

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

**APEAL FROM ORDER NO.106 OF 2014
WITH
CA/15632/2015 IN AO/106/2014**

1. Jaishree d/o Bandeppa Mahajan,]
(Jaishree w/o Prashant Shetkar)]
Age 28 Years, Occu. Houhold,]
R/o Deoni, Tq. Deoni]
At present residing at Shetkar Galli,]
Udgir, District Latur.]
2. Sow Sushilabai w/o Bandeppa Mahajan,]
Age : 72 Years, Occu. Houhold,]
R/o Deoni (Bk.) Tq. Deoni,]
District Latur.]

... Appellants.
(Orig. Plaintiff Nos. 1 and 3.)

Versus

1. Bajrang S/o Shankarrao Jadhav,]
Age : 42 Years, Occu. Agriculture,]
R/o Vilegaon, Tq. Deoni,]
District Latur.]
2. Kishan S/o Keshavrao Haibate]
Age : 47 Years, Occu. Agriculture,]
And Ex-Militaryman, R/o Neknal,]
Tq. Deoni, District Latur.]
3. Bibishan S/o Murlidhar Jadhao]
Age : 32 Years, Occu. Agriculture,]
R/o Vilegaon, Tq. Deoni,]
District : Latur.]
4. Kavita W/o Shridhar Jadhao]
Age 42 Years, Occu. Agriculture]
And household]
R/o as above.]

(Orig. Defendant Nos.6 to 9)

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| 5. | Sow. Savita W/o Sanjay Zharikunte
Age : 32 Years, Occu. Bolegaon,
Tq. Deoni, District Latur. |]
]
] | (Orig. Plaintiff No.2) |
| 6. | Bandeppa s/o Virshetiappa Mahajan
Age 77 Years, Occu. Agriculture,
R/o Deoni (Bk), Tq. Deoni,
District : Latur. |]
]
]
] | |
| 7. | Baswaraj S/o Bandeppa Mahajan,
Age : 47 Years, Occu. : Agriculture,
R/o Deoni (Bk.), Tq. Deoni,
District : Latur. |]
]
]
] | |
| 8. | Bhalchandra S/o Bandeppa Mahajan,
Age : 42 Years, Occu. : Agriculture,
R/o As above. |]
]
] | |
| 9. | Ramesh S/o Bandeppa Mahajan,
Age : 37 Years, Occu. Agriculture,
R/o As above. |]
]
] | |
| 10. | Mirza Mehboob S/o Mirza Bismilla Baig,
Age : 60 Years, Occu. Agriculture,
R/o Deoni, Tq. Deoni at present,
residing at Udgir, Near Railway Station,
Udgir, District. Latur. |]
]
]
]
] | (Orig. Defendant Nos.6 to 10)
... Respondents. |

...

Advocate for Petitioners : Mr. G. N. Chincholkar.
Advocate for Respondent Nos.1 to 4 and 10 : Mr. G. D. Kale.

...

CORAM : MANGESH S. PATIL, J.

DATED : 21 APRIL 2022

ORDER :

1. Heard.

2. Admit. At the joint request of the parties, the matter is heard finally at the stage of admission.

3. The appellants are the original plaintiff nos.1 and 3 challenging the judgment and order passed by the lower appellate court in an appeal preferred by some of the defendants, thereby quashing and setting aside the judgment and decree passed by the trial court, decreeing their suit for partition and separate possession of the suit properties, and remanding it for decision afresh.

4. The appellants are the wife and two daughters of one Bandeppa respondent no.6 who filed the suit for partition and separate possession of their share in the suit properties stated to be the ancestral and joint family properties. She arrayed Bandeppa as defendant no.1, three sons of Bandeppa, Baswaraj, Bhalchandra and Ramesh, respondent nos. 7 to 9 as defendant Nos.2 to 4. They also challenged the alienation of some of the suit properties by Bandeppa in favour of the respondent nos.1 to 4 and 10 who were added as defendant nos.5 to 9. The suit was initially filed in the court of Udgir and was numbered as Regular Civil Suit No.537 of 2000. Due to establishment of a civil court at Deoni, it was transferred to that court and was renumbered as Regular Civil Suit No. 43 of 2008.

5. The contesting respondents had filed written statement before

such transfer. However, they failed to participate at the trial after it was transferred to Deoni and the suit was decreed, *inter alia*, holding that the sale deeds executed by Bandeppa and Baswaraj in favour of defendant no.5 as also the sale deed executed by Bandeppa in favour of defendant No.6 and another sale deed executed by defendant No.3 Bhalchandra in favour of defendant No.6 were null and void.

