

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

SECOND APPEAL NO. 422 OF 2014

1. Sanket S/o Subhash Pahade
Age : 11 Yrs., Minor.
2. Ssheetal D/o Subhash Pahade
Age : 13 Yrs., Minor.
3. Chanchal D/o Subhash Pahade
Age : 16 Yrs., Minor.
Appellant Nos. 1 to 3 being
Minors, are u/g of next friend,
a real mother Sow. Sunita
Subhash Pahade, Age : 36 Yrs.,
Occ. Household, R/o :
Dharmabad, Tq. Dharmabad,
Dist. : Nanded.
4. Sow. Sunita Subhash Pahade
Age : 36 Yrs., Occ. Household,
R/o : Dharmabad, Tq. **APPELLANTS/**
Dharmabad, Dist. : Nanded. **[ORI. PLAINTIFFS]**

V E R S U S

1. Subhash S/o Hiralal Pahade
Age : 55 Yrs., Occ. Business,

R/o : Dharmabad, Tq.
Dharmabad, Dist. : Nanded.

2. Kaushalyabai W/o Hiralal Pahade
Age : 76 Yrs., Occ. Business,
R/o : Dharmabad, Tq.
Dharmabad, Dist. : Nanded.
3. Baby D/o Kantilal Tholia
Age : 30 Yrs., C/o
Kantilal Tholia, Convensing
Agent, Hawrah, Road No. 7,
Calcutta (Kolkatta)
[West Bengal].
4. Babli D/o Abheya Kumar
Age : 25 Yrs., Occ. Household,
R/o : Chailendra Kumar S/o
Laxmichand Sethi, Chauraha,
Kirana Chawdi, at Aurangabad
Dist. : Aurangabad.
5. Pooja D/o Abheya Kumar
Age : 22 Yrs., Occ. Household,
R/o : Chauraha,
Kirana Chawdi, at Aurangabad
Dist. : Aurangabad.
6. Mahaveer S/o Abheya Kumar
Age : 19 Yrs., Occ. Nil.,

R/o : Chauraha,
Kirana Chawdi, at Aurangabad
Dist. : Aurangabad.

7. Sow. Saroja W/o Vijaya Kumar
Kasliwal, Age : 40 Yrs., Occ.
Household, C/o Vijay Kumar
Kasliwal S/o Fatechand Kasliwal,
R/o : 21 C Ramnagar, Indoor
[M.P.].
8. Uttamchand S/o Kishanchand Pahade
Age : 66 Yrs., Occ. Professor,
R/o : Pulgaon, Dist. Wardha,
[Maharashtra].
9. Subhash S/o Hiralal Godha
Age : 60 Yrs., Occ. Business,
R/o : Dharmabad, Tq.
Dharmabad, Dist. : Nanded.
10. Gulabchand S/o Shantilal Jain
Age : 65 Yrs., Occ. Business,
R/o : Dharmabad, Tq. **RESPONDENTS/**
Dharmabad, Dist. : Nanded. **[ORI. DEFENDANTS]**

.....

Mr. A.M.Gaikwad, Advocate for Appellants.

Mr. A.B.Shinde, Advocate for R – 1,2 & 7.

Mr. A.G.Godhamgaonkar, Advocate for R – 8 & 9.

CORAM : T.V.NALAWADE, J.

DATE OF JUDGMENT : 05/07/2016

JUDGMENT :

1. The Appeal is filed against the Judgment and Decree of R.C.S. No. 36/2002 which was pending in the Court of the Civil Judge [Jr.Division], Dharmabad and also against the Judgment and Decree of R.C.A. No. 23/2008 which was pending in the Court of the District Judge, Biloli, district Nanded. The Suit filed by the appellant for declaration and injunction in respect of one house property is dismissed by the Courts below. Heard both sides.

2. In short, the facts leading to the institution of the Appeal can be stated as follows.

Plaintiff No. 4 is the wife of defendant No. 1. Plaintiff Nos. 1 to 3 are issues of plaintiff No. 4 born from defendant No. 1. Defendant No. 2 is the mother of defendant No. 1. It is the case of the plaintiffs that defendant No. 1 is acting as per the instigation of defendant No. 2, mother, and he is trying to dispose of the suit property. It is the case of the plaintiff No. 4 that

she has filed the Suit to protect the interest of her minor issues. It is her case that one of the defendants wants to grab the property and false record is created of lease in favour of one of the defendants.

