

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

**Civil Application No.16724 of 2016
In
Second Appeal No.268 of 1994**

Shantabai w/o Sitaram Phirke
And Others.

.. Applicants.

Versus

Vasudeo s/o Ananda Patil
And Others.

.. Respondents.

Shri. S.R. Barlinge, Advocate, for applicants.

Shri. D.R. Markad, Advocate, for respondents 1 & 3.

Coram: T.V. NALAWADE, J.

Date : 28 July 2017

ORDER:

1) The application is filed for calling back the order made by this Court of dismissal of Second Appeal No.268/1994 on 28-10-2015. Delay of about 11 months is caused and relief of its condonation is also claimed. Both the sides are heard.

2) The aforesaid second appeal was filed by present applicants to challenge the judgment and decree

of first appeal decided by the Additional District Judge Jalgaon bearing No.89/1988 which was decided along with Appeal No.76/1988. One appeal was filed by original plaintiffs and the other appeal was filed by original defendant No.1 against the decision given by the Court of the Civil Judge, Junior Division, Yawal in Regular Civil Suit No.38/1978. The suit was filed by present respondents Nos.1 to 4 for relief of possession of one open plot situated within *Gaothan* of village Navhi, Tahsil Yawal. It was the case of the plaintiffs that the plot was sold by defendant No.1 Sitaram Phirke under registered sale deed to them and possession was also given. It was contended that they were forcibly evicted from the premises by the family members of Sitaram and Sitaram. So there was cause of action for the suit. The trial Court had decreed the suit partly and had held that the sale deed was binding only on Sitaram and so the plaintiffs were entitled to get possession of 1/5th share which was of Sitaram in joint Hindu family property. The appeal preferred by the plaintiffs came to be allowed. The District Court has held that the plaintiffs are entitled to get possession of entire portion of the property.

3) The second appeal was filed in the year 1994 but no interest was shown to prosecute the matter after getting interim relief. As no interest was shown to serve notices of the appeal on some of the respondents, the appeal against those respondents was also dismissed. Subsequently application filed for restoration was allowed subject to condition of deposit of cost amount. It appears that while dismissing the appeal on 28-10-2015 this Court held that the cost amount was not deposited and this order was made due to submission made by the learned counsel for respondents, original plaintiffs. The learned counsel for the applicants-appellants submitted that the cost was deposited before the date of dismissal. Other side counsel then submitted that merits are also considered by this Court to some extent and so the appeal cannot be restored. This Court is ignoring the submissions made by the learned counsel for the respondents-plaintiffs to make some observations with regard to the merits. For condonation of delay and restoration, the appellants are required to show that there is some arguable case.

4) Admittedly, the property sold to the plaintiffs was joint Hindu family property and Sitaram being father of his three issues was Karta of the family. These four persons and also the wife of Sitaram were made party to the suit. The sale deed was executed on 7-3-1972 and the suit was filed in the year 1978 for possession on the basis of title. The plaintiffs proved the passing of consideration. The defendants took defence that Sitaram was addicted to bad vices and for satisfaction of the bad vices he had sold the property and there was no legal necessity. Admittedly as it was the property of joint Hindu family and not absolute property of minors, there was no question of consideration of the requirement of permission of the District Court in respect of the shares of the minors. As Karta Sitaram had the power and if there was legal necessity, Sitaram was entitled to sell the property.

5) Defendant No.1 Sitaram did not file written statement and apparently there was collusion between Sitaram and other members of his family. The decision of the suit was challenged by Sitaram but he lost in District Court and this action shows that there was collusion

amongst the defendants. The suit was decided on 30-12-1987 and on that date all the issues of Sitaram were major.

6) There was word against word about bad vices of Sitaram. There is recital in the sale-deed that Sitaram was in need of money for maintaining his family members, defendants. There was no evidence given by the defendants to show income which Sitaram was making for livelihood of the members of the family. This circumstance could not have been ignored. In view of these circumstances the District Court allowed the appeal of the purchaser and gave decree in respect of entire portion. Due to this circumstance nothing can be achieved by restoring the appeal as there is no case in the appeal itself. It can be said that by using the circumstance of pendency of the appeal and interim relief, the original defendants protracted execution of the decree and present is one more attempt to protract the execution. No sufficient cause is made out. In the result, the application stands rejected.