6. The defendant nos. 6 to 9 preferred the appeal. By the judgment and order under challenge it was partly allowed and the suit was remanded back for decision afresh.

7. The lower appellate court concluded that no proper opportunity of being heard was extended to the contesting respondents. Though the written statement was filed, it was erroneously mentioned by the trial court that it was not so filed. Though the defendant no.7 had filed a written statement, it was treated that he had failed to file written statement. Fair opportunity to defend the suit was not extended.

8. Learned advocate for the appellants would submit that the roznama demonstrates that the respondents were duly served with a notice after the suit was transferred to Deoni. Therefore that ground was not available for the lower appellate court. He would further submit that the respondents had an opportunity to contest the suit, but they had failed to do

so. They neither led any evidence, nor did they cross examine the appellant's witnesses and there was no alternative for the trial court to take cognizance of all these happenings. There was no illegality in the judgment and decree passed by the trial court. The lower appellate court could not have remanded the matter under Order XLI Rule 23A of the Code of Civil Procedure without recording a finding that the decree was liable to be reversed. The lower appellate court has committed illegality in allowing the appeal and directing remand.

9. Per contra, the learned advocate for the respondents Mr. G. D. Kale who appears for some of the respondents submits that it is a matter of record that they had filed a written statement. Though they did not turn up to participate at the trial, the trial court was duty bound to decide the suit on merits. It had miserably failed to do so. A specific contention was raised in the written statement that though it was a suit for general partition, all the ancestral and joint family properties were not included. Even all the coparceners who were entitled to have a share were not impleaded. The appellant's witness Jaishree had admitted in her examination- in-chief itself that she had 3 other married sisters. If such was the state of affairs, the trial court had grossly erred in overlooking such material facts and circumstances. Going by the reasoning given by the trial court, it had accepted the case of the appellants as gospel truth. Even it had failed to adjust the equities and had

straightway declared the sale deeds executed by Bandeppa and his two sons to be null and void, when at least to the extent of their share in the suit properties, there could not have been any challenge. If in the light of such state of affairs, the lower appellate court has remanded the suit for decision afresh, there was no illegality. There is no merit in the appeal and it may be dismissed.

10. I have carefully considered the rival submission and perused the papers.

11. It is a matter of record that the stand of the respondents that they were not duly served with a notice after the suit was transferred to Deoni is factual incorrect, as can be seen from the roznama showing that they were duly served with a notice after transferred.

12. However, simultaneously it is a matter of record that the contesting respondents had filed a joint written statement. They raised a plea of non joinder of necessary parties as also, non inclusion of all the joint family properties. As can be seen, the appellant Jaishree Bandeppa did admit that she had 3 other sisters as well who were admittedly not impleaded in the suit. Irrespective of the law as it stood at the time of filing of the suit and even the decision by the lower appellate court, now in view of the decision in case of **Vineeta Sharma Vs. Rakesh Sharma; (2020) 9 SCC 1**, irrespective of the fact

that these 3 sisters are married, they would be entitled to receive a share as coparceners.

13. Again, when Bandeppa, Baswaraj and Bhalchandra had executed the sale deeds of some portion of the suit properties, the trial court had clearly erred in declaring the sale deeds as null and void, when these persons could not have been legally entitled to challenge such alienations. At least to the extent of their share, those would be legal and binding on them. Still, the trial court did not consider this aspect.

14. Though the lower appellate court has not referred to these latter two grounds which I have referred hereinabove, in the net result, had the contesting respondents been provided an opportunity to contest the suit and participated at the trial, they would have certainly assisted the trial court in arriving at a just decision.

15. The decision in the case of **Municipal Corporation Hyderabad Vs. Sunder Singh; (2008) 9 SCC 485**, in my considered view, is not applicable to the facts in the matter in hand. Unlike in the matter before the Supreme Court, the lower appellate court has arrived at a finding that the decree was liable to be reversed.

16. Taking into account all the aforementioned facts and circumstances, when the lower appellate court has exercised powers under

Order XLI Rule 23A of the Code of Civil Procedure, in my considered view there is no illegality and no prejudice is likely to be caused to the appellants even if the suit is now remanded for decision afresh.

17. Appeal is dismissed. However the trial of the suit is expedited.

18. Parties shall appear before the trial court on 6 June 2022 and there shall be no need for the trial court to issue any notice to them.

19. The trial court shall make every endeavour to decide the suit as expeditiously as possible and in any event within six months from the date of appearance of the parties.

20. Pending civil application is disposed of.

(MANGESH S. PATIL, J.)