

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

Second Appeal No. 0240 of 2019

District : Beed

1. Baliram Rangnath Gund (died)
Through L.Rs.:

1-A. Sunanda alias Beby
Kamlakar Shelke,
Age : Major,
Occupation : Household,
R/o. Barshi Road, Latur,
Dist. Latur.

1-B. Manisha Rajendra Kawade,
Age : Major,
Occupation : Household,
R/o. Kisan Nagar-3,
Ganesh Chowk, Bhatwadi,
Thane, Dist. Thane.

1-C. Suwarnamala Sushil Jadhav,
Age : Major,
Occupation : Household,
R/o. Nagh Nagar,
Parali Vaijinath,
Parali, Dist. Beed.

2. Kamalbai Baliram Gund,
Age : Major,
Occupation : Nil.

3. Ganesh Baliram Gund,
Age : Major,
Occupation : Nil.

4. Nandkumar Chandrakant Gund,
Age : Major,
Occupation : Nil.

Appellants no.02 to 04
R/o. Kaij, Taluka Kaij,
Dist. Beed.

.. Appellants
(Original
defendants)

versus

Shobha Hanumanth Gund,
Age : Major,
Occupation : Household,
R/o. Kaij, Taluka Kaij,
Dist. Beed.

.. Respondent
(Original
plaintiff)

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Mr. Amol B. Chalak, Advocate, for the appellants.

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 22ND APRIL 2019

ORAL ORDER :

01. Present appeal has been filed by the original defendants. Present respondent had filed Regular Civil Suit No. 123 of 2004 for partition and separate possession against the present appellants before Civil Judge (Junior Division), Kaij, District Beed. There were in all four properties in which the plaintiff was claiming share. They were, land bearing Survey no.490/1/K admeasuring 0 acre 78 gunthas, Survey no.499 admeasuring 01 hectare 34 R and Survey no.412/A admeasuring 01 hectare 90 gunthas. There was house property bearing no. 2-1-37/1 consisting of three rooms. All these properties were situated at Kaij, District Beed. Defendants no.01 and 02 are the parents-in-law of plaintiff. Defendant no.3 is her brother-in-law. Defendant no.04 is the purchaser. Plaintiff got married with

Hanumant who was the son of defendants no.01 and 02, on 14-05-2002. However, Hanumant expired on 15-06-2003. Deceased Hanumant was member of the joint family. Suit properties were joint family properties of Hanumant and defendants no.01 to 03. It is stated that the plaintiff has share in the suit properties. The said sale deed executed in favour of defendant no.04 is illegal and not binding on the share of the plaintiff. She demanded her 1/4th share from the suit property on 05-06-2004. However, the defendants denied. Hence, the suit was filed. (Parties are referred as per their nomenclature before the trial Court.)

02. Defendants no.01 to 03 specifically contended that the pedigree given by the plaintiff is incomplete. The defendant has three daughters namely, Baby, Manisha and Suvarna, who were married in 1995, 1997 and 2002, respectively. It was stated that the land Survey no.490/1/K admeasuring 0 hectare 78 R is ancestral land. Defendant no.01 being Karta of the joint family, had obtained loan from one Rambhau Gund and then he has executed nominal sale deed to the extent of 0 hectare 41 R from Survey no.490/1/K on 22-05-2002 in the name of one Sanjay s/o. Rambhau Gund. It was also stated that land Survey no.499 admeasuring 01 hectare 34 R was purchased by defendant no.01 in the name of defendant no.02 in the year 1988 and it is self acquired

property of defendants no.01 and 02. They have sold it to defendant no.04 for repayment of loan of Rambhau Gund for release of the ancestral share. It is stated that defendant no.01 has repaid the amount of Rs. 75,000/- to Rambhau Gund. But Rambhau Gund has not re-conveyed sale deed. It is stated that land Survey no.412 admeasuring 01 hectare 90 R was purchased by defendant no.01 from one Laxmanrao Kokil in the name of Hanumant as well as defendant no.03. The said land was purchased from retirement benefits, GPF, PPF, LIC, etc of defendant no.01. It is stated that as per the said sale deed, Hanumant was the owner of 0 hectare 95 R. It is denied that the plaintiff has 1/4th share in the suit properties.

03. Defendant no.04 had filed separate written statement. It is stated that deceased Hanumant was HIV positive and the loan was obtained by defendants no.01 and 02 for the treatment of Hanumant. In order to repay the said loan, sale deed was executed and, therefore, he is a bona fide purchaser for value without notice.

04. Taking into consideration the rival contentions, issues came to be framed. Parties have led oral as well as documentary evidence. After considering the evidence on record, suit was partly decreed. It has been held that the plaintiff is entitled for 1/14th share in house no.2-1-37/1, land

Survey no.490/1/K, admeasuring 0 hectare 78 R and land Survey no.499 admeasuring 1 hectare 34 R. It is stated that at present, plaintiff is not entitled to any share from Survey no.412/A admeasuring 1 hectare 90 R.

