

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO.159 OF 2015
WITH
CIVIL APPLICATION NO. 327 OF 2015 IN SA/159/2015**

Shri Mahipati Ganapati Warang
and Ors

..Appellants

Vs

Smt. Harnabai Kondiba Warang
and Ors

.. Respondents

Mr. Sandesh D. Patil i/b Prashant P. Jadhav, Advocate for Appellants.

Mr. Shrikant H. Yadav, Advocate for Respondents no.3 and 4.

CORAM : R.G.KETKAR,J.

DATE : 06/04/2015

PC:

1. Heard Mr. Sandesh Patil, learned counsel for the appellants and Mr.Shrikant Yadav, learned counsel for respondents no.3 and 4 at length.

2. By this Appeal under section 100 of the Code of Civil Procedure, 1908 (for short, "Act"), the original defendants have challenged the Judgment and decree dated 30.3.2009 passed by the learned Civil Judge, Junior Division, Malkapur-Shahuwadi, in Regular Civil Suit No.87 of 2005 as also the Judgment and decree dated 3.5.2014 passed by the learned District Judge-1, Kolhapur in Regular civil Appeal No.101 of 2009. By these orders, the Courts below decreed the suit

instituted by the original plaintiffs and declared that the plaintiffs together have $\frac{1}{2}$ share in the suit lands and they are entitled to partition and separate possession of the same. The original defendants are also entitled to partition of their $\frac{1}{2}$ share by paying requisite court fee on it.

3. In support of this Appeal, Mr. Patil strenuously contended that earlier the appellants, hereinafter referred to as 'defendants', had instituted suit against the respondents, hereinafter referred to as 'plaintiffs', for injunction simplicitor, namely Regular Civil Suit No.51 of 1997. The trial Court dismissed the suit. The Appellate Court dismissed the appeal preferred by the defendants. The said decree was also confirmed by this Court in Second Appeal. He submitted that the courts below decreed the suit, principally, on two grounds, namely (1) in the earlier round of litigation, in a suit for injunction simplicitor, it was held that the defendants (plaintiffs herein) are co-sharers along with the plaintiffs (defendants herein). He submitted that the findings recorded in those proceedings will not be binding in a suit instituted by the respondents for partition. He submitted that even if, in an earlier suit for injunction, there was an incidental finding on relationship between the parties, the same will not be binding in a latter suit which is instituted for partition of the

properties. In support of this proposition, he relied upon the decision of the Apex Court in the case of Gram Panchayat of Village Naulakha vs. Ujagar Singh, AIR 2000 Supreme Court 3272.

4. Mr. Patil further submitted that other ground which weighed to the Courts below was that the defendants did not enter witness box. The witness examined by the defendants had no personal knowledge. He, therefore, submitted that the Appeal requires consideration as it raises substantial questions of law as formulated by this Court.

5. On the other hand, Mr. Yadav supported the impugned orders. He submitted that the appellants herein had instituted Regular Civil Suit No.51 of 1997 against the respondents-plaintiffs for perpetual injunction. In that suit, the respondents contended that plaintiffs no.2 and 3 therein are his cousins. According to the respondents herein, Arjuna was main person. He had two sons, viz Balaku and Savaji. Deceased Ganapati and plaintiffs no.2 and 3 therein were the sons of deceased Balaku. Plaintiff no.1 was the son of the deceased Ganapati. On the other hand, defendant Bandu is the son of Savaji. According to the respondents, the suit lands were in the name of Arjuna. After the death of Arjuna, the suit lands were recorded in the name of Balaku. After the death of

Balaku, name of Ganapati was entered in the 7/12 extracts of the suit lands. The respondents herein pleaded that the suit lands were ancestral properties of Balaku. After partition was effected, half share of the suit lands was given to him and he is cultivating his half portion. It was further contended that he is a co-sharer in the suit lands and, therefore, the plaintiffs, herein, being co-sharers cannot claim injunction simplicitor.

6. I have considered the rival submissions made by the learned counsel appearing for the parties. I have also perused the material on record. As noted earlier, the appellants herein had instituted Regular Civil Suit No. 51 of 1997 against the respondents herein for injunction simplicitor. After considering the evidence on record, the learned trial Judge dismissed the suit on 1.3.2000. In paragraph 16, the learned trial Judge recorded that the defendants therein (respondents-plaintiffs) had proved that his father-Balku and the father of plaintiffs no.2 and 3 and deceased Ganpati were brothers. It was further observed that the defendant being co-sharer, injunction cannot be granted against him so as to oust him from the suit lands. The learned trial Judge also noted that the plaintiffs therein did not come with the case of ouster and the learned trial Judge accordingly dismissed the suit. The Appellate court dismissed the Appeal preferred by the

appellants herein and the said decree was confirmed by this Court. In other words, the relationship between the parties was established in that proceedings.

7. Mr. Patil submitted that the previous suit was for injunction simplicitor and the findings as regards relationship between the parties and that the defendant therein was co-sharer were an incidental findings and the same will not be binding in a latter suit. In support of this proposition, he relied upon the decision of the Apex Court in the case of Gram Panchayat of Village Naulakha (supra). In paragraph 10, the Apex Court, after referring to its earlier decision in the case of Sajjadanashin Sayed Vs. Musa Dadabhai Ummer (2000) 3 SCC 350, held that even if, in an earlier suit for injunction, there is an incidental finding on title, the same will not be binding in a latter suit or proceeding where title is directly in question, **unless it is established that it was 'necessary' in the earlier suit to decide the question of title for granting or refusing injunction and that the relief for injunction was found or based on the finding on title.** In the present case, while dismissing the suit for injunction simplicitor, the Courts below held that the defendant therein (respondent herein) being co-sharer, the appellants-plaintiffs were not entitled to claim any injunction, being other co-

sharers. In other words, while dismissing the earlier suit for injunction simplicitor, it was necessary to find out whether the plaintiffs, being co-sharers, could have claimed injunction against other co-sharers. Thus, I do not find that the decision of the Apex Court in the case of Gram Panchayat of Village Naulakha (supra) advances the case of the appellants herein.

8. That apart, as noted earlier, the defendants did not enter into witness box. The witness examined by the defendants, had no personal knowledge. The Courts below, after considering the evidence on record, have concurrently decreed the suit for partition. Mr. Patil was not in a position to demonstrate that the findings recorded by the Courts below are perverse, being based upon no evidence, or that they are contrary to evidence on record. I, therefore, do not find that the Appeal involves any substantial questions of law. Hence, Appeal fails and the same is dismissed. In view of disposal of the Appeal, Civil Application No.327 of 2015 for stay does not survive and the same is disposed of.

(R.G.KETKAR, J.)