

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 82 OF 1992
WITH
CIVIL APPLICATION NO. 1286 OF 2017

Shrimant Pandhari Bhutekar
Age 23 years, Occ. Agriculture
R/o. Tugaon, Tq. Osmanabad
District Osmanabad

...Appellant

versus

1. Devidas Pandhari Bhutekar
since died his L Rs.
- 1A. Tolabai w/o Devidas Bhutekar
Age 60 years, Occ. Household
R/o. Tugaon,
Tq. and District Osmanabad
- 1B. Jadubai w/o Pulchand Thodsare
Age 45 years, Occ. Household
R/o. Dhoki,
Tq. and District Osmanabad
- 1C. Mahananda w/o Uttam Gawad
Age 45 years, Occ. Household
R/o. Tadvla,
Tq. and District Osmanabad
- 1D. Sunanda w/o Venkat Londhe
Age 45 years, Occ. Household
R/o. Todwala,
Tq. and District Osmanabad
- 1E. Popat s/o Devidas Bhutekar
Age 40 years, Occ. Agriculture,
R/o. Tugaon
Tq. and District Osmanabad
- 1F. Shrikrishna s/o Devidas Bhutekar
Age 34 years, Occ. Agriculture
R/o. Tugaon,
Tq. and District Osmanabad
- 1G. Nandkumar s/o Devidas Bhutekar

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Age 34 years, Occ. Agriculture
R/o. Tugaon,
Tq. and District Osmanabad

1H. Atmaram s/o Devidas Bhutekar
Age 30 years, Occ. Agriculture
R/o. Tugaon,
Tq. and District Osmanabad

1I. Agatrao s/o Devidas Bhutekar
Age 26 years, Occ. Agriculture
R/o. Tugaon,
Tq. and District Osmanabad

2. Mittu s/o Devidas Bhutekar
Age 34 years, Occ. Agriculture
R/o. Tugaon,
Tq. and District Osmanabad

...Respondents

.....
Mr. S.S. Choudhari, advocate for the appellant
Mr. S.V. Natu, advocate for respondents
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CORAM : V. K. JADHAV, J.

**Date of Reserving
the Judgment : 28.03.2018**

**Date of pronouncing
the Judgment : 04.06.2018**

JUDGMENT:-

1. Being aggrieved by the judgment and order passed by the 2nd Additional District Judge, Osmanabad dated 6.1.1992 in Regular Civil Appeal No. 174 of 1982, the original plaintiff has preferred this second appeal.

2. Brief facts giving rise to the present second appeal are as

follows:-

a. The appellant-plaintiff had instituted Regular Civil Suit No. 192 of 1978 for declaration of ownership in respect of suit land and also for decree of perpetual injunction. The plaintiff and defendant No.1 are the brothers interse and both of them are having two more brothers by name Nagnath and Shukracharya and their father Pandhari died leaving behind 4 sons, wife and 4 daughters. Deceased Pandhari had ancestral property at villages Tugaon and Gowardhanwadi, Tq. and District Osmanabad. The plaintiff alongwith other brothers, including mother etc. enjoyed the ancestral land till the death of Pandhari. According to plaintiff, deceased Pandhari died in the year 1964 due to dispute amongst the women folk in the family. Consequently, the joint family properties came to be partitioned by defendant No.1. The agricultural land at Gowardhanwadi came to be allotted to the share of defendant No.1 whereas the agricultural land at Tugaon came to be allotted to the plaintiff and his two brothers. The land survey No. 1/5 admeasuring 4 Acres 6 Gunthas came to be allotted to the plaintiff, the land survey No. 2/12 was allotted to the brother Nagnath and the land survey No. 5/4 was allotted to Shukracharya alongwith the land in other survey numbers, situated at Tugaon. It is a specific plea of the plaintiff that land situated at village Tugaon never allotted to defendant No.1 at

all. Defendant No.1 had submitted an application to the revenue authorities on 20.8.1966 and after making due enquiry, mutation entry No. 222 came to be sanctioned on 28.9.1966. All brothers are enjoying their respective share as owner thereof in terms of the said partition.

b. It is further case of the plaintiff that while implementing consolidation scheme in the village, the suit land was wrongly entered in the name of defendant No.1. The plaintiff had raised objection when consolidation work was completed in the year 1977-78 and the said objection was pending before the Director of Land Records, Aurangabad. According to the plaintiff, the defendants have no concerned with the suit land but in collusion with defendant No.1 they got their names mutated in respect of the suit land. It is further case of the plaintiff that since the defendants have caused obstructions in cultivation of suit land, the plaintiff constrained to institute the suit in respect of suit land for the aforesaid reliefs.

