

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.515 OF 2017

1. Bapurao Shantvan Makasare,
Age 66 years, Occupation Agri.,
R/o Bhanashivra Tal. Newasa,
District Ahmednagar.
2. Subhash Chhaburao Makasare,
Age 45 years, Occupation Agri.,
R/o Bhanashivra Tal. Newasa,
District Ahmednagar.
3. Chhaburao Shantvan Makasare,
Age 76 years, Occupation Agri.,
R/o Bhanashivra Tal. Newasa,
District Ahmednagar.
4. Sau. Ashabai Arun Makasare,
Age 48 years, Occupation Agri.,
R/o Bhanashivra Tal. Newasa,
District Ahmednagar.

...Appellants.

VERSUS

1. Suresh Sonaji Maksare,
Age 45 years, Occupation Agri.,
R/o Bhanashivra Tal. Newasa,
District Ahmednagar.
2. Abraham Sonaji Maksare,
Age 41 years, Occupation Agri.,
R/o Bhanashivra Tal. Newasa,
District Ahmednagar.
3. Sau. Vijayabai Vijay Dalvi,
Age 38 years, Occupation Agri.,
R/o Bhanashivra Tal. Newasa,
District Ahmednagar.
4. Jaywant Sonaji Makasare,
Age 46 years, Occupation Agri.,

R/o Bhanashivra Tal. Newasa,
District Ahmednagar.

5. Sunil Madukar Deodhe,
Age 44 years, occupation Service,
R/o Mahada Dist. Solapur.
6. Anil Madukar Deodhe,
Age 31 years, Occupation Service,
R/o Mahada Dist. Solapur.
7. Sau Sunita Ravindra Mahakale,
Age 42 years, Occupation Service,
R/o Near Primary High School,
Osmanabad Dist. Osmanabad.
8. Sau Anita Sanjay Gaikwad,
Age 35 years, Occupation Service,
R/o Wadgaon Sheri Tal.Haweli
Dist. Poona.
9. Sau Sunanda Ajay Gaikwad,
Age 35 years, Occupation Service,
R/o Sadaphule Wasti, Jamkhed
Tal. Jamkhed Dist.Ahmednagar.

...Respondents.

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Mr. V. D. Sapkal, Advocate for appellants.

Mr. A. P. Bhandari, Advocate for respondents No.1 to 3
and 4 to 9

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CORAM : SMT.VIBHA KANKANWADI, J.

DATE : 01-03-2019.

ORDER :

1. Present appeal has been filed by original defendants. Present respondents No.1 to 3 (original plaintiffs) had filed Regular Civil Suit No.317 of 2004 for declaration and perpetual injunction. (Parties are referred to by their nomenclature before the trial Court).

2. Before considering the disputed facts, a note can be taken in respect of admitted facts. Defendants No.1 and 3 are the real brothers of father of the plaintiffs and defendant No.5. Defendant No.2 is the son of defendant No. 1. Sharadabai was the sister of plaintiffs and defendant No. 5.

3. Plaintiffs had come with a case that, suit property was the ancestral property of plaintiffs and defendants No.5 to 10. Defendants No.1 to 4 have no right, title or interest in the suit property. The said property land bearing Gat No.141, admeasuring 4 acres, 20 Gunthas was purchased by the father of plaintiffs, defendant No. 5 from one Nagu Bhaga Makasare. Mutation Entry No.2497 was certified in 1973 to that effect. Since then it was in possession of their father. It was once mortgaged by their father and then redeemed it. Their grandfather Shantaram had partitioned land Gat No.143 and Gat No.2 between his five sons viz. Sonaji - Father of plaintiffs, defendants No.1, 3, Dinkar and Peter in 1971. Land Gat No.143 was partitioned between defendants No.1 and 3. Northern portion was allotted to Dinkar and southern portion was given to Peter. Land Gat No.2 was divided into Sonaji, defendants No. 1 and 3. Mutation entry No.2334 was effected in respect of the same. All of them started cultivating the lands as per the said partition since 1971. Sonaji was illiterate and simple person. He had never partitioned the land which had come to his share in favour of

defendants No. 1 and 3. A mutation entry bearing No. 6038 was got mutated by defendants No. 1 and 3 in 1955 showing that he has given the land to defendants No. 1 and 3. A collusive suit was filed by defendants No. 1 to 3 bearing Regular Civil Suit No. 175 of 2002 against plaintiffs, defendant No.5 and Sharadabai. Plaintiffs appeared in the matter and contested the said suit by filing written statement. However, later on names of plaintiffs were deleted and defendants No.1 to 3 entered into compromise claiming that the suit property i.e. Gat No.141/1 is the joint family property. They had shown the allocation of share in the said property amongst themselves. In fact, defendants never got possession of the property as contended in the said compromise decree. The said decree is null and void, as well as not binding on plaintiffs. Defendants No.1 to 3 have executed sale-deed in respect of 50 R land out of the said land in favour of defendant No.4 on 25-08-2004. The said sale-deed is sham and bogus. Possession was not handed over to defendant No.4 by virtue of said sale-deed. Hence, the suit was filed for declaration that the decree passed in Regular Civil Suit No.175 of 2002 is not binding on them and restraining defendants No.1 to 4 from disturbing the possession of the plaintiffs.

4. Defendants No.5 to 10 have admitted the claim of the plaintiffs.

5. Defendants No.1 to 4 have filed their written statement. It has been denied that the suit property is exclusive property of Sonaji. They have contended that the said property is ancestral and it was purchased in the name of Sonaji as Karta of the family. Partition was not effected in respect of that property earlier due to technical reason, and therefore it continued in the name of Sonaji even after the partition of other properties. Sonaji had effected the partition and applied for mutation. M. E. No. 6038 was effected accordingly. It has been contended that the decree passed in RCS NO. 175 of 2002 is legal and they had received the possession as per the decree. Defendant No.1 has sold his share to defendant No.4 and had handed over the possession.

