

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.768 OF 2017

Pandharinath s/o Vikram Ambhore,
Age 64 years, Occupation Agriculture,
R/o Shelgaon Tq. Badnapur Dist.Jalna.

..Appellant.
(Ori.Plff.)

VERSUS.

1. Murlidhar s/o Vikram Ambhore,
Age 74 years, occupation Agriculture,
R/o Mandwa Tq.Badnapur Dist.Jalna.
2. Sunil s/o Murlidhar Ambhore,
Age 44 years, Occupation Agriculture,
R/o Jamkhed Tq. Ambad Dist.Jalna.
3. Ashish s/o Rajendra Barwale,
Age 30 years, occupation Business and
Agriculture, R/o Near Head Post Office,
Jalna Dist. Jalna.
4. Shashikalabai w/o Uttamrao Pungle,
Age 76 years, Occupation Household,
R/o Dhavlapuri Tq.Dist. Aurangabad.
5. Jijabai alias Saraswatibai w/o Himmatrao
Mhaske, Age 71 years, occupation
Household, R/o Sorti Nagar, Ambad
Road, Jalna Dist. Jalna.

..Respondents.
(Ori.Defts.)

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Mr. B. R. Surwase, Advocate for Appellant.
Mr. N. K. Chaudhari, Advocate for Respondent No.3.
Advocate for Respondent No.5 – Absent.

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CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 11-06-2019.

ORDER :

1. Present second appeal has been filed by the original plaintiff challenging the concurrent Judgment and decree passed in Regular Civil Appeal No.143 of 2012 by learned Adhoc District Judge-3, Jalna, dated 17-03-2015, whereby his appeal was dismissed. In the said appeal he had challenged the Judgment and decree passed by learned Civil Judge, Senior Division, Jalna in Special Civil Suit No.97 of 2008, dated 11-03-2010. He had filed the said suit for partition and separate possession and declaration which came to be dismissed by the said Judgment and decree.

2. It is not in dispute that, plaintiff and defendant No.1 are the real brothers, defendants No.4 and 5 are their sisters, defendant No.2 is the son of defendant No.1. Further it is not in dispute that, defendant No.1 had sold certain lands to defendant No.3.

3. Plaintiff had come with a case that, their ancestor Vikram had agricultural lands and after his death those lands fell on plaintiff, defendants No.1, 4 and 5. It is stated that, the said land bearing Gut No.330 (Survey No.114) admeasuring 7 H 98 R situated at village Mandwa Tq. Badnapur Dist. Jalna, which has been more particularly

described in para 01 of the plaint was the joint family property. After death of Vikram, defendant No.1, being the elder became Karta of the joint Hindu family. At the time of death of Vikra, plaintiff was minor aged 02 years. Defendant No.1 had managed the entire properties and then in the year 1972 the Government had implemented the consolidation scheme in their village. The said property was shown in the name of defendant No.1. Plaintiff and defendant No.1 cultivated the suit land till 2006 but when he went for doing agricultural work on 25-12-2006 in the suit land, he was dispossessed by defendant No.3 and his heirs to the extent of 5 Acres 18 Gunthas. On inquiry, defendant No.3 disclosed him that, he has purchased the said land from defendant No.2 by registered sale deed dated 07-04-2006 for a consideration of Rs.2,32,000/-. Thereafter, plaintiff obtained certified copies of the sale deed and filed objection before Tahsildar. In spite of the said fact, name of defendant No.3 has been recorded to the mutation register. Under such circumstance he approached defendant No.1 at the time of 'Gudhi Padwa' of 2007 and demanded the partition, but defendant No.1 refused. Hence, he filed suit for partition, declaration and separate possession of his share.

4. Defendants No.1, 2 and 5 did not appear, and therefore, the matter has proceeded ex-parte against them. Defendant No.3 filed

written statement and denied that the suit land which he has purchased is the ancestral property of plaintiff. It is also denied that, after death of Vikram, defendant No.1 had become Karta of the joint Hindu family and plaintiff was minor at that time. It is stated that, the suit has been filed in collusion with plaintiff and other defendants. It is stated that, defendant No.2 is the owner of 5 Acres 18 Gunthas of land sold to him. It is also stated that, there was a partition and the said property had come to the share of defendant No.2.

