

**IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD**

**SECOND APPEAL 471 OF 2019
WITH
CIVIL APPLICATION NO. 9678 OF 2019**

1. Dada Patil Mohan Kotkar
Age. 63 years, Occ. Agriculture,
R/o. At post Nimblak, Tq. Nagar,
Dist. Ahmednagar.
 2. Asarabai Bansi Sapre,
Age. 53 years, Occ. Household & Agriculture,
R/o. At post Nagpur, Tq. Nagar,
District Ahmednagar.
-Appellants
(Orig. Defendants)

Versus

1. Bhimabai Sukhdeo Lande,
Age. 78 years, Occ. Household,
R/o. At post Nimblak, Tq. Nagar,
Dist. Ahmednagar.
 2. Chandrabhaga Rambhau Nannaware,
Age. 68 years, Occ. Household,
R/o. At post Niwdunge, Tq. Pathardi,
Dist. Ahmednagar.
-Respondents
(Orig. plaintiffs)

**WITH
CIVIL APPLICATION NO. 13730 OF 2022**

1. Annasaheb Dajiba Shinde,
Age. 45 years, Occ. Business,
R/o. Near Savedi Bus Stop, Ahmednagar,
Taluka and District Ahmednagar.
2. Shamshoddin Nazarali Sayyad,
Age. 67 years, Occ. Agriculture,

R/o. Bolhegaon Gavthan, Bolhegaon,
Taluka and District Ahmednagar.

....Applicants

Versus

1. Dadapatil Mohan Kotkar
Age. 67 years, Occ. Agriculture,
R/o. At post Nimblak, Tq. Nagar,
Dist. Ahmednagar.
2. Asarabai Bansi Sapre,
Age. 64 years, Occ. Household & Agriculture,
R/o. Nagapur, Tq. Nagar,
District Ahmednagar.
3. Bhimabai Sukhdeo Lande,
Age. 82 years, Occ. Household,
R/o. Nimblak, Tq. Nagar,
Dist. Ahmednagar.
4. Chandrabhaga Rambhau Nannaware,
Age. 72 years, Occ. Household,
R/o. Nivdunge, Tq. Pathardi,
Dist. Ahmednagar.

Advocate for Appellants : Mr. N.C. Garud

Advocate for Respondent No. 1 : Mr. H.U. Dhage

Advocate for applicants in CA13730/22 : Mr. A.P. Bhandari

CORAM : RAJESH S. PATIL, J.

Judgment reserved on : 14.10.2022

Judgment pronounced on : 23.12.2022

JUDGMENT :

1. Second Appeal is filed under Section 100 of the Code of Civil Procedure, against the judgment of appellate Court, whereby, the judgment and decree of trial Court was

reversed and a decree of possession was passed in favour of the original plaintiff who are the respondent in the present Second Appeal.

2. The present Second Appeal is filed on 29.09.2018, and thereafter, on 04.05.2019 an application seeking stay to the execution and operation of appellate Court's judgment was filed. Till the date of hearing of this Second Appeal admittedly no relief for staying the operation of impugned judgment and order of appellate Court dated 21.06.2018 has been granted.

3. In this Second Appeal, an application is filed by two applicants bearing Civil Application No. 13730/2022 for implementing them as co-appellants, or in the alternate the applicants be replaced in place and instead of appellants in the Second Appeal. The applicants state that they are *bona fide* purchasers having no knowledge of the proceedings. It is stated in the application that the applicant No. 1 purchased the property from respondent Nos. 1 and 2 i.e. original defendant vide Register Sale Deed dated 25.09.2018, when the appeal was pending before the appellate Court. The applicant No. 1 was not aware about the pendency of the appeal. Neither did the applicant No. 1 gave any kind of public notice in newspaper. The applicant No. 1 is in the business of sale and purchase of properties. In the sale deed dated 25.09.2018, it is not mentioned about the pending litigation. After the appellate Court passed the decree on

21.06.2018 and after filing of this Second Appeal on 29.09.2018, so also after filing of this Civil Application for stay on 04.05.2019, much latter on 29.04.2022, the applicant No. 1 sold the suit property in favour of applicant No. 2. The applicant No. 2 was not aware about the pendency of the litigation. The applicant No. 2 also did not make any kind of publication in newspaper. After, receiving knowledge of the present litigation the applicants have filed the present application.

