

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

09 SECOND APPEAL NO.680 OF 2014

1. Gangubai Tulshiram Bhujal (Deceased)
Through L.Rs.
2. Sumanbai Arvind Gheware,
Age 52 years, Occupation Household,
R/o Ragini Society, A-3,
Plot No.5, Nakshatra Park, Walmi
Naka Paithan Road, Aurangabad.
3. Chandraprabha Vinayak Kulkarni,
Age 50 years, Occupation Household,
R/o Nibayati Tal. Soygaon Dist.
Aurangabad.
4. Ushabai Purushottam Bhatt,
Age 48 years, Occupation Household,
R/o Plot No.28-A, Prabhunagar,
Society, Opp. Indonesia Company,
(Bajuwa) Gujarat State.

...Appellants.

VERSUS

1. Jaiprakash s/o Tulshiram Bhujal,
Age 41 years, occupation Agri.,
R/o Aakhatwade Tq. Pachora,
Dist. Jalgaon.
2. Subhash s/o Tulshiram Bhujal,
Age 38 years, Occupation Agri.,
R/o Aakhatwade Tq. Pachora,
Dist. Jalgaon.
3. Sanjay s/o Gopal Baag,
Age 43 years, Occupation Money-
Lending, R/o 13, Awalika Society,
Bhadgaon Road, Purne Patre Near Laons

Tq. Chalisgaon Dist. Jalgaon.

..Respondents.

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Mr. S. S. Choudhary, instructed by Mr. D. B. Pokale,
Advocates for appellants.

Mr. S. S. Kulkarni and Mr. A. S. Kulkarni, Advocate
for respondents No.1 and 2.

Mr. P. S. Shendurnikar, Advocate for respondent No.3.

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CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 08-04-2019.

ORAL ORDER :

1. Heard learned advocate Mr. S. S. Choudhary instructed by Mr. D. B. Pokale appearing for the appellants as well as Mr. P. S. Shendurnikar appearing for respondent No.3.

2. Present appellants had filed suit for partition and separate possession as well as for permanent injunction bearing Regular Civil Suit No.06 of 2005 in respect of land Gut No.258 /1 admeasuring 1 Hectare 72 R, Gut No.258/2 admeasuring 61 R situated at Mauje Badarkhe Tq. Pachora Dist. Jalgaon. The said suit was partly decreed. Plaintiff No.1 and defendants No.1 and 2 were granted 1/3rd share each in the suit properties. So also it was declared that, the sale deed dated 03-02-1998 between defendants No.1, 2 and defendant No.3 as illegal and not binding on the plaintiffs. The said

decree was passed by learned Civil Judge, Junior Division, Pachora on 08-07-2008. Original defendant No.3 filed Regular Civil Appeal No.189 of 2008 before District Court, Jalgaon. The said appeal was heard by learned Principal District Judge, Jalgaon. The appeal was partly allowed. The decree passed by the learned trial Court was set aside to the extent of sale deed in favour of appellant as illegal and granting $1/3^{\text{rd}}$ share to plaintiffs No.1 and defendants No.1 and 2. The decree was then modified stating that, plaintiffs No.2 to 4 and defendants No.1 and 2 were entitled to $1/5^{\text{th}}$ share in the suit properties. Hence, present appeal by original plaintiffs.

3. It has been submitted on behalf of the appellants that, the relief in respect of sale deed being not binding on the plaintiffs as granted by the learned trial Court ought not to have been disturbed by the first appellate Court. So also the shares have been recalculated. If the $1/5^{\text{th}}$ of the suit properties is considered then the shares will be in fragments and therefore the second appeal is filed.

4. Per contra, the learned advocate for defendant No.3 submitted that, there was wrong calculation on the part of the learned trial Court, and therefore, the said calculation has been corrected by the

first appellate Court. Defendants No.1 and 2 have share in the property and they have executed the sale deed. Therefore, only as it was prayed the sale deed cannot be held to be illegal. Therefore, the first appellate Court has corrected the mistakes committed by the trial Court.

5. It is not in dispute that, defendants No.1 and 2 have share in the suit properties. It has been held by both the Courts below that, the plaintiffs also have share in the property. It is to be noted that, original plaintiff No.1 expired during the pendency of the appeal and the present appellants No.2 to 4 are the legal representatives of original plaintiff No.1. In fact while decreeing the suit the trial Court had not considered as to whether plaintiffs No.2 to 4 have any share or not but then $\frac{1}{3}^{\text{rd}}$ share was granted to plaintiff No.1. The first appellate Court has taken a note of death of original plaintiff No.1, and therefore, the calculation has been made, and taking into consideration the effect of amendment to Section 6 in the Hindu Succession Act, the three daughters and two sons i.e. defendants No.1 and 2 were given equal shares. Therefore, there appears to be no illegality or error committed by the first appellate Court as regards calculation of share is concerned.

6. As regards sale deed dated 03-02-1998 is concerned, the defendants No.1 and 2 had sold the land to defendant No.3. The declaration was given that, it is illegal and also it was stated that it is not binding on plaintiffs. Taking into consideration the reasons given by the first appellate Court though the operative part says that, the decree passed by the trial Court is set aside to the extent of holding the sale deed in favour of defendant No.3 as illegal yet it is stated that the rest of the decree is affirm. That means, what is affirm is that, it is held that the sale deed dated 03-02-1998 is not binding on the plaintiffs. Therefore, there is no reason for the appellants to file the second appeal on that count. The relief is still in their favour.

7. Lastly it is stated that, after the calculation of shares with the area of the suit properties, it will create fragment. It will not be out of place to mention here that, the law takes its course and every provision is made in the Maharashtra Prevention of Fragmentation and Consolidation Holdings Act. If such partition is going to create a fragment then as per Section 8 AA (2), a procedure has been laid down which is required to be adopted by the Court or the Collector as the case may be, and therefore, when that procedure laid down in Section 8 AA (2) of the Maharashtra Prevention of the Fragmentation

and Consolidation of Holdings Act 1947, is followed then the grievance of the appellant may be redressed, for that purpose no directions are required to be given. That powers are inherent or conferred on the authority executing the partition. The parties would be at liberty to raise those objections or adopt the said procedure before the executing authority. Hence no substantial question of law has been made out requiring the admission of the second appeal. Hence, the second appeal is disposed of as not admitted.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.