

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

SECOND APPEAL NO. 64 OF 2012

Bhimrao s/o Gopala Madake,
Age: 72 years, Occu. Agri.,
R/o: Moha, Tq. Kallam,
Dist. Osmanabad.

...Appellant

versus

- 1) Maruti s/o Gopala Madake,
Age: 76 years, Occu. Agri.,
R/o: Moha, Tq. Kallam,
Dist. Osmanabad.
- 2) Shamrao s/o Gopala Madake,
Age: 70 years, Occu. Agri.,
R/o: As above.
- 3) Navnath s/o Bhimrao Madake,
Age: 38 years, Occu. Service,
R/o: As above.
- 4) Vilas s/o Shamrao Madake,
Age: 37 years, Occu. Agri.,
R/o: As above.

...Respondents

.....
Mr. P. B. Rakhunde, Advocate for appellant.
Mr. S. S. Choudhary, Advocate for respondent No. 1.
.....

CORAM : N.W. SAMBRE, J.

DATE : 10th JULY, 2015

ORAL ORDER :

Present appellant is original defendant to Regular Civil
Suit No. 360 of 1987. Respondent Maruti filed a suit for declaration

as owner of the suit property and injunction restraining the defendants from obstructing his possession over the suit land.

2. The suit came to be decreed by judgment and decree dated 10/02/1999, whereby present appellant-defendant was restrained from interfering with the possession of the plaintiff, as the plaintiff was declared to be owner of the suit property. The appeal at the behest of present appellant vide Regular Civil Appeal No. 32 of 2001 also came to be dismissed on 05/06/2007 by Adhoc District Judge-1, Osmanabad. As such, present second appeal.

3. Learned Counsel for the appellant-defendants would urge the following substantial question of law;

“ Whether the Courts below have committed an error in appreciating the fact that after death of their father Gopala, there is a presumption as regards jointness of the property and the appellant herein has share to the ancestral property?”

4. So as to consider the said contentions, he has taken me through the observations made by both the Courts below and would urge that the plaintiff and defendants have common ancestor by

name Gopala, who was earlier in possession of the property in question. He would urge that after death of Gopala, though sale certificate in relation to the suit property was issued in the name of plaintiff, however, he being manager of the joint family, sale certificates were never objected by present appellant, as such, same continues in favour of Maruti. According to the appellant, the said plaintiff has taken undue advantage and has claimed that the said property was his self acquired property and was not subjected to partition. According to him, in view of presumption as is available under Hindu Law qua family property, they are entitled for share in the suit property, which was ignored by both the Courts below and declared the plaintiff as owner of the property in question.

5. Mr. Choudhari, learned Counsel for respondent-plaintiff would support the judgments delivered by the Courts below and would urge that after death of Gopala, family lived together for period of two years and thereafter there was partition by metes and bounds. He would urge that admission given by the defendant to that effect in the evidence speaks of ancestral property to the extent of 10 acres which was already subjected to partition. He has relied upon the sale certificate and sought dismissal of the appeal.

6. So as to analyze the contentions of respective Counsel,

I have gone through the observations made by the Courts below and noted that in support of the contention, the present appellant filed written statement at Exhibit-24 which was adopted by other defendants at Exhibit-26. Present appellant has admitted relationship between the plaintiff and defendants, however, denied that property was exclusively owned by the plaintiff. The claim, as was put forth by the plaintiff in the suit as regards partition by metes and bounds after death of their father was also denied by the defendants.

7. Learned trial Court, as such, framed issues at Exhibit-36 and answered against the present appellant. Learned trial Court, based on the evidence of the plaintiff, who has examined himself at Exhibit-64, another witness at Exhibit-66, defendant's evidence at Exhibit-70 and one more witness at Exhibit-73, has recorded evidence and considered the same in the light of documentary evidence brought on record, particularly 7/12 extracts at Exhibits-9,10 and 79.

8. Learned Courts below have proceeded to consider the sale certificate in favour of original plaintiff-respondent herein at Exhibit-65, which reflects conferment of ownership right exclusively on the plaintiff.

9. The evidence of the parties herein was specifically analyzed by learned trial Court and it was noticed that the defendant and his witness have in clear terms admitted that ancestral property to the extent of 10 acres was available.

10. The theory of partition as is sought to be put forth by the plaintiff for seeking declaration and injunction, particularly which was effected after death of their father Gopala was accepted by the Courts below based on the evidence that was brought on record, particularly revenue entries taken to that effect.

11. The trial Court, as such, decreed the suit on 10/02/1999.

12. Learned lower appellate Court, while dealing with the appeal of one of the defendant Bhimrao i.e. R.C.A. No. 32 of 2001, has given entire reconsiderations to the claim put forth by the present appellant including that of denial of theory of partition by present appellant. Learned lower appellate Court has framed points as regards ownership of plaintiff over the suit property and also as regards effect of partition at the time of 'Gudhipadva' in the year 1956 after death of father of plaintiff and defendant Nos. 1 and 2. Lower appellate Court, upon analysis of the entire documentary and oral evidence, has proceeded to dismiss the appeal by recording

independent findings.

13. With the above back ground, submissions as are sought to be canvassed in the present appeal are concerned, it is required to be noted that the appellant, at this point of time, would urge that though sale certificate at Exhibit-65 was in the name of plaintiff, however, he being manager, was entitled and continue to do so and misuse of the same, was made by the plaintiff. The above referred submissions though are based on factual matrix, in view of provisions of Section 79 of the Evidence Act, the presumption in view of Exhibit-65 sale certificate in favour of plaintiff was not rebutted by the appellant-defendant by bringing on record the cogent evidence. The plaintiff, admittedly, has relied upon the sale certificate at Exhibit-65, however, it was open for the present appellant-defendant to place on record the sufficient evidence to demonstrate that the sale certificate, as was issued in the name of plaintiff, was pursuant to the status as manager/karta of joint family after death of their father. No evidence to that effect was brought on record by the appellant herein.

14. In my opinion, if the said contentions of the present appellant are to be accepted at this moment, the same amounts to re-appreciation of entire evidence on record.

15. In view of above, and having regard to the concurrent findings, it will be appropriate, in my opinion, to dismiss the appeal. No substantial question of law is involved in the present appeal. As such, appeal fails, same stands dismissed.

[N.W. SAMBRE, J.]