6. Parties have led oral as well as documentary evidence, after the issues came to be framed. After considering the evidence and hearing both sides, the learned Civil Judge Junior Division, Newasa has decreed the suit on 03-05-2008. The said judgment and decree was challenged by original defendants No.1 to 4 in Regular Civil Appeal No. 96 of 2014 (Old RCA No. 37 of 2008). The said appeal was heard by learned District Judge-1, Newasa and it was dismissed on 06-09-2016. Hence, they have filed present second appeal.

7. Heard learned Advocate Mr. V. D. Sapkal for appellants and learned Advocate Mr. A. P. Bhandari for respondents. It has been

vehemently submitted on behalf of appellants that both the Court below have not considered the facts and law points properly. Both the Courts failed to consider that plaintiffs and defendants were the members of Joint Hindu Family. They had share in each property belonging to the family. There was partition in respect of some of the properties, however, partition was not made in respect of suit property due to technical reason. However, later on Sonaji himself had given application to Talathi and partitioned the same between defendants No.1 and 3. The learned Trial Court had not framed the issue in respect of the fact alleged by the plaintiff that suit property was the self acquired property of Sonaji. There was no opportunity to the defendants to disprove the same. Plaintiffs had come with a case that defendants No.1 to 3 have played fraud on Sonaji, but no evidence was adduced by them. In absence of such evidence, it could not have been inferred that the mutation entry was got effected by fraud. Therefore, substantial questions of law are arising in this matter, requiring admission of the appeal.

8. Per contra, learned Advocate appearing for respondent supported the reasons given by both the Courts below and submitted that present appellants had intentionally deleted the present respondents from the suit, which they had filed. In fact, they were the contesting defendants in that matter. It was thereafter shown that there is share of the plaintiffs therein. On the basis of

said compromise decree, they have tried to get their name mutated to the record of rights of suit land. It has been admitted that there was partition in respect of landed properties, between father of the plaintiffs and defendants No.1, 3 as well their two more brothers. Suit land was purchased by Sonaji from his separate earnings. If it was joint property, then it ought to have been put to partition at that time itself. What was the technical point on which the suit land was not partitioned, has not been explained by the defendants. When the compromise decree has been obtained by playing fraud on Court, it is void and not binding on the present plaintiffs. Both the Courts have correctly appreciated the evidence and applied the law. No substantial question of law arises in this matter.

9. The relationship between the parties is admitted, so also the fact that there was a partition between the five brothers viz. Sonaji, Bapurao, Chaburao, Dinkar and Peter in the year 1971. Plaintiffs had not filed the sale-deed of the suit property showing that he had purchased the land from Nagu, but mutation entry No.2497 has been produced on record. When defendants are accepting a fact that there was partition in 1971, where was the question of family remaining joint in 1973. When they had come with a case that said property was purchased in the name of Sonaji as Karta of the family, they ought to have shown that after 1971 also the family was joint. The said mutation entry does not show that it was purchased by

Sonaji as Karta of the family. Another fact is that, Shantvan - father of the defendants No.1 and 3 was alive in 1971 and partition had taken place. It has been admitted by defendant's witness in the cross that after the partition, all of them started residing separately, started cultivating their lands separately. Then it was for the defendants to explain as to why the suit land was kept joint ? They had not objected to the act of Sonaji to mortgage the land to a third person and redeeming the same. That means he alone was exercising the ownership rights over the suit land. It was not necessary for the trial Court to frame any issue in respect of nature of the property. Both the Courts below have rightly assessed the evidence and arrived at finding that suit land was exclusive property of Sonaji.

10. When the suit land was exclusively owned by Sonaji, there was no question of share of defendants No.1 and 3 in the said land. There was absolutely no cause of action for them to file suit for partition. Defendant No.1 had filed the said suit RCS No. 175 of 2002. He was claiming share on the basis of alleged application given in 1995 for effecting mutation. He relied on M. E. No. 6038 in which it was mentioned that the land is partitioned. When neither of defendants No.1 to 3 had any right, title or interest over the suit land, there was no question of partition. What ever was tried to be made, was a 'transfer' of ownership and since the value of the land

was more than Rs.100/- it could not have been done without execution of a registered document. Mutation entry could have not given ownership rights to defendants No. 1 to 3.

11. Both the Courts below have rightly held that the compromise decree in RCS No.175 of 2002 has been obtained by playing fraud on Court. This has been proved by the fact that after plaintiffs herein had filed their written statement in that suit, their names were deleted. Thereafter it was shown that some of the members have been allotted the shares, keeping other members away. In fact, the concerned Court ought to have taken precaution to see that the compromise is legal and interest of all the parties are protected. In fact, the M. E. No. 6038 can be said to be bogus. There could not have been a partition of self acquired property by Sonaji between his brothers. That mutation entry has not created any right, title or interest. Therefore, further compromise based on that mutation is also illegal. Defendant No. 1 has sold 50 R land to defendant No.4 by taking disadvantage of said compromise decree.

12. Plaintiffs were deleted from the said suit and then the compromise had obtained by playing fraud on the Court, therefore, separate suit was maintainable to get the said decree cancelled and getting declaration that the said decree is not binding on the plaintiffs.

13. Thus, from the above-said discussion, it can be concluded that no substantial question arises in this matter. Both the Courts below have dealt with the evidence and law properly. There is no necessity to interfere with the concurrent findings. Hence, this second appeal is disposed of as **"Not Admitted"**.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.