FACTS :

4. The suit premises consists of Old Survey No. 308 i.e. Gut No. 458 admeasuring 37R + 3R Potkharab = 40R situated at village Nimblak, Taluka Nagar, District Ahmednagar (hereinafter referred to as 'property' for the sake of brevity), one person by name Sadashiv Korde was the original owner of the suit property. The said Sadashiv Korde was married and name of his wife was Aasarabai Sadashiv Korde. It is pertinent to note that there are three females of the same name in the present litigation, i.e. "Aasarabai". Therefore, for convenience they are referred to as Aasarabai-1, Aasarabai-2, and Aasarabai-3. The first wife of Sadashiv was Aasarabai (She is referred as 'Aasarabai-1' hereinafter). She died before 1957. Hence, Sadashiv Korde got married to another female whose name was also Aasarabai (she is being referred as 'Aasarabai-2' hereinafter). Sadashiv Korde had two children from his 1st wife Aasarabai-1 namely Bhimabai and Chandrabhaga (they are

plaintiffs in the present litigation).

5. The said Sadashiv Korde died on 15.11.1957. It is further the case of the plaintiff that after the death of Sadashiv, Aasarabai-2 (Second wife of Sadashiv) got married to Mohan Madhav Kotkar.

6. The said Mohan Madhav Kotkar had two children viz. Dadapatil Mohan Kotkar and Aasarabai (referred to as Aasarabai-3 hereinafter).

7. Thereafter, it is the case of the plaintiff that since Sadashiv Korde died intestate, hence, his surviving legal heirs were second wife Aasarabai-2 and two children from first wife i.e. Bhimabai Sukhdeo Lande and Chandrabhaga Rambhau Nannaware. However, it appears that the second wife Aasarabai-2 played mischief and on 08.02.1959 added only her name in the revenue record and, accordingly, mutation entry was passed in her name only.

8. It appears, thereafter, on 29.12.1960, the name of Mohan Madhav Kotkar is recorded in the revenue records as “tenant” of the suit property.

9. Subsequently, by a registered sale deed the same suit property is sold to Mohan Madhav Kotkar by Aasarabai-2 by registered sale deed dated 10.08.1992.

10. The said Mohan Madhav Kotkar passed away on 24.05.2006 and, thereafter, his children Dadapatil Kotkar and Aasarabai-3's names were recorded in the revenue record of the suit property. Immediately, thereafter on 19.08.2006 Aasarabai-2 died.

11. During that time, plaintiffs became aware about the developments, hence, on 12.10.2006, the children of Aasarabai-1 filed suit being RCS No. 463/2006 for partition, possession, declaration and permanent injunction against, Dadapatil and Aasarabai-3 (step brother and sister).

12. Initially, the said suit was decreed ex-parte and the judgment was confirmed in appellate Court. However, the Second Appeal in Hon'ble High Court, came to be allowed and matter was remitted back for fresh consideration.

13. Thereafter, the matter was heard after evidence and the said suit for partition and possession was dismissed on the ground of limitation by judgment and order dated 30.12.2014. Pursuant to which an appeal was filed by the plaintiffs. During the pendency of appeal, the defendants created third party rights in favour of applicant No. 1 (CA/13730/2022 for adding party). The said appeal came to be allowed by judgment and order dated 21.06.2018 and the suit was partly decreed and it was held that plaintiffs has entitled for 2/3 rd share in the suit property and the sale deed

dated 10.08.1992 was held as illegal and not binding.

14. During the pendency of the second appeal, register sale deed was executed on 25.09.2018, in favour of applicant No. 2 without disclosing the pendency of the second appeal. During the pendency of second appeal, even though, there was no stay to the execution of decree, the applicant No. 1 on 29.04.2022 executed Registered Sale Deed in respect of suit property in favour of applicant No. 2.

