

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

Second Appeal No. 0520 of 2018

District : Jalna

1. Kashinath s/o. Parasram Gayke,
Age : 38 years,
Occupation : Agriculture.
2. Harishchandra s/o. Parasram Gayke,
Age : 36 years,
Occupation : Agriculture.
3. Datta s/o. Parasram Gayke,
Age : 34 years,
Occupation : Agriculture.
4. Gangubai w/o. Parasram Gayke,
Age : 63 years,
Occupation : Agriculture.

All R/o. Shirner,
Taluka Ambad,
District Jalna.

.. Appellants
(Original
plaintiffs)

versus

1. Parasram s/o. Kashinath Gayke,
Age : 68 years,
Occupation : Agriculture.
2. Dagdu s/o. Parasram Gayke,
Age : 42 years,
Occupation : Agriculture.
3. Sakharam s/o. Parasram Gayke,
Age : 33 years,
Occupation : Agriculture.
4. Laxmibai w/o. Shamrao Zarekar,
Age : 80 years,
Occupation : Agriculture

5. Laxmibai w/o. Vithalrao Bagate,
Age : 78 years,
Occupation : Agriculture.

6. Bhamabai w/o. Deorao Gayke,
Age : 53 years,
Occupation : Agriculture.

7. Renuka w/o. Rameshwar Gayke,
Age : 27 years,
Occupation : Agriculture.

All R/o. Shirner,
Taluka Ambad,
District Jalna.

.. Respondents
(Original
defendants)

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Mr. Avinash D. Aghav, Advocate, for the appellants.

*Mr. R.G. Dhakne, Advocate, for respondents no.01 & 02
(Absent).*

Respondent no.03 served (Absent).

Mr. R.V. Gore, Advocate, for respondents no.04 to 07.

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 28TH MARCH 2019

ORDER :

01. Present appeal has been filed by the original plaintiffs. They had filed Regular Civil Suit No. 56 of 2003 for partition and separate possession before Joint Civil Judge (Junior Division), Ambad, District Jalna. It was contended that agricultural land Block no.159, admeasuring 07

hectares 81 R situated at village Shirner, Taluka Ambad, District Jalna, is the ancestral property of the plaintiffs and defendants no.01 to 03. Plaintiff no.04 is the wife of defendant no.01. Plaintiffs no.01 to 03 and defendants no.02 and 03 are the children of defendant no.01 and plaintiff no.04. It is stated that defendant no.01 is the manager of their joint Hindu family. He was addicted to vices and taking disadvantage of the same, defendants no.04 to 06 have got their names recorded to the record of rights. There was no legal necessity to defendant no.01 to alienate the suit land. Defendants no.04 to 06 have illegally taken possession of the suit land. Further, during pendency of the suit, defendant no.06 has sold 40 R of the suit land to defendant no.07 and so also, the said transaction is not binding on the plaintiffs. Plaintiffs contended that they have 4/7th share in the suit land and, therefore, that should be partitioned and separated. (Parties are referred as per their nomenclature before trial Court.)

02. Suit proceeded without written statement against defendants no.01 to 03. However, defendants no.04 to 06 have resisted claim by filing written statement. They denied that the suit property is joint family property of

plaintiffs as well as defendants no.01 to 03. It is stated that the defendant no.01 had acquired the suit land in compromise decree passed in Regular Civil Suit No. 95 of 1981 to the extent of 01 hectare 94 R. Husband of defendant no.06 namely, Deorao was holding 05 hectares 84 R from the said land. Defendant no.01 and Deorao sold 05 hectares land to one Suvarna Devidas Darap on 09-12-1982 by registered sale deed for legal necessity. Accordingly, name of Suvarna Darap has been recorded in the record of rights; however, she has not been made as a party to the suit. But thereafter she had sold the said land to defendants no.04 and 05 on 11-04-1983 by registered sale deed. Defendant no.01 had filed suit for partition of his 01 hectare 94 R against defendants no.04 and 05 as well as Deorao vide Regular Civil Suit No.163 of 1992. However, that suit came to be dismissed on 09-12-1993. Defendant no.07 filed written statement and it was contended that she is a bona fide purchaser for value without notice.

03. Taking into consideration the rival contentions, issues came to be framed. Parties have led oral as well as documentary evidence on record. Learned trial Court has held that the plaintiffs have failed to prove that the suit property is ancestral joint family property. It is

held that the plaintiffs have no share in the suit property. Defendant no.07 is a bona fide purchaser for value without notice. Therefore, the said suit came to be dismissed on 31-12-2012.

