

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

**SECOND APPEAL NO.4 OF 2019
WITH CA/336/2019 IN SA/4/2019**

Atul Baliram Chaudhari and another

... **Versus** ...

Anil Raghunath Chaudhari and others

...

Mr. A.M. Gholap, Advocate for the appellants

Mr. R.P. Dhase, Advocate for the respondent No.1

...

CORAM : SMT. VIBHA KANKANWADI, J.

RESERVED ON : 02th APRIL, 2019

PRONOUNCED ON : 03rd MAY, 2019

ORDER :

1 Present appeal has been filed by original defendant Nos.6 and 7. Present respondent No.1 had filed Regular Civil Suit No.153/2006 before 6th Joint Civil Judge Junior Division, Jalgaon for declaration, possession and perpetual injunction. He had come with the case that defendant No.2 is his uncle (brother of his deceased father). He is brother of defendant Nos.3 to 5 and son of original defendant No.1. Defendant Nos.6 and 7 are the sons of

defendant No.2. Plaintiff has come with the case that he is the owner of agricultural land Gat No.828 admeasuring 01 H 10 R situated at village Mamurabad, Tq. & Dist. Jalgaon which has been more particularly described in para No.1 of the plaint. The suit land was initially owned by his father Raghunath Ramji Chaudhari. Raghunath had given the said land to his mother Shevantabai till her lifetime for her livelihood in 1961. Shevantabai expired on 27.09.1986 and after her death the property ought to have been returned to Raghunath. However, it was wrongly recorded in the name of all the heirs of Shevantabai vide Mutation Entry No.1184. According to the plaintiff, defendant No.2 had prepared a false affidavit before Tahsildar, Jalgaon on 30.06.1987 and showed that all the other legal heirs of Shevantabai have relinquished their right in the suit land in his favour. Thereafter, defendant No.2 filed application with Talathi on 27.05.1987 for recording his name as owner in the revenue record and accordingly Mutation Entry No.1223 was sanctioned. Raghunath expired on 10.04.1995 and after his death defendant No.2 again filed application before Talathi on 26.11.1996 to strike out the name of the father of the plaintiff from other rights column. Accordingly name of Raghunath came to be deleted. The said Mutation Entry No.1223 is illegal, so also the possession of the defendant No.2 over the suit land is illegal. Plaintiff obtained copies of revenue entry

on 04.08.2004 and came to know that his father was owner and till his death he was considered as owner of the suit land. Initially the suit was only for perpetual injunction restraining the defendant No.2 from alienating suit land, however, during the pendency of the suit, defendant No.2 partitioned the suit land between his sons and therefore, they have been arrayed as party and possession has been sought from them also.

2 Defendant No.2 filed written statement, admitted the relationship between the parties but denied that Raghunath was owner of the suit land. It is stated that if plaintiff's contention is accepted that suit land was given to Shevantabai for her maintenance then as per Section 14 of Hindu Succession Act, 1956 she had become absolute owner of the property. After her demise, all the heirs succeeded to the property. It is stated that all other heirs had relinquished their right in his favour and accordingly Mutation Entry No.1223 was carried out. It is stated that Shevantabai died in 1986. Father of the plaintiff died in 1995. But they never had raised any objection in respect of the mutation entry. He is the owner of the suit property and therefore, he had every right to effect partition. Defendant Nos.6 and 7 have also filed written statement on the same line. It will not be out of place to mention here that defendant No.1 had expired during the pendency of the suit, however, plaintiff himself and defendant Nos.3 to 5 are

her heirs. Defendant Nos.3 and 4 have admitted the claim of the plaintiff by filing pursis. Defendant No.5 failed to appear and therefore matter proceeded ex parte against her.

3 Taking into considering the rival contentions, issues came to be framed. Parties have led oral as well as documentary evidence. Taking into consideration the same, the suit came to be partly decreed by the learned Trial Court on 14.07.2014. Plaintiff, defendant Nos.3 to 5 have been declared as owner of the suit land. It is stated that they are entitled to recover the possession of the suit land from defendant No.2, 6 and 7. Accordingly, directions have given to those defendants, however, relief of perpetual injunction was rejected.