c. Defendant No.1 has strongly resisted the claim by filing written statement Exh.26. According to defendant No.1, plaintiff, Nagnath and Shukracharya are real brothers interse and defendant No.1 is their step brother. Their father died in the year 1964. During the life time of deceased Pandhari and even after his death, entire family

was jointly cultivating the land. However, due to difference amongst the women folk, defendant No.1 started living separately. Defendant No.1 has denied that there was any partition. According to him, there is no partition at any time. It is the case of defendant No.1 that agricultural lands at Gowardhanwadi came to be acquired by the State of Maharashtra for construction of Terna project during the life time of his father and the amount of compensation towards the said acquisition was also received by their deceased father. According to him, after the death of his father, during the mourning period, their another brother Nagnath obtained his signatures on 3/4 blank stamp papers. The plaintiff and his two real brothers used those papers. In fact, defendant No.1 has not made any application before any authority. Defendant No.1 has denied mutation entry No. 222 and further stated that the same is not binding on him. According to him, all brothers are cultivating their ancestral land and therefore, the question of causing obstruction in the possession of the appellant-plaintiff does not arise. It is his case that the ancestral property was never partitioned.

d. On the basis of rival pleadings of the parties to the suit, the trial court has framed issues. Both the parties led their oral and documentary evidence in support of their rival contentions. Learned Joint Civil Judge, Junior Division, Osmanabad, by judgment and

decree dated 30.7.1982 decreed the suit thereby declaring that the plaintiff is the owner of the suit land and further restrained the defendant permanently from disturbing the peaceful possession of the plaintiff over the suit land.

e. Being aggrieved by the judgment and decree dated 30.7.1982, defendant No.1 had preferred Regular Civil Appeal No. 174 of 1982 before the District Court at Osmanabad. During pendency of appeal, defendant No.1 Devidas died and he is substituted by his legal representatives in the pending appeal. The learned 2nd Additional District Judge, Osmanabad by his judgment and order dated 6.1.1992 allowed the appeal. The judgment and decree dated 30.7.1982 passed by the trial court in Regular Civil Suit No. 192 of 1978 came to be quashed and set aside and the suit was dismissed. Being aggrieved by the same, the plaintiff has preferred this second appeal.

3. Learned counsel for the appellant-plaintiff submits that the plaintiff has succeeded in proving his title to the suit land and also that he had received the same in the partition. The appellant-plaintiff has also proved his lawful possession over the suit land and the obstruction on the part of the defendant to his peaceful enjoyment of the suit property. Even though the deed of partition is not exhibited

for want of registration, the same can be used for collateral purposes. Learned counsel submits that on careful perusal of the recital of said deed, it can be said that it is a memorandum of partition and even though the said document is unregistered, the same can be read in evidence. The appellant-plaintiff has also paid stamp duty and penalty in respect of the said document. Learned counsel submits that the mutation entry 222 also indicates and support the theory of partition as pleaded by the appellant-plaintiff and the said mutation came to be sanctioned at the instance of defendant No.1 himself. Even the corrected record after implementation of the consolidation scheme, indicates that defendant No.1 deceased Devidas had accepted the allotment of shares to each of the brothers. Defendant No.1 deceased Devidas had not challenged the correction of record by consolidation authority. Accordingly, name of appellant-plaintiff came to be mutated in the record of rights in respect of suit land. Learned counsel submits that learned Additional District Judge, Osmanabad has not considered the conduct of the parties nor taken into consideration the revenue record which fully supports the theory of the partition as put-forth with by the appellant-plaintiff.

4. Learned counsel for the respondents-original defendants submits that while deciding issue Nos. 1, 2 and 5, the trial court held that the partition deed, being unregistered, cannot be admitted in

evidence to prove the terms of partition. However, the trial court thereafter looking into the same documents has drawn inference about division of status and the fact of partition. Learned counsel submits that the alleged partition deed was also not proved as the scribe has specifically stated in his deposition that he had written the deed on the instructions and only in presence of brother Nagnath. Even the scribe has also admitted that attesting witness did not sign in his presence. The appellant-plaintiff was minor at the time of alleged execution of the partition deed and therefore, he had no occasion to cultivate the land separately in terms of the contents of partition deed. Learned counsel submits that the land survey No. 59 came to be acquired by the Government for the purpose of construction of Terna project and as per the documents placed on record the said survey number was not available for partition in the year 1966. Learned Additional District Judge has therefore, rightly concluded that the partition has not taken place after the death of deceased Pandhari. Learned counsel submits that the learned Additional District Judge has rightly allowed the appeal and dismissed the suit.

