

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

SECOND APPEAL NO. 752 OF 2003
WITH
CIVIL APPLICATION NOS. 10115/2003, 1506/2015

1. Roshanbee w/o. Shaikh
Mirajoddin Inamdar,
Age 51 years, Occu. Agriculture,
R/o. Bidkin, Tq. Paithan,
District Aurangabad.
2. Shaikh Osman s/o. Shaikh Azim,
Age about 62 years, Occu. Agril,
R/o. Bidkin, Tq. Paithan,
District Aurangabad.
3. Shaikh Ismail Shaikh Osman,
Age 32 years, Occu. Agril.,
R/o. Bidkin, Tq. Paithan,
District Aurangabad.
4. Shaikh Ahmed s/o. Shaikh Osman,
Age 30 years, Occu. Agriculture,
R/o. Bidkin, Tq. Paithan,
District Aurangabad.

....Ori. Defendants.

**....Appellants
(Orig. Respondents).**

Versus

1. Meenakshi w/o. Shamprasad Kaystha,
Age 49 years, Occu. Household,
R/o. Gandhi Chowk, Nandgaon,
Tq. Nandgaon, Dist. Nasik.
2. Smt. Deokabai w/o. Gulabchand
Shrivastav, Age 71 years,
Occu. Household and Agril,
R/o. Bidkin, Tq. Paithan,
Dist. Aurangabad, at present
residing at and Tq. Nandgaon,
District Nasik.

.....Ori. Plaintiffs.

3. Nandkishore Gulabchand Shrivastav,
Age 54 years, Occu. Agril.,
R/o. Bidkin, Tq. Paithan,
Dist. Aurangabad.
4. Babu Dagdu Kawade,
Age 71 years, Occu. Agril.,
R/o. Bidkin, Tq. Paithan,
District Aurangabad.
5. Kishanlal Asaram Totala (Deceased)
(Age Major, Occu. & R/o. As above)
6. Keshavrao Shamrao Shinde,
Age 31 years, Occu. Agriculture,
R/o. Bidkin, Tq. Paithan,
District Aurangabad.

....Respondents.
No. 3 to 6 are Orig. Deft./
Resdpt.No.1,3,5 and 6.

Mr. S.L. Kulkarni, Advocate for appellants.

Mr. A.S. Bajaj, Advocate for respondent Nos. 1 and 2.

CORAM : T.V. NALAWADE, J.
DATED : 14th September, 2015.

JUDGMENT :

1) The appeal is filed against judgment and decree of Regular Civil Appeal No. 141/1997, which was pending in the Court of 3rd Ad-hoc District Judge, Aurangabad. As the relief was not given in respect of some properties to the original plaintiffs in Special Civil Suit No. 211/1991, which was pending in the Court of Civil Judge, Senior Division, Aurangabad, the first appeal was filed by the plaintiffs and the first appellate Court has given the decision in their favour and it is held that they are entitled to

2/3rd share in land Gat No. 593 and partition is ordered accordingly. The trial Court had given decree in respect of the house properties bearing C.T.S. Nos. 413 and 414, but it was to the extent of 1/3rd share and now the appellate Court has given the share to the extent of 2/3rd and so, the appeal is limited only to that extent of the defendants. Both the sides are heard.

2) Plaintiff No. 1 is daughter of plaintiff No. 2 and deceased Gulabchand Shrivastav. Gulabchand died in the year 1965-1966, leaving behind the plaintiffs and defendant No. 1 as his legal heirs. Defendant No. 1 is son of Gulabchand.

3) It is the case of plaintiffs that Gulabchand had received and acquired the aforesaid house properties and agricultural land during his lifetime and they were his absolute properties. It is the case of plaintiffs that partition had not taken place amongst plaintiffs and defendant No. 1 and the defendant No. 1 was holding the properties for plaintiffs also. It is the case of plaintiffs that defendant No. 1 has 1/3 share in the properties as per the Hindu Law, but under sale deeds he sold more portion from the agricultural land than the share which can be given to him. It is contended that to that extent, the sale deeds were not binding on them. Defendant Nos. 2 to 8 are purchasers from

defendant No. 1. It is contended that in the year 1991 when they got information about these transactions, they asked the defendants to hand over the possession of their share, but they refused to give their share and so, the cause of action took place. It is contended that defendant No. 1 refused to make partition in respect of remaining properties also.

