

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLANT SIDE JURISDICTION

SECOND APPEAL NO. 359 OF 2016

Maruti Maya Patil,
age 55 years, Occ. Agriculture,
R/o. Gadab, Tal. Pen,
Dist. Raigad

..... **APPELLANT**

...VERSUS...

1. Bhimrao Maya Patil,
age 65 years, Occ. Agriculture
R/o. Gadab, Tal. Pen,
Dist. Raigad
 2. Mahadeo Maya Patil,
(Since deceased through L.Rs)
 - 2/1 Smt. Nanda Mqahadeo Patil,
Age 40 years, Occ. Household,
 - 2/2 Kum. Reshma Mahadeo Patil,
Age 28 years, Occ. Household,
 - 2/3 Sushma Mahadeo Patil,
Age 25 years, Occ. Household,
 - 2/4 Roshan Mahadeo Patil,
Age 17 years, Occ. Household
- All R/o. Gadab, Tal. Pen,
Dist. Raigad
3. Krishna Maya Patil,
Age 45, Occ. Agriculture,
R/o. Gadab, Tal. Pen,
Dist. Raigad
 4. Smt. Mankubai Moreshwar Kothekar,
Age 70 years, Occ. Household,
R/o. Gadab, Tal. Pen,

Dist. Raigad

5. Sau. Laxmibai Motiram Patil,
Age 24 years, Occ. Household,
R/o. Gadab, Tal. Pen,
Dist. Raigad
6. Sau. Dehubai Shankar Patil,
Age 60 years, Occ. Household,
R/o. Pezari, Tal. Alibag
7. Sau. Bebibai Mawhadeo Mhatre,
Age 52 years, Occ. Household,
R/o. Bori, Tal. Pen.
8. Sau. Gulab Naresh Chavarkar,
Age 30 years, Occ. Household,
R/o. Poyand, Taql. Alibag
9. Smt. Nandabai Mahadeo Patil,
Adult
10. Smt. Reshma Mahadeo Patil
Adult
11. Smt. Sushma Mahadeo Patil.
12. Roshan Mahadeo Patil,
Adult

Nos. 9 to 12 R/o. Rameshwar
Seva Mandal, Govekar Chawl,
2/10, Golibar Road, Santacruz,
Mumbai

RESPONDENTS

Shri S.G.Deshmukh a/w Shri S.K.Hande a/w Shri A.A.Jadhavan,
Advocates for appellant.
Shri Kuldeep S. Patil, Advocate for Respondent nos. 1, 2(j) and 4

CORAM: N.W.SAMBRE, J.
DATE : 7th JANUARY, 2020.

1] The appellant herein preferred RCS No. 22/1993 against the respondents who are plaintiffs in RCS No. 30/1994. RCS No. 30/1994 is by the blood relation of the present appellant for declaration that the will executed by deceased Maya is invalid, plaintiffs and other co-defendants are entitled for partition of the suit property.

2] Whereas RCS No. 22/1993 preferred by the present appellant, based on Will dated 5th March, 1991 executed by Maya. In the said suit, the prayer was for declaration and injunction.

3] Gat No. 358 and 343 admeasuring 0H.55.4R and 0H 11.9R are the subject matter of above suit for injunction, whereas, in addition to the aforesaid property, Gat No. 68 admeasuring 1H.10.3R is the subject matter of partition being Suit No. 30/1994.

4] The learned trial Court i.e. Court of Civil Judge, Junior Division, Pen, decreed the suit for partition i.e. RCS No. 30/1994 preferred by the respondents thereby declaring the will deed dated 5th March, 1991 executed by deceased Maya s/o Sakharam Patil as illegal and as such invalid and

further declared that the same is not binding on the plaintiffs in RCS No. 30/1994. A further declaration of share to the extent of 10/45th was ordered. The suit preferred by the appellant-plaintiffs being Suit No. 22/1993 for injunction came to be dismissed.

5] The present appellant feeling aggrieved preferred Civil Appeal No. 119 of 2005 questioning the findings recorded in RCS No. 30/1994 i.e. for declaration as to the invalidity of will dated 5th March, 1991 and for partition.

6] The appeal came to be dismissed by the Adhoc District Judge, Raigad vide impugned judgment dated 8th August, 2012. As such this Second Appeal. In addition to above, the appellant also preferred Regular Civil Appeal No. 120 of 2005 questioning the judgment of dismissal of his suit for injunction being RCS No. 22/1993. Both these appeals are dismissed by the impugned judgment dated 8th August, 2012.

