

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

Second Appeal No. 0794 of 2017

District : Aurangabad

Bhaurao @ Gangadhar Navgire,
Age : 62 years,
Occupation : Agriculture,
R/o. Girnar Tanda,
Taluka & Dist. Aurangabad.

.. Appellant
(Original
defendant)

versus

1. Ravsaheb s/o. Devrao Navgire,
Age : 59 years,
Occupation : Rickshaw Driver,
R/o. Plot No.13,
Nandanvan Colony,
Bhavsingpura Road,
Aurangabad.

.. Respondents
(Original
plaintiffs)

2. Smt. Bhagubai w/o. Devrao
Navgire,
Deceased
[Her legal heir is already
on record]

.....

Mr. Ameya N. Sabnis, Advocate, for the appellant.

*Mr. R.M. Joshi & Mr. S.B. Patil, Advocates, for
respondent no.01.*

.....

CORAM : SMT. VIBHA KANKANWADI, J.

**Date of reserving
the judgment : 30th April 2019**

**Date of pronouncing
the judgment : 04th June 2019**

JUDGMENT :

01. Present appeal has been filed by the original defendant. Present respondents are the original plaintiffs who had filed Regular Civil Suit No. 1015 of 2009 for partition and separate possession against the present appellant - defendant before 10th Joint Civil Judge (Junior Division), Aurangabad. [Parties are referred as per their nomenclature before trial Court.]

02. The original plaintiffs had come with a case that plaintiff no.02 is the real mother of defendant and plaintiff no.01 is the elder brother of defendant and son of plaintiff no.02. Husband of plaintiff no.02 and father of plaintiff no.01 and defendant Deorao were the owners of agricultural land - Block No.19 (Old Survey No.30/04) admeasuring 02 hectares 31 R situated at village Girner Tanda, Taluka & District Aurangabad. In fact, it was the ancestral property of Deorao. Deorao's father had effected partition amongst his five sons and in the said partition, Deorao had received the suit land. It is stated that after demise of Deorao, the property has devolved on plaintiffs and defendant. In fact, the property was looked after by Deorao, defendant and uncle Ganpatrao Laxman. After death of Deorao, the property was mutated in the name of Gangadhar and Bhaurao to the extent of 08 Ana share each. However,

Gangadhar and Bhaurao are same persons i.e. defendant. It is stated that defendant want to grab the suit property on the basis of said mutation entry and he has refused to allot share to plaintiff no.01. Plaintiff no.01 had approached Talathi with a request to make entry in the mutation register in respect of his name. However, Talathi did not listen and, therefore, he had preferred appeal before Deputy Collector, Aurangabad. Deputy Collector by his order dated 01-09-2008 directed Tahsildar to make enquiry in respect of mutation entry no.43 and during the course of that enquiry, Tahsildar directed plaintiffs to bring heirship certificate from the Court. It is stated that as the plaintiffs had approached defendant for effecting partition and he refused, they have filed the suit.

03. Defendant contested the suit by filing written statement. He denied the relationship. In categorical terms, he has denied that plaintiff no.02 is mother and plaintiff no.01 is his brother. He admitted that Bhaurao and Gangadhar are the same persons i.e. he himself. But it is stated that it was mistake by Talathi to allot 08 Ana share to Bhaurao and Gangadhar. According to him, he is the only heir left by his father Deorao and he is the owner of the suit property. Since 1959-60, he is cultivating the said land in that capacity. It is stated that it is the property of his self

acquisition and the plaintiffs have filed false suit.

04. After the issues were framed, parties have led oral as well as documentary evidence. After considering the evidence on record and hearing both sides, the learned trial Court has dismissed the suit on 28-02-2013. The said judgment and decree was challenged by the plaintiffs by filing Regular Civil Appeal No.95 of 2013 before District Court, Aurangabad. The said appeal was heard by the learned Ad hoc District Judge-3, Aurangabad and after hearing both sides, the appeal came to be allowed. The suit was decreed. It was held that plaintiff no.01 and defendant would get half share each in the suit property. It can also be seen that defendant by way of counter claim had claimed ownership and declaration to that effect. There is no specific order of dismissal of counter claim in the trial Court's judgment. However, learned first appellate Court has dismissed the said counter claim on 18-04-2017. Hence, this second appeal by the defendant.

