

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

933 SECOND APPEAL NO.273 OF 2017

PRABHAKAR SAKHARAM RATHOD

VERSUS

BABU SAKHARAM RATHOD AND ANR

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Mr. S.B. Ghatol Patil, Advocate for the appellant

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 10th JULY, 2019

ORDER :

1 Present appeal has been filed by original plaintiff, who had filed Regular Civil Suit No. 80 of 2009 for declaration and permanent injunction against present respondents, before learned 2nd Joint Civil Judge Junior Division, Gangakhed, Dist. Parbhani. The said suit was partly decreed on 29.04.2013. Relief of declaration was rejected, but relief of injunction was granted. Present respondent No.1/defendant No.1 had challenged the said judgment and decree before District Judge-1, Gangakhed by filing Regular Civil Appeal No. 19 of 2013. It came to be allowed on 30.10.2015. In the said appeal itself, plaintiff had filed cross-objection. It was dismissed. The entire suit was dismissed, by setting aside the decree passed by learned Trial

Court. Hence, this Second Appeal.

2 Heard learned Advocate Mr. S.B. Ghatol-Patil for appellant/original plaintiff. Taking into consideration his submissions and perusal of impugned judgment and decree, it is not even necessary to issue notice to the respondents.

3 It has been submitted on behalf of appellant that both the Courts below have not considered the evidence and law points involved in the case properly. Plaintiff as well as defendants and one Govind are real brothers. They have sister by name Shewagabai. Agricultural land Gat No. 82 belonged to their father; however lands Gat No. 83 and 110/2 were purchased by only brothers. There was partition amongst the brothers about 15-20 years prior to suit and then Govind had sold the land which was given in his share. Plaintiff and defendants were cultivating the lands which have come to their share. Plaintiff is in service at Gangakhed and lands are at Tivthana. He used to cultivate it by visiting the village. According to plaintiff, his possession was threatened by defendants on 04.06.2009 and therefore, he filed the suit for declaration and injunction. Defendant No.1 had contended that there was no partition and they were cultivating the land as per family arrangement. He possesses the land since the death of their father. Defendant No.2 supported the contention of the plaintiff about

partition effected 15-20 years ago; but denied that he had ever threatened the possession of plaintiff. Both the learned Courts have erred in holding that there was no partition amongst the brothers, when one of the brothers was supporting plaintiff. The alleged admissions given by plaintiff have been relied. When there was evidence about partition, but it was not upheld by both the Courts, then it can be said that the finding is perverse and therefore, second appeal deserves admission as substantial question of law are arising. He relied on the decision in **Ishwar Dass Jain (dead) through Lrs v/s. Sohan Lal (dead) through Lrs** [AIR 2000 SC 426]; wherein it has been held that, "Interference is permissible in second appeal, when material or relevant evidence is not considered by both the Courts". It was also submitted that learned Trial Court had held that plaintiff possesses suit property and therefore, his possession deserves to be protected. Learned First Appellate Court has reversed the finding on the erroneous ground that injunction cannot be granted against co-owner. The learned appellate Court has wrongly dismissed the entire suit.

4 The evidence, that has been adduced by plaintiff, shows that there was no written partition deed executed at the time of alleged partition. He has not given date of partition or even approximate month and year. Vaguely it has been stated that it took place 15-20 years ago. The details of

the said partition has not been given to him. Though it is an admitted fact that Govind has sold certain portion of lands, that fact itself does not infer that there was partition by metes and bonds. There was no hurdle for plaintiff to give details of partition. He as well as defendant No.2 have not stated, as to whether any share was given to their sister or not. At one place, plaintiff tried to say that the partition took place during the life time of his father; and another breath he has denied it. Merely because two brothers were saying that there was partition, we cannot accept it without evidence. Though defendant No.1 had not cross-examined them and had not led any evidence, yet, independently also plaintiff ought to have proved his contentions.

5 Plaintiff is relying on 7 x 12 extract and mutation entry No.1439 to support his averment about partition. However, perusal of said mutation entry would show that entry in respect of names of heirs of Prabhakar i.e. father of plaintiff was taken. It does not make a whisper about partition. Therefore, both the Courts were justified in holding that there was no partition effected between plaintiff and his brothers in respect of properties left by their father. Naturally corollary of the same was that plaintiff cannot be held to the exclusive owner of suit properties.

6 The learned Trial Judge has held that since brothers were

separately cultivating lands by virtue of family arrangement and plaintiff possess suit land, his possession needs to be protected. It is to be noted that the details of said family arrangement have not been given. Under such circumstance, plaintiff would be co-owner in the suit land. He had not proved that he is being ousted. Though defendant No.2 tried to support plaintiff on the point of partition, he denied the allegations against him for threatening the possession of Plaintiff. Therefore, mere statement of plaintiff cannot be believed. Unless he proves that there was an attempt to oust him, he was not entitled to get relief of injunction against co-owners. The learned First Appellate Court has rightly dealt with this point.

7 No fault can be found in the judgment and decree passed by the Courts below. The error committed by learned Trial Court has been rightly interfered with by learned First Appellate Court. Ratio of **Ishwar Dass Jain** (supra) is not helpful to plaintiff, as he has failed to show perversity and wrong inference by both the Courts. No substantial question of law is arising in this case as contemplated under Section 100 of Code of Civil Procedure. Hence, the appeal stands disposed of as “**Not Admitted**”.

(**Smt. Vibha Kankanwadi, J.)**