the first place, as already observed, the review applicant was not party to the suit / Regular Civil Appeal or Second Appeal, and therefore, he is a stranger to the said proceedings, which ultimately culminated into the disposal of the Second Appeal in terms of settlement arrived between the parties to the Second Appeal. Secondly, even to hold that the review applicant is a aggrieved person, the Court of competent jurisdiction was not approached by the applicant to adjudicate his contention that, two sale deeds

dated 26.02.1998 and 29.09.1998 executed by the appellant Asaram in favour of applicant is a result of lawful and valid transaction and by virtue of it, he became owner and came in possession of the said property. The appellant in Second Appeal Shri Asaram not only has disputed said sale transactions, but even by way of filing additional affidavit, the stand is taken by him that, he has never executed the alleged sale deeds in favour of the applicant. It is further stated in the additional affidavit that, even if assuming that Asaram has executed such alleged sale deeds, he was not competent to execute the said sale deeds in view of the stay granted by the Appellate Court to the decree passed by the trial Court, and also decree passed by the trial Court was never sent to the Collector for effecting partition by metes and bounds. It is not necessary for this Court to go into the greater details, suffice it to say that the review application at the instance of the applicant cannot be entertained. The issue raised by the applicant that two sale deeds dated 26.02.1998 and 29.09.1998 is genuine transaction and by virtue of it, he became owner and is in lawful possession of suit property, would fall beyond the purview of controversy which was raised in the Second Appeal. Such adjudication at the instance of the applicant would lead to the adjudication of the disputed questions of fact and also would be beyond the controversy, which was involved in the Second Appeal arising out of the proceedings in Regular Civil Suit No. 475/1994 filed by Asaram.

16. In that view of the matter, this Court is of the opinion that the review application deserves no consideration. This Court is bound by the ratio laid down in two judgments delivered at Principal Seat, cited across the bar by the learned counsel appearing for the respondents in the case of Khalil Haji Bholumiya Salar (cited supra) and also in the case of Ramkrishna Shridhar and Ors (cited supra) wherein the view is taken that stranger to the suit is a stranger to the agreement of compromise and he cannot file an application either in the suit or in the appeal proceedings to challenge a compromise decree as he is not a party to the suit, bar under Rule 3A of Order 23 of CPC cannot be extended to him, said provision must confine only to the parties to the suit who are parties to the compromise agreement, stranger to a compromise decree cannot file an application in a suit or an appeal to challenge a compromise as not being lawful, but must file a separate suit for the purpose.

17. In that view of the matter, this Court is of the considered view that the review application deserves no consideration, the same is devoid of any merits and stands rejected. Civil Application No.5417/2012 for adding as party respondents also stands disposed of.

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