

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

SECOND APPEAL NO.251 OF 2012

Babruwan s/o. Dhondiba Kasabe,
Age : 56 years, Occ. Agri.,
r/o. Moha, Taluka Kalla,
District Osmanabad ..Appellant

Vs.

1. Kamalbai w/o. Rama Gaikwad,
Age : 50 years, Occ. Household,
r/o. A Building 559, Room No.2,
Tadiwala Road, Pune

2. Vimalbai w/o. Shridhar Sawant,
Age : 47 Occ. Household,
r/o. Jawala (Nizamuddin),
Tq. Paranda,
at present Islampur (Diksal),
Kallam, Dist.Osmanabad

③. Parshuram s/o. Dhondiba Kasabe,
Age : 82 years, Occ. Nil.,
r/o. Moha, Taluka Kalla,
District Osmanabad

④. Parvatibai w/o. Dhondiba Kasabe,
Age : 94 years, Occ. Nil,
r/o. Moha, Taluka Kalla,
District Osmanabad

**Appeal dismissed
as per the order
dated 04.10.2013**

..Respondents

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Mrs.M.A.Kulkarni, Advocate for Appellant
Mr.M.P.Tripathi, Advocate for respondent Nos.1 and 2
Appeal is dismissed against respondent Nos.3 and 4

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CORAM : SANGITRAO S. PATIL, J.

DATE : JULY 12, 2017

ORAL ORDER :

Heard the learned Counsel for the appellant. She submits that in Ground Nos.(v) and (ix) of the appeal memo, R.C.S. number has been wrongly mentioned as 84 of 1990 instead of 58 of 1999. She seeks permission to carry out amendment in respect of number of the suit.

2. The proposed amendment is a formal one. It is allowed to be carried out.

3. Heard the learned Counsel for the parties on admission of the appeal.

4. The appellant is the brother of the deceased Parshuram - Respondent no.3. Respondent nos.1 and 2 are the daughters of the deceased respondent No.3. They had filed R.C.S. No.75 of 1996 against the appellant as well as their father - respondent no.3 for declaration of their title to

the suit land and also for perpetual injunction to protect their possession over the suit land. The learned trial Judge decreed the suit on 07.10.2003. The appellant preferred R.C.A. No.199 of 2003 against that judgment and decree, which came to be dismissed on 16.09.2011 by the learned Ad-hoc District Judge-1, Osmanabad. Against that judgment, the appellant has preferred this Second Appeal.

5. The learned Counsel for the appellant submits that the trial Court as well as the first appellate Court did not consider the effect of the compromise decree effected in R.C.S. No.58 of 1999. The said Courts did not consider that respondent nos.1 and 2, being the daughters, have no right to claim partition during the lifetime of the deceased respondent No.3. According to her, the compromise decree in R.C.S. No.58 of 1999 would operate as *res-judicata* and therefore, the suit filed by respondent nos.1 and 2 would not be maintainable. She submits that these are the substantial questions of law,

which are required to be considered in this Second Appeal and therefore, Second Appeal may be admitted.

6. As against this, the learned Counsel for respondent nos.1 and 2 submits that the land bearing block no.212 situate within the local limits of village Moha was allotted to the deceased respondent No.3, he being an ex-serviceman. He partitioned the suit land and gave it to the share of respondent nos.1 and 2. Since then, respondent nos.1 and 2 became owners of the suit portion of the land. Some portion of the land belonging to the deceased respondent No.3 was given by him to the appellant also. He submits that respondent nos.1 and 2, being the daughters of the deceased Parshuram, were entitled to have share in the property of the deceased respondent No.3. The deceased respondent No.3 himself being the absolute and separate owner of the land allotted to him by the Government, gave the suit land to respondent nos.1 and 2 and the appellant would have no *locus-standi* to challenge

such allotment of the land. He submits that the compromise decree in R.C.S. No.58 of 1999 is not binding on respondent nos.1 and 2 since they were not the parties to that suit. He submits that the trial Court as well as the first appellate Court considered the effect of that compromise decree and found that it will not have adverse effect on the rights of respondent nos.1 and 2 to claim title to and possession over the suit land. According to him, the appellant himself has no *locus-standi* to challenge the claim of respondent nos.1 and 2 in respect of the suit land. He submits that the deceased respondent No.3, allegedly, had executed the will in favour of the appellant, however, during his lifetime, he denied execution of any such will. He gave evidence against the appellant in the Court in the present suit and as such, the will alleged to have been executed by him would stand revoked. He submits that there is absolutely no question of law involved in this appeal. He, therefore, prays that

the appeal may be dismissed.

7. Indisputedly, the land that is stated to have been allotted by the deceased respondent No.3 to respondent Nos.1 and 2 during his lifetime was his separate property. Though the appellant is the real brother of the deceased respondent No.3, he had no right to have share in that land. As seen from the contents of the compromise decree passed in R.C.S. No.58 of 1999, the appellant was claiming his right and interest in the suit land on the basis of the will allegedly executed by the deceased respondent No.3. However, the deceased respondent No.3, who died during pendency of this appeal, had refused to have executed any will in favour of the appellant. He appeared as a witnesses on behalf of respondent nos.1 and 2 in the present suit and stated on oath that he has allotted the suit land to the share of respondent nos.1 and 2, who are his daughters, and that the appellant has no concern whatsoever with the suit land. He denied that he

ever executed any will-deed in favour of the appellant. If this statement on oath made by the deceased respondent No.3 is considered, it will be clear that even if any will-deed was executed by him in favour of the appellant, it would stand revoked.

8. Admittedly, respondent nos.1 and 2 were not parties to the compromise decree passed in R.C.S. No.58 of 1999. Consequently, the said compromise decree would not be binding on respondent nos.1 and 2. Respondent nos.1 and 2, being daughters of the deceased respondent No.3, were entitled to have share in his property. They came with a specific case that the deceased respondent No.3 allotted the suit land to their share in the partition that was effected on Chaitra Pratipada Shake 1970. The deceased respondent No.3 being the absolute owner of the suit land, had every right to dispose it of as per his own wish. If that be so, after getting the suit land in partition, which was effected by the deceased respondent No.3 himself, respondent nos.1

and 2 would get a legal right to claim title to and possession over the suit land.

9. The entries in the record of rights cannot vest title in respect of the suit land in favour of the appellant. The said entries are taken for fiscal purposes and they cannot be treated as conclusive evidence for vesting title to any person in respect of the agricultural land. The trial Court as also the appellate Court have considered the effect of the entries in the record of rights in respect of the suit land and have not considered the said record in favour of the appellant. The trial Court and first appellate Court have considered the effect of the compromise decree in R.C.S. No.58 of 1999 as well.

10. The learned Counsel for the appellant cited the judgment in the case of **Byram Pestonji Gariwala Vs. Union Bank of India and ors., AIR 1991 SC 2234(1)**, wherein it is held that the compromise

decree signed by the Counsel and not by the party in person is binding, executable and would operate as *res judicata*. In the present case, as stated above, respondent nos.1 and 2 were not the party to the suit in which the said compromise decree has been effected. Therefore, the present suit would not be hit by principles of *res-judicata*.

11. The judgment of the trial Court has been confirmed by the first appellate Court. There are concurrent findings of facts given by these Courts. I do not find any substantial question of law involved in the present Second Appeal. In the circumstances, I am not inclined to admit the appeal. Hence, the order:-

- (i) The appeal is dismissed.
- (ii) No costs.
- (iii) Civil Application stands disposed of.

[SANGITRAO S. PATIL, J.]