

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL APPLICATION NO. 1219 OF 2016
IN
SECOND APPEAL NO. 468 OF 2009

Javaruddin Ahmad Mulla Since deceased
through LRs Saipanulok Jahiruddin Mulla ... Appellant

Vs

Sou.Khatunbi Ibrahim Fullari & Ors. ... Respondents
Mr. I.M. Khairdi, Advocate for the Appellant.
Mr. S.S. Kanetkar, Advocate for Respondents No. 1 & 3.
Mr. Somnath R. Thengal, Advocate for Respondents No. 4-A,
4-B,4-D and 4-E.

CORAM : SANDEEP K. SHINDE J.
DATE : July 9th, 2019

P.C. :

1. Heard learned counsel for the parties.
2. The original defendants no. 4 and 5, in Regular Civil Suit No. 74 of 1990 have preferred this appeal, against the decree passed in Regular Civil Appeal No. 202 of 1998.
3. Pending suit, as on 11th April, 1990 defendant no. 3 sold, part of the suit property, to the defendant no. 4 who in turn sold it to defendant no. 5 on 22.06.1993. The suit between mother and son for

declaration under Section 34 of the Specific Relief Act was instituted in the year 1990; however upon death of mother-plaintiff, her estate was represented by her daughter. Eventually, the suit came to be converted as a suit for partition, instead of declaration.

4. Learned Trial Court declared plaintiffs entitlement to $1/5^{\text{th}}$ share and $2/5^{\text{th}}$ of defendant no. 2 and 3 each, separately out of the suit property. Clause no. 4 and 5 of the operative order of the Learned Trial Court reads as under :-

*“4. The Revenue authority is hereby directed to divide the entire suit property by metes and bounds in such a fashion and out of it $1/5^{\text{th}}$ portion along with its physical possession be allotted to the share of the plaintiff No. 1A and $2/5^{\text{th}}$ share out of it is to be allotted to the defendant no. 2 out of land gat no. 146/2 subject to description of sale-deed dated 22.06.1993
Exh. 79*

5. The $2/5^{\text{th}}$ share out of the suit property is to be allotted to the defendant no. 5 instead of his predecessor

in title the defendant no. 3 subject to the sale deed dated 11.04.1990”.

5. In view of the operative order at clause nos. 4 and 5, the Trial Court directed to allot share of defendant no. 4 to the defendant no. 5, subject to sale deed dated 11.04.1990.
6. In the Regular Civil appeal preferred by the defendant no. 4 and 5, Appellate Court vide Judgment dated 09.12.2003 set aside clause nos. 4, 5 and 6 of the operative part of the order passed by the Trial Court. In effect, 2/5th share out of the suit property, which was directed to be allotted to the defendant no. 5 instead of his predecessor-in-title has been set aside.
7. Aggrieved by the Judgment and Decree of the Appellate Court, this appeal is preferred.
8. Admit; on the following substantial question of law:
 - (i) Whether Appellate Court is justified in reversing the decree, and in particular clause nos. 4 & 5 of the Judgment of the Trial Court, without first declaring that Sale Deed executed by defendant no. 3 to

defendant no. 4 is illegal for want of right or title thereto.

9. Call for Record and Proceedings from the Trial Court.
10. Since the suit was instituted in the year 1990, the hearing of the appeal is expediated.

(SANDEEP K. SHINDE, J.)