7] As far as the present second appeal is concerned, it is the case of the appellant that he has preferred the second appeal questioning the judgment and decree dated 8th August,

2012, passed in RCA No. 119 of 2005, in which the judgment in RCS No. 30/1994 declaring the will invalid and decreeing the suit for partition was questioned.

8] Learned counsel for the appellant Shri Deshmukh would strenuously urged that the Court below committed an error apparent on the face of record in decreeing the suit for partition and declaration that the will invalid. According to him, the evidence brought on record by the appellant was not properly appreciated and the court below failed to consider that the property was already subjected to the partition during the life time of deceased Maya. He would further urge that the suit property was self acquired property of Maya which was purchased under the provisions of the Bombay Tenancy and Agricultural Land Act in the capacity of protected tenant on the tillers day. Further submissions are, once there exist a will dated 5th March, 1991, in favour of the appellant, both the Courts below have committed an error of law in decreeing the suit by overlooking the provisions of Section 32 M and 32 G of the Bombay Tenancy and Agricultural Land Act.

9] While countering the submissions, the learned counsel for the respondents submits that the present second appeal is not maintainable, particularly when the decree passed in the suit preferred by the present appellant being RCS No. 22/1993 for injunction and declaration has attained the finality as the same is not questioned before this Court. The further submission is, the appeal is directed against the concurrent findings and as such this Court is not required to reappreciate the evidence and that being so, the appeal is liable to be dismissed.

10] Considered the rival submissions. At the outset, it is required to be noted that once the suit preferred by the appellant being RCS No. 22/1993 in which the following issues were framed and answered and which were confirmed in appeal by the impugned judgment, are not challenged by way of second appeal, the findings therein has attained the finality against the present appellant.

1] Does Plaintiff prove that he became owner of suit property by way of will deed dated 5.3.91 and is in possession and cultivation of it?	In the negative
2] Does he prove that the will deed dated 5.3.91 executed in favour of plaintiff is legal and valid?	In the negative

2-A] Whether suit property gut No. 343 & 358 admeasuring about H0.10.9R and H0.51.9R respectively situated at village Karav are the ancestral property of plaintiffs and defendant?	In the affirmative
3] Does he further prove that in the year 1986 in the life time of his father, partition was effected in respect of immovable and moveable property?	In the negative
4] Does he further prove that defendants having no any concern with the suit property?	In the negative
5] Does he prove that on 24.3.93 defendants obstructed the peaceful possession of plaintiffs over the suit property?	In the negative
6] Whether plaintiff is entitled for declaration?	In the negative
7] Whether plaintiff is entitled for permanent injunction against defendants?	In the negative
8] What order and decree	As per order below

11] Apart from above, whether the present appeal in the aforesaid background is maintainable or not is also required to be addressed by the appellant.

12] RCS No.22/1993 was preferred by the present appellant for declaration and perpetual injunction. In the said suit, the contention of the plaintiff-appellant was that his father allotted Survey No.343 and 385 of village Karav by Will dated 9.3.1991 in his favour. Father Maya expired on 3.3.1993.

Since there was challenge by the present respondent to the alleged lawful possession of the appellant over the said property, the aforesaid suit was initiated.

13] Similarly, respondent No.1-Bhimrao alongwith other respondents initiated Regular Civil Suit No.30/1994 for partition and separate possession and declaration of very same property. Regular Civil Suit No.30/1994 was decreed by the judgment and decree dated 30th July, 2005 whereas the Suit No.22/1993 preferred by the appellant was dismissed vide said common judgment. The appellant feeling aggrieved, rightly preferred two first appeals being Civil Appeal No.119/2005 against the judgment and decree passed in Regular Civil Suit No.30/1994 and Civil Appeal No.120/2005 against the judgment and decree dismissing the suit for injunction passed in Regular Civil Suit No.22/1993.

