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SA 504 OF 2023.odt

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

SECOND APPEAL NO. 504 OF 2023

Shyam S/o. Amrut Baviskar,
Age 54 years, Occ. Driver,
R/o. Boudhwada, Taluka Chopda,
District Jalgaon.

.. APPELLANT
(Original Defendant No.8)

VERSUS

1. Gokul S/o. Damu Baviskar,
Age 59 years, Occ. Labour,
R/o. Boudhwada, Taluka Chopda,
District Jalgaon.
2. Prakash S/o. Dagdu Baviskar,
Age 60 years, Occ. Labour,
R/o. Boudhwada, Taluka Chopda,
District Jalgaon.
3. Wana S/o. Malhari Baviskar,
Age 62 years, Occ Labour
R/o. Boudhwada, Taluka Chopda,
District Jalgaon.
4. Baburao S/o. Genda Wankhede,
Age 85 years, Occ. Nil
R/o. Ganpur, Taluka Chopda,
District Jalgaon (Since deceased
the respondent No.5 is the sole legal
representative)
5. Daulat S/o. Baburao Wankhede,
Age 60 years Occ. Agriculture,
R/o. Ganpur, Taluka Chopda,
district Jalgaon.

6. Sou. Pramilabai W/o. Shrawan Brahme,
Age 50 years, Occ. Household,
R/o. Prabudh Housing Society, Amalner,
Taluka Amalner, Dist. Jalgaon.
7. Sau. Bebabai W/o. Yuvraj Panpatil,
Age 53 years, Occupation Household,
R/o. Yeroli, Sector, 5, Thane, Taluka Thane,
Dist. Thane.
8. Aananda S/p. Kisan Birhade,
Age 36 years, Occ. Labour,
R/o. Bodhawada,
Chopda, Tal. Chopda, Dist. Jalgaon
(Original Deft. Nos 1,2, 4 to 6.)
9. Aananda S/o. Wajir Baviskar,
Age 58 years, Occupation Agriculture,
R/o. Ganpur, Taluka Chopda,
Dist. Jalgaon (since deceased First Appeal
Abated by order dated. 14.10.2024
(Original defendant No.3)
10. Gopichand S/o. Nagraj Bhalerao,
Age 60 years, Occ. Service R/o. Boudhwada,
Chopda, Taluka Chopda, Dist. Jalgaon.
11. The State of Maharashtra through
the Collector, Collector office, Jalgaon,
Taluka Jalgaon, Dist. Jalgaon.
12. The Additional Commissioner, Revenue
Court, Nashik, Taluka Nashik, Dist. Nashik.

(Original defendant Nos. 7, 9 and 10)
RESPONDENTS.

Mr. S.P. Salgar, Advocate h/f. Mr. V.Y. Patil, Advocate for appellants
Mr. P.B. Patil, Advocate for respondent Nos.1 to 3
Mr. A.R. Devkate, Advocate for respondent Nos. 5 to 8
Mr. D.B. Bhange, AGP for respondent Nos. 11 and 12

Mr. B.B. Kulkarni, Advocate for respondent No. 10

WITH SECOND APPEAL NO. 52 OF 2016.

- 1] Baburao S/o. Genda Wankhede,
Age 85 years, Occ. Nil,
R/o. Ganpur, Taluka Chopda,
District Jalgaon (Since deceased the
appellant No.2 is the sole legal representative)
- 2] Daulat S/o. Baburao Wankhede,
Age 60 years, Occupation: Agriculture
R/o. Ganpur, Taluka Chopda,
Dist. Jalgaon.
- 3] Sou. Pramilabai W/o. Shrawan Brahme,
Age 50 years, Occ. Household,
R/o. Prabodh Housing Society, Amalner,
Taluka Amalner, Dist. Jalgaon.
- 4] Sou. Bebabai W/o. Yuvraj Panpatil
Age 53 years, Occupation Household,
R/o. Yeroli, Sector 5, Thane, Taluka Thane,
Dist. Thane.
- 5] Aananda S/o. Kisan Birhade,
Age 56 years, Occupation Labor,
R/o. Bodhawada, Chopda, Taluka Chopda,
Dist. Jalgaon.

