

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 175 OF 2021

1. Dashrath S/o. Rajaya Batinwar
Died through Lrs'

1.1 Smt. Kaushalyabai w/o.
Dashrath Battinwar,
Age : 67 yrs, Occ: Household,
R/o. Paranda, Tq. Paranda,
Dist. Osmanabad.

1.2 Prakash S/o. Dashrath Battinwar,
Age : 41 yrs, Occ: Business,
R/o. Paranda, Tq. Paranda,
Dist. Osmanabad.

1.3 Laxman S/o. Dashrath Battinwar,
Age : 44 yrs, Occ: Business,
R/o. Paranda, Tq. Paranda,
Dist. Osmanabad.
Through GPA
Rajesh Chandraya Bodge,
Age : 65 yrs, Occ: Business,
R/o. Kilken, Tq. Ausa,
Dist. Latur

...Appellants
(Orig. Plaintiff)

Versus

1. Sou. Nahida Anjum W./o. S.
Mazaharulla Hashmi,
Age : 72 yrs, Occ: Household,
R/o. Ausa, Tq. Ausa, Dist. Latur

2. S. M. Hashmi,
Died Through LR's

2.1 Sou. Khairunissa W/o. Khalil Patel
Age : 52 yrs, Occ: Household,
R/o. Hangarga, Tq. Tuljapur,
Dist. Osmanabad.

2.2 Sou. Jhairunissa W/o. Mujib Shaikh
Age: 42 yrs, Occ: Household,
R/o. Lamjana, Tq. Ausa,
Dist. Latur.

2.3 Gafurulla S/o. Mazaharulla Hashmi,
Age : 40 yrs, Occ: Business,
R/o. Ausa, Tq. Ausa, Dist. Latur.

2.4 Gajala S/o./ Mazaharulla Hashmi,
Age : 38 yrs, Occ: Business,
R/o. As above.

2.5. Nazirulla S/o. Mazaharulla Hashmi,
Age: 38 yrs, Occ: Business,
R/o. As above.

2.6 Ahazarullha S/o. Mazaharulla Hashmi,
Age : 34 yrs, Occ: Business,
R/o. As above.

2.7 Fatemabee d/o. Mazaharulla Hashmi,
Age : 32 yrs, Occ: Household,
R/o. As above.

2.8. Navidulla S/o. Mazaharulla Hashmi,
Age : 30 yrs, Occ: Business,
R/o. As above.

2.9 Munnibegum D/o. Mazaharulla Hashmi,
Age : 28 yrs, Occ: Household,
R/o. As above.

...Respondents
(Orig. Defendants)

WITH
SECOND APPEAL NO. 184 OF 2021

Balaji S/o. Kshirsagar Shinde,
Age : 52 yrs, Occ: Business,
R/o. Ausa. Tq. Ausa,
Dist. Latur

...Appellant
(Orig. Plaintiff)

Versus

1. Sou. Nahida Anjum W./o. S.
Mazaharulla Hashmi,
Age : 72 yrs, Occ: Household,
R/o. Ausa, Tq. Ausa, Dist. Latur
2. S. M. Hashmi,
Died Through LR's
- 2.1 Sou. Khairunissa W/o. Khalil Patel
Age : 52 yrs, Occ: Household,
R/o. Hangarga, Tq. Tuljapur,
Dist. Osmanabad.
- 2.2 Sou. Jhairunissa W/o. Mujib Shaikh
Age: 42 yrs, Occ: Household,
R/o. Lamjana, Tq. Ausa,
Dist. Latur.
- 2.3 Gafurulla S/o. Mazaharulla Hashmi,
Age : 40 yrs, Occ: Business,
R/o. Ausa, Tq. Ausa, Dist. Latur.
- 2.4 Gajala S/o./ Mazaharulla Hashmi,
Age : 38 yrs, Occ: Business,
R/o. As above.
- 2.5. Nazirulla S/o. Mazaharulla Hashmi,
Age: 38 yrs, Occ: Business,
R/o. As above.
- 2.6 Ahazarullha S/o. Mazaharulla Hashmi,
Age : 34 yrs, Occ: Business,
R/o. As above.
- 2.7 Fatemabee d/o. Mazaharulla Hashmi,
Age : 32 yrs, Occ: Household,
R/o. As above.
- 2.8. Navidulla S/o. Mazaharulla Hashmi,
Age : 30 yrs, Occ: Business,
R/o. As above.
- 2.9 Munibegum D/o. Mazaharulla Hashmi,
Age : 28 yrs, Occ: Household,
R/o. As above.

