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

**SECOND APPEAL NO.317 OF 2018
WITH
CIVIL APPLICATION NO.699 OF 2018
IN
SECOND APPEAL NO.317 OF 2018**

Akash Gurunath Katare ... Appellant
V/s.
Vijay Ramshekhar Mhetre @
Hanamgaonkar and ors ... Respondent

Mr.Prasad P. Kulkarni, for Appellant.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J

DATE : 19th JUNE, 2018.

P.C. :

- 1] Heard learned counsel for the appellant.
- 2] This Second Appeal is preferred against the judgment and decree dated 24.07.2015, passed by Ad-hoc District Judge-2, Solapur, thereby partly allowing Regular Civil Appeal No.91 of 2015, which was preferred against the judgment and decree dated 31.1.2015 in Special Civil Suit No.231 of 2011.
- 3] The suit was filed by the respondent Nos. 1 to 4 seeking relief of declaration that the sale deed dated 30.12.2010, executed by respondent Nos 5 to 8 in favour of appellant is illegal, null and void and on the basis of said sale deed, they shall not create any obstruction to the possession of respondent Nos. 1 to 4, over the suit

land.

4] It was specific case of the plaintiffs in the trial Court that the suit land was originally belonging to Smt. Limbavabai. She has two sons namely Chandrashekhar and Ramshekhar. Ramshekhar has two sons namely Bhimrao and Sunil and two daughters namely, Indumati and Surekha. Ramshekhar had two wives. Bhimrao and Sunil were born from first wife; whereas from second wife, plaintiff No.1 Vijay, plaintiff No.4 Sunita were born. It was contended that the suit properties were the joint family properties and were not partitioned. In such situation, defendant Nos. 1 to 4 had no right to alienate the suit property, in favour of defendant No.5.

5] It was the case of respondent Nos 1 to 4 that Limbavabai had executed will deed in favour of defendant Nos 1 to 4 and hence they had become exclusive owners of the suit property on the basis of will deed.

6] Both the trial Court and Appellate Court found that the will deed is not properly proved by defendants. It was not produced also. In such circumstances, defendant Nos 1 to 4 cannot be said to be owners of the suit property, on the basis of will deed.

7] The only submission advanced by learned counsel for appellant is that when no specific declaration was sought by the plaintiffs that the will deed executed by Limbavabai was not legal and

not binding, both the trial Court and Appellate Court should not have recorded such finding.

8] However, this contention cannot be accepted as in order to find out whether defendant Nos 1 to 4 had derived the exclusive title of the suit property, it was necessary for the trial Court and Appellate Court to consider whether the will deed alleged to be executed by Limbavabai in their favour was legal and valid. Hence the finding to that effect was required to be recorded as incidental finding, on the basis of which the legality, validity of the sale deed of defendant Nos. 1 to 4 and defendant No.5 was to be decided. Hence, no fault can be found in the impugned judgment of trial Court which is also confirmed by the appellate Court, only with slight modification by holding that the said sale deed is void to the extent of undivided interest of non alienating co-parceners.

9] In view thereof, no interference is warranted in the Second Appeal. Otherwise also no substantial question of law is raised. Hence the Second Appeal stands dismissed.

10] In view of dismissal of Second Appeal, Civil Application No.699 of 2018 also stands disposed off.

[DR.SHALINI PHANSALKAR-JOSHI, J.]