4) Some of the purchasers filed written statement and contested the matter. They denied that the properties were joint Hindu family properties of plaintiffs and defendant No. 1. They contended that they have purchased the properties from defendant No. 1 who was the absolute owner of the suit properties. Alternatively they contended that if the suit is decreed in favour of plaintiffs, the sale deeds made in their favour by defendant No. 1 be protected to the extent of share of defendant No. 1. The challenge in respect of joint family nature of house properties cannot be considered as those findings were accepted by the defendants.

5) The trial Court had held that only the suit houses were self acquired properties of Gulabchand and the trial Court has observed that only 1/3 share was given to each of the plaintiff in the suit properties. No separate finding was given by

the trial Court as to why the plaintiffs were not entitled to get the share in agricultural land. Only one sale deed, sale deed made in favour of defendant No. 7, was held to be invalid. The first appellate Court has held that when there is no record to prove that it was ancestral properties of Gulabchand and when there is record to show that the properties were absolutely owned by Gulabchand, the trial Court ought to have given equal share to the plaintiffs and defendant No. 1.

6) The learned counsel for appellants submitted that the first appellate Court did not frame specific points for consideration on the basis of issues and so, the decision of the first appellate Court is liable to be set aside. It appears that the appeal was admitted only on one substantial question of law that "as to whether there is perversity in appreciation of evidence on record by the learned Ad-hoc District Judge, Aurangabad."

7) In the appeal memo, prayer was made to consider the ground Nos. VI, VII, VIII, IX for formulation of substantial questions of law. The points raised are as under :-

- (i) That, the suit was for partial partition and so, it was not tenable.

- (ii) That, the specific points were not framed by the first appellate Court.
- (iii) The appellate Court's judgment is affected due to perversity as relevant material is not considered, and
- (iv) The first appellate Court failed to consider the provisions of Prevention of Fragmentation and Consolidation of Holdings Act.

8) Before considering the other challenges, the challenge made against the decision of the first appellate Court that specific points were not framed needs to be considered. Though it is true that specific points for consideration are not mentioned in the judgment by the first appellate Court, each and every issue which was considered by the trial Court is specifically dealt with in the reasoning given by the first appellate Court and it is well reasoned judgment. So, it cannot be said that specific points, issues were not considered and not decided by the first appellate Court.

9) The reasoning given by the two Courts below and the record show that Gulabchand was the absolute owner of the properties and Gulabchand died somewhere in 1965-1966. Admittedly, Gulabchand left plaintiffs and defendant No. 1 as the

only legal heirs. In view of these circumstances, in ordinary course, plaintiffs and defendant No.1 get equal share in the suit properties.

10) It is not disputed that after the death of Gulabchand, names of plaintiffs were also entered in the revenue record of the suit properties as the owners. In view of these circumstances, there was no room for the purchasers to take the defence that they were bonafide purchasers. Present proceeding is filed by only few of the purchasers and they have not given explanation as to why they did not make any inquiry before purchasing the property from defendant No. 1. When the property is sold by male member of Hindu Joint Family, the other defence like it was transaction by Karta was available and for that defence of legal necessity could have been taken by the purchasers. This defence was not taken in both the Courts below and no evidence in that regard was given. Surprisingly, defence was taken that defendant No. 1 was absolute owner of the properties when the record was otherwise. The relevant record on the basis of which finding is given that Gulabchand is absolute owner is considered by the Courts below. The findings of the Court below that it was the absolute properties of Gulabchand and from Gulabchand, the properties came to

plaintiffs and defendant No. 1 is findings on facts. Thus, there is no force in so called points on the basis of which substantial questions of law were proposed by the purchasers, defendants. The entire record is considered by the first appellate Court and in view of the aforesaid circumstances, it cannot be said that the decision of the first appellate Court is perverse. The first appellate Court has rightly considered that the provision of section 8 of the Hindu Succession Act would apply in view of the facts and circumstances of the case. No point of limitation was involved.

11) In the result, the appeal stand dismissed. Civil applications are disposed of.

[T.V. NALAWADE, J.]

SSC/