3. Ahasanulla S/o. Hasan Quadri,
Age : 62 yrs, Occ: Agri,
R/o. As above.

4. Aslam Talebsab Arab,
Age : 72 yrs, Occ: Medical
Practitioner, R/o. As above.

...Respondents
(Orig. Defendants)

...

Mr. S. N. Lale Yelwatkar, Advocate for the Appellants
in both Appeals.

Mr. G. L. Deshpande, Advocate for the Respondents in
SA/175/2021.

Mr. V. D. Solunke, Advocate for Respondents in
SA/184/2021.

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CORAM : R.M. JOSHI, J

RESERVED ON : MARCH 28, 2023

PRONOUNCED ON APRIL 18, 2023

COMMON JUDGMENT :

1. Appellants are original Plaintiffs in R.C.S. No. 316/1998 and R.C.S. No. 254/1999, which were decreed by the Trial Court and the said judgments and decree were reversed by the First Appellate Court in R.C.A. No. 87/2013 and 901/2013, by dismissing suit. Being aggrieved by these judgments dated 10th February, 2022 passed by the First Appellate Court, the present Appeals are filed under Section 100 of the Code of Civil Procedure (for short 'CPC'). The parties are referred to by their nomenclature in the suit.

2. Plaintiffs filed suits for declaration of ownership and possession of suit property being plot no. E-1 & E-7 situated at Quadri Nagar in Survey No. 166 admeasuring 30A 32 Gunthas in south corner admeasuring 4A 25 Guntha in northern part of 7A 25 Guntha. They claim title and possession over suit properties on the strength of registered sale deeds executed by heirs or successor in the title of Hasinabegum, for lawful consideration. Plaintiffs further claim that the suit plots were mutated in their name in the record of Municipal Council and revision register and that they have paid all the taxes of the Municipal Council regularly. It is specifically averred that predecessor in the title of the suit plots Hasinabegum, had field suit bearing R.C.S. No. 84/1988 against defendants. The said suit was decreed on 05.09.1994 and the said decree has attained finality. The plaintiffs also alleged that the defendants are interfering in the possession of the Plaintiff over the suit property and hence, these suits came to be filed.

3. Defendants by filing written statement resisted the suit by denying contentions of the

Plaintiffs including their claim of the title of Hasinabegum over the suit plots. It is specifically contended that Survey No. 166 admeasuring 30A 209 Guntha of village AUSA was originally owned by Amirbee and out of the said land 3A 10 Guntha land was acquired on 09.10.1956 for construction of Nilanga – Latur road and the said Amirbee had received compensation against the said acquisition. It is also said that in the year 1956 one more approach road passed through the southern portion which has divided survey no. 166 in three parts. It is stated that defendant no. 2 on 05.12.1969 has purchased 14 Are land from Survey No. 166 in three pieces from Shafuddin for consideration of Rs. 7,000/- and since then he is in possession of the said land. It is claimed that Hasinabegum on the basis of incorrect entries in the record in respect of Survey No. 166 has executed sale deed without any title or possession thereof and hence, plaintiffs have no title and possession over suit plots. However, it is not in dispute that she filed R.C.S. no. 84/1988 against defendant no. 1 for relief of declaration and injunction. It is alleged that there was restraining order against Hasinabegum from alienation of the land

to the extent of 1 Acre till the disposal of the suit and during the existence of the said injunction sale deeds were executed. It is alleged that plaintiffs have given incorrect boundaries of the suit plot. Defendants have also filed counter claim seeking declaration to be owners and possessor of the 14 Acre land purchased by defendant no. 2 from Shafuddin on 03.08.1969 as described in para 1 of the counter claim.

4. With these pleadings, parties led evidence before the Trial Court and the trial Court decreed the suits and dismissed counter claim. Plaintiffs were declared owners and in possession of the suit plots no. E-1 and E-7. Further order of injunction was issued against defendants. The said judgments were carried in Appeals before the First Appellate Court. The First Appellate Court by passing impugned judgments has reversed the order of the Trial Court and dismissed R.C.S. No. 316/1998. No order however was passed by the First Appellate Court in respect of the rejection of the counter claim by the trial Court.