(Original defendant Nos. 1,2, 4 to 6)
APPELLANTS.

VERSUS

01. Gokul S/o. Damu Baviskar,
Age 59 years, Occ. Labour,
R/o. Bodhawada, Rampura,
Tal. Chopda, Dist. Jalgaon.
2. Prakash S/o. Dagdu Baviskar,

Age 60 years, Occ. Labour,
R/o. Boudhwada, Taluka Chopda,
District Jalgaon.

3. Wana S/o. Malhari Baviskar,
Age 62 years, Occ Labour
R/o. Boudhwada, Taluka Chopda,
District Jalgaon.

(original plaintiffs)

04. Aananda S/o. Wajir Baviskar,
Age 58 years, Occupation Agriculture,
R/o. Ganpur, Taluka Chopda,
Dist. Jalgaon (since deceased First Appeal
Abated by order dated. 14.10.2024

(Original defendant No.3)

05. Gopichand S/o. Nagraj Bhalerao,
Age 60 years, Occ. Service R/o. Boudhwada,
Chopda, Taluka Chopda, Dist. Jalgaon.

06. Shyam S/o. Amrut Baviskar,
Age 55 years, Occ. Driver,
R/o. Boudhwada, Taluka Chopda,
District Jalgaon.

(Original defendant Nos. 7 and 8)

07. The State of Maharashtra through
the Collector, Collector office, Jalgaon,
Taluka Jalgaon, Dist. Jalgaon.

08. The Additional Commissioner, Revenue
Court, Nashik, Taluka Nashik, Dist. Nashik.

(original defendant Nos. 9 and 10)

....RESPONDENTS.

Mr. A.R. Devkate, Advocate for appellant,
Mr. P.B. Patil, Advocate for respondent Nos. 1 to 3
Respondent No.4 died
Mr. B.B. Kulkarni, Advocate for respondent No.5
Mr. D.B. Bhange, AGP for respondent Nos. 7 and 8

CORAM : S.G. CHAPALGAONKAR, J.

DATE : 6th MARCH, 2025.

JUDGMENT :-

1. The appellant/original defendant No.8 impugns the judgment and decree dated 2.9.2015 passed in Civil Appeal No. 27 of 2010 passed by District Judge, Amalner, thereby reversing the judgment and decree dated 15.7.2010 passed in R.C.S. No. 50 of 2005 passed by Civil Judge (Senior Division), Amalner.

2. Respondent Nos. 1 to 3 (plaintiffs) instituted suit seeking decree of partition and separate possession and declaration that sale deed dated 22.2.2000, executed by defendant Nos. 1 to 3 in favour of defendant Nos. 4 and 5 is null and void and not binding on their rights. According to plaintiffs, suit lands were originally owned by Malhari Hira, Giridhar Shama, Dagadu Bhika, Baijabai Tukadu and Vitthal Hari. It was in possession of Mayabai Mahar, Nadarbai Mahar and Bajirkrushna Mahar. Suit property was Mahar Inam Class-6 which was re-granted. Consequently, mutation entry No. 17586 was certified. After re-grant of suit land, it was mutated in the name of Malhari Hira, Giridhar Shama and Dagadu Bhika in ownership column. Plaintiff No.1 is son of Giridhar Shama. Plaintiff No.2 is son of Dagadu Bhika and Plaintiff No.3 is son of Malhari Hira. After death of Giridhar, name of Damu has been entered as owner. Similarly, after Giridhar Shama, Malhari Hira and Dagadu Bhika, plaintiffs become lawful owners but their names were not mutated. The litigation as to the mutation entry is wrongly decided by respondent No.5. According to plaintiff, they are owner to the extent of

1/3rd share in suit property and order passed by defendant No.10 in R.T.S. Revision No. 288 of 1999 dated 22.2.2000 is not binding on their rights.

