

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

SECOND APPEAL NO. 249/2011

Mahipati S/o Manikrao Shendge
Age 54 yrs. Occ-Agri & Service
R/o Makhani, Tq. Gangakhed
Dist.Parbhani

.. APPELLANT
[Orig.plaintiff]

Versus

Narayan S/o Manikrao Shendge
Age 40 yrs, Occ-Agri,
R/o Makhani, Tq. Gangakhed
Dist.Parbhani.

.. RESPONDENT
[Orig.Deft.]

...
Shri A.S.Deshmukh,Adv. for appellant
Shri H.V.Patil,Adv. for respondent
...

**CORAM : N.W.SAMBRE,J.
DATED : 1st JULY, 2015**

ORAL ORDER :-

The present Appeal is by the original plaintiff who preferred Regular Civil Suit. No.300/04 in the Court of Second Joint Civil Judge, Junior Division, Gangakhed praying therein decree for permanent injunction or in alternate for partition and separate possession.

2] The suit property consists of half portion of Municipal House no.613/3/2 admeasuring 16 ft. from East and 28½ ft from West from North 44 ft. and from South 40 ft.

3] It is claimed by present appellant-plaintiff that he is elder brother of defendant and both of them reside separately. According to him, they have purchased suit property from one Bhise on 2/4/1993 by registered sale deed out of their self acquired earning.

4] After purchase of the property in question, they obtained permission from Municipal Council and constructed house on said plot bearing Municipal House No.613/3/2.

5] It is claimed by appellant that the respondent was residing in the half portion of the house and the shop in the another half portion was given on rent. It is further claimed that on the next day of Gudi Padwa of 2004, partition amongst plaintiff, defendant and other three brothers and father took place. According to the plaintiff, after partition, suit property came to his share as he has given up his claim from agricultural land. It is further claimed by him that he became absolute owner of the said property and is recovering rent from the shop. According to him, his possession and his right was obstructed by defendant which has prompted in filing of the Suit.

6] In response to the summons, defendant filed his written statement at Exh.14 alleging therein that the suit property was purchased out of the earning received from the joint family. It was further alleged that there was neither any partition nor deed in separation by metes and bound of the joint family property. According to him, he is in actual possession and sought dismissal of the suit.

7] The trial Court with above background framed issues at Exh.16, as under :

ISSUES	FINDINGS
1] Does the plaintiff prove that suit house is partitioned ?	In Negative
2] Does the plaintiff prove his possession over half share ?	In Negative
3] Does the plaintiff prove obstruction in his possession?	In Negative
4] Does the plaintiff prove that plaintiff relinquished his right in the suit house ?	In Negative
4-A] Does the defendant prove that the suit property is the joint family property ?	In Negative
5] Is plaintiff entitled for injunction and in alternate for possession ?	In Negative.

8] The trial Court based on the evidence and the pleadings of the parties was pleased to dismiss the Suit as it is noticed by the trial Court that the appellant herein has failed to establish his case.

9] An Appeal by present appellant before learned Ad-hoc District Judge-I, Gangakhed bearing Regular Civil Appeal No.31/2008 suffered the fate of dismissal, as such present Second Appeal.

10] Shri Deshmukh, learned counsel for appellant plaintiff on the point of legality and validity of the judgment would urge that both the judgments are liable to be set aside on the ground that another Suit filed by present respondent for partition of property in question is not added in the common hotpotch. According to him, the Court below has though noted that the sale deed is in joint name of the present appellant the respondent and the Court overlooking the same has dismissed the Suit. According to him, the findings are perverse and liable to be assailed.

11] Learned counsel for the respondent-defendant would urge that though the sale deed dated 2/4/1993 is in the joint name and there is a joint mutation of the suit property in the name of the appellant and the respondent, however, the property was purchased out of the income received from the joint family property. According to him, at no point of time, partition of the property of the joint family was effected by metes and bounds as has been alleged by the present plaintiff. According to him, both the Courts below have rightly held that the appellant is not entitled for the share in the property and sought dismissal of the Appeal.

12] In the light of the rival contentions of the parties, it is noticed that the point that is sought to be canvassed by present appellant particularly as regards theory of relinquishment which was answered against present appellant. The claim that the said amounts to the entitlement of the present appellant for having share in the property particularly in the background of

admission given by defendant about joint holding of property in question that is to say ownership of the property in question.

13] Shri Deshmukh in this background would urge that since nature of the property in question was not held to be joint family property the same cannot be subject matter of partition. Further according to him, his rights are paralysed for the property in question though there is admission of his title to the suit property.

14] The learned counsel for the respondent having taken me through observations of lower courts below, it is required to be noted that the appellant herein in support of his claim has examined himself. In the examination in cross, he has in clear terms gave admission that the partition of the suit property took place between three brothers, appellant and the respondent on the next day of Gudi Padwa of 2004. According to him, the said partition was reduced in writing, however the Courts below have noted that neither such partition deed nor any documentary evidence or oral evidence was brought to that effect on record. It is brought to my notice that P.W.2 witness of the present appellant has rather deposed on the same line, however, neither any such document is placed on record, as such both Courts have proceeded to conclusion that the property in question was not partitioned.

15] It is admitted by present appellant that for the purpose of employment, he was required to stay out of said place and as such it was incumbent on him to show as to how he was

put to the possession of the suit property. Apart from above, it is required to be noted that the Court below while analysing the evidence brought before it has noted that the present appellant has failed to prove his possession over suit property and as such proceeded to answer the claim of the present appellant against him. The Court has noticed otherwise from the record and the evidence that the defendant was in possession of the suit property.

16] With the above referred background and the findings recorded by Courts below, to analyse submission of the learned counsel for the appellant that the suit property was subjected to partition and as such came to his share, he was put to the possession of the same is really unbelievable particularly in absence of any documentary or oral evidence to that effect.

17] Apart from above, both the Courts below have concurrently held that the present plaintiff is not entitled for the relief of injunction/partition and possession. It is also required to be noted that it is an admitted position of the record that the appellant herein is having other three brothers apart from the respondent and father who were not party to the suit in question which is for partition and separate possession. In view thereof, in my opinion, both the Courts having concurrently held against present appellant, no case for interference is made out. Appeal as such, fails and stands dismissed.

(N.W.SAMBRE,J.)

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