

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

**SECOND APPEAL NO. 737 OF 2016
WITH
CIVIL APPLICATION NO. 1461 OF 2016**

Smt. Sushma Vilas Mayekar Appellant

Vs.

Nirmala Ramesh Khot & Ors. Respondents

Mr. Abhay D. Parab for Appellant.
None for Respondent no.1.

Coram : NITIN W. SAMBRE, J.

Date : 28th January, 2020

P.C.:

1. Respondent no.1 initiated Regular Civil Suit No.114 of 2001 for partition and mandatory injunction. The suit came to be decreed by the judgment and order dated 20th October, 2012 passed by the Court of Joint Civil Judge, Junior Division, Malvan whereby it was declared that plaintiff and defendant no. 4 to 6 will be entitled to have 1/18 share, whereas the defendant nos. 1, 2 and 7 would have unified 7/18 share in the property. Further declaration was ordered that the

property mentioned in the sale-deed dated 30th October, 1986 be excluded while carrying out partition of 1/18th share in favour of defendant nos. 1, 2 and 7.

2. The defendant no.3, Manoj Vilas Mayekar feeling aggrieved preferred Regular Civil Appeal No.68 of 2009, which came to be dismissed on 18th April, 2012 by the Court of District Judge-1, Sindhudurg at Oras. As such, this Second Appeal.

3. Learned counsel for the appellant has tried to canvass two questions of law.:

(a) As the claim for partition being given up in regard to dwelling house No.1152 at Malvan, whether the Court below have committed an error in decreeing the suit including the property in which share was relinquished ?

(b) Whether the sale-deed dated 30th December, 1986 executed by husband and mother-in-law of the appellant is by way of sale of necessity?

4. At the outset, this Court is required to appreciate that the property, which is subjected to partition is admittedly an ancestral property.

5. Even if, in the plaint, the respondent-plaintiff has for the time being not sought partition of the dwelling house, that by itself, will not render the decree for partition of the property a nullity. Even if the original plaintiff, has not shown interest in the said property i.e. dwelling house bearing Malvan Municipal House No. 1152, he may not ask for in execution, shares to that extent. However, that cannot be termed to be substantial question of law in the second appellate jurisdiction, which warrants interference.

6. As far as the second contention regarding the sale of necessity based on deed dtd. 30th December, 1986 is concerned, it is not in dispute that son of the appellant initiated Regular Civil Suit No. 19 of 2003 questioning the sale-deed dtd. 30th December, 1986 being not a sale of necessity. The present appellant claimed that the said suit was already dismissed. Apart from the above, the fact remains that when

the sale-deed was executed, the appellant was very much in the company of her husband and mother-in-law and after the death of her husband and mother-in-law, the claim of the appellant was that the sale was not of necessity. The appellant has failed to establish initial onus to prove the sale. In view of same Courts below have rightly not gone into the said issue by calling upon the defendant to prove the sale of necessity. No substantial question of law is involved in the aforesaid appeal. The appeal as such must fail and accordingly dismissed.

7. In view of dismissal of the Second Appeal, pending civil application is also dismissed.

(NITIN W. SAMBRE, J.)