

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

SECOND APPEAL NO.810 OF 2018 WITH
CIVIL APPLICATION NO.12166 OF 2018

Shriram Bibhishan Khamkar ... APPELLANT

VERSUS

Gopalkrishna Digambar Musande
(Potdar) and others ... RESPONDENTS

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Shri S.J. Salunke, Advocate for appellant t

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CORAM : A.M. DHAVAL, J.

DATED : 19th NOVEMBER, 2018

ORAL ORDER :-

1. Heard Mr. Salunke, learned counsel for the appellant. The concurrent findings show that the suit property, a field of 98 R, was self acquired property of Dinkar, who died in 1993. Before his death, in 1980, he allotted the suit property to his wife by effecting mutation. The defendant No.1 wife, on the basis of said mutation, executed registered sale deed in favour of defendant No.5 on 14.8.2000, who is appellant before this Court.

2. One Gopalkrishna, son of Digambar claimed partition and challenged the said transaction. The trial Court dismissed

the suit. The first appellate Court allowed the appeal and decreed the suit and granted 1/5th share to the plaintiff. The purchaser defendant No.5 has challenged the said judgment.

3. If Digambar was the exclusive owner of the suit property, he could not have effected transfer of the same in favour of his wife merely by carrying out mutation entry. Such transfer can be effected only by registered gift deed. It is also not the case that the property was allotted to the wife for maintenance. In the situation, defendant No.1 could not become the exclusive owner of the property and as per Section 8 of the Succession Act on death of Digambar, the widow as well as her sons were owners of the property, each having 1/5th share. The learned trial Judge did not consider this legal position and dismissed the suit. The same has been rightly corrected by the first appellate Court.

4. Learned counsel for the appellant argued that there was no prayer for setting aside the alienation. He relied on the case of **Kisan Ramji Khandare Vs. Kausalyabai w/o Gangaram Korde & ors.**, reported in **[2007(4) Mh.L.J. 43]**. The plaint shows all the necessary pleadings to challenge the said transaction. It is claimed that, the said sale deed is not binding on the plaintiff to the extent of his share as held in **Corporation**

of the City of Bangalore Vs. M. Papaiah & anr. reported in **[AIR 1989 SC 1809]**. The plaint has to be read as a whole and mere absence of specific prayer will not be relevant. There are necessary pleadings, and the sale deed was not signed by the plaintiff. Therefore, mere claim that it is not binding on him is enough. Since the property was self acquired, there was no question of any partition.

5. No substantial question of law has been raised to interfere with the findings by the first appellate Court. Hence, the appeal is dismissed in limine. In view of dismissal of the Appeal, Civil Application stands disposed of.

(A.M. DHAVAL, J.)

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