

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO.723 OF 2016
WITH
CIVIL APPLICATION NO.1440 OF 2016**

Sidramappa Gurappa Aadvitote (Decd. Thr. Lrs.)

and Anr.

..Appellants

vs.

Sou. Nasrin Salim Bagwan & Anr.

...Respondents

Mr. Ashok B. Tajane for the Appellants.
Mr.Surel S. Shah for the Respondent No.2.

**CORAM : A. M. DHAVALA, J.
DATE : 17th SEPTEMBER, 2018.**

P.C.:

. Heard learned counsel for the parties at length.

2. The Land Gat No.8 at Akkalkot ad-measuring 2 H 58 R seems to be the joint family property of the plaintiffs and co-heirs. The wife and children of the Plaintiff No.1 by registered Sale deed dated 20/9/2006 sold 0 H 43 R land from the suit property to the defendant. The plaintiffs claim that as there was no partition and no ascertainment of specific shares to the co-parceners, the sale was illegal and the purchaser has no right except to claim partition. The sale was of undivided share. Still the Respondent says that the defendant has taken possession and constructed a shed. According to the plaintiffs the defendants illegally constructed the shed after the filing of the suit when the injunction order was in force.

3. The learned Trial Judge held most of the issues in favour of the plaintiff but held that the defendant stepped into the shoes of the vendor and becomes co-sharer and the plaintiff cannot claim injunction against the co-sharer. Hence, the suit for injunction and mandatory injunction was dismissed.

4. In the First Appeal No.8/2010 the Learned District-Judge, Solapur held that the defendant was in possession and had constructed shed before filing of the suit. He held that the shed was not illegal or unlawful. He dismissed the appeal and thereby confirmed the judgment of the Trial Court.

5. It is true that as long as there is no partition one of the co-owners or co-parceners cannot sell any of the property to any stranger and the stranger gets no right for the said specified land. It is also argued that the land sold was more than what the vendors were entitled in partition. However, the fact remains that the defendant has obtained physical possession of the land. The learned Appellate Court has discussed in detail in paragraph no.24 and 25 of the judgment about the possession of the defendant. The learned First Appellate Judge for sound reasons have come to the conclusion that the shed was constructed before the filing of the suit.

6. I agree with the submission of the learned counsel for the appellant that the other co-sharers are not bound to claim partition against the third party purchaser. It is for the purchaser to file a suit for partition and claim share of vendor. He can claim equity for allotment of land given to him by the vendor but has no substantive right to that effect. Nonetheless when he was put in possession, the suit should be for possession. There is no substance in the case that the defendant was not in

possession. He has erected the shed which is sought to be dismantled and removed. There is no perversity in the finding of the First Appellate Court that the defendant is in possession of the land. Considering the reasoning of the learned Trial Judge, I find that when the defendant is in possession of land, the plaintiff could have filed a suit for possession or partition and in such case the defendant could not have retained possession under the Sale Deed, but a suit for injunction simplicitor or mandatory injunction was not maintainable when the plaintiffs and other co-sharers were not in physical possession of the land. In view of this, there is no substantial question of law.

7. Mr. Shah, learned counsel for the Respondent argued that the appeal is not maintainable as the defendant has filed cross objections which were allowed and no appeal has been preferred against the same. He placed reliance in the case of ***Hari Shankar Rastogi vs. Sham Manohar & Ors.***¹. I find that the plaintiff has filed only one suit which came to be dismissed. He is required to file only one appeal and not two appeals. The objections preferred by the Defendant was against the finding and not against the decree passed though it is permissible, post amendment, under Order 41 Rule 22. Mere rejection of cross objection on finding will not give rise to right of appeal. In the present appeal the appellant has challenged all the findings including finding regarding possession which relates to the cross objections. As I am not admitting second appeal, it is not necessary to give specific finding on this issue. However, it is apparent that allowing cross objection on finding would not have compelled the appellant to file separate appeals against it and against decree of the Trial Court and the First Appellate Court. As long as there are no separate decrees, there is no necessity to file separate appeals. Learned Advocate Shah has relied on the case of ***Banarsi vs. Ram Phal***². *paragraphs 10 and 11*. It is observed that

1 (2005) 3 Supreme Court Cases 761

2 (2003) 9 Supreme Court Cases 606

distinction has to be made between cross objections against the decree and cross objections permissible against finding for considering the necessity of appeal. Second Appeal is dismissed in limine only on the ground that suit for injunction was not maintainable and the suit should have been for possession. Civil application stands disposed of.

(A. M. DHAVALA, J.)

Rajeshwari
Subodh
Karve

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by Rajeshwari
Subodh Karve
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