

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CIVIL APPLICATION NO. 8936 OF 2018
IN SECOND APPEAL NO. 586 OF 2018

Nirmalabai Sahebrao Shinde,
Age 47 years, Occupation Agri.,
R/o ambewadi, Aghur,
Tq. Vaijapur Dist. Aurangabad. ...Applicant.

VERSUS

Vatsalabai Karbhari Shinde,
Age 88 years, Occupation Nil,
R/o Aghur Tq. Vaijapur
Dist. Aurangabad.
And Others. ...Respondents.

...
Mr. R. V. Gore, Advocate for applicant.
Mr. A. D. Kasliwal, Advocate for respondents No.1 and 2.

...
CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 09-01-2019.

ORAL ORDER :

1) Heard Mr. R. V. Gore, learned advocate appearing for applicant and Mr. A. D. Kasliwal, learned advocate appearing for respondents No.1 and 2.

2) The present civil application has been filed by the appellant who was original defendant No.9 before the trial Court. Present respondents No.1 and 2 were the plaintiffs in Regular Civil Suit No. 10 of 2005. The said suit was filed for partition and separate possession of land Gut No. 89 admeasuring 10 Acres 33 Gunthas situated at Mauje Loni (Bk.) Tq. Vaijapur Dist. Aurangabad along with declaration that, sale deed dated 15-05-2001 is not binding

upon them. Present applicant/ appellant had purchased 2 Acres 29 Gunthas land out of the said gut from Subhadrabai, mother of defendant No.3 / respondent No.3. Original defendants No.1 to 8 had filed the written statement and it was stated that, there was partition in respect of land Gut No.117. The plaintiffs had relinquished their rights in the said suit land and it was stated that, they have no concern with Gut No.89. It was stated that, Subhadrabai had taken loan of Rs.30,000/- from defendant No.9 and executed sale deed dated 15-05-2001 for security reasons. It was stated that, it was a nominal sell however that sale deed is null and void. Defendant No.9 had contested the matter and filed her own written statement stating that, even defendant No.3 had signed the said sale deed which was in respect of land Gut No.89 received by Subhadrabai as her 'Stridhan'. She was the exclusive owner of the said property. The said suit Regular Civil Suit No.10 of 2005 came to be partly decreed on 19-11-2009, in respect of plaintiff No.2, granting 1/6th share. Plaintiff No.1 filed Regular Civil Appeal No.172 of 2012. Even defendant No.9 filed Regular Civil Appeal No.40 of 2012 before learned Additional District Judge, Vijapur. Both the appeals were allowed and the Judgment and decree passed by the lower Court was set aside. The matter was remanded for framing proper issues and giving opportunity to the parties. After the remand of the suit again the trial Court partly decreed the suit and it

was held that the sale deed is not binding upon the plaintiffs. Defendant No.9 preferred appeal bearing Regular Civil Appeal No.54 of 2016 before learned Additional Adhoc District Judge – 1, Vijapur. The appeal has been dismissed on 26-10-2017. The said Judgment and decree, the defendant No.9 intends to challenge in the second appeal.

3) It has been contended by the applicant that, during the pendency of the appeal, the stay was granted to the execution of the Judgment and decree passed by the learned trial Court. Certain factual as well as law points were not at all considered by both the Courts below. They have lost sight of the point that whether Vastalabai, Sudam and Ashok had any right in ancestral property of Karbhari as they were the illegitimate children as Vastalabai was not legally wedded wife of Karbhari. Defendant No.9 was put in possession of the property by Subhadrabai, and therefore, since the date of sale deed he is enjoying the said property. It is stated that, she has good grounds to succeed in second appeal, and therefore, she has prayed for stay of the impugned decrees.

4) The application has been objected on the ground that, evidence has been properly considered by both the Courts below. When there are concurrent findings, they need not be interfered with.

5) It is to be noted that, plaintiff had come with a case that, plaintiff No.2, defendants No.1 and 2 are the children of plaintiff No.1. One Karbhari was the owner of land Gut No.89. It was specifically stated that, there was partition of the properties, Gut No.117 was partitioned between four sons of Karbhari and then Gut No.89 came to the share of Karbhari and plaintiff No.1. The legal point, what was the nature of Gut No.89 after it was allegedly received by Karbhai in partition. A specific contention was raised that the plaintiff No.1 is not the legally wedded wife of the Karbhari. Karbhari had son by name Babulal and Subhadrabai was the wife of Babulal. The question involved is, whether she was in a position to execute a sale deed in respect of a specified portion of 2 Acres 29 Gunthas. The defence that has been taken by defendant No.9 is that, the said portion was received as a 'Stridhan' by Subhadrabai and then she executed the sale deed for legal necessity. Both the issues in that respect have been answered in the negative by the learned trial Court as well as by first appellate Court. Whether the appellant can be said to be the bonafide purchaser is also required to be considered. No doubt the sale deed is executed and it is specifically stated that the possession has been handed over. The sale deed is executed in the year 2001 and the suit came to be filed on 04-01-2005. Another fact that is also required to be considered that, since Subhadrabai might be getting some share in the entire

land, whether the acts done by Subhadrabai can be adjusted, that means, while partitioning the land whether the land which would go to the share of the Subhadrabai, can be adjusted to defendant No.9 is also required to be considered, which has not been considered by both the Courts below.

6) Under such circumstance, the case is made out to grant stay to the execution of the decrees given by Courts below till the hearing and final disposal of the second appeal. It is made clear that the admission of the second appeal will be considered separately after perusing the record and proceedings. Hence, following order.

ORDER

1. The application is hereby allowed.
2. The operation, implementation and execution of Judgment and decree dated 26-06-2017 passed by learned Adhoc District Judge-1, Vaijapur Dist. Aurangabad in Regular Civil Appeal No. 54 of 2016, arising out of Judgment and decree dated 24-08-2016 in Regular Civil Suit No. 10 of 2005 passed by learned Civil Judge, Junior Division, Vaijapur is hereby stayed, pending and final disposal of the second appeal.
3. Put the second appeal for admission on 06-02-2019.

**(SMT. VIBHA KANKANWADI)
JUDGE**

vjg/-.