

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

SECOND APPEAL NO.919 OF 2016

Baban Vithoba Khandave and Anr. ... Appellants
Versus
Hema Dnyandeo Choudhari and Ors. ... Respondents

.....

Shri R.S. Apte, Senior Counsel I/b. Shri R.S. Pachundkar for Appellants.
Shri S.M. Gorwadkar, Senior Advocate I/b. Shri Pratap Patil for Respondent No.1.
Ms. Ujwala Sawant a/w. Bhagyashri Mangale for Respondent Nos.2 to 5.
Shri Ketan A. Dhavale for Respondent Nos.6 and 7.

.....

CORAM : M. S. KARNIK, J.

DATE : 25th JUNE, 2019.

ORAL JUDGEMENT

1. By consent of the parties heard finally.
2. Admit.
3. The Appeal is admitted on the following substantial question of law :-

“Whether the Lower Appellate Court exceeded jurisdiction by directing partition of suit property by metes and bounds as stated in Para 40 and 41 of the impugned judgment,

which exercise is otherwise within exclusive jurisdiction of Revenue Authorities in view of Section 54 of Code of Civil Procedure ?”

4. This Appeal is filed by original defendant Nos.1 and 8. The plaintiff is the daughter of defendant Nos.1 and 8. The suit property was ancestral property in the hands of defendant No.1. The plaintiff filed a Suit for partition and separate possession. The Trial Court decreed the Suit and held that the plaintiff is entitled for 1/5th share in the suit properties and separate possession thereof, specifically 80 R land on northern side of S.No.16/2A+1B situated at Lohgaon as mentioned in compromise Exhibit 62-A. The judgment and decree of the Trial Court was challenged by the original defendant Nos.1, 2, 3 and 8. The Appellate Court was of the opinion that the defendant Nos.4, 6 and 8 have not signed the compromise pursis, the compromise pursis (Exhibit 62-A) can not be termed as read and recorded by the Court.

5. Insofar as the entitlement of the plaintiff to the share in the suit property, the Appellate Court held that the plaintiff is entitled to get 1/5th share in the suit property excluding the property sold by defendant No.1 to defendant Nos.4 to 7 and the

property sold by defendant Nos.1 and 8 to Genba Sopan Moze Trust.

6. Learned Senior Counsel Shri Apte appearing on behalf of the appellants-the original defendant Nos.1 and 8 would urge that the Appellate Court was not justified in virtually partitioning the suit property by metes and bounds which exercise has to be done by the Collector under Section 54 of the Code of Civil Procedure. He would moreover submit that the Appellate Court was not justified in issuing direction as per Clause 2(c) of the operative portion of the order of the First Appellate Court that the Collector or any Gazetted Officer appointed by him to act on his behalf shall effect the partition as per shares referred in Para 40 and 41 of the judgment and order. This according to Shri Apte is an exercise which is required to be done by the Collector or the Revenue Authorities under Section 54 of the Code of Civil Procedure.

7. Learned Senior Counsel would further urge that though the Appellate Court was right in holding that the plaintiff is entitled to 1/5th share in the suit property, however, the Appellate Court was not justified in holding that the plaintiff will

get full share to the extent of 86 R land. He would further submit that the Appellate Court committed an error in observing that there is no evidence to show that the plaintiff has received her share in the consideration amount towards land sold to defendant Nos.4 to 7. He would submit that the plaintiff was consenting party to the agreement dated 10.07.2009 and therefore the plaintiff's share should have been proportionately reduced by the Appellate Court. The argument of the learned Senior Counsel is that even though the sons of the defendant No.1 are consenting party to the said agreement, have not been made any grievance and therefore relying on the same analogy even the plaintiff can not take any benefit by claiming that she has not received any consideration under the agreement dated 10.07.2009 towards reduction of her proportionate share.

