

FARAD CONTINUATION SHEET No.
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

SECOND APPEAL NO. 440/2018

(VITHALRAO S/O MAHADEORAO WALKE (DEAD) THR. LR's ANUSAYABAI WD/O VITHALRAO WALKE & OTHERS **VERSUS** PUSHPAKUMAR S/O RAMESHKUMAR SHRIVASTAVA (DEAD) THR. LR's GEETA PUSHPAKUMAR SHRIVASTAVA & OTHERS)

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Shri A.C. Dharmadhikari, counsel for the appellants.
Shri R.R. Shrivastava, counsel for R-1(a) to 1(c) & 2.

CORAM : A.S. CHANDURKAR, J.

DATE : SEPTEMBER 03, 2018.

This appeal under Section 100 of the Code of Civil Procedure, 1908 has been filed by the original defendants who are aggrieved by the decree passed by the trial Court and confirmed by the first appellate Court.

2. The facts giving rise to the present appeal as can be seen from the plaint averments are that it is the case of the original plaintiffs that initially Khasra No.5/8, Survey No.269 was admeasuring about 22400 square feet and was owned by two brothers Deorao and Bhayyaji. On 13.03.1970, said property was sold to seven purchasers for a consideration of Rs.3,000/-. According to the plaintiffs, one of the purchasers was one Meerabai Choudhary. On 02.02.1984, said Meerabai Choudhary sold about 3200 square feet of land in favour of one Mulchand Gupta, who thereafter constructed about six shop blocks on the area admeasuring 1000 square feet. According to the plaintiffs, on 03.02.1995, they purchased area admeasuring 1925 square feet from Mulchand Gupta for a consideration of Rs.45,000/-. The defendant nos.1 and 2 are stated to be owners of plot nos.2 and 6

and according to the plaintiffs while constructing the boundary wall there was an attempt to encroach upon the properties of the plaintiff. Hence, suit was filed for a prohibitory injunction seeking to restrain the defendants from encroaching or disturbing the plaintiffs' possession. Further relief of declaration that the plaintiffs were the owners of plot no.7 admeasuring about 168 square meters came to be filed. By amending the plaint, a further declaration was sought that measurement of plot no.7 shown as admeasuring 1000 square feet and plot no.6 shown as admeasuring 3600 square feet be declared void.

3. In the written statement filed by the defendant nos.1 and 2, the case of the plaintiffs was denied. According to the said defendants, on 27.05.1970 there was a partition between the seven purchasers of the suit property pursuant to the sale-deed dated 13.03.1970. In that partition, Meerabai was allotted only 1000 square feet area and that part of the land having been sold to Mulchand Gupta, nothing further remained for being claimed by the plaintiffs. According to them, plot no.6 that was given to one Pundlikrao Sambhe admeasured about 3600 square feet. The defendant no.2 claimed that by virtue of sale-deed dated 10.03.1980, said plot no.6 came to be purchased by him. It was thus prayed that the suit was liable to be dismissed.

4. The parties led evidence before the trial Court and after considering the same, the trial Court recorded a finding that the plaintiffs were owners of land admeasuring 3200 square feet and that the defendants were attempting to encroach the same. On that count, the suit was decreed as prayed. The appellate Court after reappreciating the evidence, confirmed that decree. Being aggrieved, the defendant nos.1 and 2 have challenged said decree.

5. Shri A.C. Dharmadhikari, learned counsel for the appellants, submitted that the Courts erred in applying the provisions of Section 45 of the Transfer of Property Act, 1882 (for short, 'the said Act') while concluding that the plot purchased as per Exhibit 179 was equally divided amongst the purchasers. It was submitted that the name of the plaintiffs' vendor Meerabai was inserted after scoring off the earlier names and that correction was counter signed by only one of the vendors. Referring to the sale-deed at Exhibit 238, it was submitted that same was to the extent of 3600 square feet and without challenging that sale-deed it was not open for the plaintiffs to claim that plot no.7 admeasured 3200 square feet. The learned counsel referred to the deposition of the parties and submitted that there was no basis whatsoever for the Courts to apply provisions of Section 45 of the said Act in favour of the plaintiffs. By virtue of the decree as passed, the defendants would be deprived of the property purchased by them under the sale-deed dated 10.03.1980 at Exhibit 238. It was then submitted that the plaint map as filed was without any scale so as to indicate the exact area to which the plaintiffs were claiming entitlement. Referring to the plaint map it was submitted that except description of the suit property by alphabets, the dimensions were not mentioned and thus, a vague description of the suit property was sought to be given. It was further submitted that all purchasers of the suit property were necessary parties in the suit and in their absence, it could not be concluded that there was an equal contribution towards the purchase price while executing the sale-deed at Exhibit 179. It was thus submitted that in the light of these material aspects the appeal gave rise to substantial questions of law which required consideration.

