

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

SECOND APPEAL NO.287 OF 1991

1. Pandurang s/o Kondaji Thokal,
(died, by L.Rs.)
- 1-a. Kashinath s/o Pandurang Kondaji,
Age 50 years, Occu. Agri.,
- 1-b. Kandu s/o Pandurang Kondaji,
Age 50 years, Occu. Agri.,
- 1-c. Bhanudas s/o Pandurang Kondaji,
Age 50 years, Occu. Agri.,
- 1-d. Gorakshnath s/o Pandurang Kondaji,
Age 50 years, Occu. Agri.,
- 1-e. Sulochana d/o Pandurang Kondaji,
Age 50 years, Occu. Agri.,
- 1-f. Yamunabai w/o Pandurang Kondaji,
Age 50 years, Occu. Agri.,

All R/o Village Waghewadi,
Post Lahgaon, Taluka Newasa,
District Ahmednagar

.. Appellants

Versus

1. Ramchandra s/o Kondaji Thokal,
dead through his legal heirs
- 1-A. Vishwanath s/o Ramchandra Thokal
Age 74 years, Occu. Agri.,
- 1-B. Barku s/o Ramchandra Thokal,
Age 74 years, Occu. Agri.,
- 1-C. Vasant s/o Ramchandra Thokal,
Age 74 years, Occu. Agri.,
- 1-D. Shivaji s/o Ramchandra Thokal,
Age 74 years, Occu. Agri.,
- 1-E. Kisan s/o Tuma Thokal,

All R/o Village Waghewadi,
Post Lahgaon, Taluka Newasa,
District Ahmednagar

2. Tuma s/o Kondaji Thokal
Dead through his legal heirs
L.Rs. already on record
3. Malanbai w/o Dadu Chandne,
Age 45 years, Occu. Household,
4. Babai w/o Mahadeo Waghmare,
Age 43 years, Occu. Household
5. Tarabai w/o Suresh Dinkar
Age 40 years, Occu. Household
6. Kumkum w/o Chandrabhan Bosale,
Age 30 years, Occu. Household

All R/o Jawked Bk.
Taluka Pathardi, Dist.Ahmednagar

7. The Special Land Acquisition Officer,
District Ahmednagar .. Respondents

Mr Mujtaba Gulam Mustafa, Advocate for appellants
Mr K.S.Bhore, Advocate for respondents No.1-A, 1-C and 1-E

CORAM : N.W. SAMBRE, J.

**DATE OF RESERVING
THE JUDGMENT : 26.02.2015**

**DATE OF PRONOUNCING
THE JUDGMENT : 05.03.2015**

JUDGMENT

1. This second appeal was admitted on 22nd August 1991 on following question of law :

“ Whether the defendant No.1 Ramchandra purchased the property as member of Joint family and whether the plaintiff will get share in it ?”

2. The brief facts for consideration of present second appeal are as under :

The appellant-original plaintiff filed Regular Civil Suit No.174/1983 in the Court of Joint Civil Judge, Junior Division, Newasa, for partition, separate possession and claiming perpetual injunction against defendant No.1 or by anybody claiming through him from causing any interference in the possession of the plaintiff. A declaration is sought that the plaintiff is entitled to one third share from the share of defendant No.1.

3. The claim pertains to the suit property bearing Gut No.730 (1-A) ad measuring 4 acres out of 7 acres 30 gunthas on the northern side.

4. The claim, as above, was based on a prayer for partition, separate possession and injunction wherein the plaintiff claimed that plaintiff and defendant No.1 are brothers, having common ancestor Kondaji. There were two other brothers, viz. Rabhaji and Dhondiram and the plaintiff and defendant No.1 are surviving class one heirs of Kondaji. It is further claimed that suit land block No.370 was owned by Kondaji and defendant No.1 who was cultivating the suit land for joint family. According to plaintiff, he had sought partition in 1966 to which the defendant No.1/respondent responded and urged that the land in question was purchased by him in an auction, having satisfied

the debts of Kondaji and for the share of plaintiff he should pay cost in proportion to auction money. Plaintiff claimed that on 30th July 1966 he paid amount of Rs.150/- to the defendant No.1 and as such, he was put into possession of Northern side portion of the land to the extent of four acres. He further claimed that he remained in possession of the same as is apparent from the revenue entries, however, according to him, the defendant No.1 managed revenue authorities to get the plaintiff's name deleted from the revenue record and based thereon, started obstructing his possession, hence the suit.

5. At Exhibit 23, the defendant No.1 filed written statement and denied the claim for partition and claimed that the suit was not tenable for want of joinder of necessary parties, as other legal heirs of late Kondaji are not impleaded in the suit. It was further sought to be claimed by defendant No.1 that Kondaji had obtained loan of society and as such, a charge was created on the suit property. For want of repayment, the society auctioned the suit land which the defendant No.1 purchased for a consideration of Rs.200/- and as such, the suit property became his self-acquired property. He further denied the payment of Rs.150/- as claimed by the plaintiff on 30th July 1966.

6. The defendant No.2 was deleted from the array of defendants. Learned trial Court framed following issues at Exhibit 37 and answered the same accordingly.

ISSUES

“1. Does the plaintiff prove that he is in possession of

the suit land 1-A lawfully ?

