

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

SECOND APPEAL NO.486 OF 1992

Vithabai Yeshwant Raut

(Since deceased through LRs)

1A. Balkrishna Yeshwant Raut & Ors.

... Appellants

V/s.

Laxmibai Sadashiv Raut

(Since deceased through LRs)

1A. Amrut Sadashiv Raut & Ors.

... Respondents

.....

Mr.Mahendra Agvekar, Advocate for the Appellants.

Mr.K.S. Deval, Advocate for the Respondents.

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CORAM : RAVI K. DESHPANDE, J.

DATED : JULY 2, 2015.

P.C.

The trial Court passed a decree in Regular Civil Suit No.103 of 1983 on 26th September, 1991. The plaintiffs are declared to be the owners in possession of the suit property. The defendants are permanently restrained from interfering with the possession of the plaintiffs over the suit property. The Lower Appellate Court by its judgment and order dated 11th February, 1992 allowed the Civil Appeal No.276 of 1991 filed by the defendants. The judgment and decree passed by the trial Court

is set aside and the suit has been dismissed. The plaintiff are before this Court in this Second Appeal.

2 This matter was admitted on 6th October, 1992, on the substantial questions of law mentioned in ground nos.5, 6 and 9 which are reproduced below:

“(5) The Lower Appellate Court erred in not holding that decree in Reg. Civil Suit 25 of 1948 was acted upon by the parties by getting necessary mutations effected and further that it was not at all necessary to execute the said decree.

(6) The Lower Appellate Court erred in not holding that evidence of mutation entries and other evidence was led by the Appellants to corroborate their case that decree in Reg.C.S.No.25 of 1948 was acted upon by conduct of parties and it was not necessary to make averments in that regard in the plaint.

(7) ...

(8) ...

(9) The Lower Appellate Court erred in holding that documentary evidence of agricultural operations was necessary for proving the case of the Appellants.”

3 There was a Regular Civil Suit No.25 of 1948 filed by one Yashwant, the father of the plaintiffs, for partition and separate possession, in which, Sadu, the father of the defendants was joined as the defendant no.1. The said suit was decreed by the trial Court. As a result of it, the father of the plaintiff was held entitled to 1/3rd share in the suit property, including one described in paragraph 1(b) of the plaint in Regular Civil Suit No.25 of 1948. The dispute in Regular Civil Suit No.103 of 1983 filed by the present Appellants pertain to the land admeasuring 70' x 70' in Gavthan of Villlage Bolinj, Taluka Vasai, District - Thane, which was covered by paragraph 1(b) of the plaint in R.C.S.No.25 of 1948, containing the averment that the defendant no.1 therein (Sadu, the father of the defendants in this suit) is in possession of it. The plaintiffs now in this suit claim that they are the owners of this property and in possession of it. The decree is, therefore, sought against the defendants from interfering with the possession of the plaintiffs over the suit property. In order to claim prohibitory injunction, the aspect of possession of the plaintiffs over the suit property becomes significant.

4 The only document on record to substantiate the claim for possession is the mutation entry No.1676 at Exhibit-69

dated 12th August, 1954. It records the names of the plaintiffs along with the name of Sadu, the father of the defendants in this suit. It appears from the said mutation entry that it was made on the basis of the statement made by Sadu on 10th July, 1954. Undisputedly, execution petition was required to be filed to execute a decree passed in Regular Civil Suit No.25 of 1948, to claim partition and separate possession of the suit property by metes and bounds. There was an order passed by the trial Court under Section 54 of the Code of Civil Procedure for effecting the decree for partition and separate possession. There is nothing on record to show that the collector put the parties in possession of their respective shares, by metes and bounds pursuant to the decree passed in Regular Civil Suit No.25 of 1948.

5 The Lower Appellate Court has held that the trial Court committed an error in holding that the plaintiffs established their possession over the suit property. It is also not the case put forth in the plaint that the decree passed in Regular Civil Suit No.25 of 1948, was satisfied by putting the father of the plaintiff in possession of the suit property after the decree was passed. The trial Court placed reliance upon mutation entry no.1676, which indicate the names of the father of the plaintiff

Yashwant and the father of the defendant Sadu and it does not help the appellants to establish separate possession of 1/3rd share in the suit property. The position which emerges is that though the plaintiffs are held to be the owners of 1/3rd share of the suit property, they cannot claim an order restraining the defendants from interfering with their possession, in the absence of the proof of their possession over the suit property. The substantial questions are answered accordingly. In the result, Appeal is dismissed.

(RAVI K. DESHPANDE, J.)