6. Shri R.R. Srivastava, learned counsel for the legal heirs of respondent no.1-original plaintiffs supported the impugned decree. According to him, the suit as filed was only with regard to plot no.7 that is claimed to be purchased by the plaintiffs. No relief whatsoever is sought with regard to plot no.6. It was submitted that during pendency of the suit, the plaint was amended by adding paragraph 2A therein and specific averments with regard to equal contribution being made by the seven purchasers were made. However, the written statement was not consequentially amended which indicated that defendant nos.1 and 2 did not dispute the assertions made therein. Relying upon the provisions of Section 45 of the said Act as well as the decision in *State of Maharashtra & Another Versus B.E. Billimoria & Others* [(2003) 7 SCC 336] it was submitted that in absence of any evidence with regard to unequal contribution, the presumption that each vendor had equal share was rightly applied by the Courts. He also referred to the evidence of the vendor to indicate that her version was not specifically challenged. The execution of the partition-deed was denied by referring to the deposition of the vendor of defendant nos.1 and 2. Referring to the averments in the plaint, it was submitted that the suit property was adequately described so as to enable passing of an executable decree. The objection with regard to non-joinder of necessary parties had not been specifically raised before the Courts. It was thus submitted by relying upon the judgments in *Sajjadanashin Sayed Md. B.E. Edr.(D) by LR's Versus Musa Dadabhai Ummer & Others* [(2000) 3 SCC 350], *Jaspal Kaur Cheema & Another Versus Industrial Trade Links & Others* [(2017) 8 SCC 592], *Church of Christ Charitable Trust and Educational Charitable Society, Represented by its Chairman Versus*

Ponniamman Educational Trust, Represented by its Chairperson/Managing Trustee [(2012) 8 SCC 706], Shivaji Balaram Haibatti Versus Avinash Maruthi Pawar [(2018) 11 SCC 652], Dagadabai (Dead) by Legal Representatives Versus Abbas alias Gulab Rustum Pinjari [(2017) 13 SCC 705] and Sushil Kumar Versus Rakesh Kumar [(2003) 8 SCC 673] that no interference in the appeal was called for.

7. In reply, learned counsel for the appellants referred to the earlier adjudication in Regular Civil Suit No.1824 of 1986 which was filed by Mulchand Gupta for perpetual injunction. It was submitted that the said adjudication amounted to *res judicata* insofar as present plaintiffs who were the purchasers from said Mulchand Gupta were considered.

On the other hand, it was submitted by the learned counsel for the respondents that said suit was for injunction simplicitor and the question of title was only incidentally involved therein. Thus, the principles of *res judicata* would not be applicable.

8. I have the learned counsel for the parties at length and with their assistance, I have perused the records of the case.

9. Perusal of the plaint as filed indicates that the same specifically relates to the plot purchased by the plaintiffs by virtue of sale-deed at Exhibit 181 admeasuring 3200 square feet. According to the plaintiffs, their vendor Shri Gupta had constructed six shop blocks and that area was marked with alphabets ABCD in the plaint map. The remaining portion of said plot was said to admeasure 1925 square feet and it was shown by letters EFGH. The plaintiffs claimed ownership of this portion of plot no.7 admeasuring 1925 square feet as per sale-deed dated 03.02.1995.

The prayers in the plaint indicate declaration sought by the plaintiffs with regard to the area that has been purchased by them with a further prayer of prohibitory injunction. Though it was urged by the learned counsel for the appellants that the suit property was vaguely described and that the plaint map was not according to scale, when the plaint map is considered alongwith the averments made especially in paragraphs 3 and 4 of the plaint, it becomes clear that the relief in the suit is restricted to the area owned by the plaintiffs admeasuring 1925 square feet. The said contention as sought to be raised by the appellants with regard to improper and vague description of the suit property cannot be accepted in the light of the aforesaid.

