

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

917 SECOND APPEAL NO.171 OF 2019

SHIVANAND KALLYANAPPA SOLSHE
VERSUS
PRASHANT SHIVAJI SURVASE AND OTHERS

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Mrs. Surekha G. Chincholkar, Advocate for the appellant

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 13th MARCH, 2019

PER COURT :

1 Heard learned Advocate for the appellant. The present appellant is the original defendant No.2. Present respondent Nos.1 to 4 were the original plaintiff Nos.1 to 4, who had filed Special Civil Suit No.136/2011 for partition and separate possession as well as declaration that the sale deed is not binding on their share before the learned 5th Joint Civil Judge Senior Division, Osmanabad. The said suit proceeded ex parte against both the defendants. The suit came to be decreed. It was the case of the plaintiffs that plaintiff No.4 is the wife of defendant No.1 and plaintiff Nos.1 to 3 are their children. It is stated that plaintiffs have share in agricultural land bearing Gat No.207 admeasuring 12 Hectares 34 Ares Western side

admeasuring 6 Hectares 40 Ares situated at village Murta, Tq. Tuljapur, Dist. Osmanabad. It is stated that the said property belongs to Joint Hindu Family. Defendant No.1 has sold the said property to defendant No.2 on 13.10.2011 without the consent of the plaintiffs. Defendant No.1 had no exclusive right to sell the said property and therefore the suit for partition and separate possession as well as for declaration, that the said sale deed is not binding on their share, was filed.

2 Defendant No.1 appeared in the matter, but did not file his written statement. Defendant No.2 though served, failed to appear. It appears that after taking into consideration the oral evidence in the form of affidavit-in-chief of plaintiff No.4 and the revenue records, the suit came to be decreed. It was held that each of the plaintiff has 1/5th share in the suit property. The declaration about the sale deed dated 13.10.2011 executed by defendant No.1 in favour of defendant No.2 is not binding on the plaintiffs share has also been granted.

3 Original defendant No.2 intended to challenge the said Judgment and Decree and therefore approached District Court, Osmanabad, however, there was delay of 3 years 7 months and 21 days. Therefore, Miscellaneous Civil Application No.15/2017 was filed for condonation of delay.

4 In the said application for getting the delay condoned the applicant/original defendant No.2 contended that he had no knowledge about the pronouncement of Judgment and Decree by the Trial Court. He was suffering from Hypertension, Blood Pressure and Diabetes. Due to his old age and the continuous treatment, he was advised by his Doctor to take total bed rest. He came to know about the Judgment and Decree only on 25.01.2017 and then he applied for the certified copies.

5 The application was contested by the respondent Nos.1 to 4 stating that the delay has not been explained properly and day to day explanation for the delay has not been given.

6 It appears that the applicant preferred not to lead any evidence and only on the basis of submissions made by the learned Advocate, who was presenting both the parties, the application has been decided. It was found by the learned First Appellate Court that the applicant has not made out the case for condoning the delay of 3 years 7 months and 21 days, thereby application was rejected. Now, the said order is under challenge in this Second Appeal.

7 Learned Advocate appearing for the appellant/applicant submitted that though the defendant No.2 was duly served by the suit summons, he failed to appear, it was on the basis of the presentations

made by the defendant No.1. He had no knowledge about the passing of Judgment and Decree. He had given reasons for the delay in preferring the appeal. An opportunity ought to have been given by the First Appellate Court to produce documentary evidence to submit the reasons given by the applicant. The applicant has good case on merits. It is submitted that before he purchase the said property, he had given a public notice in the newspaper. He had taken precautions before purchasing the land. In the sale deed also, it is mentioned that the transaction has taken place due to the legal necessity on the part of the defendant No.1. Plaintiff Nos.1 and 2 were minors. So also plaintiff No.3 was 18 years of age. Therefore, it was stated in the sale deed itself that the decision to sell the suit land was taken to raise expenses for domestic purpose. Therefore, the said sale transaction was binding on the plaintiffs. Another fact, which was not brought on record by the plaintiffs was that the family has other properties also, but they were kept out of the ambit of suit for partition. When other properties belonging to the Joint Family were not brought into hotch pot, the suit for partial partition was not maintainable and therefore all these points could have been raised by the appellant in his First Appeal. However, while deciding the delay condonation application the learned First Appellate Court has not exercised the discretion properly.

8 Most of the facts, which have been narrated earlier would show that the suit proceeded ex parte against the defendant No.2 i.e. present applicant. Present applicant is not challenging the mode of service of summons on him. That means, he was properly served. It was his decision not to engage any Advocate. At this stage, we cannot say that any representation was made by defendant No.1 to him, as a result of which he had not attended the dates given by the Trial Court. In fact, when the fact is admitted that the suit property was the ancestral property or the property belonging to the Joint Hindu Family, then what precaution defendant No.2 had taken would have been in question. We cannot go into further merits of the case. Only on the basis of submissions made on behalf of the applicant, it is only required to be seen in this Second Appeal, whether the discretion with the First Appellate Court was exercised by the First Appellate Court judiciously or not. Applicant had approached the First Appellate Court after the period of 3 years 7 months and 21 days. It was definitely a huge and inordinate delay. The reason that was stated, was that the applicant was suffering from Hypertension, Blood Pressure and Diabetes. Though it was stated by the present applicant that he was advised complete bed rest, he has not produced any documentary evidence to support his contention. He has also stated that due to old age and continuous treatment he was

advised the bed rest. It is to be noted that even in this application his age is given as 55, in the suit, which was filed in the year 2011 his age has been given as 48. It cannot be stated that he is old aged person. When inspite of opportunity he had not filed documentary evidence in the form of medical certificates to support his contention about the advise of bed rest, the learned First Appellate Court was justified in rejecting the application for condonation of delay. No circumstance has been pointed out, which would lead to inference that the discretion has not been exercised judiciously by the learned Principal District Judge, Osmanabad while dealing with the matter. Under such circumstance, as regards the scope of this appeal is concerned, no substantial question of law has been pointed out, and therefore, matter cannot be admitted as contemplated under Section 100 of the Code of Civil Procedure. The appeal stands disposed of as not admitted. Civil Application also stands disposed of.

(Smt. Vibha Kankanwadi, J.)

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