

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

**SECOND APPEAL NO. 456 OF 1991
WITH
CIVIL APPLICATION NO. 5081 OF 2015**

1. Bhagwan s/o Ganpat Ambte
Age : 35 Yrs., Occ. Agricultural,
R/o : Khande Pargaon,
Taluka & Dist. : Beed.

2. Mohan s/o Udhavrao Amte
[deceased Thr. L.Rs.]

- 2-A. Vimalbai w/o Mohan Amte
Age : 54 Yrs., Occ. Service,
R/o : Shahu Nagar, Beed,
Dist. : Beed.

- 2-B. Sandeep s/o Mohan Amte
Age : 28 Yrs., Occ. Service,
R/o : Shahu Nagar, Beed,
Dist. : Beed.

- 2-C. Sachin s/o Mohan Amte
Age : 25 Yrs., Occ. Service,
R/o : Shahu Nagar, Beed,
Dist. : Beed.

3. Rajaram s/o Ganpati Amte
Age : 40 Yrs., Occ. Agricultural,
R/o : Khande Pargaon, APPELLANTS/
Taluka & Dist. : Beed. [ORI. DEFT.NOS. 1 TO 3]

V E R S U S

1. Ranu s/o Manikrao Amte
[deceased Thr. L.Rs.]
- 1-A. Gumphabai w/o Ranu Amte
Age : 70 Yrs., Occ. Household,
R/o : Khande Pargaon,
Taluka & Dist. : Beed.
- 1-B. Ramkisan s/o Ranu Amte
Age : 45 Yrs., Occ. Agril.,
R/o : Khande Pargaon,
Taluka & Dist. : Beed.
2. Ramnarayan s/o Manikrao Amte
Age : 30 Yrs., Occ. Agril.,
R/o : Khande Pargaon,
Taluka & Dist. : Beed.
[Abated as per Addl. Registrar's Order dated 08/04/1992]. RESPONDENTS/
[ORI. PLTFF. AND
ORI.DEFT.NO.4]

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Mr. G.K.Naik-Thigale, Advocate for Appellants.

Mr. K.R.Doke, Advocate for Resp. No. 1.

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CORAM : T.V.NALAWADE, J.

DATE OF JUDGMENT : 24/06/2016

JUDGMENT :

1. The Appeal is filed against the Judgment and Decree of R.C.A. No. 174/1986 which was pending in the District Court, Beed. The Appeal was filed in the District Court by the plaintiff of R.C.S. No. 290/1984 which was pending in the Court of the Civil Judge [Sr.Division], Beed. The relief of permanent injunction was claimed by the plaintiff, but the trial Court had refused the said relief. The first appellate Court has granted such relief. Original defendant Nos. 1 to 3 have challenged the decision of the District Court. Civil Application is filed by the appellants for permission to produce documents viz. receipt allegedly executed by defendant No. 4 and plaintiff in respect of handing over of possession to the present appellants. Heard both

sides.

2. In short, the facts leading to the institution of the Appeal can be stated as follows.

The Suit was filed in respect of agricultural lands viz. G.No. 55 admeasuring 51 R., G.No. 89 admeasuring 51 R., G.No. 165 admeasuring 1 H. 5 R. The lands are situated at Khande Pargaon, Tahsil and district Beed. Defendant No. 4 is real brother of plaintiff. Defendant Nos. 1 to 3 contended that they have purchased share of defendant No. 4 from the aforesaid lands.

3. It is the case of the plaintiff that the suit properties are ancestral properties of plaintiff and defendant No. 4. It is contended that plaintiff is karta of the joint family of the plaintiff and defendant No. 4 and is cultivating the land for the joint family. It is contended that as no partition has taken place between defendant No. 4 and the plaintiff, defendant No. 4 was not in a position to hand over separate and actual possession of $\frac{1}{2}$ share to anybody. It is contended that as defendant Nos. 1 to 3 obstructed the possession of the plaintiff over the

suit property, cause of action took place for the Suit.

4. Defendant Nos. 1 to 3 filed joint Written statement and contested the Suit. They contended that defendant No. 4 was the owner of $\frac{1}{2}$ portion of aforesaid suit lands and he was in actual possession of his share in the suit lands. It is contended that defendant No. 4 had sold his share to one Shaukat Ali under registered sale deed. It is contended that Shaukat Ali sold this property to one Abdul and from Abdul defendant Nos. 1 to 3 have purchased it under the sale deed on 08/07/1992. The boundaries of the share purchased by defendant Nos. 1 to 3 are mentioned in the Written Statement. It is contended that as defendants are in separate possession of this portion, injunction can not be given against them in respect of that portion.