15. It is the case of the present applicant for adding parties, on 07.09.2022 when they got knowledge of the notices issued for measurement of the suit property, after such knowledge the applicants enquired about the pendency of the proceedings. Thereafter, immediately on 20.09.2022 filed Civil Application for adding them as parties or in the alternative to substitute them as the appellants.

16. It is pertinent to note that during the pendency of the present Second Appeal and after passing of the decree against the defendant for possession and partition, they have created third party interest in favour of applicant No.1 on 24.09.2018 and further applicant No.1 on 29.04.2022 execution sale deed applicant No.2.

17. After passing of the judgment and decree in further execution of document creating third party interest would be

bad in law. The applicants cannot be called as *bona fide* purchasers. The applicants have not published any kind of public notices in newspaper. The plaintiffs examined in all three witnesses and the defendant examined two witnesses. The moot question in this matter was argued as to whether suit will be said to be filed within limitation.

18. The learned Advocate for the applicants referred to Articles 109 and 110 of the Limitation Act. It is argued on behalf of the applicants that the plaintiffs have knowledge about the execution of document. The applicants have argued that this Second Appeal is covered by three substantial questions of law namely A, B and D.

19. The plaintiff (original respondent No. 1) argued that there is Class – 1 of the Schedule, therefore, their claim would be 2/3rd. Section 58 is regarding the declaration. A legal necessity had not arisen for Aasarabai to sell the plaintiff's share. She had no right to sale 2/3rd share of the plaintiff.

20. According to the appellant ground Nos. 2 to 8 are the substantial questions of law and hence, the second appeal should be admitted.

21. I have heard both the sides and have gone through the impugned judgments.

22. The claim of Aasarabai-2, that pursuant to Mutation Entry she became owner of suit property, does not hold good, as the Supreme Court in Suraj Bhan and others Versus Financial Commissioner SLP (C) 7688 – 7689 of 2004, has held that revenue entries are only for fiscal purpose.

23. The plaintiffs are the daughters of deceased Sadashiv from his first wife (Aasarabai – 1). Sadashiv's, second wife Aasarabai -2, has no issues from her marriage to Sadashiv. Hence, after death of Sadashiv his legal heirs as per Hindu Succession Act, are plaintiff No. 1, plaintiff No. 2 and Aasarabai -2 (2nd wife). Therefore, plaintiffs will each have 1/3rd share and Aasarabai – 2 will have 1/3 rd share, from the estate of deceased Sadashiv.

24. The sale Deed dated 10.08.1992, executed by Aasarabai – 2, in favour of Mohan kotkar, does not record any recitals as to what was the legal necessity for Aasarabai-2, to sell the entire suit property. It is not the case of Aasarabai – 2 that she had obtained consent from plaintiff before executing the sale deed.

25. The plaintiff have argued that they got knowledge of sale deed on 11.08.2006, when they obtained certified copy of sale deed. The defendants were not able to prove the prior knowledge of plaintiffs. The suit is filed on 12.10.2006. Hence, the suit is filed within limitation.

26. In view of evidence recorded, it is clear that plaintiffs have together 2/3rd undivided share in the suit property, therefore, the sale deed dated 10.08.1992, to that extent is not valid. Therefore, no fault can be found in appellate Court's judgment and order dated 21.06.2018.

27. No substantial question of law arises in this Second Appeal and the same is dismissed.

28. Civil Applications stand disposed off, accordingly.

(RAJESH S. PATIL, J.)

LATER ON :

29. After pronouncing of this judgment, learned Advocate for the appellants seeks stay to the same for a period of four weeks. The said request made on behalf of Advocate for the appellants has been opposed by learned Advocate appearing for the respondents.

30. In view of the request made by the learned Advocate for the appellants, the instant judgment and order is stayed for a period of four weeks from today.

(RAJESH S. PATIL, J.)