

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

SECOND APPEAL NO. 21 OF 2018
WITH
CIVIL APPLICATION NO. 341 OF 2018

Kundlik Laxman Wagaskar and Ors. ...Appellants

Versus

Subhadrabai Arjun Kalamkar and Ors. ...Respondents

Mr. J.J. Patil, Advocate for Appellants
Mr. A.B. Jagtap, Advocate holding for Mr. V.D. Sapkal,
Advocate for Respondent No. 2
Mr. D.S. Manorkar, Advocate for Respondent Nos. 1 and 3

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**CORAM : A.M. DHAVAL, J.
DATE: 31st OCTOBER, 2018**

ORAL ORDER :

1. Regular Civil Suit No. 220 of 1996 was filed by respondent No.1 - Subhadra - (R/1), her two sons and one daughter namely, Dada, Akka and Manda against the husband of Subhadrabai Arjun, who is respondent No. 2 herein. It was a suit for partition and separate possession. The same was decreed and the plaintiffs were given $\frac{1}{4}^{\text{th}}$ share each. This Judgment was challenged by respondent No. 2 - Arjun by Regular Civil Appeal No. 66 of 2008. The said appeal was dismissed with costs, but the Judgment was modified and plaintiff Nos. 1 and 3 were given $\frac{1}{3}^{\text{rd}}$ share each as plaintiff Nos. 2 and 4 were dead. While

deciding the Second Appeal, the learned Principal District Judge, Ahmednagar in para No.17 observed that the original defendant - Arjun, who was appellant in first appeal, had obtained collusive compromise decree in Regular Civil Suit No. 66/2004 and relied upon the Judgment of the Apex Court in the matter of ***Gram Panchayat, Naulakha Vs. Ujagar Singh reported in AIR 2000 SC 3272***, wherein, it was held that there was no necessity to challenge the said Judgment and decree as it was obtained by fraud or collusion. This second appeal is preferred by brothers and sisters of Arjun and some purchasers. It is their case that there was no partition between Arjun and them. When Arjun's wife and children filed suit for partition against Arjun, they were not parties to the suit and in the first appeal, in which the observations were made against them. Hence, they have preferred the second appeal.

2. The maintainability has been challenged by learned Advocate for the respondent Mr. Manorkar on the ground that the appellants are not parties to the original suit and in the first appeal, the Judgment and decree was not challenged by them by filing first appeal, and therefore, the second appeal is not maintainable.

3. It is true that the present appellants were not parties to the

suit and they were also not parties before the first appellate Court. In their absence, the learned First Appellate Court could not have made any observations regarding fraud or collusion when the present appellants had no opportunity of hearing. It is needless to say that the Judgment and decree binds the parties to the suit and the persons claiming through them. In the present case, the appellants are claiming their own independent rights on the ground that there was no partition between them and the appellant - Laxman. In such circumstances, the Judgment in Regular Civil Suit No. 220 of 1996 confirmed in Regular Civil Appeal No. 66 of 2008, shall not bind the present appellants on the ground that they were not parties. If they are in possession of the properties ordered to be partitioned, they can take appropriate remedies in the execution proceedings. In such proceedings, it will be also open for the original plaintiffs to raise appropriate defences including alleged claim of collusion or fraud. This Court is not expressing any opinion about the same. It is clarified that the Court can record the factual findings only in presence of the parties which are likely to operate or affect their rights. With these observations, it is held that this second appeal is not maintainable, and therefore, it is dismissed in limine. The appellant shall get 3/4th Court fees remittance.

4. Though, the second appeal is dismissed, learned advocate Mr. J.J. Patil submits that he has received notice of threat from the respondents in this matter. Since the appeal is dismissed, the learned advocate is permitted to file separate Civil Application and right to prosecute the same for the alleged contempt is maintained. It will be continued in spite of dismissal of appeal.

(A.M. DHAVALÉ)
JUDGE

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