8. Learned Senior Counsel Shri Gorwadkar on the other hand would submit that the Courts below have concurrently held that the plaintiff is entitled to 1/5th share in the suit property. He would submit that even the appellants are not seriously disputing that the plaintiff is having 1/5th share in the suit property.

9. Inviting my attention to Para 40 and 41 of the order of the First Appellate Court, learned counsel would submit that based on the sale deeds which have been effected during the pendency of the proceedings, what the First Appellate Court has done is only to arrive at the finding as to what is the exact area of the share the parties are entitled to. In his submission this exercise is perfectly permissible. He urged that Appellate Court has not partitioned the suit property by metes and bounds. From the remaining properties it is then for the Collector to demarcate the share of the plaintiff as per the entitlement calculated by the First Appellate Court is his submission. He would further invite my attention to the pursis at Exhibit 62-A dated 9.7.2009. He would point out that even in the pursis it was agreed that though the plaintiff has consented to the sale deed dated 10.07.2009, however in the compromise pursis below Exhibit 62-A it is specifically agreed between the parties that the plaintiff would be entitled to 80 R of land. Learned Senior Counsel on instructions of the plaintiff would submit that instead of share of 86 R of land as calculated by the First Appellate Court, plaintiff would satisfied with 80 R of land as per Trial Courts order.

10. Heard learned counsel for the parties. The Courts below have concurrently found that the plaintiff is entitled to 1/5th share in the suit property. The property is admittedly ancestral property in the hands of defendant No.1. Even the appellants defendant Nos.1 and 8 do not dispute the entitlement of the plaintiff to receive 1/5th share in the suit property. Insofar as the land sold by the defendant No.1 to defendant Nos.4 to 7, I find from the compromise pursis below Exhibit 62-A that though the plaintiff had consented for the sale of the land in favour of defendant Nos.4 to 7 by defendant No.1, it was however agreed that plaintiff will get an area of 80 R specifications of which are mentioned in the said compromise pursis. Moreover even in the sale deed it is clearly mentioned that though the plaintiff is a consenting party to the sale deed she is not at all concerned with the consideration.

11. In this view of the matter, I do not see any error in the findings of the First Appellate Court that the plaintiff has not received any share in the consideration of the land sold to defendant Nos.4 to 7. I am therefore unable to accept the contention of learned Senior Counsel that plaintiff's share is to be

proportionately reduced.

12. I find that the plaintiff is not a consenting party to the sale deed executed by defendant Nos.1 and 8 in favour of Genba Sopan Moze Trust. Shri Apte, learned Senior Counsel made a faint attempt to rely upon agreement of sale where the plaintiff is shown to have consented for the sale of the property. However, admittedly she is not consenting party to the sale deed. I therefore do not find any force in the contention of learned Senior Counsel Shri Apte.

13. Taking into consideration the various sale deeds and the extent of land which have been sold by defendant Nos.1 and 8, the First Appellate Court has arrived at a findings that the plaintiff will get her full share i.e. 86 R of land. I do not find any error in this. However learned Senior Counsel Shri Gorwadkar on instructions, in all fairness submitted that he would restrict this claim to 80 R of land as decreed by the Trial Court. He would further concede that in accordance with the Section 54 of the Code of Civil Procedure it is for the Collector to partition the suit property by metes and bounds. Hence the following order :-

ORDER

- 1) The Appeal is partly allowed.
- 2) The decree of the Appellate Court to the extent that the plaintiff is entitled to 1/5th share in the suit property excluding the property sold by defendant No.1 to defendant Nos.4 to 7 and the property by defendant Nos.1 and 8 to Genba Sopan Moze Trust is maintained.
- 3) It is held that the plaintiff is entitled to 80 R of land out of the suit property.
- 4) Clause 2(c) of the order passed by the First Appellate Court is modified and it is ordered that the Collector or any Gazetted Officer appointed by him to act on his behalf shall effect the partition as per the shares of the respective parties as determined.

(M. S. KARNIK, J.)