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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL APPLICATION NO. 4217 OF 2013
IN
FIRST APPEAL NO. 539 OF 2015**

Vithal Padmakar Patil & Ors. ...Applicants
Versus
Yamunabai Dwarkanath Gondhale & Ors. ...Respondents

Mr. Sandesh Dadasaheb Patil for the Applicants

Mr. Shivraj R. Patil for the Respondent Nos.1 and 2

Mr. Vagish Mishra with Mr. Nishant Tripathi i/b M. Tripathi & Co. for the Respondent No. 3

**CORAM : A. S. OKA &
REVATI MOHITE DERE, JJ.
THURSDAY, 13TH AUGUST, 2015**

P.C. :

1. Heard learned Counsel appearing for the applicants, the learned Counsel appearing for the first and second respondents and the learned Counsel appearing for the third respondents.

2. The applicants are the original defendant Nos. 2 to 10. The first and second respondents are the plaintiffs. The first three applicants and the first and second respondents are real brothers and sisters. Fifth to tenth applicants are the members of the family of the first three applicants.

3. A suit for declaration was filed by the first and second respondents before the Civil Court. The first declaration was as regards Sale Deed dated 6th November, 2007 by contending that the said Sale Deed was null and void. The said Sale Deed has been executed by the applicants and first and second respondents in favour of the third respondents. By the said Sale Deed, the land subject matter of the suit were sold to the third respondents. It is contended in the plaint by the first and second respondents that the said Conveyance Deed was obtained by the third respondents by misrepresentation and fraud. It was misrepresented that consideration would be paid to the first and second respondents but ultimately nothing was paid by the third respondents to the first and second respondents.

4. The Suit was contested by third respondents. However, the present applicants did not file any written statement. By the impugned decree, the trial Court declined to grant declaration that the Sale Deed is void. However, the trial Court held that the first and second respondents are entitled to 2/3rd share together in the suit properties and in the

consideration for the said Sale Deed. Accordingly, following was the decree passed by the trial Court :

“ORDER

a)

b) *It is hereby declared that, the plaintiffs have 2/3rd share in the consideration amount of suit lands.*

c) *The defendant no. 2 to 10 do pay consideration Rs.5516666/- to the plaintiffs within one months from the date of decree.*

d) *The amount Rs.8816667/- deposited by defendant no.1, in court be given to plaintiffs along with its accrued interest after appeal period is over.*

e) *The suit against defendant no. 1 is dismissed, defendant no.1 to borne his own costs.*

Pronounced in open court.”

5. It is not in dispute that the amount of Rs. 88,16,667/- deposited by the third respondents has been withdrawn by the first and second respondents. Admittedly, the total consideration mentioned in the Sale Deed dated 6th November, 2007 is Rs. 2,15,00,000/-.

6. The submission of the learned Counsel appearing for the applicants is that by taking the averments made in the plaint as correct,

since the first and second respondents are real sisters of the first three applicants, at highest, they will be entitled to $1/5^{\text{th}}$ share each. He would, therefore, submit that even going by the findings recorded by the trial Court, the share of the first and second respondents taken together will be $2/5^{\text{th}}$ and therefore, amount of Rs. 88,16,667/- withdrawn by the first and second respondents is infact more than their share.

7. The learned Counsel appearing for the first and second respondents submitted that the trial Court, while recording finding regarding the shares, has taken into consideration the entries in the 7/12 extracts and has come to the conclusion that the shares of the first and second respondents are $1/3^{\text{rd}}$ each. He would urge that in any case the applicants will have to secure the balance decretal amount of Rs. 55,16,666/- by depositing the same in the Court.

8. We have given careful consideration to the submissions. We have perused the plaint and in particular, paragraph Nos. 2 onwards. In paragraph 2, it is contended by the first and second respondents that they are the sisters of the first three applicants and they constitute a joint Hindu

family governed by Mitakshara Law. In paragraph Nos. 4 to 6 of the plaint, the first and second respondents have contended that the lands subject matter of the Sale Deed are jointly owned.

9. It will be necessary to make reference to the relevant finding recorded by the trial Court. The relevant finding is in paragraph 24 regarding computation of shares, which reads thus:

“24] The consideration for entire lands for Rs.21500000/- is fixed. The fixation of consideration is not disputed nor challenged by the defendant no. 2 to 10. So being jointness, an equal share comes to the plaintiffs and defendant no. 2 to 4. Thus for each lands it comes $1/3^{\text{rd}}$ to each plaintiff. For both plaintiffs it comes $2/3^{\text{rd}}$ share in the consideration. Both plaintiffs prayed joint share $2/3^{\text{rd}}$ for them. From the mathematical calculations, the amount Rs.14333333/- comes to the share of both plaintiffs.”

10. Thus, the finding of the learned trial Judge is that the first and second respondents/plaintiffs and the first three applicants (first three defendants) have equal share. Thus, the finding is that the property is a joint family property of the first and second respondents as well as first

three applicants. First three applicants are the real brothers of the first and second respondents. Therefore, even going by the said finding, the first three applicants and first two respondents will have $1/5^{\text{th}}$ share in the land sold to the third respondents. In the plaint, $2/3^{\text{rd}}$ share is claimed only on the basis of mutation entries. However, in second paragraph of the plaint, there is a specific averment that the first and second respondents and first three applicants constitute a joint Hindu family governed by Mitakshara Law. It is not the case of the first and second respondents that there was relinquishment of shares by the first three applicants or any of them in their favour.

11. Therefore, taking the findings of the trial Court as right and averments made in the plaint as correct, *ex-facie*, the shares of the first and second respondents will not exceed $1/5^{\text{th}}$ each. They have already received sum of Rs. 88,16,667/- out of total consideration of Rs. 2.15 lakhs.

12. It is true that clause (c) of the impugned decree is a money decree. But, we find that even going by the case made out by the first and second respondents/plaintiffs, clause (b) declaring the shares of the parties

is *ex-facie* erroneous. It is pertinent to note that the first and second respondents have not challenged the impugned decree. Hence, a case is made out for grant of stay. Accordingly, we dispose of the application by passing the following order :

ORDER

There will be stay of execution and operation of clause (c) of the operative order of the impugned judgment and decree dated 3rd May, 2013, till the disposal of the appeal.

(REVATI MOHITE DERE, J.)

(A. S. OKA, J.)