

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**SECOND APPEAL NO.596 OF 2016
WITH
CIVIL APPLICATION NO.11992 OF 2016
IN SA/596/2016**

HEMLATA W/O ASHOKRAO KULKARNI
AND OTHERS
VERSUS
SHARDABAI W/O BALKRISHNA KULKARNI
AND OTHERS

.....
Advocate for Appellants/Applicants : Mr. H. V. Tungar
Advocate for Respondents No.2-A, 2-B, 3 to 5 : Mr. D. P. Deshpande
Advocate for Respondent No.1 : Mr. J. V. Deshpande and B.M.Magar

.....
CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 20-09-2021.

ORDER :

1. Present appeal has been filed by the original plaintiff to challenge the Judgment and decree passed in Regular Civil Appeal No.173 of 2015 by learned Adhoc District Judge-1, Beed, dated 04-07-2016 thereby dismissing their appeal wherein they were challenging the final decree passed by learned Civil Judge, Senior Division, Beed in respect of Special Civil Suit No.406 of 1998.
2. The predecessor of the present appellants Ashok Balkrishna Kulkarni had filed partition suit i.e. Special Civil Suit No.406 of 1998 against his father, mother, brothers, sisters and others. The suit property consisted of two agricultural lands and house property at

village Palsingan Tq. Dist. Beed, but it appears that as regards the two agricultural lands and one house property is concerned, they were sold by father for legal necessity and, therefore, those properties were excluded from the decree of partition. It was then revealed that there were four house properties which were in fact old house numbers converted into new house numbers thereby increasing the number of the house properties situated at Beed were held to be available for partition and the shares in the same were carved out. Court Commissioner was appointed to suggest the partition. It appears that the preliminary decree was passed on 09-01-2007 and in fact the original defendant No.4, the mother, filed application for passing final decree i.e. Miscellaneous Civil Application No.96 of 2007. The Plaintiff and other defendants were shown as non-applicants to the said civil application. It appears that the non-applicants No.2 to 12 were duly served in the final decree proceedings, however, in spite of receiving the notices they did not appear. The matter proceeded ex-parte against them, however, it appears that the non-applicant No.1 Ashok i.e. original plaintiff appeared through Advocate and filed address memo. Both the Courts below have held that the notice has been properly served on non-applicant No.1 Ashok. Thereafter, the Court Commissioner was

appointed, Advocate Mr. R. B. Dhande was appointed as Commissioner, and after following the procedure, he submitted report on 09-06-2008 suggesting the proposed partition. It appears that the mother filed say to the said report, however, the non-applicant Ashok failed to give say. Such failure has been recorded by Court and then final order has been passed on 25-09-2008 by the concerned Court regarding drawing up of the final decree as per the partition suggested.

3. It also appears that the present appellants intended to challenge the said final decree before the First Appellate Court, however, there was delay of around 4 ½ years and, therefore, they had filed application for condonation of delay. After the delay was condoned, the first appeal was heard by learned Adhoc District Judge-1, Beed. After hearing both sides, the appeal has been dismissed. Hence, this second appeal.

4. Heard learned Advocate Mr. H. V. Tungar for appellants, learned Advocate Mr. D. P. Deshpande for respondents No.2-A, 2-B, 3 to 5, and learned Advocate Mr. J. V. Deshpande and B. M. Magar for respondent No.1.

5. It has been vehemently submitted on behalf of the appellants that if we consider the suggested partition then it can be seen that it is absolutely not convenient, it rather causes harassment not only to the appellants but to the respondents also. In fact, the suggestion ought to have been with intention to cause minimum loss to the parties. Further, there is no road made available to respondent No.1 Shardabai. Even the appellants also do not have any access to their share as in the front side there are four shop structures. Due to the ill-health Ashok could not take part in the final decree proceeding. On the contrary, one opportunity should be made available to the appellants who would put forth their objections and suggestions. By drawing attention of this Court to the map, drawn by the Court Commissioner, it has been pointed out that though it may suggest that area wise, a proper distribution has been tried to be achieved, however, neither the original plaintiff/decreed holder nor the defendant/judgment debtors No.2 and 4 are having proper access. On the contrary, along with the appeal, the appellants had suggested the division which could give access to all the share holders. He, therefore, prayed for giving an opportunity before the executing Court to put forth the say and submitted that substantial questions of law are arising in this case as the convenience has not

been seen by the Court Commissioner and both the Courts below have also not considered the same.

