

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 763 OF 2011

Shri. Jitendra Yashwant Ayare ...Appellant

Versus

Srimati Savita Shantaram Jadhav & Ors. ...Respondents

.....
Mr. Rakesh Bhatkar for the Appellant.

Mr. S.M. Railkar for Respondent Nos. 1 to 3.

.....

CORAM: **MRS.MRIDULA BHATKAR, J.**

DATE : **MARCH 06, 2018**

P.C.:

1. This Second Appeal is directed against the judgment and order dated 30th June, 2011 passed by the learned District Judge-1, Ratnagiri in Civil Appeal No. 29 of 2010.

2. Respondent no.1 is original plaintiff and respondent nos. 2 to 5 are her siblings. Respondent nos. 6 to 8 are the siblings of the present appellant. They all are cousins by relation. Respondent no.1 had filed a Regular Civil Suit No. 128 of 2003 for partition and declaration in respect of the suit property i.e., ancestral property, situate at Village Zadgaon, District Ratnagiri. By judgment and order dated 26th February 2010, the learned Judge of the trial Court

partly decreed the Suit thereby accepting that the plaintiff and her siblings so also defendant no.1 i.e., appellant and his siblings have shares in the suit property. There were total 18 shareholders. The plaintiff and defendant nos. 5 to 7 were given 1/18th share and original defendant nos.1 to 4 i.e., appellant and respondent nos. 6 to 8 were given 7/18th share. Being aggrieved by the said judgment and order, the present appellant/ defendant no.1 had filed Civil Appeal No. 29 of 2010 in which the issue of non-application of the principle of ouster by the trial Court was raised and it was accordingly determined by the learned District Judge of the Appellate Court. The said Appeal was partly allowed. The Appellate Court maintained the order of the trial Court except operative clause no. 5 with following modification, which is reads as under :

“i) While effecting the partition, the suit house and the land in which the suit house is standing i.e. land Survey No. 186 Hissa No. 5 shall be put to the share of defendant Nos. 1 to 4, as far as possible”.

3. In the present Second Appeal, the learned Counsel for the appellant has raised substantial question of law, which according to him is as follows:

Whether the First Appellate Court has not properly considered the principles of ouster and erroneously held that it is not established.

4. The learned Counsel for the appellant has submitted that the learned Judge of the Appellate Court has not properly considered the evidence of the plaintiff and admissions given by the witness Shri Vinayak i.e., defendant no.8, who is brother of the plaintiff. In support of his submission, he relied on the ratio laid down in the case of ***Rambhau Bhaduji Bhende (deceased) Vs. Kisan s/o. Bhaduji Bhende (deceased)*** reported in ***2004 (2) ALL MR 826***. In the evidence, the appellant has brought positive animus and certain admissions shows that the principles of ouster should have been made applicable in the present case by the trial Court and the Appellate Court.

5. The learned Counsel for the respondents while opposing this Second Appeal, has pointed out that the relevant portion of the judgment and order so also the evidence of the parties, and has submitted that no substantial question of law is made out in view of the detail reasons given by the learned Judge of the trial Court.

6. Heard submissions. Read judgments and orders of both the Courts and perused the records and proceedings. My attention is drawn to the evidence of Vinayak. There are certain admissions given by Vinayak and the plaintiff that whenever they used to go to their ancestral house, the mother of the appellant used to tell them that they have no right in the suit property. The learned Judge of the First Appellate Court has in fact framed proper issue on the point of principle of ouster and has discussed the entire evidence and also the proof of principle of ouster in detail. The documentary evidence i.e., 7/12 extracts of the suit properties, has brought on record disclosing the name of the father of the plaintiff and other revenue record has also discussed. In paragraph no. 10 of the impugned judgment and order, the Appellate Court has rightly stated that either in the pleading or in the evidence nowhere stated at what point of time the defendants or mother of the appellant/defendant no.1 ousted the plaintiff and defendant nos. 5 to 8 from the suit property

7. Moreover, whatever admissions are pointed out as evidence of ouster, cannot be said ouster because it shows that the plaintiff and her sisters though they were told that they have no right in the house, they continue to visit and stay at their family house and all that time,

the mother of the appellant/defendant no.1 used to say so. Thus, it was a casual routine comments or quarrels in the family and it cannot be labelled as ouster. The Appellate Court has rightly considered continuous residence of the plaintiff and her sisters at different places due to their marital status. In order to prove ouster, the party has to lead hostile animus in the positive manner. Mere occasional utterances 'you have no right in the suit property' cannot be said as ouster in the eyes of law. I do not find any merit in the submissions of the learned Counsel for the appellant.

8. The learned Counsel for the appellant has also pointed out the admission sought in the cross-examination of Vinayak where he has admitted that in the year 1970-71, the appellant and his brothers received money of the land acquisition proceedings wherein their ancestral property was acquired by the Government. This money was received by the defendants in the year 1973 and, therefore, he had demanded that money from the appellant/defendant no.1 in the year 1974. However, the appellant/defendant no.1 did not give his share so also the witness admitted that he did not lodge any complaint to the Land Acquisition Authority. Thus only qua that the acquired land the principle of ouster is applicable.

9. The submissions of the learned Counsel for the appellant in respect of money received in the land acquisition proceedings cannot be said ouster in respect of all ancestral properties. There is no substantial question of law involved as discussed and the reasoning given by the Appellate Court on this issue is well reasoned and adequate. Hence, Second Appeal is dismissed.

(MRIDULA BHATKAR, J.)