05. Plaintiff has challenged the said judgment and decree in Regular Civil Appeal No. 01 of 2007. The appeal was heard by the learned District Judge-2, Ambajogai, District Beed. It was partly allowed. The judgment and decree passed by the learned trial Court was modified. It was held that the plaintiff is entitled to get 11/84th share from lands Survey no.490/1C, Survey no.499 and 1/4th share in the house property. It was also declared that the sale deed in favour of defendant no.04 was held to be void to the extent of plaintiff's share. Now, the defendants are before this Court in this second appeal.

06. Heard learned Advocate for the appellants.

07. Taking into consideration the judgment and decree passed by both the Courts below and the submissions, it is not even necessary to issue notice to the respondent.

08. Learned Advocate for the appellants submitted that both the Courts below have not considered that the three daughters of original

defendants no.01 and 02 were not made party to the suit and, therefore, the suit was bad for non-joinder of necessary parties. Further, as per the written statement itself, defendant no.01 was ready to give share to the plaintiff from ancestral land i.e. Survey no. 490/1/K and the house property. Further, concurrent finding has been given in respect of property Survey no.412/A. Therefore, it cannot be now questioned. As regards, agricultural land Survey no.499 is concerned, it was self acquired property of defendant no.01. He has purchased it in the name of defendant no.02 from his retirement benefits, GPF as well as PPF and LIC. The property was sold to defendant no.04 in 2003 towards the loan raised by defendant no.01 for treatment to Hanumant, who was suffering from HIV. Therefore, the said transaction was out of legal necessity and, therefore, both the Courts have considered defendant no.04 as bona fide purchaser for value without notice.

09. At the outset, it can be seen that though a contention was raised in the written statement that the suit is bad for non-joinder of necessary parties, a specific issue was not framed by the learned trial Court. But then, it was for the present appellants to bring it to the notice of the trial Court, that there is necessity to frame such an issue. There was no attempt by the defendants and then they proceeded to adduce evidence. Further, it can also be seen

that the learned trial Court has given the calculation as to how he had arrived at the conclusion that the plaintiff has 1/14th share. In para 48 of the judgment of the trial Court, cognizance of three daughters of defendant no.01 has been taken. Under such circumstance, non-joinder of necessary party has not resulted in any perversity.

10. Another fact that is required to be considered, that during pendency of the appeal, defendant no.01 expired and the three daughters have been brought on record as legal representatives. Therefore, whatever objection could have been there as regards their non-joinder of party, it can be said to have been achieved, in a sense, when they have been added as party, may be as legal representatives of original defendant no.01 and then the shares have been carved out in respect of daughters also. Therefore, now, in the second appeal, it cannot be stated that because of the non-joinder of the daughters as party, a substantial question of law is arising.

11. As regards, suit property Survey no.490/1/K is concerned, admittedly, it is ancestral property. According to the defendants, a nominal sale deed was executed by defendant no.01 in favour of one Rambhau Gund and the real transaction between him and Rambhau Gund was a loan transaction. It is to be noted that

Rambhau Gund is not a party to the proceedings. Under such circumstance, in his absence, defendants could not have been allowed to lead any evidence than whatever is appearing on the registered document. Further, as regards purchase of land Survey no.499 in the name of defendant no.02 is concerned, the admission given by defendant no.01 speaks that he had purchased the said property out of the income of his ancestral land in Survey no.490, his salary and by selling some gold ornaments of his wife. Except bare words, it appears that there was nothing to support his contention. He could have definitely adduced evidence and relief on his salary as well as sale of gold ornaments and the purchase of land Survey no.499. He was not specific as to how much amount he had taken from salary and how much was fetched by selling gold ornaments. But he has also stated that he has also used income of ancestral property to purchase land Survey no.499. Therefore, it cannot be said to be an exclusive self acquired property. When the income generated from the ancestral property is also used, then it becomes ancestral. There is no necessity to discuss anything in respect of land Survey no.412/A because both the Courts have abstained themselves from giving any share to the plaintiff out of that land.

12. It will not be out of place to mention here, that the defendants themselves had not preferred any

first appeal challenging the judgment and decree passed by the trial Court. Now, after the first appellate Court's decision, they have filed this second appeal. No doubt, the decree that has been passed by the learned trial Court has been modified by the first appellate Court, but it is to the extent of the share that has been calculated wherein the share of the daughters have also been considered. Under these circumstances, no substantial question of law is arising in this appeal.

13. In the light of above, the second appeal is disposed of as '**not admitted**'.

(Smt. Vibha Kankanwadi)
JUDGE

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