5. During pendency of this second appeal, the appellant-plaintiff has filed civil application No. 1286 of 2017 seeking permission to produce on record the copies of certain documents annexed with the

said application to indicate that defendant No.1 deceased Devidas and his sons are in possession of land to the extent of 6 hectare and 90 Are in total only. Learned counsel for the appellant-plaintiff submits that though the name of deceased Pandhari had appeared in the award passed by the Acquisition Officer, however, total amount of compensation is in respect of the land bearing survey No. 59 situated at Gowardhanwadi was obtained by defendant No.1 Devidas and after receipt of said amount of compensation, defendant No.1 deceased Devidas executed receipt to that effect in presence of Land Acquisition Officer, Osmanabad. Learned counsel submits that similarly, land bearing survey No. 60 to the extent of 11 Acres 13 Gunthas, which was allotted to the share of brother Nagnath and plaintiff Shrimant came to be acquired for the purpose of construction of Terna project. The amount of compensation of the said land bearing survey No. 60 to the extent of 7 acres came to be withdrawn by brother Nagnath and the amount of compensation of the land to the extent of 4 acres and 13 gunthas of the land survey No. 60 situated at village Tugaon came to be withdrawn by the plaintiff. Consequently, the appellant-plaintiff remained in possession of land survey No.1/5 admeasuring 4 acres and 6 gunthas situated at village Tugaon, Tq. and District Osmanabad only. Learned counsel submits that even after withdrawing the amount of compensation, deceased defendant No.1 Devidas purchased the land in the name of his sons.

Learned counsel submits that in view of the same, civil application deserves to be allowed and the documents annexed with the civil application be taken on record, which ultimately indicate that deceased Devidas and after his death his sons remained in possession of the land to the extent of 6 hectare 90 Are in total. Learned counsel submits that the respondents are falsely making averments that deceased Devidas became landless if the aforesaid theory of partition is accepted.

6. Learned counsel for the respondents submits that the aforesaid civil application cannot be entertained at the stage of final hearing of second appeal and the application simplicitor is not maintainable on the sole ground that it is not filed under Order XXXLI Rule 27 of C.P.C. Further, no reasons whatsoever are mentioned in the application for any inability to bring on record the said fact and documents after the appeal came to be admitted by this Court in the year 1992. Learned counsel submits that survey No. 60, as mentioned in the civil application, is not referred in the alleged partition deed, nor it was the case of the appellant in the suit. The appellant-plaintiff neither pleaded in the suit nor deposed in his evidence that defendant No.1 deceased Devidas had in fact received some amount of compensation. In fact, the entire compensation amount was received by deceased Pandhari during his life time.

Learned counsel submits that the other land came to be purchased by the sons of deceased Devidas from their own income after the year 2002 and onwards and it cannot be correlated to the joint family properties nor to the alleged compensation of land survey No. 59. Learned counsel submits that deceased Devidas had never submitted application to the revenue authorities for making entries in the record as per the alleged partition deed. The said application or the copy thereof was never brought before the Court and ultimately the said mutation entry 222 in respect of the partition deed came to be set aside by the revenue authorities subsequently. Learned counsel submits that the civil application is thus liable to be rejected.

7. I have carefully considered the submissions advanced by the learned counsel for respective parties. With their able assistance, I have perused the pleadings and the grounds taken in the appeal memo as well as the civil application filed for bringing on record the subsequent events. I have also gone through the record and proceedings.

