

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

Second Appeal No. 745 of 2006

* Phulanbai W/o Raosaheb Deoni,
Age 45 years
Occupation Agriculture,
R/o Borul, Taluka Udgir,
District Latur. **.. Appellant.**

Versus

- 1) Udhav S/o Narsingrao Bobde,
Age 40 years,
Occupation : Agriculture.
- 2) Trivenibai W/o Narsingrao Bobde,
Age 60 years,
Occupation : agriculture.
- 3) Maroti S/o Narsingrao Bobde,
Age 39 years,
Occupation : Agriculture.
- 4) Gangabai D/o Narsingrao Bobde
under guardianship of respondent No.2.
- 5) Anita d/o Narsingrao Bobde
under guardianship of respondent No.2.
- 6) Narsingrao s/o Narayanrao Bobde
Age 65 years,
Occupation : Agriculture.
- 7) Pandurang s/o Gyanoba Deone,
Age 60 years,
Occupation : Agriculture.

All residents of Borul,
Taluka Deoni, District Latur. **.. Respondents.**

Shri. A.G. Dalal, Advocate, for appellant.

Shri. S.S. Chillarge, Advocate, for respondent Nos.1 to 5.

CORAM: T.V. NALAWADE, J.

DATE : 16th SEPTEMBER 2015

JUDGMENT:

1) The appeal is filed by the original defendant No.3 of Regular Civil Suit No.272 of 1980 which was pending in the Court of the Civil Judge Junior Division Udgir. She has challenged the decision of the trial Court by which the trial Court had decreed the suit of present respondent Nos.1 to 5 filed for partition and separate possession and she has also challenged the decision of the first appellate Court, District Court, Udgir, given in Regular Civil Appeal No.251 of 2001. Though the appeal filed by present appellant in first appellate Court is partly allowed, the first appellate Court has held that plaintiffs had one-fourth share each in 5 acres 2 gunthas portion sold to present appellant by defendant No.1 and that way the first appellate Court has protected the transaction made in favour of the present appellant by defendant No.1

only to the extent of 1/4th share of defendant No.1 in the property purchased by present appellant. The first appellate Court has further held that the remaining property is available for partition amongst the plaintiffs. Both the sides argued for final disposal of the appeal.

2) Original plaintiff No.1 Udhav is son of defendant No.1 Narsing, plaintiff No.2 Trivenibai is wife of Narsing. Plaintiff No.3 Maroti was child in womb when the suit was filed. Plaintiff Nos.4 and 5 were born after the date of the suit and they joined in the suit as plaintiffs after their birth under the guardianship of Trivenibai. Defendant No.2 is the purchaser to whom some property from land Survey No. 214 situated at village Borul, Tahsil Deoni, District Latur was sold by defendant No.1. Appellant, defendant No.3 is the purchaser of portion of 5 acres 2 gunthas subsequent to the date of the suit.

3) It is the case of the plaintiffs that defendant No.1 was addicted to liquor and due to bad habits he was not taking care of the plaintiffs and he was wasting and disposing of the joint family property. Prior to the date of

the suit he had sold area of 3 acres 2 gunthas in favour of defendant No.2 when, according to the plaintiffs, there was no legal necessity. It is contended that said sale deed is not binding on the plaintiffs. In the suit, relief of partition and separate possession was claimed in respect of aforesaid land and the area of land shown was 18 acres 17 gunthas. It appears that after filing of the suit sale deed was made in favour of defendant No.3 by defendant No.1 and so defendant No.3 was also made party defendant in the suit.