4 Being aggrieved by the said Judgment and Decree original defendant No.2 filed R.C.A. No.153/2014 before learned District Judge-4, Jalgaon. The said appeal came to be dismissed on 20.08.2018. Now, being aggrieved by the said Judgment and Decree defendant Nos.6 and 7 have filed the present Second Appeal. It will not be out of place to mention here that when the matter was on board on 15.01.2019, statement was made on behalf of respondent No.1 (original plaintiff) that even the present appellants, who were the respondent Nos.6 and 7 in the Trial Court, had separately filed

R.C.A. No.131/2018 challenging the same Judgment and Decree and the said appeal has been dismissed on 20.08.2018 as stated by learned Advocate for the respondent No.1 and there is no appeal filed challenging that appeal.

5 Heard learned Advocate Mr. A.M. Gholap for the appellants and learned Advocate Mr. R.P. Dhase for the respondent No.1.

6 It has been submitted on behalf of the appellants that Raghunath had given Gat No.828 to Shevantabai for maintenance. In fact, it had come on record that prior to that there was a partition between Raghunath and Baliram i.e. defendant No.2, who were the sons of Ramji in 1952-53. But then on 23.11.1961 by a Mutation Entry No.5580 Raghunath had given the land to Shevantabai. Thereafter, after Shevantabai expired, name of all her heirs came to be recorded vide Mutation Entry No.1184. She had expired on 27.09.1986. Said mutation entry was never challenged by Raghunath during his lifetime. On the contrary, thereafter Raghunath as well as other heirs had relinquished their rights in favour of Baliram and for that purpose Mutation Entry No.1223 was effected on 27.05.1987. That mutation entry was also never challenged by Raghunath. In fact, Raghunath's name was entered in the other rights column and then it was removed in 1996. When the property was given to Shevantabai towards maintenance, then she had

become exclusive owner of the said property by virtue of Section 14 of the Hindu Succession Act and therefore, the property devolved on her heirs. He relied on the decision in Jupudy Pardha Sarathy vs. Pentapati Rama Krishna and others, 2016(1) ALL MR 434 (S.C.), wherein it has been held that property when given to widow as lifetime interest in the suit property in lieu of her maintenance then the limited right becomes absolute right by virtue of Section 14 of the Hindu Succession Act. It was also submitted that when the mutation had taken place regarding entering names of all the heirs of Shevantabai, way back in the year 1987 and thereafter in 1987 itself Mutation Entry No.1223 came to be effected, then the suit for declaration of ownership filed in the year 2006 is time barred. Therefore, substantial questions of law are arising in this case.

7 Per contra, the learned Advocate appearing for respondent No.1 submitted that there are concurrent findings of the Courts below. The appeal which was filed i.e. R.C.A. No.153/2014 was by father. Present appellants were respondent Nos.6 and 7. They had filed their separate appeal after a long gap i.e. R.C.A. No.131/2018 and that is also dismissed, therefore, the present appeal is not maintainable. Shevantabai had become owner by virtue of Section 14 of the Hindu Succession Act. However, it is to be noted from the Mutation Entry No.5580 that the property was given for livelihood only

and not towards maintenance. There was no application of provision of Section 14 of Hindu Succession Act in this case. A specific stipulation was made in the application by Raghunath that after death of Shevantabai the said land will revert back to him. Therefore, what was created was only a limited right and therefore, after death of Shevantabai the property ought to have reverted back to Raghunath. Defendant No.2 had come with a case that Raghunath had relinquished his right but there was no document, much less a registered document to support his contention about relinquishment. Though the possession of the property was with defendant No.2, it cannot be said that it was any way adverse to either Raghunath or plaintiff. Therefore, the suit was within limitation and based on title. Both the Courts have taken correct view and appreciated the evidence properly, therefore, there is no substantial question of law involved in this case. He relied on Full Bench decision of Punjab and Haryana High Court in **Smt. Jaswant Kaur vs. Harpal Singh and others, AIR 1977 Punjab and Haryana, 341**, wherein it has been held that -

“It is clear from the language of Section 14(2) that a restricted estate created by will, gift, decree, award or any other instrument, prior to the commencement of the Act shall not be enlarged into full ownership under sub section (1) and that a restricted estate can be created in favour of a female even after coming into force of the Act.

A careful perusal of sub sections (1) and (2) shows that sub section (2) is in the nature of a proviso to sub section (1). If a case falls within the provisions of sub section (2), then sub section (1) will not apply. It is to be determined in what circumstances sub section (2) will apply. A plain reading of the sub section shows that its provisions are attracted if two things exist, namely, (I) that right of the female to the property is created by an instrument in writing and (ii) that it contains such terms as create restricted estate. If any of the above ingredients is missing from the instrument, then sub section (2) will not apply.”

