

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

**Second Appeal No.331 of 2012
With
Civil Application No.6357 of 2012**

Kisan s/o Karbhari Andhale
And Another.

.. Appellants.

Versus

Deorao s/o Karbhari Andhale
And Others.

.. Respondents.

Shri. H.V. Tungar and Shri. Raghuraj V. Deshmukh,
Advocates, for appellants.

CORAM: T.V. NALAWADE, J.

DATE : 20th OCTOBER 2015

ORDER:

1) The appeal is filed against the judgment and decree of Regular Civil Suit No.120/2001 and also against the judgment and order of Regular Civil Appeal No.167 of 2007. Heard learned counsel for the appellants.

2) The suit was filed by respondents Deorao and Narayan for relief of declaration and injunction. The

plaintiffs and defendant No.2 are real brothers *inter se*. Defendant No.3 - Chandrakala is wife of defendant No.2. Defendant No.1 is father of the plaintiffs and defendant No.2. Defendant No.1 was tenant in land Survey No.10/A in the past.

3) It is the case of plaintiffs that land Survey No.10/3 admeasuring 1H 72R in which there is a well having water is the subject matter of the suit. It is contended that land Survey No.10/A having area of 10 acres 30 gunthas was owned by one Dongarsing Gandhi and defendant No.1 was the tenant about 55 years prior to the date of suit of this land. It is contended that defendant No.1 and his brothers Subhana and Bhaginath were members of joint family and defendant No.1 was Karta of that family. It is contended that for the joint family Sy. No.10/A was purchased by them in the year 1963 and the property remained joint till the year 1970. It is contended that in the year 1970-71 defendant No.1 and his two brothers partitioned Survey No.10/A and to the share of defendant No.1 area of 1H 42 R was given. It is contended that after this partition, three parts of this land were

created and they are given number as 10/1, 10/2 and 10/3. It is contended that the area which was allotted to defendant No.1 was given Survey No.10/3.

4) It is the case of the plaintiffs that plaintiffs and defendant No.2 jointly purchased 30 gunthas portion from Bhaginath, brother of defendant No.1 on 3-8-1988 of his portion from Survey No.10/A.

5) It is contended that there was some dispute in the joint family in the year 1980 and so defendant No.1 partitioned the property which was with him and which had come under the partition which was effected amongst the defendant No.1 and his two brothers. It is contended that defendant No.1 did not keep any portion for himself and responsibility of maintenance of defendant No.1 and his wife was taken by plaintiff Nos.1,2 and defendant No.2. It is contended that, the land was then divided amongst plaintiff Nos.1,2 and defendant No.2 though name of defendant No.1 only was mutated in revenue record. It is contended that for maintenance of defendant No.1 and his wife they were giving crop share.

6) It is the case of the plaintiffs that father of defendant No.3 has knowledge of court proceeding but for defendant No.3 they got executed a sale deed on 7-7-1999 from defendant No.1. It is contended that though consideration of Rs.71,000/- was shown, no amount was paid to defendant No.1 and it was the sham document. It is contended that there was no reason for defendant No.1 to sell the property and possession was never given to defendant No.3. It is contended that when for getting connection of electricity plaintiffs collected 7/12 extract of the suit land they realised that such document was prepared. It is contended that plaintiffs then approached defendant No.1 through mediators and he admitted that he had committed mistake.

7) It is the case of the plaintiffs that defendant No.3 refused to take steps for reconveyance and so cause of action took place. They prayed for relief of setting aside the sale deed and for injunction.

8) Defendant No.1 filed consent written statement. He admitted that land admeasuring 1H 42R

was given to his share and 30 gunthas land was purchased subsequently and entire area was divided by him amongst his three sons. He contended that when the plaintiffs were out of station it was represented to him that share of defendant No.2 was to be entered in the name of wife of defendant No.2 and that way his signature was obtained on the sale deed.

9) Defendant Nos.2 and 3 filed joint written statement. They contended that the aforesaid land was purchased by defendant No.1 and his two brothers from their own income and so the portion which had come to the share of defendant No.1, in partition which had taken place between defendant No.1 and his brothers, was his self acquired property. They contended that for maintenance of himself and his wife defendant No.1 sold the property to defendant No.3 for consideration of Rs.71,000/- and since then defendant No.3 is in possession of the property.

10) Issues were framed by the trial Court on the basis of aforesaid pleadings. The trial Court held that the

suit property was joint family property but the trial Court further held that the partition took place amongst plaintiffs and defendant Nos.1 and 2 in the year 1980 and the three brothers were in separate possession of their portions. The trial Court held that it was not self acquired property of defendant No.1 and defendant No.3 was not bona fide purchaser. The trial Court considered the revenue record which includes Khasara Patrak which was more than 55 years old. The record was to the effect that defendant No.1 was protected tenant of some portion of Survey No.10/A. As defendant No.1 and his two brothers partitioned the property it can be said that it was their joint Hindu family property. It is not disputed that partition took place amongst defendant No.1 and his two brothers long back. In the evidence, defendant No.2 admitted that his father had partitioned the property which was joint Hindu family property and so for purchasing the suit property there was joint family estate with defendant No.1 and his brothers. Defendant No.1 himself has admitted that it was joint Hindu family property and he partitioned this property amongst his three sons. There is one document but in that document

the three sons are shown to be owner of 10 gunthas portion each. Much was argued on the basis of this document. Even if that document was there it was necessary for the defendants to show that such partition was actually effected and the remaining property was kept with him by defendant No.1. On the other hand there is report of Court Commissioner showing that the land which was standing in the name of defendant No.1 was found to be divided into six strips and in each strip different crop was being taken. When there is specific averment of defendant No.1 that there was partition, it is not possible to believe that only 10 gunthas portion was given to each of plaintiff Nos.1 and 2.

11) The important circumstance against defendant Nos.2 and 3 is that when sale deed was executed in favour of wife of defendant No.2, she had knowledge about the rights of the plaintiffs in this land. There was document of partition of aforesaid nature but such possession was not with any of the three brothers. The Court Commissioner report does not show that some property was there of which possession could have been

given by defendant No.1 to defendant No.3. Courts below have held that it was sham document and it was probably got executed by deceiving defendant No.1.

12) The points decided by the Courts below are questions of fact. There are concurrent findings. The findings are given on the basis of mutation, oral evidence and other circumstances. This Court holds that there is no material on the basis of which substantial questions of law can be formulated. In the result, the appeal stands dismissed. Civil Application stands disposed of.

Sd/-
(T.V. NALAWADE, J.)

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