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***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION***

***SECOND APPEAL NO. 526 OF 2013
with
CIVIL APPLICATION NO. 1242 OF 2013***

Mr. Shrirang Dasharath Gaikwad
Deceased through his Legal Heirs. ...Appellants/Applicants.

V/s.

Mr. Satish Vishwambhar Gaikwad & Ors. ... Respondents.

Mr. Ravi P. Kadam for the Appellants/Applicants.

Mr. Nikhil Wadikar for Respondents 1 and 2.

CORAM : N.M. Jamdar, J.

DATE : 8 January, 2018.

Oral Order :-

By this Second Appeal, the Appellant – Original Plaintiff has challenged the judgment and order passed by the learned District Judge, Satara dated 7 January 2013, allowing the Appeal filed by the Respondent – Defendant and setting aside the order passed by the learned Civil Judge, Satara. The learned Civil Judge, Satara had decreed the suit filed by the Appellant – Plaintiff and had granted injunction in his favour.

2. The Appellant filed a Regular Civil Suit No. 443 of 2000 in the Court of Civil Judge, Senior Division, Satara. It is the case of the Appellant – Plaintiff that in the year 1992, an oral partition took place between the Appellant and his nephew Respondent Nos.1 and 2. Thereafter, a mutation entry to that effect was made on 9 July 1992 and 13 Ares portion on the northern side came to the share of the Appellant. According to the Appellant, since the Respondents were interfering with his lawful possession, an injunction needed to be granted. The learned Civil Judge, by the judgment and order dated 18 August 2008 decreed the suit and granted injunction as prayed for. The learned District Judge, after assessing the evidence on record concluded that the Appellant had failed to prove that there was an oral partition and that the mutation entry which was carried out on the same date of the application was in collusion with the Talathi. Accordingly, the learned District Judge allowed the Appeal by order dated 7 January 2013.

3. The learned Counsel for the Appellant submitted that the learned District Judge was in error in not considering the factum of possession. He contended that the Appellant was in possession of the suit property and without reversing this finding to the Trial Court, the learned District Judge has allowed the Appeal. This contention cannot be accepted. If the case of the Appellant as in the plaint is seen, the Appellant has clearly asserted that there was a joint

family and after the death of the brother of the Appellant in the year 1992, an oral partition took place in the year 1993 and 13 Ares on the northern side came to the share of the Appellant. Based on this oral partition and consequential allotment of shares, that an injunction is sought. Foundation for seeking injunction is the entitlement of the Appellant by virtue of an alleged oral partition between the parties. If the oral partition is not proved, then the property remains a joint family property by the averments in the plaint itself. Therefore, the factum of oral partition will have a direct nexus with the grant of an injunction. The contention of the learned Counsel for the Appellant that this aspect of oral partition can be separated from aspect of physical possession cannot be accepted in these facts and circumstances.

4. Turning now to the evidence as regard the oral partition. As per the case of the Appellant himself, there is no partition deed. The Appellant examined two witnesses. Witness No.1 - Rajendra i.e. the son of the Appellant and witness No.2 - Vyankat. There was no cogent reason for the Appellant not to step in the witness box. The Appellant should have done so since the case was of oral partition to which the Appellant was a party. A Power of Attorney was given by the Appellant to his son to depose on his behalf. The learned District Judge considered the evidence of PW-1 Rajendra, son of the Appellant. The learned District Judge, after examining the evidence

of PW-1 Rajendra, found that he was unable to state various details in respect of the oral partition. Same was the position in respect of Witness No.2 Vyankat, who also could not state whether there was any oral partition by way of metes and bounds. Considering the oral evidence of these two witnesses, the learned District Judge concluded that the oral partition was not proved. It is not possible to undertake the exercise of re-appreciating the evidence of these two witnesses under a Second Appeal.

5. As regard the mutation entry, the application for carrying out the mutation entry was not produced by the Appellant – Plaintiff, but it was brought on record by the Respondents. The learned Counsel for the Respondents pointed out that even in this application and the mutation entry, there is no specific reference to the location and possession of 13 Ares. There is no record to show that any notice was issued to the Respondents of this application.

6. As regard the contention of the learned Counsel for the Appellant in respect of statements in the written statement, the written statement as a whole needs to be carefully perused. It is the case of the Respondents that under the pretext that there was an oral partition, the Appellant was tried to assert certain rights and even though such oral partition had taken place as contended, the Appellant continued to act as a karta of the joint family.

7. As regard the arguments of the learned Counsel for the Appellant that in case the oral partition is not proved, the property is a joint family property and therefore the possession of the Appellant needs to be protected. This is not the case of the Appellant in the suit. The Appellant's case is not that the property continues to be a joint family property an entire case has been of an oral partition. Such practices of changing the stand as the litigation goes along cannot be permitted. The parties must be candid to the Court from the inception of the proceedings till the end.

8. Considering these circumstances, it cannot be said that there was any error committed by the learned District Judge while assessing the evidence on record. The Appellant had filed a suit for injunction in respect of the joint family property on the basis of an oral partition but failed to prove the factum of oral partition. In the circumstances, there was no error in refusing to grant relief of injunction to the Appellant. No substantial question of law arises. Second Appeal is accordingly dismissed. Civil Application stands disposed of.

(N.M. Jamdar, J.)