5. Learned Counsel for the Plaintiffs states that the First Appellate Court has committed error in

holding that the sale deed of Plaintiff is not valid. The grounds on which they were held to be invalid were never raised by the defendant in their written statement and for the first time findings are recorded, such as bar of Section 8 of the Maharashtra Prevention of Fragmentation and Consolidation of Holdings Act, 1947 (for short '**Consolidation Act**') as well as failure to seek sanction from the Planning Authority for the lay out. He contends that the findings recorded by the First Appellate Court that the contract is illegal under Section 23 of the Contract Act cannot sustain for want of any opportunity being given to the Plaintiff to meet with objections. On the point of the findings recorded by the First Appellate Court in respect of *res judicata*, it is contended that the facts on record have not been correctly appreciated.

6. Learned Counsel for the Defendants supported the impugned judgment by stating that it was open for the First Appellate Court to re-appreciate the evidence on record and arrive at independent findings than the one recorded by the Trial Court. It is stated that no error committed of law or facts by First Appellate

Court in dismissing the suit.

7. In view of the controversy involved in these appeals, following substantial question of law is framed:

“Whether the First Appellate Court has committed error in holding that the sale deed of Plaintiff in respect of the suit plot is invalid in view of the provisions of the Consolidation Act and for want of the NA permission under the provision of the Act of 1966.”

8. At the outset, it needs to be recorded that there is not dispute about the fact that either heir or successor in title of Amirbee, original owner of Survey No. 166 has executed registered sale deeds in favour of Plaintiff in respect of suit plot which is also supported by valid consideration. In the written statement only defence taken by the defendant challenging those documents is that their vendor had no title and possession over the suit plot, therefore, there could not have transferred valid title in favour of Plaintiffs. Except for this, no other objection seems to have been raised regarding validity of sale deeds. On this issue, neither there was pleading in

the written statement nor any evidence was led before the Trial Court. However, for the first time, First Appellate Court has gone into the validity of the sale deeds on the count that they are hit by the provisions of the Consolidation Act. For the purpose of declaring the said sale deed to be invalid, it is held by the First Appellate Court that the standard area for Marathwada Region is 0.81 Are and therefore, fragment below that area is not permissible and hence, the sale deeds in question in favour of Plaintiffs were held to be not valid.

9. In this regard, however, it is material to note that there is no omnibus restriction on fragmentation of the land. More particularly, in view of Section 31(2) of the Consolidation Act which does not create a bar of fragmentation to the land situated within municipal limits. Thus, for creating bar application to execution of sale deed, it must be held that the suit properties do not fall within municipal limits. Such issue is not pure question of law but mixed question of fact and law, which needs to be raised at first instance. Without recording finding on

said issue, it is not permissible to hold that the sale deed is hit by provisions of Consolidation Act.

10. Apart from this, the First Appellate Court has also held that for the purpose of lay out in respect of the agricultural land permission is required under the Maharashtra Regional and Town Planning Act, 1966 (for short '**Act of 1966**'). It is observed that Hasinabegum has failed to convert agricultural land into residential land and also failed to seek sanction from the planning authority to lay out by paying requisite fees. A question arises as to whether it is permissible for the First Appellate Court to entertain such issue in absence of it being raised before the Trial Court. Needless to say that the principle of *Audi Alteram Partem* is not adhere to while recording findings in respect of this issue as well a issue with regard to Consolidation Act. Had there being any issue framed in this regard Plaintiff could have explained the circumstances in which the sale deed was executed and to justify its validity. For want of any such opportunity being given to the Plaintiff, and as prejudice is shown to have been caused to plaintiffs, the findings of the

First Appellate Court cannot be allowed to sustain. On this count alone, judgment and decree passed by the First Appellate Court deserves to be set aside.

11. In view of above discussion and having regard to the facts of the case, the substantial question of law framed deserves to be answered in affirmative. As a result, the impugned judgment and decree cannot sustain. The only course remains open for this Court is to relegate back the First Appeal for decision afresh. Parties are directed to appear before the First Appellate Court on 02nd May, 2023. No separate notice needs to be issued to the parties for their appearance. First Appellate Court to decide the appeal expeditiously as possible and in any case, within a period of six months from the date of receipt of writ of knowledge of this order.

12. Appeal stands disposed of in above terms.

(R.M. JOSHI, J.)

Malani