05. It will not be out of place to mention here, that by order dated 27th February 2019, both the parties were put to notice that the matter can be disposed of at the admission stage itself and, therefore, the matter was heard finally at the stage of admission.

06. Heard learned Advocate Mr. A.N. Sabnis appearing for the appellant and learned Advocate Mr. R.M. Joshi appearing for respondent no.01. Respondent no.02 expired during the pendency of the second appeal and her heir is already on record.

07. It has been vehemently submitted on behalf of the appellant, that the learned trial Court had properly appreciated the evidence and had rightly concluded that there is absolutely no relationship between plaintiffs and defendant. Plaintiff no.02 especially has not given explanations in respect of so many questions those were posed and when specific denial regarding the relationship was contended, there was heavy burden on the plaintiffs to prove the relationship first. The first and the foremost fact is that after death of Deorao, entry in the 7/12 extract shows that the name of the defendant came to be mutated and as he was minor at that time, his guardian has been shown as his uncle. If plaintiff no.02 was his real mother, then why she had not taken any steps to get the names mutated. So also, she does not claim that she has brought up defendant. On the contrary, her service record which was called for would show that she was residing at Aurangabad with plaintiff no.01 and she is not giving any reason as to why she was not residing with the husband at Girner Tanda. It was pointed out that a fraud has been played by the plaintiffs on Court and they

obtained heirship certificate behind the back of the defendant by filing MARJI No.370 of 2011. They have falsely shown his address as that of Nandanvan Colony, Bhavsingpura, Aurangabad and got the summons served on that address where they themselves were residing. But now, in the suit, they have given his address as Girner Tanda. If the summons / notice of that proceedings would have been served on defendant at proper address, he would have contested the same. In spite of that decision, it was not necessary for the defendant to challenge it in the present proceedings and on the basis of evidence adduced in this case itself, he has proved that there is absolutely no relationship between him and plaintiffs. It was rightly observed by the trial Court, that Deorao expired in 1956 and as per the service book Exhibit 67, date of birth of plaintiff no.02 was 04-09-1949. So also, the date of birth of defendant as per the school leaving certificate, Exhibit 24A, is 20-12-1956 and, therefore, it was rightly observed that it is difficult to accept that plaintiff no.02 would have given birth to defendant when she was 6½ years of age. The learned first appellate Court relied upon the said succession certificate and he has made his own calculation. He relied upon the service book of plaintiff no.02, who was the employee of Animal Husbandry Department, that she had mentioned the name of defendant as her nominee. It is stated that as per pension form,

Exhibit 66, the birth date of defendant is 25-03-1960 and, therefore, subsequent date has been considered by the learned first appellate Court and the difference of age is taken as 10 years 06 months and 21 days. Only on that point, it was observed that it will not be proper to infer that the defendant is not the son of plaintiff no.02. This is an erroneous conclusion drawn by the first appellate Court. He, therefore, submitted that since the appellate Court has not legally considered all the points involved and has arrived at a perverse finding, it deserves to be set aside and thereby restoring the judgment and decree passed by the learned trial Court.

08. Per contra, learned Advocate appearing for respondent no.01 supported the reasons given by the learned first appellate Court. He submitted that plaintiff no.02 was employed at Aurangabad. She was a government servant and, therefore, she was residing at the place of her job. That cannot be considered negatively against her. She has nominated the defendant after her death and she has considered him as the heir of Deorao as well as herself. For her, plaintiff no.01 and defendant were equal. Defendant was residing in Nandanvan Colony along with the plaintiffs. His name was included in the voters' list of Shantipura and, therefore, the notice of the heirship certificate proceedings was issued on that address. He did not choose to contest the said

proceedings and, therefore, it was allowed. Even the citation was issued in a widely circulated newspaper, yet, the defendant did not contest the said proceedings. Therefore, that decision has been rightly considered by the first appellate Court which was not considered by the trial Court. Plaintiffs had share in the suit property as heir of Deorao and, therefore, the appeal has been rightly allowed.