8. The relations interse are not disputed by either of the parties. The dispute is about partition amongst the brothers as contended by the appellant-plaintiff. The said partition deed is not registered document and as such inadmissible in evidence. Even otherwise,

there is no specific pleading about execution of the partition deed. The appellant-plaintiff and his witnesses have not given any particulars as to how and when the actual partition had taken place. According to the witness P.W.1 Bhalchandra, who happened to be the scribe of the alleged partition deed, only brother Nagnath was present when the said deed was scribed by him. The appellant-plaintiff was about 5/6 years old at the time of alleged partition. Even the said scribe has admitted that he had written the said deed as per the direction of brother Nagnath and said brother Nagnath was alone present. The said brother Nagnath had not stepped up in the witness box to depose about the fact of partition. Even another brother Shukracharya, who came to be examined as P.W.4, has also failed to give any particulars in respect of the so called partition. Said brother P.W.4 Shukracharya has deposed contrary to the evidence of the scribe. P.W.4 Shukracharya has altogether brought a new theory to the effect that it was oral agreement about partition and the land was allotted to each of the brother and thereafter the partition deed was prepared. He has also deposed that all brothers were present which is contrary to the evidence given by P.W.1, who happened to be the scribe of the said alleged deed of partition. Though it is the contention of the appellant-plaintiff that the amount of compensation of the acquired land survey No.59 came to be received by deceased defendant No.1 Devidas, P.W.4 Shukracharya, the brother, has

specifically deposed that compensation amount for acquisition of the aforesaid land came to be received by their father. The appellant-plaintiff was minor at the time of alleged partition deed. The said document of partition does not disclose that anybody has signed the said document of partition in the capacity as guardian of the appellant-plaintiff even if the said deed is considered for use of collateral purposes. However, 7x12 extract discloses that brother Nagnath is the guardian of appellant-plaintiff. On the other hand, the mother of the appellant-plaintiff was alive.

9. Even though there is no pleading to the effect that since the appellant-plaintiff was minor, he was cultivating the land on *batai* basis, the appellant-plaintiff has examined P.W.3 Gowardhan on the said point.

10. So far as the mutation entry 222 is concerned, though this mutation appears to have been sanctioned as per the application of deceased Devidas, he had challenged the said mutation entry before revenue authority and the Sub Divisional Officer, Osmanabad, by his judgment and order dated 31.1.1985, cancelled the said mutation by allowing the appeal preferred by deceased Devidas. Being aggrieved by the same, the appellant-plaintiff Shrimant had preferred appeal before the Additional Collector, Osmanabad. However, by judgment

and order dated 26.8.1985 the said appeal came to be dismissed by the Additional Collector. Thus, the mutation entry 222 is also not helpful to the appellant-plaintiff to substantiate the theory of partition as put up by him. Learned Additional District Judge, in para 13 of the judgment, has observed that even after mutation entry 222 is considered to some extent, the land allotted in terms of the said mutation to the brothers appears to be inequitable. Even though the land from Gowardhanwadi was not available for partition in the year 1966, as acquired by the Government, the same has been shown as subject matter of alleged deed. Moreover, during pendency of appeal before the learned District Judge, the appellant has produced the certified copy of Misc. application No. 8 of 1973 which came to be filed in the year 1973 by the widow of Pandhari viz. Lochanabai and eight others for succession certificate. Accordingly, succession certificate was granted in favour of the Lochanabai. The said application came to be submitted on behalf of all legal heirs, including four sons and four daughters of Lochanabai. Learned Additional District Judge has therefore, rightly concluded that there appears no partition between the brothers as contended. Further, the present appellant-plaintiff shown as minor in the said application and Lochanabai was shown as guardian. However, in the revenue record, brother Nagnath is shown as guardian of the appellant-plaintiff. Learned Additional District Judge has therefore, rightly

concluded that the theory put forth by the appellant-plaintiff about partition is not reliable and acceptable and consequently, the appellant-plaintiff cannot be declared as owner of the suit land and the nature of the property remains as joint family property.

11. So far as the civil application filed by the appellant-plaintiff is concerned, I do not find any substance in the said civil application. After a long gap, the appellant-plaintiff has filed the said civil application without explaining as to what prevented him from filing those documents before the first appellate court and even at the time of admission of this appeal. Further, even though other documents annexed with the civil application are considered to some extent that would not support the theory of partition as put forth by the appellant-plaintiff.

12. In view of above discussion, I do not find any substance in this second appeal. There is no substantial question of law involved in this appeal. I do not find any reason to interfere in the well reasoned judgment and order passed by the learned 2nd Additional District Judge, Osmanabad in Regular Civil appeal No. 174 of 1982. Hence, the following order.

O R D E R

- I. Second appeal is hereby dismissed with costs.
- II. Second appeal is accordingly disposed of.
- III. The civil application No. 1286 of 2017 is rejected.

(V. K. JADHAV, J.)

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