10. According to the plaintiffs on 13.03.1970, two brothers viz. Deorao and Bhayyaji sold Khasra No.5/8 admeasuring 22400 square feet to seven purchasers. One of the purchasers was one Meerabai Chaudhary. Said Meerabai thereafter sold 3200 square feet of land to Mulchand Gupta as per sale-deed dated 02.02.1984 at Exhibit 180. In the sale-deed at Exhibit 179, there is no reference to the individual contribution made by the purchasers. It is in this context that the provisions of Section 45 of the Act of 1882 would come into operation. As held in *State of Maharashtra & Others* (supra) in absence of any evidence with regard to the contribution towards the total consideration, it would be presumed that the purchasers would be equally interested in the property having equal share. The said presumption has not been rebutted by the defendants by leading cogent evidence. Though it was the case of the defendant nos.1 and 2 that on 27.05.1970, there was a partition between said purchasers and land admeasuring 1000 square feet only was given to Meerabai Chaudhary, that partition-deed has not come on record. Even in the deposition of the vendor

of defendant nos.1 and 2 there is no indication as to the said partition and hence the appellate Court was justified in observing that in absence of said partition-deed being placed on record, the presumption under Section 45 of the Act of 1882 was not rebutted and same would operate. Though in the revenue records at Exhibit 222, the area of plot no.7 is shown as 1000 square feet and that entry has been taken on the basis of partition-deed dated 27.05.1970, in absence of that partition-deed, it cannot be held merely on the basis of mutation entries that Meerabai was allotted land only to the extent of 1000 square feet.

11. In this context, it is to be noted that the defendant no.1 in his deposition at Exhibit 217 admitted that he had a photo-copy of the said partition-deed but the same was not placed on record. Another relevant aspect is that the plaint was amended during pendency of the suit and paragraph 2A was brought on record. In paragraph 2A, it was specifically pleaded by the plaintiffs that all the purchasers had equally contributed while purchasing Khasra no.5/8 on 13.03.1970 and that unequal allotment of the plots could not have been shown by the revenue authorities. The averments made in said amended paragraph were not denied by effecting any consequential amendment. It is therefore clearly a case of *non-traverse* as held in *Jaspal Kaur Cheema & Another* and *Sushil Kumar* (supra). The finding therefore recorded by both the Courts by relying upon the provisions of Section 45 of the Act of 1882 does not deserve to be interfered with.

12. According to the appellants, by virtue of the impugned decree, the area purchased by defendant nos.1 and 2 pursuant to the sale-deed at Exhibit 238 of land admeasuring 3600 square feet of plot no.6 would be reduced. As noted above, the plaintiffs were seeking relief only with regard to the portion of land purchased by

them as per sale-deed at Exhibit 181 to the extent of 1925 square feet. No relief was sought with regard to plot no.6 and the plaintiffs were agitating about their rights only with reference to plot no.7. On the case of the plaintiffs being proved, they are entitled to relief with regard to plot no.7. It is for the defendant nos.1 and 2 to ventilate their grievance if they find that plot no.6 purchased by them does not admeasure 3600 square feet. The same therefore cannot be a reason to deprive the plaintiffs of their entitlement to the property purchased by them. It was not necessary for the plaintiffs to have challenged the sale-deed of the defendant nos.1 and 2 and they were justified in agitating their rights in respect of 1925 square feet of land purchased by them.

13. The plea of non-joinder of parties was not raised by the defendants before the Courts below. Same cannot be raised at this stage of the proceedings. It is found that both the Courts have appreciated the evidence on record in the correct perspective while decreeing the suit. There is a clear admission of the defendant no.1 in his cross-examination that possession of 168 square meters (1925 square feet) from plot no.7 was given to the plaintiffs by his vendor Mulchand Gupta. It is thus found that the Second Appeal does not give rise to any substantial question of law and no interference is required to be made with the impugned judgment.

14. In view of aforesaid, the Second Appeal stands dismissed with no order as to costs. For a period of eight weeks from today, the original plaintiffs shall not create third party rights in the suit property.

JUDGE