5. Taking into consideration the rival contentions, issues came to be framed and after considering the evidence on record as aforesaid, the suit was dismissed and the appeal preferred by the plaintiff was also dismissed. Hence, this second appeal.

6. Heard learned advocate Mr. B. R. Surwase, appearing on behalf of appellant and learned advocate Mr. N. K. Choudhari, appearing on behalf of respondent No.3.

7. At the outset it can be said that, unless it is pointed out by the appellant that, there is a substantial question of law involved in the case, cognizance of the second appeal cannot be taken. In this case there are concurrent findings by both the Courts, and therefore, this Court would be slow in interfering with the said concurrent Judgment

and decree. The first and the foremost fact that is required to be considered is that, the learned Trial Court as well as the first Appellate Court have held that, plaintiff has failed to prove that he was minor when his father expired. Though both the Courts have stated that, land Gut No.330 admeasuring 7 H 98 R was the ancestral property of plaintiff and defendant No.1, it has been held that, defendant No.3 has proved that there was partition between the family members and plaintiff has received agricultural land in village Mandva itself. It was also held that, the defendant No.3 is the bonafide purchaser for value without notice. Even if for the sake of arguments we accept that on the date when Vikram expired plaintiff was minor yet the question remains that, after he attended the majority, what he has done to get his name mutated to the revenue record, is a question to which we do not find any answer in the plaint as well as evidence of the plaintiff. Merely because the suit property stood in the name of defendant No.1 and then in the name of defendant No.2, it cannot be stated that, it is a joint Hindu family property. According to plaintiff, Vikram had expired long ago when he was 02 years old. He says his date of birth is 12-06-1951. Though both the Courts have held that, he has not proved that date, even if for the sake of arguments we take that date, then his father might have died somewhere in 1953-1954. It is hard to believe therefore that till 2006 he had not made any efforts to get his name

mutated to the property which was left by his father.

8. Both the Courts have in fact considered the oral evidence properly and have taken into consideration the vital admissions those have been given by the plaintiff in his cross. In his cross taken on behalf of defendant No.3, the plaintiff has clearly stated that he is cultivating 10 Acres of land out of the suit land since last 30 to 35 years. Towards the Western side of his 10 Acres of land, there is 10 Acres land of defendant No.1 which he had transferred in the name of his sons. He has also stated that, son of defendant No.1 is residing separately from defendant No.1. Even he himself had transferred 3 Acres of land in the name of his son Ashok. In spite of these facts, he claims that there is no partition between him and his brother. The question therefore arises as to how without partition he could have transferred 3 Acres of land in the name of his son Ashok. Further admission shows that, since 1971 he is residing at village Shelgaon and taking income from the land of his share. Defendant No.1 is taking income from the land of his share. Though he has denied that there is partition between him and his brother, he says that, he is having 1 H land in village Shelgaon out of Gut No.986. He goes on to say that, defendant No.1 is not having any share in that land at Shelgaon. Defendant No.1 had sold 10 Acres of land in the year 1975-1976 and it

appears that the plaintiff had never challenged that transaction. He has stated his occupation as agriculture only, under such circumstance how he could have acquired the property at Shelgaon and defendant No.1 cannot be said to have share in that property, itself is a question. Therefore, these admissions definitely were leading to a fact that there was partition between plaintiff and defendant No.1 in respect of the suit property.

9. The said fact of partition was also viewed by both the Courts from the entries in the 7/12 extract. Since it is a point of fact, this Court need not go into all those details of entireties but certainly the conclusion can be drawn that he and defendant No.1 were dealing separately in respect of the property that had come to their share after partition.

10. Recitals in the sale deed that was executed by defendant No.2 in favour of defendant No.3 are also important. The action of defendant No.1 in transferring the portions of the land in favour of his son and grandsons was never challenged earlier by the plaintiff. It is hard to believe that, if he is residing jointly with defendant No.1, then he would not have come to know about the transfer effected by defendant No.1 in favour of defendant No.2 and other family properties. Therefore, the conclusion drawn by both the Courts is the probable conclusion on the basis of preponderance of probabilities. There is no perversity pointed

out, hence there is no question of substantial evidence of law as contemplated under Section 100 of Code of Civil Procedure. Therefore, the second appeal is disposed of as **not admitted**.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.