6. The learned Advocate Mr. D. P. Deshpande, Mr. J. V. Deshpande and B.M.Magar appearing for respondents supported the reasons given by the Courts below and submitted that no substantial questions of law are arising in this case. He further submitted that the Court Commissioner had paid visit and made inspection with due notice to Ashok, however, he did not take part. In fact, when thrice the matter was fixed for inspection, it was got adjourned on the request of Ashok and ultimate date of inspection 06-01-2008 was fixed as per his convenience. His Advocate was also not present, however, the present appellants No.1 and 3 were present at that time. Thereafter, the report was submitted, the report shows that all the necessary factors have been considered. The Court Commissioner has given reasonable access to all the share holders and, therefore, there is no necessity to change the arrangement that has been made in the report.

7. At the outset, it is to be noted that it was original plaintiff who had come to the Court for partition and separate possession. After the suit was decreed it appears that he had not immediately taken

action but then the mother who was original judgment debtor No.4 filed application for final decree. Original plaintiff appeared and it appears that he had the knowledge about the appointment of Court Commissioner to suggest the partition. It also appears that the inspection has been done after getting a convenient date from decree holder Ashok, still he remained absent. It has been tried to be contended on behalf of the appellant that the learned First Appellate Court has made wrong observations that Ashok has not challenged the suggested partition by way of Court Commissioner's report. In fact, the same Court had condoned the delay caused in filing first appeal. The delay was around 4 ½ years and the main reason that was stated in the application was that Ashok was not keeping good health. He was suffering from arthritis and his heart was weak. He ultimately expired on 05-08-2010. This Court does not agree with the submission on behalf of the appellant that since the delay has been condoned, the observations regarding absence of Ashok at the time of inspection by the Court Commissioner and on the report ought not to have been made. In fact the delay was for the period of filing first appeal, that means after the final decree was passed. Final decree has been passed on 25-09-2008 and the inspection has been done on 06-01-2008, and the report has been

submitted on 09-06-2008, that means even after submission of the Court Commissioner's report, the matter was before the said Court for passing final decree for about three months. Another fact to be noted is that the present appellants No.1 and 3 were present when the inspection was done by the Court Commissioner and it is specifically stated in the report that the area which is in their possession was inspected by seeking their permission. In spite of this fact, it is then stated that they were not aware about the proceedings.

8. Now as regards the acceptance of report of the Court Commissioner is concerned, the learned Civil Judge, Senior Division, has stated that there is no challenge to the said report and, therefore, it is accepted. The learned First Appellate Court had then re-looked at the report and the objections raised by the present appellants. Apart from the observations regarding non-participation of Ashok, it has also been observed that the suggestions suggested by learned Court Commissioner need not to be interfered with. The front portions are allotted to all the three sons and the mother which is having the same facility. The married daughters are allotted piece of land at the backside and other sharers have been put behind.

Now as regards the access which has been now tried to be raised is that there would be certain properties to which practically every facility may not given at the time of partition. If we consider the suggested map on behalf of the appellant, then it gives less area to Ashok and Avinash whereas it gives more area to Shardabai and Anil which is contrary to the suggestions given by Court Commissioner. Court Commissioner in his report has given more area to Ashok and Avinash and comparatively less to Shardabai and Anil as a common road is kept by taking part from their share for giving access to the married daughters. There is no objection by Shardabai and Anil to the suggestion by the Court Commissioner, that means they are ready to accept less. Further, the suggestion given by the present appellants give less area to the married daughters as compared to the area given by the Court Commissioner.

9. Merely because the suggested partition is not acceptable to one of the sharer, it cannot lead to substantial question of law and, therefore, the appeal requires to be dismissed, accordingly it is dismissed. Pending civil application stands disposed of.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-

GAWADE
VIRENDRA
J

Digitally signed by
GAWADE
VIRENDRA J
Date: 2021.10.04
14:01:07 +0530