3. The suit property is given house No. 3-7-35 in the record of local body, Dharmabad and it is situated at Mahaveer Nagar. The size of the property East – West is 23 feet and North – South is 56.5 feet. It is the case of the plaintiffs that they are living on first floor of the building.

4. It is the case of the plaintiffs that Hiralal, father of defendant No. 1, was owner of the suit property and he died on 14/04/1994. It is the case of the plaintiffs that Hiralal has left behind one son, widow and 3 daughters. Some daughters were made parties to the Suit by the plaintiffs but the Suit was dismissed as against them as no steps were taken by the plaintiffs to serve those daughters of Hiralal. Defendant No. 8 is brother of Hiralal and it is contended that defendant No. 8 has no concern with the suit property.

5. It is the case of the plaintiffs that Special Civil Suit No. 71/1999 is filed by defendant No. 2 but it is a collusive Suit and the intention behind the Suit is to deprive the plaintiffs of their right in the suit properties. It is contended that defendant No. 9 is not in possession of the portion of the suit house but the record is created that he is in possession. It is contended that in Special Civil Suit No. 71/1999, defendant Nos. 1 to 8 are made party defendants by defendant No. 2 to use this record. It appears that defendant Nos. 3 to 7, daughters of Hiralal were also parties to the partition Suit. Following reliefs were claimed by the plaintiffs in the present matter.

- [i] Declaration that defendant No. 2, widow of Hiralal, has relinquished her share in the suit property.
- [ii] Defendant Nos. 3 to 7, daughters of Hiralal, had no share in the suit property.
- [iii] Defendant Nos. 8 and 9 have no concern with the suit property.
- [iv] Hiralal was the exclusive owner of the suit property.

[v] The decree of partition of Special Civil Suit No. 71/1999, which was likely to be given is collusive and it can not be executed against the plaintiffs. The relief of injunction was also claimed by plaintiffs to protect their so called possession over first floor of the building.

6. Defendant Nos. 1, 2 and 10 filed joint Written Statement. They contend that Hiralal and his brother, defendant No. 8, had equal shares in the suit property as the property was their ancestral property. They contended that Special Civil Suit No. 71/1999 filed for partition was already decreed, but this circumstance is concealed from the Court. They contend that defendant No. 2 had not relinquished her share in the property.

7. Issues were framed on the basis of aforesaid pleadings. Both sides gave evidence. Copy of Judgment delivered in Special Civil Suit No. 71/1999 was produced on record. This document shows that Hiralal got $\frac{1}{2}$ share and defendant No. 8 got $\frac{1}{2}$ share in the aforesaid suit property.

8. In view of nature of relief claimed in the present Suit, defendant Nos. 3 to 7, daughters of Hiralal, were necessary parties to the Suit. As the Suit was dismissed as against them, relief of declaration that Hiralal was the owner of entire property and it was his absolute property, could not have been given. Further, declaration in respect of the decision which was likely to be given in Special Civil Suit No. 71/1999, could not have been given and for that relief the Suit was premature. On 23/07/2014, this Court [other Hon'ble Judge] admitted the Appeal on following substantial questions of law viz. (I) and (ii), which reads as under :

- (i) Whether learned Judge of the lower appellate Court ignored evidence while deciding the issue of possession ?
- (ii) Whether the Courts below ignored the evidence while deciding the appellants' share in the suit property ?

9. The pleadings of the plaint show that it is not disputed that the property was standing in the name of father of defendant No. 1 in the relevant record. No

record is produced to show that Hiralal was absolute owner. Further, Suit for partition was already filed in which brother of Hiralal had claimed $\frac{1}{2}$ share. Even if these circumstances are ignored, the circumstance that Hiralal has left behind his heirs viz. 1 son, 4 daughters and widow, can not be ignored. All these successors of Hiralal have right to enjoy the property. If partition takes place amongst the successors of Hiralal, son of Hiralal, defendant No. 1 can get some portion and only in that portion, plaintiffs will have share. In view of these circumstances, declaration as claimed by the plaintiffs could not have been given. If property is joint Hindu family property of not only of plaintiffs and some defendants, but also the daughters of Hiralal, the relief of injunction could not have been given in favour of the plaintiffs. In view of these circumstances, there was no other alternative before the Court below than to dismiss the Suit. Though the aforesaid substantial questions are formulated, this Court holds that no substantial question of law as such is involved in the matter.

10. In the result, Second Appeal stands dismissed. In view of dismissal of the Second Appeal,

Civil Applications do not survive and stand disposed of.

[T.V.NALAWADE, J.]

KNP/S.A. 422.2014 – [J]