

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

912 SECOND APPEAL NO.599 OF 2019
WITH
CA/13599/2019
IN
SA/599/2019

VITHAL SAKHARAM KALE
VERSUS
LAXMAN SAKHARAM KALE AND OTHERS

...
Mr.N.B.Khandare, Advocate for appellant.

...
CORAM: V.L.ACHLIYA,J.

DATE : 20/11/2019

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ORAL ORDER:

1. Being aggrieved by the concurrent decisions rendered by the Courts below, the appellant/plaintiff has preferred this Second Appeal.

2. Heard learned counsel for appellant. Perused the Judgments and decree passed by the Courts below.

3. The appellant/plaintiff had filed R.C.S. No. 17/2008 seeking decree of partition and separate possession in respect of land

bearing G.No. 170 admeasuring 30 R. of village Kothari, Taluka Kinwat, District Nanded. The plaintiff has further claimed relief to hold that the sale deed dated 17/08/1995 executed by defendant No. 1 in favour of defendant No. 10 as illegal and not binding upon plaintiff.

4. The appellant/plaintiff has approached with the case that his father Sakharam Kale died in the year 1982. Before his death, partition took place between plaintiff and defendant Nos. 1 to 9 and 11. In said partition, except suit property all other properties were mutually partitioned amongst plaintiff and defendants other than defendant No. 10. The suit property admeasuring 30 R. kept out of partition for livelihood of their parents. The parents of plaintiff were residing with defendant No. 1, who is eldest among all the brothers and 'karta' of the family. After the death of Sakharam, the suit land was mutated in the name of defendant No. 1. In the year 2007, when plaintiff enquired from defendant No. 1 about suit land, the defendant No. 1 told him that he has sold suit land to defendant No. 10. After enquiry, the plaintiff came to

know that defendant No. 1 has sold suit land to defendant No. 10 vide registered sale deed dated 17/08/1995. In this back-ground, the plaintiff has filed Suit seeking partition, separate possession of suit land admeasuring 30 R. with further relief to declare the sale deed in favour of defendant No. 10 as not binding upon the plaintiff. The plaintiff has claimed 1/9th share in the suit land admeasuring 30 R.

5. Defendant No. 1 contested the Suit with contention that his father late Sakharam was owner and in possession of field S.Nos. 158,159,194 and 299. His father died in the year 1982. On 30/03/1983 the lands stands in the name of his father partitioned amongst him and his brothers i.e. defendant Nos. 1 to 9 and 11. Accordingly, their names were recorded in revenue record. The suit land came to his share. His name was recorded in the ownership column. The names of plaintiff and other defendants were recorded in other right column. The plaintiff has taken disadvantage and filed Suit seeking partition of suit lands. He has sold the suit land to defendant No. 10 in the year 1995 and defendant Nos. 2 to 9 consented for said

sale. In this back-ground, defendant No. 1 has urged to dismiss the Suit.

6. Defendant Nos. 2 to 9 and 11 have supported the claim of plaintiff. Defendant No. 10 resisted suit claim on the ground of bonafide purchaser as well as on the ground of limitation.

7. In order to prove his case, the plaintiff has stepped into witness box. Defendant No. 1 examined himself and further examined one witness and produced various documents in support of his case. On due appreciation of evidence, trial Court has dismissed the Suit by holding that the plaintiff has failed to prove that the suit property is liable for partition and the sale deed executed in favour of defendant No. 10 is illegal and not binding upon the plaintiff. Being aggrieved, the appellant/plaintiff preferred Appeal before the District Court, Nanded. By the Judgment and decree dated 25/07/2019 passed in R.C.A. No. 157/2014, learned District Judge-2, Nanded confirmed the Judgment and decree passed by trial Court. Aggrieved by concurrent decisions rendered by Courts below, the appellant/plaintiff has preferred

this Appeal.

8. Learned counsel for appellant strenuously contended that Appeal raises substantial questions of law. It is submitted that in view of the plea raised by defendant No. 1 that partition has taken place after the death of Sakharam and plaintiff and each of the defendants got their respective share and suit property has fallen to the share of defendant No. 1, the entire burden rest upon defendant No. 1 to prove said fact. On failure to prove the case set up by defendant No. 1, the Suit ought to have been decreed. It is submitted that the Courts below erred in considering the purport of Section 102 of Indian Evidence Act and in that view the Judgment and decree passed by Courts below are not sustainable in law. It is submitted that Judgment and decree passed by the Courts below are perverse.

9. I have thoroughly considered the submissions advanced in the light of Judgments and decree passed by Courts below. In my view, the Judgments and decree passed by Courts below are quite consistent with the pleadings and evidence adduced in the case.

Defendant No. 1 has specifically denied the case put-forth by plaintiff that except suit land admeasuring 30 R., all other properties were partitioned during the life time of Sakharam and suit land admeasuring 30 R. excluded from partition for the purpose of maintenance of their parents. Defendant No. 1 has also denied the case of plaintiff that taking disadvantage that parents were residing with defendant No. 1, the defendant No. 1 got suit land mutated in the name of defendant No. 1. In view of specific denial on the part of defendant No. 1 as to the case put-forth by plaintiff, the burden to prove the fact of partition and exclusion of suit land from partition during the life time of their father entirely rest upon the plaintiff. Except oral testimony, the plaintiff has adduced no evidence to prove that except suit land all other properties were partitioned before the death of their father. On the contrary, the evidence adduced by defendants to prove that the properties held by Sakharam were partitioned amongst plaintiff and his brothers after the death of their father. The oral testimony of defendant No. 1 found duly supported by the corroborative evidence in the nature of 7/12

extract and mutation entries produced on record. In that view, the reasons and findings recorded by trial Court and confirmed in Appeal can not said to be perverse.

10. It is difficult to accept the case of plaintiff that partition has taken place during the life time of their late father and except suit land admeasuring 30 R., all other properties were partitioned amongst the plaintiff and defendant Nos. 1 to 9 and the suit land was left out from partition for the purpose of maintenance of their parents. If the partition had taken place as pleaded by plaintiff prior to the death of Sakharam, the share of Sakharam ought to have been carved out in the partition. In that view, the case of defendant No. 1 found to be more convincing and acceptable. Hence, the reasons and findings recorded by Courts below can not be termed as perverse.

11. The suit land admeasuring 30 R. was sold by registered sale deed way-back in the year 1995. The Suit has been filed in the year 2008 i.e. after more than 12 years. It is difficult to believe that plaintiff and his

brothers were unaware of such transaction. In order to entertain the Second Appeal, it is incumbent upon the appellant to satisfy the Court that Appeal raises substantial question(s) of law. In the Appeal preferred, no specific substantial question(s) of law has been raised. The grounds of appeal have been claimed to be treated as substantial question(s) of law. None of the grounds raised in the Appeal make out a case to satisfy the Court that Appeal raises substantial question of law. In absence of perversity in the Judgment, orders passed by Courts below, I am not inclined to entertain the Appeal. Accordingly, the Appeal is dismissed. In view of dismissal of Appeal, C.A.No. 13599 of 2019 stands disposed as dismissed.

[V.L.ACHLIYA]
JUDGE

KNP