09. As aforesaid, the matter is taken up for final hearing at the admission stage itself. Taking into consideration the pleadings, evidence and submissions referred above, following are the substantial questions of law involved in this case :-

(I) Whether plaintiffs had proved that they are the brother and mother of defendant, respectively ?

(II) Whether plaintiffs had share in the suit properties ? If yes, what is their share ?

(III) Whether the learned first appellate Court was justified in reversing the decision by the trial Court ?

10. Unless we consider the relationship between the parties, we cannot reach to the conclusion regarding the rights of the parties in the property. At the outset, it can be seen that even if the

defendant has stated that the suit property is his self acquired property, but it appears that there is absolutely no evidence to that effect. Even the learned first appellate Court has answered issue no.02 regarding, whether the defendant has proved that the suit land is his self acquired property, the finding is given in the negative. That decision was not challenged by him before the first appellate Court. Under such circumstance, it is now required to be seen as to whether relationship between the parties is established. We cannot ignore the fact that a Court of limited jurisdiction had already granted a decision. However, it is to be noted that for the present defendant, it was held that he was duly served but since he did not appear, the matter proceeded *ex parte*. Perusal of the said application would make it clear that the address of the present defendant, who was respondent no.02 in MARJI No.370 of 2011, was given as Nandanvan Colony, Bhavsingpura, Aurangabad. But here in this suit i.e. R.C.S. No.1015 of 2009, the plaintiffs themselves have given his address as Girner Tanda. Important point to be considered is that the said MARJI No.370 of 2011 came to be decided on 14-08-2014 and even prior to that, this suit was filed on 16-12-2009. Thus, the fraud can be seen to be apparent. It will not be out of place to reiterate the fact that the suit was filed on 16-12-2009 and MARJI No.370 of 2011 was filed in 2011. The suit came to be decided on 28-02-2013

wherein it was held that plaintiff no.02 is not the mother and plaintiff no.01 is not the brother of defendant. The appeal was preferred by the plaintiffs on 02-04-2013 and it appears that keeping the concerned Court dealing with MARJI No.370 of 2011 in dark, the said order has been obtained on 14-08-2014. When already a Civil Court having competent jurisdiction had given a finding regarding the relationship in a contested suit, then in MARJI, which is of a summary nature, the said decision in the Civil Suit would have been binding. Yet, in spite of the decision of the suit in 2013, the said judgment was not produced in MARJI No.370 of 2011. Under such circumstance, we cannot take into consideration the subsequent pronouncement as having binding effect on this proceedings.

11. If we consider the pleadings of the plaintiff and the testimony of PW 02 Bhagubai, it can be seen that she is very much silent on the point as to when she got married to Deorao, where she was residing after her marriage and when the defendant and plaintiff no.01 were born. Even as regards date of death of Deorao, pleadings as well as evidence is silent. Perusal of the petition filed by the plaintiffs i.e. MARJI No.370 of 2011 would show that they had come with a case that Deorao expired on 25-01-1959. To the limited extent, we can consider the order that was passed in that case and it can be seen

that the death certificate of Deorao was produced at Exhibit 13 and the date mentioned in the petition has been got confirmed. The service book of plaintiff no.02, who was serving in Animal Husbandry Department, has been got produced through PW 03 Dr. Mohd. Moinoddin. Much stress has been given about the fact of nomination by her to the defendant. But, at this stage, we are more concerned with her birth date that is mentioned in the service book. As per the said service book, her date of birth is 04-09-1949. Then if we calculate it with date of death of Deorao i.e. 25-01-1959, then on his date of death, she was around 09 years and 04 months.

