

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CIVIL APPLICATION NO. 15081 OF 2018
IN
SECOND APPEAL NO. 883 OF 2016

1. Govindsinha s/o Vitthalsinha Tehra,
Age 67 years, Occupation Business,
R/o Gadipura, Nanded.
 2. Vinodsinha s/o Vitthalsinha Tehra,
Age 56 years, Occupation Business,
R/o Gadipura, Nanded.
 3. Rekhabai w/o Ashoksinha Pardesi,
Age 62 years, occupation Household,
R/o 296, Ganesheth, Near Alpana
Talkies, Pune.
 4. Sushma w/o Ramsinha Pardeshi,
Age 61 years, Occupation Household,
R/o Patharwada Tq. Ambad Dist.
Jalna.
 5. Geeta w/o Durgsinha Hajari,
Age 60 years, Occupation Household,
R/o Rajput Galli, Talikot,
Dist. Bijapur (KS).
 6. Reetabai w/o Somnathsinha Pardeshi,
Age 53 years, Occupation Household,
R/o 25, Nanpeth, Near Dhoke,
Talim Tq. Dist. Pune.
- ..Applicants.

VERSUS

1. Deelipsing s/o Vitthalsingh Tehra,
Age 64 years, occupation Business,
R/o ND -3 , Cidco, Aurangabad
Tq. Dist. Aurangabad.
2. Mohd. Nisar s/o Abdul Sattar,
Age 57 years, Occupation Business,

R/o Shri Nagar, Nanded
Tq. Dist. Nanded.

3. Niyojit Suryanagar Police Adhikari
& Karmachari Gruh Nirman Sanstha
Hassapur, through its
Promoter, Mohd. Rafi s/o Cahnd
Sab Khan Police Inspector, Vehicle
Department, Aurangabad
Tq. Dist. Aurangabad. ..Respondents.

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Mr. Katneshwarkar, Advocate instructed by Mr.
Janakwade Shivsamb N. for applicants.

Mr. A. A. Mukhedkar, Advocate for respondents.

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CORAM : SMT.VIBHA KANKANWADI, J.

**Date of reserving the
Order : 07-01-2019.**

**Date of Pronouncing the
Order : 22-01-2019.**

ORAL ORDER :

1. Present application has been filed by original respondents No.2, 3, 6, 7, 8 and 9 of the second appeal allowing them to sell the suit land to the extent of 5 H 57 R to fulfill the demands.

2. The applicants are contending that, they are the brothers and sisters interse. Respondent No.1 is also their brother who had filed Special Civil Suit No.96 of 2006 for declaration regarding his ownership and possession over 1/3rd land from Survey No.7/A admeasuring 1 H 7 R and Survey No.7/B admeasuring 5 H 50 R

situated at Hastapur Tq. Dist. Nanded, and other house property. The suit came to be dismissed by learned Joint Civil Judge, Senior Division, Nanded holding that he has failed to prove his share, and therefore, not entitled to have partition and separate possession. Thereafter he preferred Regular Civil Appeal No.151 of 2012. The same came to be dismissed by learned Adhoc District Judge -2, Nanded on 11-08-2016. Therefore, he has filed the second appeal which has been admitted on the substantial questions of law. It has been contended that, though initially it was canvassed by plaintiff that, there was a oral partition between him and defendants No.1 to 3, he could not prove the same. Thereafter, he had filed an affidavit before the Appellate Court stating that, Gut No.7 admeasuring 27 H 37 R belongs to one Rajusinh s/o Laxmansinh Rajput. He also referred to some compromises, and thereafter, he tried to change his pleadings on the basis of some compromise deed filed in Special Civil Suit No. 99 of 1990, thereby stating that his mother got the said property from her maternal side. The said theory has not been accepted by the first appellate Court, therefore his entitlement itself is in question. However, on the basis of application filed by the appellant, the present applicants have been restrained from alienating the suit properties. The total suit property admeasures 6 H 57 R, the share claimed by the plaintiff is to the extent of 1/3rd and by way of amendment he has claimed 1/7th share which comes

around 1 H, and for this share he has blocked transaction of the entire land. Even after considering the case of the plaintiff he has no right excess to 1 H. It is stated that, the sisters are married and practically they are not in a position to cultivate the land. Elder brother i. e. applicant No.1 has become old. Applicant No.2 is heavily indebted as he had taken loan from several persons for the purpose of marriage of his daughter and son. Applicant No.4 is a cancer patient, and therefore, they have prayed to allow them to sell land from suit land to the extent of 5 H 57 R.

3. The application has been orally objected by the respondent No.1, to this application original appellant.

4. Heard learned advocate Mr. Katneshwarkar instructed by learned advocate Mr. S. N. Janakwade for applicants and learned advocate Mr. A. A. Mukhedkar for respondent No.1. Perused the documents.

5. It has been submitted on behalf of the applicants that, even for the sake of arguments it is accepted that, plaintiff has any right in the suit properties, it would come as per his own pleadings to the extent of 1 H, taking into consideration the fact that he is claiming 1/7th share. Taking into consideration the need of the applicants, they have prayed for selling out the portion of the land by keeping the share which might be allotted at the end of the second appeal.

He also submitted that, respondent No.1 may get 1 H land demarcated as per his choice and the rest may be allowed to be sold by applicants. When both the Courts below are against him, he should not block the rights of the applicants, especially when they are in need of finance.

6. Learned advocate for the respondent No.1 submitted that, though the Courts below are against the respondent No.1 the appeal is admitted and after hearing both the parties the injunction has been granted restraining the present applicants from alienating or creating third party interest, therefore they cannot ask the plaintiff to demarcate 1 H land in anticipation.

7. Though both the Courts below are against the respondent No.1 – original plaintiff, it is to be noted that the second appeal has been admitted, and therefore, it has to be taken to the logical end. The calculations may be correct that as per 1/7th share claimed by plaintiff he would get at the most 1 H land, but it is to be noted as to whether during the pendency of the suit appellants can be allowed to dispose of the other portion of the land. The reason why the applicants want to sell the land is stated that, applicant No.1 has become old, that cannot be the ground for selling the land. In fact he has given his occupation as business and he is only 67 years of age. When he can look after his business, he may also look after

the land. As regards applicant No.2 is concerned it is stated that, he is heavily indebted as he had obtained loan from several persons for the purpose of marriage of his daughter and son. Only vague statement has been made, no particulars have been given when the daughter and son of applicant No.2 got married and how much loan has been obtained by him. Further as regards applicant No.4 is concerned, a certificate dated 17-08-2018 has been filed stating that she has undergone six cycles of chemotherapy. How much amount she requires for further medical treatment and whether further medical treatment is necessary or not has not been stated. Thus merely because there is some financial constraint, if at all for the sake of arguments it is accepted, it is not the cause for all the original defendants, and therefore, under the guides of permission from this Court, applicants cannot sell out the land which may or may not be prejudicial to the rights of other parties.

8. Another important fact is that, the application is verified only by applicant No.2. Consent of applicants No.3, 5 and 6 appears to have not been obtained in writing. Merely because the application is filed on their behalf also it cannot be presumed that they have consent. Therefore, no case is made out to allow the applicants to sell the land. At the most the appeal can be expedited taking into consideration the fact that some of the applicants are already senior citizens including the respondent No.1 and that applicant No.4 is a

cancer patient. After the entire service of the appeal to respondents is complete, applicants may, if advised file an application for fixing the date of the final hearing of the appeal.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.