

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

SECOND APPEAL NO. 689 of 2011

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| 1 | Najir Ali Shaikh,
age 40 years occupation agriculture | (Orig. plaintiff) |
| 2 | Smt. Salima Alli Shaikh,
age 60 years occupation household | (Orig.Deft.No.4) |
| | Both R/o Guha Taluka Rahuri
Dist. Ahmednagar | <u>..Appellants</u> |

Versus

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| 1 | Shaikh Nabab Hamidbhai,
age 70 years occupation agriculture
R/o Guha Tal.Rahuri Dist.
Ahmednagar (DIED),
through legal representatives: | (Orig.Deft.No.1) |
| 1/A | Niyazbee Nabab Shaikh,
age 65 years occupation household | |
| 1/B | Shabbir Nabab Shaikh,
age 42 years occupation agriculture | |
| 1/C | Jamshed Nabab Shaikh,
age 35 years occupation agriculture
1/A to 1/C R/o Guha Tal.Rahuri
Dist. Ahmednagar | |
| 2 | Mhairun Mohammed Kazi,
age 50 years occupation household
R/o Balab Tal. Ambegaon Dist. Pune,
at present Gonegaon Taluka Newawsa
Dist. Ahmednagar. | (Orig.Deft.No.2) |
| 3 | Parveen Rajjak Shaikh, age 30 years
occupation household R/o Momin
Akhada Tal. Rahuri Dist. Ahmednagar | (Orig. Deft.No.3) |
| | | <u>...Respondents</u> |

CORAM : AVINASH G. GHAROTE, J.

Date : 30th September, 2019

ORAL JUDGMENT:

1. For the sake of convenience, the parties are being referred to as they were before the Trial Court.
2. The original owner of the suit property bearing Gat No. 661 area 3H.28 R situated at village Guha Taluka Rahuri was one Hamidbhai, who had two sons, one being father of the plaintiff and the other, Shaikh Nabab Hamidbhai/defendant No.1. He also had two daughters, who are defendants No.3 & 4. It appears that father of the plaintiff passed away and the relationship between the plaintiff and defendant No.1 is that of nephew and uncle. Contending that consequent to the demise of Hamidbhai in the year 1992, the plaintiff and defendant No.1, each had half share in the suit property, a claim for partition and separate possession by metes and bounds was raised by the plaintiff by way of Reg. Civil Suit No. 489/1993. The same was opposed by defendant No.1 by contending that during the life time of Hameedbhai itself, the partition had taken place between defendant No.1 and father of the plaintiff, since which time, defendant No.1 was in possession of his half share. It was stated

that the well was common and he had constructed a water channel, made developments and improvements upon his share of the land by investing thousands of rupees. Defendants No.2 to 4 had filed a pursis at Exh. 16, whereby they had admitted the claim of the plaintiff. The learned Trial Court upon consideration of the evidence and the documents before it, in spite of finding that the 7/12 extract at Exh. 38 recorded equal distribution of the land in the names of the plaintiff and defendant No.1; the *Khate* extracts at Exh. 30 & 31 stood separated, which recorded the separate entries of the plaintiff and defendant No.1 in respect of the suit property; the residences were separate as was apparent from the assessment extracts at Exh. 35 & 36; the plaintiff in his cross-examination having admitted that half share each is recorded in 7/12 extract and that the plaintiff is in possession of excess land to the extent of 20R; the P.W.2 examined by the plaintiff did not know about the family transactions, as a result of which, his evidence was not useful to the plaintiff, decreed the suit by holding that there was no partition and, therefore, the suit property be partitioned in equal shares between the plaintiff and defendant No.1.

3. Defendant No.1 being aggrieved by the judgment and decree of the Trial Court, filed Regular Civil Appeal No. 239/1999,

which came to be allowed, dismissing the suit of the plaintiff, as a result of which, the present appeal has been filed by the original plaintiff.

4. Mr. Shaikh Mazhar A. Jahagirdar, learned Counsel appearing for the appellant/plaintiff, vehemently argued that the approach of the learned first Appellate Court was incorrect inasmuch as he ignored the material document relied upon by the Trial Court, namely, Exh. 38, which has resulted in miscarriage of justice, due to which the impugned judgment and decree of the learned first Appellate Court requires to be set aside and that of the Trial Court restored. He further submitted that ignorance of the material document by the learned first Appellate Court would be a substantial question of law.
5. None appeared for the respondents, when the matter was called before lunch recess. Similar was the position when the matter was called after lunch break.
6. Having heard the learned Counsel for the appellant/plaintiff and having perused the judgments of the Trial Court as well as of the first Appellate Court, it is apparent that the learned Trial Court had committed an error of fact, in decreeing the suit, which has rightly been corrected by the

learned Appellate Court. As pointed out above, the learned Trial Court found every thing in favour of the partition having already taken place between father of the plaintiff and defendant No.1, consequent to which, there was not only physical separation by metes and bounds, which is reflected from the 7/12 extract as well as Exh. 38, wherein an area admeasuring 1H.64R was recorded in the name of the plaintiff and an equal area of 1H.64R was recorded in the name of defendant No.1 from and out of entire land of block No. 661 admeasuring 3H.28R, but that this position was also reflected from the documents, such as, *Khate* extracts at Exh. 30 & 31, which indicated that separate assessments were being paid by the plaintiff and defendant No.1 in respect of their separate shares. This being the position, the finding of the learned Trial Court that there was no partition by metes and bounds, does not stand to reason, and has been rightly corrected by the learned first Appellate Court. The partition is further indicated from the fact that two houses were also separately mutated in the names of the plaintiff and defendant No.1, which is so found by the Trial Court itself from the assessment extracts at Exh. 35 & 36. Thus, the revenue record clearly established the factum of partition by metes and bounds of the land of block No. 661 between the plaintiff's father and defendant No.1. This entire position as well as the document

at Exh. 38 has been correctly considered and construed by the learned first Appellate Court and, in fact, the learned Trial Court itself had found that Exh. 38 had indicated the partition between the plaintiff and defendant No.1. This being the factual position, I do not find that there is any infirmity in the reasonings in the impugned judgment by the learned first Appellate Court. No question of law much less any substantial one arises for consideration. The appeal is, therefore, without any merits and the same is hereby dismissed, with no order as to costs.

(AVINASH G. GHAROTE, J.)

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