12. The next thing that is required to be considered is that there are two documents showing different date of birth of defendant. As per Exhibit 24A, the school leaving certificate, his birth date is 20-12-1956 and as per the pension form Exhibit 66, it is 25-03-1960. At the outset, it appears that the learned first appellate Court, who relied on the subsequent date i.e. in the pension form Exhibit 66, failed to consider that the pension form was filled by plaintiff no.02. Further, as per the testimony of PW 03 Dr. Mohd. Moinuddin, Exhibit 66 was given on 07-05-2008. Though he has initially stated that on 27-09-1992 she had given the nomination of plaintiff no.01 as well as defendant as her sons, yet, in his examination in chief itself, he has stated that no

note has been taken about her heirs in service book. That means, what is relied by the learned first appellate Court is Exhibit 66 which was produced on 07-05-2008 and she had retired on 30-04-2008. It can also be seen from his cross examination, that note of heirs was not taken prior to that of Exhibit 66 in authenticate way. Under such circumstance, between pension form Exhibit 66, which was filled by plaintiff no.02 herself and the school leaving certificate Exhibit 24A, what was reliable was the school leaving certificate. Therefore, the first appellate Court committed an error in not considering the authenticity of the documents, authorship of that document and unnecessarily relied on Exhibit 66. Now, taking into consideration the date of birth of the defendant in school leaving certificate Exhibit 24A as 20-02-1956 and her birth date as 04-09-1949, the inference drawn by the learned trial Court, that it is hard to accept, that she would have delivered the child at the age of 6½ years, is the correct interpretation and appreciation of the evidence. Therefore, taking into consideration the findings given by the learned trial Court, that the plaintiffs have failed to prove that plaintiff no.02 is mother of the defendant and plaintiff no.01 is brother of the defendant, is the correct finding.

13. It is not in dispute, that the property was left by Deorao. At the time of death of Deorao,

plaintiff was minor. Under such circumstance, plaintiff no.02, if she would have been the widow of Deorao, then would have certainly got her name mutated to the suit land. However, there is no explanation put forward by her as to why she did not get her name mutated, rather allowed uncle of defendant to be shown as his guardian. *Pahani Patrak* Exhibit 23 clarifies this situation. The learned trial Court has rightly invoked Section 114 of the Indian Evidence Act to draw adverse inference against the plaintiffs for not adducing that evidence which was in their special knowledge. Since the plaintiffs have failed to prove the relationship, it cannot be stated that they have any kind of right, title or interest in the property left by Deorao. The suit was rightly dismissed by the learned trial Court.

14. The Hon'ble Apex Court in *Santosh Hazari Vs. Purushottam Tiwari (Deceased)* by L.Rs. [(2001) 3 SCC 179] has observed thus :-

" While writing a judgment of reversal the appellate court must remain conscious of two principles. Firstly, the findings of fact based on conflicting evidence arrived at by the trial court must weigh with the appellate court, more so when the findings are based on oral evidence recorded by the same Presiding Judge who authors the judgment. This certainly does not mean that when an appeal lies on facts, the appellate court is not competent to reverse a finding of fact arrived at by the trial Judge. As a matter of law if the appraisal of the evidence by the trial Court suffers from a

material irregularity or is based on inadmissible evidence or on conjectures and surmises, the appellate court is entitled to interfere with the finding of fact (See Madhusudan Das v. Narayanibai [AIR 1983 SC 114]. The rule is — and it is nothing more than a rule of practice — than when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient balance of improbability to displace his pinion as to where the credibility lie, the appellate court should not interfere with the finding of the trial Judge on a question of fact (See Sarju Pershad Ramdeo Sahu v. Jwaleshwari Pratap Narain Singh [AIR 1951 SC 120]). Secondly, while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it. We need only remind the first appellate courts of the additional obligation cast on them by the scheme of the present Section 100 substituted in the Code."

15. Therefore, in view of the above said reasons, the substantial questions of law are answered as follows :-

- (I) In the negative,
- (II) In the negative &
- (III) In the negative.

16. Hence, the following order :-

(a) The second appeal is hereby allowed.

(b) The judgment and decree passed by the Ad hoc District Judge-3, Aurangabad, in Regular Civil Appeal No. 95 of 2013, dated 18-04-2017, is hereby set aside. The judgment and decree passed by 10th Joint Civil Judge (Junior Division), Aurangabad, in Regular Civil Suit No. 1015 of 2009, dated 28-02-2013, is hereby restored.

(c) Parties to bear their own costs.

(d) Decree be drawn accordingly.

(Smt. Vibha Kankanwadi)
JUDGE

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