

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

SECOND APPEAL NO.736 OF 2016

1. Indubai w/o Damodhar Shinde,
Age : 55 years, Occu.: Household and
Agriculture, R/o.: Bejnoor,
Tq.and Dist. Beed
2. Ashok @ Balu s/o Damodhar Shinde,
Age : 33 years, Occu.: Agriculture,
R/o.: Neknoor, Tq.and Dist.Beed
3. Ishar @ Pinu s/o Damodhar Shinde,
Age : 33 years, Occu.: Agriculture,
R/o.: Neknoor, Tq. and Dist.Beed
4. Vidhya d/o Damodhar Shinde,
Age : 37 years, Occu.: Agriculture
and Household,
R/o.: Neknoor, Ta. and Dist. Beed
5. Bibi d/o Damodhar Shinde,
Age : 35 years, Occu.: Agriculture
and Household,
R/o.: Neknoor, Tq. and Dist.Beed

..APPELLANTS
(Orig. Deft.
Nos.5A to 5E)

VERSUS

1. Vishwanth s/o Ganpati Satpute,
Age : 63 years, Occu.: Agri.,
R/o.: Neknoor, Tq. and Dist. Beed
2. Taramati w/o Hari Shinde,
Age : 63 years, Occu.: Agri and
Household, R/o.: Neknoor,
Tq. and Dist. Beed
3. Satish s/o Hari Shinde,
Age : 32 years, Occu.: Agriculture,
R/o.: Neknoor, Tq. and Dist. Beed

4. Umesh s/o Hari Shinde,
Age : 38 years, Occu.: Agriculture,
R/o.: Neknoor, Ta. and Dist. Beed
5. Dnyanoba s/o Sahebrao Shinde,
Age : 58 years, Occu.: Agri.,
R/o. Neknoor, Tq.and Dist.Beed
6. Narayan s/o Sahebrao Shinde,
Age : 73 years, Occu.: Agri.,
R/o.: Neknoor,
Tq.and Dist.Beed

..RESPONDENTS

(R.No.1 is Orig.
Plaintiff, Resp.
Nos.2 to 5 are Orig.
Defts.Nos.1 to 4 and
R.No.6 is Orig.Deft.
No.6)

Mr. B.A. Dhengle, Advocate for the appellants
Mr. C.V. Dharurkar, Advocate for respondent No.1

CORAM : SANGITRAO S. PATIL, J.

DATE : 19th JULY, 2017

ORAL ORDER :

The appellants, who are the legal heirs of the deceased – Damodhar, have preferred this appeal against the concurrent finding of facts recorded by the Trial Court in Regular Civil Suit No.358 of 2008 and the First Appellate Court in Regular Civil Appeal No.91 of 2015, respectively.

2. The learned counsel for the appellants submits

that Regular Civil Suit No. 17 of 1965 was filed by the deceased – Damodhar and his brothers namely Haribhau, Dnyanoba, Janardhan, Kisan and their mother Laxmibai against their step brother Narayan, which came to be decreed on 26.06.1968. Regular Darkhast No.66 of 1977 was filed for execution of that decree. During the pendency of that execution proceedings, respondent No.1 (original plaintiff) purchased the suit land from Haribhau and Dnyanoba. He submits that the said transaction in respect of the suit land would be hit by the principle of *lis pendens* in view of Section 52 of the Transfer of Property Act. Neither the Trial Court nor the First Appellate Court considered this legal question and have accepted the claim of respondent No.1, holding him as the absolute owner of the suit land and restrained the appellants from interfering with his possession over the suit land.

3. The learned counsel for the appellants, relying on the judgments in the cases of **Jayaram Mudaliar Vs. Ayyasamy 1972 (2) SCC 200** and **Mst. Koyalee Vs. State, AIR 2009 Rajasthan 28**, submits that the question of *lis pendens* will have to be considered by this Court by

admitting the Second Appeal.

