


<b>MHAH010012742022</b> 	<b><u>Regular Civil Appeal No.45/2022</u></b>  Shripad Madhukarrao Bhong Vs. Prabhakar Bhaskar Bhong
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**ORDER BELOW EXH.7**

Brief facts raised by parties are as under.

Plaintiff /appellant filed suit for partition and separate possession of suit property C.T.S.No.271 adm.100.7 sq.mtr. situated at Chas. The suit property was originally owned by Bhaskar Savleram Bhong. This Bhaskar was survived plaintiff's father Madhukar and uncle Prabhakar and Ramchandra. It was pleaded that, the suit property was not partitioned between the brothers but defendant No.1 to 4 sold 2/3rd property to defendant No.5 who in his turn raised illegal construction detrimental to the interest of plaintiff.

2. On the contrary, it was contended by defendant No.5 (purchaser) that the suit is bad for non-joinder of necessary party. The power of attorney is not having appropriate P.O.A. According to them, there took place oral partition between three brothers. Northern 1/3rd area came to the share of plaintiff's father, so as remaining 2/3rd share come to the share of other two brothers. The oral partition was acted upon between the brothers and two brothers sold 2/3rd share to him by registered sale deed by handing over possession on 23/03/2011. The same was not resisted by plaintiff but when he tried to raise construction this frivolous suit is filed.

3. After framing relevant issues, learned Trial Court found that property is still not partitioned, suit is bad for non-joinder of necessary parties and other two issues relating to relief are answered as redundant.

4. Heard advocate for appellant and contesting respondent. Gone through documents. It can be noted that as per answers given by trial Court the suit is dismissed on technical ground i.e. non joinder of necessary parties. In this situation, if the appeal is considered I find that the suit being for partition and separate possession the nature of property needs to be preserved. From the photographs of suit property which are claimed as recent one, the defendant No.5 raised construction on certain area of alleged 1/3rd share of appellant. It is ground floor having no construction over it which can be described as big open space on floor, then staircase which is going on half portion of first floor construction. If the photograph is seen, it reveals that plaster took place alongwith railing wall on roof but still the construction is not finished in all sense to make it usable.

5. Here, the cases relied by Learned advocate for appellant needs reference and appreciation. 1990 AIR 867 – Dorabji Cawasji Warden Vs. Commi Sorab Warden and another. On the contrary respondent relied on (2016)1 HLR 339 – Shaikh Riyasat Ali Vs. Shaikh Saifuddin by Calcutta High Court.

6. In case relied by appellant, it has been held that when property is joint family property and not partitioned by metes and bounds the shareholder can only sale share and the purchaser will have right to get the property partitioned by legal procedure. Hon'ble Supreme Court held that, if any of the shareholder sells his share and handover possession, such possession to purchaser becomes illegal and plaintiff can ask for eviction.

7. On the contrary, the case relied by respondent No.5 it was found by Hon'ble Calcutta High Court that plaintiff did not come with clean hands. It observed that the suit is not maintainable unless all co-sharers are joined as a parties in suit.

8. I have given thoughtful consideration to the ratios laid down in above cases. As held by Hon'ble Calcutta High Court, on technical ground the learned Trial Court dismissed the suit. But now the appellant has carried said decree in appeal which is continuation of suit and when the suit is continued by way of appeal the nature of suit property which is joint family property needs to be preserved. So I find that the case relied by appellant is more suitable to the facts in hand and the case relied by respondent would be applicable if the appeal is decided on merit.

9. Considering above discussion of facts, law relied and status of the disputed construction, I find that at least the position of construction as seen in photographs filed vide list Exh.22 and 24 needs to be preserved as it is till disposal of appeal on merit. In

result, I pass following order.

**ORDER**

1. Application Exh.7 is allowed.
2. Respondent/defendant No.1 to 5 shall maintain status-quo of suit property construction as depicted in four photographs dated 28/03/2022 filed by both parties as per above list supra. For ready reference, the four photographs shall be kept alongwith interim order.
3. Cost in cause.

Date: 13-04-2022.

( M.R. Natu)  
District Judge 2,  
Ahmednagar.