5. Issues were framed on the basis of aforesaid pleadings. Both sides gave evidence. The trial Court had dismissed the Suit by holding that plaintiff and defendant No. 4 were initially jointly owning the property and there was joint possession and so defendant Nos. 1 to 3, as purchasers of share of defendant No. 4, are entitled to

enjoy joint possession along with the plaintiff. The trial Court relied on the recital of the sale deed executed in favour of defendant Nos. 1 to 3 by the last owner Abdul. The first appellate Court referred the principles of Hindu Law and has held that as no partition has taken place between the plaintiff and defendant No. 4, defendant No. 4 was not in a position to hand over joint possession of the property to Shaukat Ali, the first purchaser.

6. This Court [other Hon'ble Judge] admitted Appeal on 28/10/1991 by holding that substantial questions of law need to be formulated as mentioned in Appeal memo in grounds Nos. (II) to (IV), (VII), (X), (XIII) and (XVI). The grounds are as under.

(II) The Courts below have not properly appreciated the provisions of Section 38 of the Specific Relief Act.

(III) The lower appellate Court ought to have considered that the defendant No. 1 is predecessor-in-title of defendant Nos. 1 to 3, had half share in the suit property and in pursuance to the sale deed he handed over possession to the extent of his share to the

purchasers and as such no injunction can be granted against the purchasers.

- (IV) It ought to have been seen that the defendant No. 4 had executed first sale deed in the year 1981 thereafter the second sale transaction was of 1982 and the present appellants are the purchasers of the third rank, who are put in possession in pursuant to the sale deed effected by the defendant No. 4 who had admittedly joint share in the suit property and as such in such circumstances, no injunction can be granted against the person who has admittedly has share in the property.
- (VII) The Court below has erred in holding that the property has not been specifically described in the sale instances of the predecessor-in-title of the plaintiff, this can not be the ground for issuing injunction against the defendants and setting aside the decree passed by the trial court.
- (X) The Court below has misread the principles noted in Hindu Law by Mulla 1986 Edition, Page 349.
- (XIII) The Court below has not taken into consideration the primary principles that no

injunction can be issued either when the property is joint or when the alienation effected by a co-parcner in the joint family and has put the purchaser in possession in pursuant to the said alienation.

(XVI) It ought to have been seen that Mir Shaukat Ali being predecessor -in-title of the defendant Nos. 1 to 3 and the plaintiff being signatory to the possession receipt executed by him, he is estopped from contending that no possession has been parted in favour of the purchasers.

7. From the aforesaid contentions and the principles of Hindu Law, it can be said that most of the aforesaid points are irrelevant and they are not at all involved in the Second Appeal. The main points which involve substantial questions of law can be as follows.

[i] Whether defendant Nos. 1 to 3 have proved that there was partition between plaintiff and defendant No. 4 and defendant No. 4 was enjoying the share separately when he executed sale deed in favour of Shaukat Ali ?

[ii] Whether defendant Nos. 1 to 3 have right to claim joint possession with the plaintiff in view of the principles of Hindu Law and in view of the submission made first time in this Appeal ?

8. In a case governed by Hindu Law, the burden to prove partition is always on the party who contends that partition has taken place. The first sale deed was executed on 25/08/1981 by defendant No. 4 in favour of Shaukat Ali. It was necessary for defendant Nos. 1 to 3 to prove that on the date of sale deed, on 25/08/1981, defendant No. 4 was in possession of his separate share or subsequent to that he got share separated and handed it over to defendant Nos. 1 to 3.

9. Defendants have not come with specific case on the date of partition. The 7/12 extracts at Exhs. 5 to 7 and 27 to 29 are for the years 1982-83 to 1984-85. They show that plaintiff and defendant No. 4 had equal share in the suit lands but in possession column, no separate possession of these 2 brothers was shown. Exh. 36 is the extract prepared during implementation of consolidation scheme and it also shows that these 2 brothers were

cultivating the land jointly in the year 1972-73.

