

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

**904 SECOND APPEAL NO. 926 OF 2009
WITH
CA/12864/2009
IN
SA/926/2009**

PRALHAD SHANKAR BARI

VERSUS

**PUSHPA PANDURANG NAIK
AND ORS.**

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Mr. A.G.Talhar, Advocate for Appellant.

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CORAM : T.V.NALAWADE, J.

DATE : 28th JULY, 2016

ORDER :-

. The Appeal is filed by plaintiff No. 1 of R.C.S. No. 429/1987 which was pending in the Court of the Joint Civil Judge [Jr.Division], Jalgaon against the decision of the trial Court and against the decision of R.C.A. No. 107/1996 which was pending in the Court of the District Judge -2, Jalgaon. Heard learned counsel for the appellant.

2. The Suit was filed by the present appellant against his cousin brothers for relief of declaration of ownership in respect of agricultural lands and for relief of injunction. It is contended that land G.No. 69 admeasuring 6 H. 70 R. and land G.No. 443 admeasuring 4.4 Hectors situated at Shirsoli, Tahsil and District Jalgaon are the ancestral properties of the plaintiffs. It is contended that these lands were allotted to the share of plaintiffs during partition of the joint family properties and revenue record was created accordingly. It is contended that behind the back of plaintiffs, defendant No. 2 got changed the revenue record and then sold 2.2 Hectors land from G.No. 443 to one Ramdas Bari by sale deed dated 21/08/1980 and defendant No. 6 is the successor of said Ramdas.

3. It is contended that in R.D. No. 206/1977, which was filed by defendant No. 1 against defendant Nos. 2 and 3, cousins of plaintiffs, for recovery of money, the suit fields were attached and sold in auction. It is contended that as the property was belonging to plaintiffs, these properties could not have been sold but they came to be sold on 21/08/1987. On the basis of these contentions, plaintiffs had claimed the relief of declaration of ownership and relief of

injunction to protect the so called possession of the plaintiffs over the suit properties. Alternatively relief was claimed that if the plaintiffs are found to be owner of $\frac{1}{2}$ share, then the relief to that extent be given.

4. Defendant No. 1 filed Written Statement and denied the aforesaid contentions. He contended that R.C.S.No. 282/1972 was filed by him against defendant Nos. 2 and 3 for relief of recovery of money and the said Suit was decreed in his favour. He contended that for recovery of money in the said execution proceeding, the properties were attached and were put to court auction. It is contended that objections were filed by the plaintiffs in the said execution proceeding, but they were rejected and application filed under Order XXII Rule 15 (8) of the Code of Civil Procedure was also rejected. It is contended that such matter was decided in the execution proceeding and as no other proceeding is tenable in view of provision of Section 47 of the Code of Civil Procedure and so the Suit itself is not tenable. He contended that defendant Nos. 2 to 5 and plaintiffs have joined hands to create complications and to avoid payment of money to defendant No. 1.

5. Defendant Nos. 2 to 4 did not file Written Statement and they did not contest the matter. Defendant No. 6 filed Written Statement and she contended that she had purchased some portion from land G.No. 443 for valuable consideration of ₹ 20,000/- from defendant No. 2 under sale deed dated 07/07/1980 and her family was bonafide purchaser without notice for lawful consideration. She contended that mutation was effected on the basis of sale deed in favour of her husband and they were in possession.

6. On the basis of the aforesaid pleadings, issues were framed. Both sides gave evidence. Trial Court held that plaintiffs failed to prove that in family partition, these 2 properties had come to the share of plaintiff. The circumstance that objections were raised in the execution proceeding of similar nature and they were decided against the plaintiffs, is considered against the plaintiffs. The Courts have considered the case of plaintiffs on merits also and due to the finding given on aforesaid point, the Suit came to be dismissed.

7. Though there is oral evidence, plaintiffs were relying only on first mutation. Mutation No. 2740 at Exh. 82

is discussed by the Courts below and it show that on the application of Vitthal Shankar and Pundlik Supdu, the names were deleted and it was informed to the authority that during life time of the common ancestor Shankar, some property was given to them. The aforesaid mutation shows that the names of other members of joint family were deleted and name of only defendant No. 2 was entered in the revenue record. No other record was produced to show that other properties were allotted to the share of defendant No. 2. The evidence of witness examined by plaintiff was also against him as this evidence shows that father of defendant Nos. 2 to 4 viz. Supdu was in possession and after his death the defendants came in possession of the property. The Court considered that plaintiffs had submitted before the executing Court that other properties of defendants can be attached for recovery of money but no record of such other property was produced to show that other properties were allotted to the share of the defendants.

8. There are circumstances that steps were not taken by the plaintiffs even when their names were deleted from revenue record and only name of defendant No. 2 was entered in the revenue record. On the basis of this

circumstance and the apparent collusion between plaintiff and defendant Nos. 2 to 5, the Courts below have held that only to avoid the execution of decree and sale of the property in execution proceeding filed by defendant No. 1, the Suit was filed. The findings are on question of facts and on 2 occasions plaintiff got opportunity to get decision on this dispute. No substantial question of law as such is involved in the matter.

9. In the result, Second Appeal stands dismissed. In view of dismissal of Second Appeal, C.A. No. 12864 of 2009 stands disposed of.

[T.V.NALAWADE, J.]