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

**SECOND APPEAL NO.66 OF 2017
WITH
CIVIL APPLICATION NO.1283 OF 2017**

Shaikh Razak s/o Shaikh Mannu,
Age : 70 years, Occu. Agri.,
R/o Sonari, Tq. Himayatnagar,
Dist. Nanded

..APPELLANT
(Ori. Defendant No.1)

VERSUS

1. Shaikh Rustum s/o Shaikh Chand,
Age : 90 years, Occu. Agril.,
R/o Sonari, Tq. Himayatnagar,
Dist. Nanded
2. Shaikh Rahim s/o Shaikh Muneer
Died, Through L.Rs.
- 2-i) Shaikh Qayyum s/o Shaikh Muneer,
Age 30 years, Occu.Agril.,
- 2-ii) Shaikh Muneer s/o Shaikh Rustum
Age : 56 years, Occu.Agril.,
- 3-iii) Shaikh Kayum s/o Shaikh Muneer,
Age : 32 years, Occu. Agril.,

All R/o Pardi (Vaijapur), Tq.
Mukhed, Dist. Nanded
4. Mastan Khan s/o Mehatab Khan,
Died, through L.Rs.
- 4-i) Tanyabee w/o Mastan Khan,
Age : 48 years, Occu. Agril.,
- 4-ii) Simibee d/o Mastan Khan,
Age : 22 years, Occu. Education,
- 4-iii) Manan Khan s/o Mastan Khan,
Age : 17 yrs, minor U/g of his
mother Tanyabee Mastan Khan,

(2)

- 4-iv) Mateen Khan s/o Mastan Khan,
Age : 15 yrs., minor, U/g of
his mother Tanyabee Mastan Khan,

All R/o Sonari, Tq. Himayatnagar,
Dist. Nanded

5. Abdul Mujeeb s/o Abdul Majid,
Age : 50 years, Occu. Agril.,
R/o Mohingalli, Himayatnagar,
Dist. Nanded

..RESPONDENTS
(R. Nos.1 to 3 – Ori. Plffs.,
R. No.4 – ori. Deft. No.2,
R. No.5 – ori. Appellant no.5
in RCA)

Mr Mahesh V. Ghatge, Advocate for appellant

CORAM : N.W. SAMBRE, J.

DATE : 29th June, 2017

ORAL ORDER

The present appellant filed Regular Civil Suit No.76 of 1995 for recovery of possession of land Gat No.41, area 3 Hectares 94 R at village Sonari, in which findings came to be recorded that the land Survey No.16/A is in possession of the appellant, however, the ownership vests with the present respondents-plaintiffs. The said findings are upheld up-to this Court in a second appeal, however, with an observation that the document viz. oral partition deed could be considered in favour of the present appellant for collateral purpose.

2. Based on the findings recorded in Regular Civil Sui No.76 of 1995 against appellant which were confirmed up-to second appeal, the present respondents-plaintiffs filed Regular Civil Suit No.14 of 1997 (Old No.74 of

(3)

1996) claiming recovery of possession of 1 Hectare 31 R land out of Survey No.16/A and Grampanchayat House No.86/A at village Sonari. The said suit came to be decreed on 6th November, 2004 by the judgment and order of Civil Judge Junior Division, Himayatnagar, which was further confirmed in appeal being Regular Civil Appeal No.11 of 2010 by judgment and decree dated 7th October, 2016. Thus, the present Second Appeal.

3. Learned Counsel appearing on behalf of the appellant-defendant, while inviting attention of this Court to the judgment of the Apex Court in the matter of **Bondar Singh & ors. vs. Nihal Singh & ors.**, reported in **AIR 2003 SC 1905**, would urge that even if findings of ownership in Regular Civil Suit No.76 of 1995 are recorded against the appellant-defendant, still the oral partition deed which is un-registered one can be considered for collateral purpose in favour of the present appellant. So as to substantiate his contention, learned Counsel would invite attention of this Court to the order passed in Second Appeal No.170 of 2001 by this Court confirming the judgment and decree in Regular Civil Suit No.76 of 1995. In addition, he would draw support from paragraph 5 of the said judgment so as to submit that once the present appellant having been found in possession of the suit property based on oral partition deed, his possession could be held lawful.

4. Apart from above, Mr Ghatge then would urge that the oral partition deed since is not registered, its evidentiary value while determining the issue of possession is required to be appreciated.

(4)

5. With the assistance of Mr Ghatge, I have perused the judgment delivered in Regular Civil Suit No.76 of 1995, further confirmed in Second Appeal No.170 of 2001 by this Court. It is to be noted that in the said suit a specific issue is framed as regards ownership of respondents over the disputed agricultural land being Survey No.16/A and the said issue of ownership was answered in favour of the respondent. In view thereof, the claim of the appellant that the deed of oral partition could be interpreted in favour of the present appellant particularly in the light of the observations made by this Court in Second Appeal No.170 of 2001 is liable to be rejected. The said document, in my opinion, in the backdrop of judicial verdict of the Court cannot be termed to be the one open for consideration particularly while dwelling on the issue of factum of lawful possession of the present appellant. As such the contention of the appellant that the document of oral partition is required to be considered by this Court for collateral purpose i.e. for inferring lawful possession of the appellant stands rejected.

6. Though Mr Ghatge has also sought to canvass that the suit property which includes a house property was claimed to be purchased out of joint family income by the respondent being karta of the family, however, both the Courts below have concurrently answered the issue against the present appellant.

(5)

7. An additional submission is sought to be raised by Mr Ghatge that the suit property in Regular Civil Suit No.76 of 1995 and the present suit is altogether different and as such the principle of *res judicata* will not apply. He would emphasize upon the the claim to the extent of 61 R of land of which possession is sought in Regular Civil Suit No.76 of 1995 for the said purpose. I am afraid, such plea of the appellant at this stage can be accepted particularly is liable to be rejected when in earlier suit a specific issue about ownership of the respondent herein over Survey No.16/A at Mauja Sonari was raised, considered and answered against the appellant. Whether 61 R land involved in Regular Civil Suit No.76 of 1995 or the land to the extent of 1.31 Hectares, subject-matter of the present suit is different one is not established by the appellant by leading cogent evidence so as to infer that the land to the extent of 1.31 Hectares is not out of Survey No.16/A in regard to which the ownership findings are recorded in favour of defendant in Regular Civil Suit No.76 of 1995.

8. In view thereof, Second Appeal lacks merit and stands dismissed. In view of dismissal of the second appeal, pending civil application does not survive and stands disposed of accordingly.

(N.W. SAMBRE, J.)

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