

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO. 651 OF 2016
WITH
CIVIL APPLICATION 1155 OF 2018**

Lahu Bhau Kale ... Appellant
Versus
Santosh Jaysing Malusare and others ... Respondents

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Mr. Ajay A. Joshi for the Appellant.
Mr. Sushan S. Prabhune for Respondent Nos. 2, 3, 4A, 4B, 4C, 5
and 6.

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CORAM : SANDEEP K. SHINDE, J.
DATE : 21st JANUARY, 2019.

P. C.:

1. Heard learned Counsel for the parties.
2. Learned Counsel for the appellant has tendered compilation of documents containing the notes of evidence, the judgment in previous proceedings i.e. Regular Civil Suit No.197 of 1960, judgment in Civil Appeal No. 211 of 1964.
3. This Second Appeal is preferred by the defendant in Regular Civil Suit No. 351 of 2008. Suit was filed by the respondent for declaration of his title and for injunction to restrain the defendants from selling, transferring or creating of

third party interest therein. The suit land is *Gat* No.119 (old *Gat* No.183) corresponding Survey No.70/8 admeasuring 64R. Plaintiffs were apprehending alienation of the suit land by the defendants as their names were recorded in the revenue records. The learned trial Judge dismissed the suit against which Regular Civil Appeal No.47 of 2011 was preferred by the plaintiffs. The Appellate Court allowed the appeal and set aside the decree of the trial Court. It is against the judgment and decree of the Appellate Court, the defendant has preferred this appeal.

4. The defendant denied the plaintiffs' title and possession over the suit land and relied on Mutation Entry No.701. Defendant further contended that he is absolute owner of the suit land and the plaintiffs' name has been mutated in the revenue record illegally.

5. In the first appeal the defendant had filed cross objections and contended that the trial Court had committed an error by holding the plaintiffs' in possession in the suit land. The defendant also sought declaration that he may be declared as owner of the suit land and his possession therein may be upheld.

6. Before advertng to the contentions raised by the appellant it may be stated that the predecessor in title of the defendant had

filed Civil Suit No.197 of 1960 seeking partition in respect of the five properties. It is admitted fact that the suit property New Gat No.119 corresponding Survey No.70/8 was one of the properties in Regular Civil Suit No.197 of 1960 (for short 'the previous suit'). The suit was dismissed on 30th December, 1961 and the plaintiffs therein (predecessor in title of the appellant herein) had filed Civil Appeal No.91 of 1961 (previous Appeal). The whole grievance in previous Appeal was that the trial Court did not frame proper issues and incorrectly shifted burden on the plaintiffs to prove that the family was joint and he had 1/3rd undivided share in the property. The appeal was allowed and the suit was remanded for trial afresh. On remand the trial Court recast the issue and called upon the defendants in the, previous suit, to prove the factum of previous partition. The previous suit was dismissed and the finding was recorded that defendant had proved the suit properties therein were partitioned long back. The judgment of the trial Court in the previous suit was carried in Civil Appeal No. 211 of 1964. The appeal was dismissed and the finding of the trial Court was upheld on the point of previous partition.

7. I have perused the judgment in the previous suit and the previous appeal arising. Admittedly, the property involved in the

present suit was a part of suit property in the previous suit. In the previous suit the defendants therein (who are the predecessor in title of the plaintiffs in the present suit) had resisted the suit on the ground that partition had taken place way back in the year 1918.

8. The question that is required to be answered is whether the finding recorded in the previous judgment which attained finality can be relied upon as provided under Sections 40 to 43 of the Evidence Act in the civil suit between the same parties.

The judgment, order or decree passed in the previous civil proceedings, if relevant as provided under Sections 40 to 42, the Court has to decide to what extent it is binding or conclusive with record to the matters decided therein. Hence, in each and every case first question which would require consideration is whether judgment, order or decree is relevant? If relevant, its effects. It may be relevant for limited purpose, such as motive or as fact in issue and it would depend upon the fact of each case.

9. Mr. Joshi, learned Counsel for the appellant submitted that the Appellate Court committed manifest error by holding that the fact in issue relating to the partition of the suit property concluded in the previous judgment binds the parties in the

present proceedings. Mr. Joshi has taken me through the previous judgments and the judgment passed by the Appellate Court in the present proceedings.

10. The previous suit was filed by the predecessor in title of the defendant against the predecessor in title of plaintiffs herein. Plaintiffs in the present suit, relied on finding recorded in the previous suit that the suit properties were partitioned several years ago, between Genu, Yesu and Rama. The defendant in the present suit represents the branch of Genu; whereas plaintiffs represent the branch of Yesu.

In the previous suit it was held that the lands which had fallen to the share of plaintiffs was sold by them vide sale dated 21st May, 1926. It appears from the previous judgments that the sale-deed dated 21st May, 1926 was proved by secondary evidence. Both the Courts in the previous suits thus concluded that vide sale-deed dated 21st May, 1926, the predecessor in title of the defendants herein, sold the property which has fallen to the share of Genu and thus held the defendants in the said suit had proved that partition had taken place between the branch of Genu, Yesu and Rama.

11. In the case in hand the name of the defendant was continued in the revenue record and taking advantage of this fact, it appears he was interfering with the possession of the plaintiff in the suit land and the plaintiffs were apprehending alienation of the suit land by the defendant on the basis of the revenue record, which favours him thus the instant suit was filed.

12. In the given state of fact, in my view the previous judgments are relevant inasmuch as the factum of a previous partition which was the issue therein has been held to be proved by the plaintiffs in the case in hand. Admittedly, the suit property in the present case was one of the properties in the previous suits. In fact, in the previous suit the predecessor in title of the plaintiffs were called upon to prove the factum of previous partition. It was proved by them by oral and documentary evidence and accordingly the issue was answered accordingly.

Having recorded the finding of fact in the previous judgment, the very issue cannot be addressed again merely because the name of the defendant was mutated in the revenue record of the suit land. In my view, the fact in issue in the case in hand and the fact in issue in the previous suit is one and the same.

13. In the given set of facts the finding recorded in the previous judgment cannot be reopened or disturbed on the basis of some revenue entries, which found in favour to the defendant.

14. The appeal does not give rise to any substantial question of law, therefore, same is dismissed. In view of dismissal of appeal, civil application does not survive and the same is disposed of.

(SANDEEP K. SHINDE, J.)