

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

SECOND APPEAL NO. 587 OF 2022

Shivdas s/o. Vithal Darade,
Age 54 yeasers, Occ. Agri.
R/o. Daregaon (Ner)
Tq. & Dist. Jalna.

... APPELLANT

VERSUS

1. Parwatabai w/o. Abasaheb More,
since deceased through LRs.

1-A. Annasaheb S/o. Abasaheb More,
Age 59 years, Occ. Agri.
Tq. Mantha, Dist. Jalna.

1-B. Chhabubai w/o. Anandrao Wayal
Age 64 years, Occ. Household,
R/o. Tokwadi, Tq. Mantha,
Dist. :- Jalna.

1-C Mankawarbai w/o. Laxmanrao Khandare,
Age 62 years, Occ. Household,
R/o. Kanadi, Tq. Mantha,
Dist. Jalna.

2. Bhagwanrao S/o. Patilbuwa Vaidya,
Age 74 years, Occ. Agri (Original judgment debtors)

3. Ramrao s/o. Patilbuwa Vaidya
since deceased through LRs

3-A. Kuntabai w/o. Ramrao Vaidya,
Age 54 years, Occ. Household.

3-B. Rekha D/o. Ramrao Vaidya,
Age 29 years, Occ. Household.

3-C Bhagwat s/o. Ramrao Vaidya,
Age 32 years, Occ household.

4. Vatsalabai w/o. Kundlikrao Deshmukh,
Age 64 years, Occ. Household (Original Judgment Debtors- Defts.)
5. Madanrao S/o. Ramkisan Vaidya
Age 32 years, occ. Agri.

All respondent Nos. 2 to 5 R/o Vaidya Wadgaon,
Tq. Mantha, Dist. Jalna.

.. RESPONDENTS.

Mr. B.R. Kedar, Advocate for appellant,
Mr. V.R. Naik, Advocate for respondent No.1.

CORAM : S.G. CHAPALGAONKAR, J.

DATE : 2nd AUGUST, 2023

ORDER :-

The present appeal takes exception to the judgment and decree dated 12.7.2022 passed by the learned District Judge – II Jalna in R.C.A. No. 133 of 2018 thereby confirming the order dated 10.7.2018 passed below Exh.19 in Regular Darkhast No. 1 of 2013 passed by the Joint Civil Judge (J.D.), Mantha, whereby the objection petition filed by the appellant came to be dismissed.

2. Respondent No.1 Parvatabai More, had instituted a suit bearing R.C.S. No. 86 of 2001 seeking a decree of partition and separate possession in respect of the agricultural lands including the one from Gat No. 56 situated at Jalna. The suit came to be decreed for 1/12th share in the suit property in favour of the plaintiff. During the pendency of the suit, defendant No.3A has transferred 2 Hectare 5 R land out of the suit property in favour of one Gayabai Vaidya under registered sale deed, who further transferred part of land admeasuring 1 Hectare 20 R in favor of

the appellants under registered sale deed dated 6.6.2012. The respondent No.1/ plaintiff in pursuance of the decree passed in her favour initiated execution proceeding vide Regular Darkhast No. 1 of 2013 before C.J.J.D., Mantha. The praecipe was forwarded under Section 54 of C.P.C. for partition and demarcation of shares. The appellant, who is the purchaser post decree, raised objection before the Executing Court vide Exh.19 contending that he has purchased the land situated at village Daregaon in the year 2012, without any knowledge of the decree passed in favour of the plaintiff. The Executing Court, considering the provisions of Section 52 of the Transfer of Property Act rejected the objection vide order dated 10.7.2018. The appellant preferred R.C.A. No. 133 of 2018 which came to be rejected vide order dated 12.7.2021.

3. Mr. Kedar, learned counsel appearing for the appellant submits that the original judgment debtor/defendant No.3A was holding more than 3 Hectare of the land. She alienated 2 Hectare 5R land in favour of Gayabai Vaidya and appellant purchased 1 Hectare 20R land from her. He submits that in such a scenario, 1/12th share allotted in favour of the respondent as per the decree can be adjusted against the remaining land of defendant No.3A and the land purchased by the appellant can be equitably adjusted. He submits that the request in the above terms was made before the appellate court, however, the appellate Court refused consideration observing that such objection was not raised before the Executing Court or it can be raised before the Collector. The appellate Court cannot deal with such objections.

4. Mr. Naik learned advocate appearing for the respondent

decree holder submits that the surveyor has already carved out the shares, prepared the map for distribution of the property. The appellant does not have independent right. Both the courts below have, on appreciation of factual and legal aspects rejected the claim of the appellant. Therefore, he submits that there is no substance in the appeal.

5. It is not in dispute that original defendant No.3A -Kantabai has executed a sale deed in favour of Gayabai Vaidya during pendency of the suit. It is informed that the said transaction is in violation of the injunction order. The sale transaction is hit by the principle of *lis-pendens* as contemplated under Section 52 A of the Transfer of property Act. The appellant purchased a portion of the suit land from Gayabai Vdiaya after passing of the decree in favour of the respondent/plaintiff. Therefore, the appellants can not have independent right to resist the execution of the decree. The objection raised by the appellant is rightly dismissed after considering the law espoused in the judgments referred in the impugned order.

6. Mr. Kedar, learned counsel for the appellant would submit that the appellant has already filed application before the District Collector at Jalna on 19.8.2022 for adjustment of equities. He would submit that although the measurement is complete and map has been carved out, the final decree is not passed till the date, or possession is not handed over to the respondent- decree holder. He would, therefore, submit that the Collector can be directed to adjust the equities by considering the application submitted by the appellant for that purpose.

7. It is trite that the Collector has to effect partition under Section

54 of the CPC in accordance with the decree sent to him. However, it is always open to the Collector to adjust the equities while making distribution of the property in terms of the decree. Reference can be given to the judgment in the case of ***Khemchand Shankar Chaudhari and another Vs. Vishnu Hari, reported in AIR 1983 124.*** The Apex Court, in the said matter observed thus :-

“In the case of transferees pendent lite also, if there is no dispute, the Collector may proceed to make allotment of properties in an equitable manner instead of rejecting their claim for such equitable partition on the ground that they have no locus standi. A transferee from a party of a property which is the subject matter of partition can exercise all the rights of the transferor. There is no dispute that a party can ask for an equitable partition. A transferee from him, therefore, can also do so. Such a construction of section 54 of the Code of Civil Procedure advances the cause of justice.

.... In any such case where there is no dispute if the Collector makes an equitable partition taking into consideration the interest of all concerned including those on whom any interest in the subject matter has devolved, he would neither be violating the decree nor transgressing any law. His action would not be ultra vires. On the other hand, it would be in conformity with the intention of the legislature which has placed the work of partition of lands subject to payment of assessment to the Government in his hands to be carried out in accordance with law (if any) for the time being in force relating to the partition or the separate possession of shares.”

8. In that view of the matter, it would be open for the appellant to pursue his remedies before the Collector, particularly, when he has already exhausted the same by filing the application dated 19.8.2022. The collector would consider and decide the said application on its own

merit taking in to account legal position discussed hereinabove. However, so far as challenge to the impugned order in this second appeal is concerned, no substantial question of law is made out for consideration. Hence, second appeal is dismissed with the aforesaid observations.

[S.G. CHAPALGAONKAR]
JUDGE

grt/-