

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

SECOND APPEAL NO.649 OF 2014

WITH

CIVIL APPLICATION NO.10586 OF 2008

WITH

CIVIL APPLICATION NO.2180 OF 2017

Adinath Sakharam Solanke

...Versus...

Sau. Mathurabai w/o Vaijinath Kamble and others

...

Mr. G.V. Mohekar, Advocate for the appellant

Mr. B.S. Kudale, Advocate for the respondent No.1

Mr. B.A. Shinde, Advocate for the respondent No.2

Mr. G.C. Navandar, Advocate for the respondent No.3

Mr. A.A. Nimbalkar, Advocate for the respondent Nos.8A and 8B

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CORAM : SMT. VIBHA KANKANWADI, J.

RESERVED ON : 28th MARCH, 2019

PRONOUNCED ON : 02nd APRIL, 2019

ORDER :

1 Present appeal has been filed by the original defendant No.8.
(The parties are referred as per their nomenclature before the Trial Court.)
Present respondent No.1 was the original plaintiff, who had filed Regular

Civil Suit No.200/1990 for partition and separate possession before Joint Civil Judge Junior Division, Majalgaon, Dist. Beed. The said suit was for partition and separate possession. It came to be decreed. It was held that the plaintiff, defendant No.1 and defendant No.2 each have $4/16^{\text{th}}$ share, defendant No Nos.3, 4 and 5 each have $1/16^{\text{th}}$ share and defendant Nos.6A to 6D jointly have $1/16^{\text{th}}$ share in the suit property. Original defendant No.1 challenged the said Judgment and Decree in Regular Civil Appeal No.96/2004 (old No.3/2001) and present appellant-original defendant No.8 challenged the said Judgment and Decree in R.C.A. No.186/2004 (old No.10/2004). Both the appeals were heard by learned Adhoc District Judge-1, Majalgaon and both were dismissed by a common Judgment on 08.02.2007. Present appellant is original defendant No.8, therefore, challenged the said Judgment and Decree in this Second Appeal.

2 The learned Advocate appearing for the appellant submitted that the appellant is the purchaser of 4 Acres land from the suit land which is agricultural land bearing Gat No.45 admeasuring 11 Hectare 22 Ares from western side and which is more particularly described in para No.2 of the plaint. It is stated that the collusive suit between plaintiff and defendant No.1, in order to dupe him he is a bona fide purchaser for value without notice. However, opportunity was not given to him to contest the matter. Substantial question of law is arising on the point that property

originally belong to Narhari, who had two wives. Defendant No.2 is the son of one of the wives, defendant Nos.1 and 2 are the sons of first wife and plaintiff is the daughter of second wife. Evidence was led to show that plaintiff has relinquished his share from the suit properties and the mutation entries showing partition were not considered by both the Courts below. It was the contention of the defendant Nos.1 and 2 that there was oral partition in 1980-81 by metes and bound and accordingly revenue entry was taken on 08.01.1982. By considering those entries and the fact of partition, defendant No.8 had purchased the land and therefore, his transaction and possession ought to have been protected by both the Courts below.

3 Per contra, the learned Advocates appearing for respondent Nos.1, 2, 3, 8A and 8B have supported the reasons given by both the Courts below and it has been submitted on behalf of the original plaintiff that though the opportunity was given to defendant No.1 to contest the matter, he failed to file written statement and then directly filed the First Appeal. Both the Courts below have considered the evidence on record and come to the right conclusion that the suit property was the self acquired property of Narhari. Mother of the plaintiff got married prior to 1956 and therefore, her daughter has share in the suit properties. Defendant No.8 has purchased the land during the pendency of the suit and therefore, it is hit

by doctrine of lis pendense.

4 At the outset, it is required to be seen, as to whether any substantial question of law has been made out as contemplated under Section 100 of CPC, in order to admit the Second Appeal. Here, in this case, the suit was filed on 13.08.1990, whereas the present appellant-original defendant No.8 has purchased the suit property by sale deed dated 19.05.1992. It appears that the defendant Nos.1 and 2 were relying on mutation entry to prove partition and alleged relinquishment by the plaintiff i.e. Mutation Entry No.185. Copy of the same is made available. That does not show that there was a partition. Only entry of legal heirs of Narhari was taken. It was also stated that both the sons should be given half share and both daughters and two wives name should be entered in other rights column. This endorsement cannot amount to partition by any stretch of imagination. It is the noting taken by the revenue authority and it does not show that anybody from the sharer or coparcener had expressed any kind of intention to sever the relationship and then partition was done. If partition would have effected, the details would have been given as to which portion has been given to whom, therefore, the said mutation entry is not helpful to defendant No.8.

5 Both the Courts below have held that defendant Nos.1 and 2 have failed to prove the relinquishment, which is stated to be on the basis of

cash amount as well as gold given to plaintiff, both the widows of Narhari. This being the question of fact cannot be gone in Second Appeal.

6 When the suit was filed prior in time to the transaction of sale between defendant No.2 and defendant No.8, it cannot be said to be a collusive suit.

7 As regards giving opportunity to defendant No.8 to contest the matter, the First Appellate Court has specifically framed the point Nos.3 and 4 and dealt with it elaborately. In spite of giving many opportunities to defendant No.8 to file written statement, he did not contest. Further, opportunity was also given to him to cross examine the witnesses, but the learned Advocate, who was representing the defendant No.8 denied to cross examine the plaintiff. That means, even after not filing the written statement, the defendant No.8 had taken part in the trial of the suit. Therefore, now, defendant No.8 cannot agitate that proper opportunity was not given him to contest the matter. The burden was on him to prove that he was a bona fide purchaser for value without notice. Thus, taking into consideration the impugned Judgment and Decree, it can be said that no substantial question of law has been made out to admit the Second Appeal.

8 Before parting a fact can be noted that defendant No.2 who is the vendor of the present appellant has 4/16th share in the suit property, he

had the right to sell out the undivided share. Therefore, at the time of execution of the Judgment and Decree, if possible, the property sold to the present appellant can be put to the share of defendant No.2 and this observation may be considered by the executing Court/executing authority.

9 With the above said observations, the Second Appeal is disposed of as “**Not admitted**”. Since Second Appeal is not admitted, pending Civil Applications are also disposed of.

(Smt. Vibha Kankanwadi, J.)

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