3. Suit was contested by defendant Nos. 1 to 6 by filing written statement. Trial court framed issues based on pleadings of parties. Finally, dismissed the suit vide judgment and decree dated 15.7.2010. Plaintiffs filed Civil appeal No. 27 of 2010 before the District Judge, Amalner. However, appellant/original defendant No.8 was not arrayed as party in the appeal. Appellate court, after hearing parties as shown in the appeal memo, allowed the appeal by setting aside judgment and decree dated 15.7.2010 passed in R.C.S No. 50 of 2005 and decreed the suit holding that branches of Malhari Hira, Giridhar Shama, Dagadu Bhika, Baijabai Tukadu and Vitthal Hari are having 1/6th share each in suit property and sale deeds executed by defendants, *inter-se*, are not binding on the rights of plaintiffs to the extent of their share. Further, defendant Nos. 6 to 8 are permanently restrained from selling out the suit property to anybody.

4. Aggrieved defendant No.8, who was not joined as party in Civil Appeal No. 27 of 2010, filed present second appeal. Similarly, original defendant Nos. 1 to 6 filed Second Appeal No. 56 of 2016. The said second appeal has been admitted by framing substantial questions of law vide order dated 13.2.2023.

5. So far as present appeal is concerned, it is not disputed before this court that appellant/original defendant No.8 was not arrayed as party to the Civil Appeal No. 27 of 2010, although he was party in the

original proceeding of suit i.e. RCS No. 50 of 2005. It is true that defendant Nos. 7 and 8 had not filed written statement in original suit. However, appellate court has passed decree of perpetual injunction against defendant Nos. 6 to 8 by restraining them to sale out suit property to anybody. Apparently, right of defendant No.8 has been affected.

6. Learned advocates for respective parties do not dispute the position that defendant No.8 was not made party in Civil Appeal before the District Judge, In that view of the matter, following substantial question of law arises for consideration in these appeals.

“Whether, decree passed by appellate court in absence of original defendant No.8 being party to the appeal, is sustainable in law. ?

7. By consent of parties, appeals were heard on aforesaid substantial question of law. Considering limited controversy, they made their submissions.

8. Learned advocates for respective parties do not dispute factual position that defendant No.8 was not party in the appeal, although he was party in suit and this error was not probably noticed by appellate court and ultimately, decree has been passed. It is true that defendant nos. 6 to 8 purchased property from defendant Nos. 4 and 5 after obtaining necessary permission from the revenue authorities and converted suit property into Non-agricultural purpose. The additional written statement filed by defendants shows that even defendant Nos. 4

to 8 have sold out the property to some other persons. The decision in appeal could not have been rendered in absence of defendant No.8 being party in appeal before the District Court. It can be observed that decree passed by trial court has been reversed by appellate court and specific decree of permanent injunction is passed against defendant Nos. 6 to 8, restraining them from selling out the suit property to anybody. If that is so, the findings recorded by appellate court are behind the back of defendant No.8 which cannot be countenanced. Hence, there is fundamental defect of violation of principles of natural justice. As such, the decree passed by appellate court cannot be sustained in law and liable to be quashed and set aside.

9. In the result, the substantial question of law as framed will have to be answered in the negative. Hence, following order :-

O R D E R

- [A] Second appeals are partly allowed;
- [B] Judgment and decree dated 02.09.2015 passed by District Judge-1, Amalner, is quashed and set aside. Matter is remanded back to the District Judge-1, who shall re-admit the Civil Appeal No. 27 of 2010 and decide the same after granting an opportunity of hearing to all concerned.
- [C] Parties to appear before the District Court on 7th April, 2025.
- [D] Second Appeals stand disposed of in above terms.

[S.G. CHAPALGAONKAR, J]

grt/-