10. Admittedly, in the revenue record no partition was shown to be effected either before the aforesaid date of sale or after it. It appears that defendant No. 4 also did not support the case of defendant Nos. 1 to 3 during trial. Exh. 63 is the sale deed executed in favour of Shaukat Ali by defendant No. 4 and in this document it was not mentioned that defendant No. 4 was in separate possession of his share. The contents of this sale deed show that defendant No. 4 had sold his $\frac{1}{2}$ share in the aforesaid agricultural lands. This sale deed was not signed even as a witness by the plaintiff.

11. Shaukat Ali, the purchaser of Exh. 63, is examined as witness by defendant Nos. 1 to 3. In the evidence also, he has stated that in Exh. 63 he had purchased $\frac{1}{2}$ share of defendant No. 4. He tried to improve the version that on the second date of sale deed, defendant No. 4 and the plaintiff partitioned the land and separate possession was given to him. Such was not the case in the pleadings and no such record was produced.

Here it needs to be mentioned that Civil Application which is under consideration is filed for permission to produce one so called possession receipt prepared on the date of sale deed executed in favour of Shaukat Ali. Shaukat Ali did not mention about such document. There are many other circumstances creating doubt about the conduct of defendant Nos. 1 to 3. Some 7/12 extracts were tried to be shown to this Court, on which attempt was made by defendant Nos. 1 to 3 to show that subsequently separate possession was shown but this record was not produced in the Court and the nature of entries was also highly suspicious. It can be said that to avoid criminal action, such record was not produced. It can be said that defendants are trying to protract the things and they are trying to create complications. In view of these circumstances, this Court holds that no permission can be granted to produce the document on which there is thumb impression allegedly put by the plaintiff.

12. In the cross examination, Shaukat Ali has admitted that he had filed complaint that plaintiff had taken away crops. In that case, plaintiff was acquitted.

In cross examination, he tried to say that there was one agreement of sale in which separate possession was shown of defendant No. 4 but that document was also not produced on record. He tried to say in the cross examination that partition had taken place between plaintiff and defendant No. 4 but he has no independent witness. He stated that he is not from that village. All these circumstances create probability in favour of the plaintiff that defendant No. 4 had not handed over possession to Shaukat Ali as there was no partition between the plaintiff and defendant No. 4.

13. The Courts below have not believed the evidence of the defendants and their witness Shaukat Ali. There is word against word. Both the Courts below have held that there was no partition. The finding given by the trial Court on this point was not challenged by defendant Nos. 1 to 3 and this single circumstance is sufficient for dismissal of the present Appeal.

14. It appears that in the sale deed executed by Abdul at Exh. 48 and 49, first time the boundaries were shown. But in the sale deed executed by Shaukat Ali in

favour Abdul, there are no such boundaries. On the basis of the sale deed, mutations were made and the names were entered in the ownership column, but the names of defendants and Shaukat Ali were never entered in crop cultivation column. Under the provisions of Maharashtra Land Revenue Code, every year crop enquiry is held and the names of the persons are entered in the crop cultivation column. At the relevant time, there was practice of entering the names but the names of the defendants were never entered. Thus, it can not be believed that defendants/appellants were cultivating any portion of the suit land.

15. The first appellate Court has rightly relied on the principles of Hindu Law from Edition 1986 quoted in para Nos. 3,4 and 9 to hold that purchaser from co-parcener can not claim joint possession. Thus, it was necessary for defendant Nos. 1 to 3 to file Suit for partition and get their share separated. Learned counsel for defendant Nos. 1 to 3 placed reliance on 2 cases reported as (2013) 5 Supreme Court Cases – 218 [Nasib Kaur and Ors. Vs. Dulari Singh and Ors.] and (2002) 9 Supreme Court Cases – 608 [Sakhahari

Parwatrao Karahale and Anr. Vs. Bhimashankar

Parwatrao Karahale]. In the first case, the facts were different. The property was not ancestral, it was not of joint family of Hindu. In the second case, it is held that all co-sharers are entitled to joint possession when the property belongs to joint family. This proposition can not be used in favour of defendant Nos. 1 to 3 as they are stranger purchasers.

16. In the result, Second Appeal stands dismissed. In view of dismissal of Second Appeal, C.A. No. 5081 of 2015 does not survive and stands disposed of.

17. At this stage, learned counsel for the appellants requested for continuation of interim relief. It is rejected.

[T.V.NALAWADE, J.]