4) Both defendant Nos.2 and 3 resisted the suit. The trial Court had held that both the sale deeds were not binding on the plaintiffs and it was held that plaintiff Nos.1 and 3 have one-third share each in the suit property. It was held that in the suit property plaintiff Nos.2,4 and 5 and defendant No.1 have 1/12th share. The first appellate Court held that plaintiff Nos.1 to 3 and defendant No.1 have one-fourth share in the area of 5 acres 2 gunthas sold to defendant No.3 by defendant No.1 and in the remaining portion of 10 acres 9 gunthas all the plaintiffs and defendant No.1 have one-sixth share. It

appears that defendant No.2 had challenged the decision of the trial Court and he succeeded in the appeal and the said sale deed made in favour of defendant No.2 is protected, it is not set aside. Learned counsel for the appellant submitted that in view of the provision of section 52 of the Transfer of Property Act and when the first appellate Court had formed the opinion that the suit was collusive, the Court ought to have protected the sale deed in favour of defendant No.3 in entirety. He submitted that the issue of legal necessity also ought to have been considered by the Courts below. He submitted that when plaintiff Nos.4 and 5 were not in picture, there was no need to consider their right in the suit property and so the Courts below ought to have held that in case of partition, plaintiff Nos.1 to 3 and defendant No.1 can get equal share i.e. one-fourth share in the property. He submitted that in that case the sale deed made in favour of defendant No.3 could have been protected to that extent. The decision given by the first appellate Court shows that only to some extent i.e. one fourth share in area of 5 acres 2 gunthas the sale deed is protected.

5) It cannot be disputed that when suit for partition is filed, the person who was Karta in the past cannot act as Karta and the shares become definite. For the same reason if there was no other heir available like plaintiff Nos.4 and 5 on the date of suit, their right to have share in the property on the date of the suit cannot be considered. So, substantial question of law can be formulated on this point as follows :

Whether the first appellate Court has committed error in taking into consideration plaintiff Nos.4 and 5 and giving them share in the property which was not sold by defendant No.1 on the date of suit ?

6) On the basis of provisions of Hindu Succession Act, sections 6 and 8, and the law laid down in the case reported as **1978 (3) SCC 383 (Gurupad Khandappa Magdum v. Hirabai Khandappa Magdum)** notional partition can be effected on the date of suit and it can be for entire area or 15 acres 11 gunthas which was available for partition on the date of suit (this area is calculated after excluding the property already sold to defendant No.2).

7) There was no question of consideration of point of legal necessity as suit for partition was filed and defendant No.1 could not have acted as Karta. These issues could not have been framed and substantial question of law on this point cannot be formulated. It is settled law.

8) The provision of section 52 of the Transfer of Property Act shows that if the Court finds that it was collusive suit, protection of provision of section 52 cannot be given. Even if this provision is not considered, it can be said that whatever property was owned by defendant No.1 could have been sold to defendant No.3, by defendant No.1. As suit was filed for partition and as the defendant No.1 had one-fourth share in the suit property, it was open to him to sell this portion of the suit property. Thus following substantial question of law can be formulated and decided in favour of the appellant :-

“Whether due to circumstance of suit and sale after filing of the suit, defendant No.3 can be denied of his right to get property, share of defendant No.1 under the sale deed ?

9) In view of the discussion made this Court holds that there was right to defendant No.1 to sell his own share to defendant No.3 and to that extent the right of purchaser, defendant No.3 - appellant can be protected. This correction is required in the decisions given by the Courts below and the modification of the decision given by the first appellate Court has become necessary. In the result following order :-

10) The appeal is partly allowed. The judgments and decree of the trial Court and the first appellate Court are modified. The suit of the plaintiffs is decreed partly. It is hereby declared that plaintiff No.1 Udhav, plaintiff No.2 Trivenibai, plaintiff No.3 Maroti and defendant No.1 Narsing have 1/4th share in the suit property which was admeasuring 15 acres 11 gunthas (Survey No.214 from village Borul, Tahsil Deoni, District Latur) on the date of the suit.

11) The possession of the property sold to defendant No.3 Phulanbai is to be taken for making equitable partition and care to be taken to see that the

share of defendant No.1 is given in possession of the defendant No.3. The decree in favour of plaintiff Nos.4 and 5 is hereby set aside. Consequential relief given like mense profit is to be determined by following procedure. Decree be drawn accordingly.

Sd/-
(T.V. NALAWADE, J.)

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