04. The plaintiffs challenged the said judgment and decree in Regular Civil Appeal No. 28 of 2013 before District Court, Jalna. The appeal was heard by learned Ad hoc District Judge-3, Jalna and it came to be dismissed on 08-09-2015. Hence, present second appeal.

05. Heard learned Adv. Mr. A.D. Aghav appearing for the appellants. So also, heard learned Adv. Mr. R.V. Gore appearing for respondents no.04 to 07. None for respondents no.01 to 03 though served.

06. It has been vehemently argued on behalf of the appellants, that both the Courts below have not considered the evidence as well as law points properly. The suit property was ancestral property of defendant no.01 and, therefore, definitely the plaintiffs as well as defendants no.02 and 03 along with defendant no.01 have share in the suit property. Learned first appellate Court ought not to have given weightage to Regular Civil Suit No. 163 of 1992 filed by defendant no.01 as the

contents of the said pleadings were not proved in this case. The sale deeds which were executed by defendant no.01 in favour of defendants no.04 and 05 were not binding on the plaintiffs as they have share in the suit property. Further, it was not considered that the transaction between defendant no.04 and defendant no.07 was hit by *lis pendense*. Therefore, definitely, substantial questions of law are arising requiring admission of the second appeal.

07. Per contra, learned Advocate appearing for respondents no.04 to 07 supported the reasons given by both the Courts below. Though it was the statement that Advocate Mr. R.G. Dhakne would be appearing for respondents no.01 and 02, he had not filed Vakalatnama and he was not present on the day when the matter was taken up for hearing.

08. It is to be noted from the impugned judgments and decree, that though the plaintiffs were contending that the suit property admeasuring 07 hectares 81 R in Block no.159 was the ancestral property, yet the documents on record show that defendant no.01 was the owner of land admeasuring 01 hectare 94 R land only. Defendants have categorically pleaded and proved by filing the compromise decree in Regular Civil Suit No. 95 of

1981 (Exhibit 99) and terms of compromise (Exhibit 40), that suit Block no.159 and other two lands were the subject matter of that suit. That suit was filed by one Mainabai and Deorao i.e. husband of present defendant no.06. Present defendant no.01 was party to that proceedings. The terms of compromise show that the three properties i.e. including the suit property was inherited by Mainabai from her son Kachru, who expired about 35 years prior to that suit. Since Mainabai was issueless, she had adopted Deorao and as per the terms of compromise, 5 hectares 84 R was given from Block no.159 to Deorao and defendant no.01 received 01 hectare 94 R. Thus, the origin as to how the property came to defendant no.01 was the said compromise terms and decree. Therefore, it cannot be stated that the suit property was ancestral property of defendant no.01 as well as plaintiffs and defendants no.02 and 03. When it was received by defendant no.01 in a compromise, that too, to the extent of 01 hectare 94 R land only, it becomes separate property of defendant no.01 over which the plaintiffs and defendants no.02 and 03 have no right. This fact, coupled with the legal point has been properly dealt with by both the Courts below.

09. The conduct of defendant no.01 is also required to be considered in Regular Civil Suit No.

163 of 1992. That was the suit filed by him for partition. Though it was dismissed in default, yet, his contention can be taken into consideration. Instead of defendant no.01 seeking restoration of that suit, it appears that he filed suit for partition through plaintiffs. Still he cannot run away from the pleadings in that suit. In that suit, he had clearly contended that his right is restricted to 01 hectare 94 R only. Therefore, plaintiffs, in all, cannot claim any right over 07 hectares 81 R land from Block no.159. Further, as regards, the compromise decree, same has not been challenged by anybody. So also, the order of dismissal in default of Regular Civil Suit No. 163 of 1992 has also become final. Both the proceedings have binding effect on the plaintiffs as they want to claim through defendant no.01. When it was a separate property of defendant no.01, we need not even take the point of legal necessity into consideration. He had every right to dispose of the property. Accordingly, he had disposed it of and, therefore, now the plaintiffs cannot claim any right contending that they have share in the suit property.

10. Both the learned lower Courts have dealt with the facts as well as law properly and, therefore, when there is concurrent finding, this

Court would be very slow in interfering with the said judgments and decrees unless it is shown that the said finding is perverse. The appellants have failed to prove any kind of perversity and, therefore, no substantial question of law can be said to arise in this appeal.

11. In the result, the second appeal is disposed of as '**not admitted**'.

(Smt. Vibha Kankanwadi)
JUDGE

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