

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**928 APPEAL FROM ORDER NO.120 OF 2014
WITH
CA/630/2016 IN AO/120/2014**

BHARAT ARJUNRAO ALKUTE
VERSUS
MIRZA SARFRAJ BAIG MIRZA AHEMAD BAIG AND OTHERS

...
Advocate for Appellant : Mr. V. V. Bhavthankar
Advocate for Respondent No.12 : Mr. S. S. Shinde h/f Mr.S.J. Salunke
...

CORAM : ARUN R. PEDNEKER, J.

DATE : 11th October, 2022

PER COURT :

1. The present appeal is filed against the Judgment and order passed by the learned Adhoc District Judge-1, Majalgaon, District Beed, in Regular Civil Appeal No.11 of 2007, whereby the learned Adhoc District Judge, Majalgaon was pleased to set aside the Judgment of the learned Trial Court dated 18/12/2006 granting a decree of partition and the Appellate Court remanded the matter to the Trial Court for reconsideration.
2. Heard learned Advocate Mr. Bhavthankar V. V. for Appellant and learned Advocate Mr. S. S. Shinde holding for Mr. S. J. Salunke for respondent No.12.

3. The brief facts leading to file the present appeal can be summarized as under :-

The original plaintiff filed a suit for partition and separate possession of the suit property of approximately 25 Acres. Plaintiff Nos.1 to 8 and defendant Nos.4 to 6 are family members. Defendant Nos.1, 2 and 3 have purchased part of the suit property from defendant Nos.4 to 6 and defendant Nos.1, 2 and 3 had further sold the suit property to defendant No.7. The suit was contested by the defendant Nos.1 to 3. Defendant Nos.4 to 6 have not filed any written statement and their application for filing written statement was rejected on 22/07/2004. The Trial Court after considering the material on record, framed issues with findings thereon as under :-

	<i>ISSUES</i>	<i>FINDINGS</i>
1	<i>Do plaintiffs prove their right, title and interest in and over suit land being legal heir of Mirza Baig ?</i>	<i>...No</i>
2	<i>Whether sale deed Nos.478/74 and 32/77 are illegal and not binding upon plaintiffs ?</i>	<i>...No</i>
3	<i>Whether suit is barred by limitation?</i>	<i>...To the extent of Deft nos.1 to 3 not within limitation</i>
4	<i>Whether defendant No.3 is bonafide purchaser for value ?</i>	<i>...Yes</i>
5	<i>Do defendant Nos.1 and 2 have perfected their title by adverse possession ?</i>	<i>...Does not survive</i>

6	<i>Are defendant Nos.1 to 3 entitled for compensatory costs as prayed ?</i>	<i>...No</i>
7	<i>What order and decree ?</i>	<i>...As per final order</i>
8	<i>Do the plaintiffs prove that their father executed sale deeds bearing No.487/74 and 32/77 for security of the payment of transactions were not of out and out sale?</i>	<i>...No</i>

4. The learned Trial Court after examining the issues framed as above, held that the defendant Nos.4, 5 and 6 sold part of suit properties by two different sale deeds dated 13/03/1974 and 16/01/1977 to defendant Nos.1, 2 and 3. Defendant No.1, 2 and 3 in turn sold the same to defendant No.7 vide sale deed dated 06/09/2007. The learned Trial Court has further held that all the above sale transactions are valid and binding on the plaintiffs. The Trial Court allowed partition of suit properties excluding properties covered by the above sale deeds.

5. Aggrieved by the order of the Trial Court, the original plaintiffs filed Regular Civil Appeal No.11 of 2007 contending before the Appellate Court that there was no legal necessity for defendant Nos.4 to 6 to sell the suit land. It was rather a mortgage deed, but the deed was transcribed as a sale deed, although the transaction is

in the nature of a mortgage.

6. The learned Appellate Judge on consideration of the submissions before it was of the view that the respondent Nos.4 to 6 i.e. the original defendants No.4, 5 and 6 did not contest the suit and their written statement was also not on record. Thus the defendants were not able to effectively put up their case before the Trial Court. In view of the said finding, the Appellate Court remanded the matter to the Trial Court for fresh determination. Aggrieved thereby the present appellant /defendant No.7 filed the present proceedings.

7. The learned Advocate appearing for the appellants/defendant No.7 submits that the Appellate Court has erred in remanding the matter back to the Trial Court as there was no appeal preferred by defendant Nos.4, 5 and 6, So also defendant Nos.4, 5 and 6 did not submit before the Appellate Court that they have not executed the sale deeds. The learned Advocate for the appellant would further submit that the Appellate Court cannot insist upon defendant Nos.4, 5 and 6 to file their written statement and to contest the proceedings.

8. Per contra, the learned Advocate appearing for respondent No.12 i.e. the original defendant No.4 has accepted the sale transaction was never challenged by the said defendant, but submits that his written statement was not taken on record and that there was no occasion for him to defend the partition suit.

9. Having considered the rival submissions, I am of the view that in the fact situation of this case i.e. (a) the defendant Nos.4 to 6 have sold the suit property to the defendant Nos.1, 2 and 3 and defendant Nos.1, 2 and 3 have further sold the suit property to defendant No.7, (b) defendant Nos.4 to 6 has not contested the suit proceedings by filing their written statement, and in any event they have not disputing the fact that they have not challenged the sale deed whereby part of the suit property was sold to the defendant Nos.1 to 3, (c) even before this Court the respondent Nos.4 to 6 have not disputed the existence of sale deed nor they have filed any affidavit explaining that the sale deed is in the nature of mortgage transaction as contended by the plaintiff, no purpose would be served in reopening the partition to the extent of suit property governed by the sale deeds by remanding the matter back

to the Trial Court.

10. Further, the Appellate Court cannot insist upon the defendants to file their written statement and contest the proceedings. More so when they have not filed an appeal before the Appellate Court as they were not aggrieved party by the Trial Courts Judgment, at least to the extent of the property sold by the said defendants.

11. The finding of the Trial Court that the sale transactions are valid and a remaining property can be partitioned between the plaintiffs and defendant Nos.4, 5 and 6 is maintained. If there is any grievance as regards their share in the suit property (excluding the part sold by above sale deeds), this Court is not expressing any opinion and that is for the remand Court to decide. I have not expressed any opinion as regards the remand qua remaining part of suit property excluding the portion of property covered by the sale deeds, as there is no challenge to the same before me.

12. As regards the part of suit property covered by above sale deeds are concerned, there can be no remand or adjudication by the Trial Court. The sale property is beyond the purview of the partition

suit.

13. In view of the above, the Appeal From Order is partly allowed and disposed of. Pending civil application stands disposed of.

(ARUN R. PEDNEKER, J.)

vj gawade/-.