4. As against this, the learned counsel for respondent No.1 submits that the deceased - Damodhar had filed Regular Civil Suit No.68 of 1995 against his brothers Narayan, Haribhau and Dnyanoba in respect of the suit land and other lands belonging to the joint family, seeking relief of perpetual injunction restraining the appellants from alienating the suit land. In that suit, it was the defence of the brothers of the deceased - Damodhar that there has been partition of the joint family property on Gudhipadwa of 1985. In that partition, they have got the suit land to their exclusive share. They denied that the suit land belongs to the joint family of the deceased - Damodhar and the defendant-brothers. In that suit, it was held that the suit property was not the joint family property. The suit was therefore dismissed. Regular Civil Appeal No.93 of 1997 filed by the deceased Damodhar came to be dismissed on 23.09.2003 and the findings of the Trial Court were confirmed.

5. The learned counsel for the respondents submits that in view of this subsequent change in circumstances,

the execution proceedings bearing Regular Darkhast No. 66 of 1977 would not come in the way of Haribhau and Dnyanoba in selling the land, which was given to their exclusive share in the partition of 1985. According to him, the deceased - Damodhar himself admitted in his deposition recorded in Regular Civil Suit No.68 of 1995, that the land was purchased by respondent No.1 which was given to the exclusive shares of Haribhau, Dnyanoba and Damodhar. It was further admitted that the partition of the joint family property was effected amongst the brothers of the deceased - Damodhar and himself and as such, the decree was passed in Regular Civil Appeal No.91 of 2005. The finding of facts in respect of the partition amongst the deceased Damodhar and his brothers recorded in Regular Civil Suit No.68 of 1995, has attained finality. Therefore, it is not open for the appellants-legal heirs of the deceased - Damodhar, to reopen that issue and claim partition in respect of the suit land purchased by respondent No.1. He submits that in view of the concurrent finding of facts recorded by the Trial Court as well as the First Appellate Court, no substantial question of law is involved in this appeal.

6. It is true that Regular Darkhast No. 66 of 1977 was pending for execution of the decree passed in Regular Civil Suit No.17 of 1965. However, as seen from the evidence of Damodhar, recorded in Regular Civil Suit No. 68 of 1995, the suit property has been partitioned amongst his brothers and himself in the year 1985 and accordingly, all of them got specific shares in the joint family property. The deceased — Damodhar has specifically admitted that Haribhau and Dnyanoba had sold out the lands of their respective shares out of the land called "Gaarpit". He further admitted that after the said sale transaction, respondent no.1 and Raghunath are cultivating the lands purchased by them. He admits that in the land called "Umbar Vihir", Dnyanoba, Haribhai and himself are the sharers. These admissions clearly indicate that there has been a partition by metes and bounds amongst the brothers of the deceased— Damodhar and himself though Regular Darkhast was pending. When all the parties to the suit got joint family property partitioned and when the suit land was given to the share of Haribhau and Dnyanoba i.e. the brothers of Damodhar, it would not be open for the legal heirs of the deceased Damodhar to challenge the sale

transaction in respect of the suit land on the principle of lis pendens. Consequently, the judgments cited above by the learned counsel for the appellants would be of no help to the appellants to advance their case. The Trial Court as well as the Appellate Court have rightly appreciated the evidence on record and found that respondent No.1 has become absolute owner of the suit land since he has purchased it from Haribhau and Dnyanoba under a registered Sale Deed in the year 1993. In view of this concurrent finding of facts and considering the evidence on record, no interference in the impugned judgments and decrees is warranted. In my view, no substantial question of law is involved in this appeal. Hence, I pass the following order:-

O R D E R

- (i) The Second Appeal is dismissed.
- (ii) No costs.
- (iii) In view of the disposal of the Second Appeal, Civil Application No.14399 of 2016 is rejected.

[SANGITRAO S. PATIL]
JUDGE