8 The documents which were produced on record and not disputed were that an ancestor Ramji had many agricultural lands. Those lands were partitioned by Ramji himself during his lifetime on 29.08.1953. Mutation to that effect was made by Mutation Entry No.3872 and property No.828 went to the share of Raghunath. That means, before that property was given to Shevantabai it was the exclusive property of Raghunath by virtue of partition. That partition was never challenged by Baliram i.e. defendant No.2. Thereafter there was Mutation Entry No.5580 on 23.11.1961 on the basis of application given by Raghunath. It was specifically stated in the application that giving said property to his mother during her lifetime for livelihood i.e. for cultivation and after her death the property would revert back to Raghunath. Here, it is to be noted that Shevantabai is the mother of Raghunath as well as that of defendant No.2. That means, not only

Raghunath but defendant No.2 was also under obligation to maintain Shevantabai. It cannot be stated that only Raghunath was bound to maintain Shevantabai and for that purpose the suit land was given to her as maintenance. It is only the charity that was shown by Raghunath and he gave one of the properties, which he received in partition, to his mother for cultivation as her livelihood till her lifetime. A specific stipulation was made that after her death the property is to revert back to him. That means, he had clear intention to create only a limited interest in the suit property in favour of Shevantabai. The ratio laid down in **2016 (1) ALL MR 434 (S.C.)** (supra) will not be applicable to the fact of this case, for the simple reason is that in that case right of maintenance was created in favour of widow by the husband that too by executing a Will. Definitely the ratio laid down in **AIR 1977 Punjab and Haryana 341** is required to be considered here.

9 After death of Shevantabai as stated in the mutation entry Exh.37 the property would have reverted back to Raghunath automatically. It could not have been devolved on Shevantabai's heirs by succession, since it was not an exclusive property under Section 14 of Hindu Succession Act. Question of relinquishment of right by Raghunath and others, even if for the sake of argument for a second, was out of question. Another fact, that is also required to be noted is that though the Mutation Entry No.1184 in favour of

all the heirs of Shevantabai was effected, it could not have created any right, title or interest in their favour except Raghunath, who was originally the owner of the said property. Question of challenging that mutation entry, therefore, does not arise at all. Mutation entries are made for fiscal purposes and they do not create any right or do not take away the right of a person. Important point to be noted is that after alleged relinquishment of right by Raghunath why his name, who then be shown in the other rights column, has not been explained by defendant No.2. Raghunath expired in 1995 and it appears that defendant No.2 got his name deleted even from other rights column in 1996. This can be said to be a systematic act on the part of the defendant No.2 only to grab the property.

10 As regards point of limitation is concerned, a specific issue was framed and it has been answered in the affirmative by the learned Trial Court, so also by the learned First Appellate Court. When none of the mutation entries had created or extinguished right of Raghunath the cause of action for the plaintiff stated to have been arisen after he had collected the revenue entries. Further, question of limitation is always not a question of law. It is a mixed question of law and fact. When both the Courts are concurrently on the facts have arrived at conclusion that plaintiff as well as defendant Nos.3 to 5 are the owners of the property, then definitely they are

entitled to get back the possession.

11 One more fact, that is required to be considered is that defendant No.2 is claiming title over the suit property on the basis of that relinquishment affidavit. When Raghunath only was the owner of the property and therefore, there was no question of relinquishment in favour of defendant No.2, who had no share in the suit property. Furthermore, the said document is not a registered document. Therefore, said Mutation Entry No.1223 could not have created any right, title or interest in favour of defendant No.2. When defendant No.2 himself had not received any right, title or interest, he could not have passed on any legal right, title or interest in favour of the present appellants (original defendant Nos.6 and 7).

12 Even if for the sake of argument it is accepted that since defendant Nos.6 and 7 i.e. the present appellants are also the parties respondents in R.C.A. No.153/2014, they can file this Second Appeal. Yet, it is to be noted that original defendant No.2 (appellant before the First Appellate Court in this case) has not filed any Second Appeal challenging the said Judgment and Decree. Therefore, there are these legal hurdles for the appellants also.

13 In view of the concurrent findings on the basis of detailed and proper appreciation of evidence as well as law points, no substantial question of law is arising in this case requiring admission of the Second Appeal. Hence, following order.

ORDER

- 1 Second Appeal stands disposed of as “**not admitted**”.
- 2 Civil Application No.336 of 2019 stands disposed of accordingly.

(Smt. Vibha Kankanwadi, J.)

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