2. Whether the suit is bad for non joinder of necessary parties ?

3. Does the defendant No.1 prove that the suit lands are his self acquired property ?

4. Whether the plaintiff is entitled to claim the partition ?

5. If yes, what would be his share ?

6. Whether the suit is barred by the principles of res-judicata and Estoppel ?

7. What order ?

FINDINGS

1. in the negative
2. In the affirmative
3. In the affirmative
4. In the negative
5. Does not arise
6. In the negative
7. As per order below

7. The trial Court dismissed the suit of the present appellant – plaintiff by an order dated 30th June 1986, which was subject-matter of first appeal before the 2nd Additional District Judge, Ahmednagar in Regular Civil Appeal No.276 of 1986. The appeal as well came to be

dismissed on 21st January 1991 as such, the present second appeal.

8. Before the trial Court, the plaintiff examined himself at Exh.41 in support of his claim whereas the defendant No.1 examined himself at Exh.60. Except these two witnesses, no other oral evidence was brought on record by the parties. The plaintiff, in his examination-in-chief, has deposed that in partition, he has received the suit property as he has paid amount of Rs.150/- to the defendant No.1 towards his share for repayment of the loan amount obtained by Kondaji. He further claimed that as he was put into possession of Northern portion of the property, entries to that effect were taken in revenue record. In his cross-examination, plaintiff has admitted that his father had taken loan from the society and the suit land was mortgaged. He further claimed that father has not repaid the loan, however, the same was repaid by the plaintiff and defendant No.1. He further claimed that he was unaware about the possession of the suit property being taken over by the said society. He has also admitted that the defendant No.1 has purchased the land from the society.

9. One of the important admissions given in the cross-examination by the plaintiff was that, Exhibit 42 does not bear his thumb impression which is a document dated 27th July 1966 relied upon by the appellant – plaintiff for claiming payment of Rs.150/- to defendant No.1 as his share towards the repayment of loan amount.

10. So far as the defendant No.1 is concerned, who had examined himself at Exh.60, in clear terms has stated that he had purchased the suit property in auction, as his father had failed to repay the loan

amount of the society. He has further deposed that before purchasing the property, he had taken consent of all the brothers as he had offered them to jointly purchase the property, however, none of them, including plaintiff, agreed to share for repayment of loan amount. He further claimed that he alone repaid the amount to the society by out of his own earning while working at Bombay, by sending money orders and the society as such, has executed the sale-deed in his favour in respect of the suit property. In his cross-examination, he has deposed that his father Kondaji was cultivating the land in question so as to maintain his family. He has also admitted that at that time he was living at Bombay along with his three sons. He has denied the possession of the plaintiff over the suit land.

11. In the light of above referred evidence, the learned trial Court after having analysed the same, has dismissed the suit.

12. In appeal, the appellate Court framed following points for consideration and dismissed the appeal.

POINTS

(1) Does the defendant prove that he has become exclusive owner of the property because of the purchase made by him for consideration of Rs.200/- from Shingvi-Tukai Co-operative Society after said society has purchased it in auction for recovery of the loan amount incurred by the original owner deceased-Kondaji ?

(2) Does the plaintiff prove that said property has been purchased by defendant No.1 out of nucleus of the joint family income and said property has been put into common hotchpotch of the ancestral property and therefore available for partition and separate

possession ?

(3) What order ?

FINDINGS

(1) Yes

(2) No

(3) Appeal is dismissed

13. So far as the question of law that is sought to be agitated by the learned Counsel for the appellants i.e. whether the property in question was purchased by the defendant No.1 - Ramchandra as a member of joint family is concerned, the burden was on the plaintiff to establish that the property was purchased by defendant No.1 as a member of joint family.

14. Having regard to the evidence discussed herein above, plaintiff - appellant, in my opinion, has not brought on record a single piece of evidence to support his contention that the defendant No.1 - respondent has purchased the property as a member of Hindu Joint family. Perusal of evidence of the plaintiff and the defendant No.1 as is rightly analysed by the Courts below reflects that it was Kondaji who was cultivating the property and subsequently, the property was purchased by defendant No.1 in auction by paying consideration to the society while he was staying at Bombay along with his three sons. The alleged claim by the plaintiff that he has paid Rs.150/- towards his share for repayment/consideration of the land is concerned, in his

cross-examination, he has admitted that the said document Exhibit 42 does not bear his thumb impression. Once the plaintiff has failed to discharge his burden of establishing the said fact, both the Courts below, in my opinion, have rightly held against the plaintiff and dismissed the suit.

15. Despite there is concurrence of fact recorded by the Courts below, still this Court is intending to analyse the perversity of appreciation of evidence and on going through the said issue, it is noticed that the plaintiff has not discharged his burden.

16. The plaintiff having failed to establish that the suit property was purchased by the defendant No.1 as a joint family member, the question of plaintiff's share over the suit property will hardly be of any consequence as he will not be entitled to any share in the property.

17. Though the learned Counsel for the appellants has sought to raise the Ground Nos.II, VIII, XII, XV and XVII as substantial questions of law, however, perusal of the said grounds viz. the nature of suit property as joint family property, absence of sale certificate in favour of defendant No.2 by the society, the alleged revenue entries claimed to be in favour of the plaintiff, the parting of Rs.150/- towards repayment of debt by virtue of Exh.42 and the discretion to be exercised by the trial Court in ordering addition of parties, in my opinion, in no way the said grounds can be termed as substantial questions of law.

18. As such, the present second appeal being devoid of merits, stands rejected.

(N.W. SAMBRE, J.)

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