14] Both these appeals, preferred by the appellant, were dismissed by a common judgment dated 8th August, 2012 passed by the Ad-hoc District Judge-I, Raigad. The appellant has questioned the judgment and decree passed in favour of the respondent in Regular Civil Suit No.22/1993 dismissing the claim of the appellant for injunction and declaration confirmed in first appeal, which is not subject matter of challenge in the present appeal. This Court has posed a question to the

learned counsel for the appellant as to whether the judgment and decree passed in Regular Civil Suit No.22/1993 confirmed in First Appeal No.120/2005 is challenged by way of a separate second appeal, to which the counsel for the appellant is unable to answer and as such, this Court took it that there is no second appeal preferred against the judgment and decree passed in Regular Civil Suit No.22/1993, confirmed in Civil Appeal No.120/2005.

15] This Court as such is required to consider the effect of non-questioning the judgment and decree in a suit preferred by the appellant for declaration and injunction. Admittedly, the claim in the said suit is based on the Will claimed to have been executed by Maya, father of plaintiff and defendants. The succession to suit property is claimed by the Appellant based on Will in both the suits. As such defence raised in the Regular Civil Suit No.30/1994 by the Appellant are pleading in plaint in Regular Civil Suit No.22/1993.

16] As such, by the conduct of the appellant of not questioning the judgment and decree in Regular Civil Suit No.22/1993, which was confirmed in regular civil appeal and which has attained finality between the parties, has to be considered as detrimental to the interests of the appellant while dealing with the claim raised in the present second appeal. Aforesaid finding by this Court can be substantiated by the following reasons.

Rival claim between the parties to suits in relation to the very same property has been adjudicated at the behest of the appellant in Regular Civil Suit No.22/1993. As such on one hand the defence of the Appellant raised in Regular Civil Suit No.30/1994 was not established whereas the very same plea in Regular Civil Suit No.22/1993 has been rejected by both the Courts below. Hence, there is a finality to findings recorded in the connected suit i.e. Regular Civil Suit No.22/1993, due to non-questioning of the judgment and decree in the said suit in a separate appeal or even in this appeal. The effect of non-filing of the appeal against the judgment and decree as is observed herein-above results in giving finality to such judgment and decree between the same parties in relation to the subject matter arising out of similar dispute. The finality can be taken away only by way of taking recourse to a legal procedure which the appellant has failed to. In support of the aforesaid observation, this Court can rely on the judgment of the Apex Court in the matter of *Premier Tyres Limited V/s Kerala State Road Transport Corporation* reported in **AIR 1993 SC 1202**. Paragraphs 4 and 5 of the said judgment read thus:

“4. Although none of these decisions were concerned with a situation where no appeal was filed against the decision in connected suit but it appears that where an appeal arising out of connected suits is dismissed on merits the other

cannot be heard, and has to be dismissed. The question is what happens where no appeal is filed, as in this case from the decree in connected suit. Effect of non filing of appeal against a judgment or decree is that it become final. This finality can be taken away only in accordance with law. Same consequences follows when a judgment or decree in a connected suit is not appealed from.

5. *Mention may be made of a Constitution Bench decision in Badir Narayan Singh v. Kamdeo Prasad Singh. In an election petition filed by the respondent a declaration was sought to declare the election of appellant as invalid and to declare the respondent as the elected candidate. The tribunal granted first relief only. Both appellant and respondent filed appeals in the High Court. The appellant's appeal was dismissed but that of respondent was allowed. The appellant challenged the order passed in favour of respondent in his appeal. It was dismissed and preliminary objection of the respondent was upheld. The Court observed, 'We are therefore of opinion that so long as the order in the appellant's appeal No.7 confirming the order setting aside his election on the ground that he was a holder of an office of profit under the Bihar Government and therefore could not have been a properly nominated candidate stands, he cannot question the finding about his holding an office of profit, in the present appeal, which is founded on the contention that that finding is incorrect.'*

17] In case if claim of the appellant in the present appeal is allowed, the consequences will be, on the very same plea set up by the appellant, the claim will stood rejected in judgment and decree in Regular Civil Suit No.22/1993 whereas the same will stood accepted in

Regular Civil Suit No.30/1994 thereby giving rise to the contradictory findings on the very same issue.

18] In the aforesaid background, the very second appeal preferred by the appellant whether is maintainable should have been established by the appellant, which the appellant has failed to.

19] Apart from above, the respondents/original plaintiffs in RCS No. 30/1994 has proved that the suit properties were joint family properties of an undivided Hindu Family of the plaintiffs and deceased Maya Sakharam Patil and was never a self acquired property of Maya Sakharam Patil. The Court below has also observed that though the will dated 5th March, 1991, executed by Maya Sakharam Patil was proved, the documentary evidence, particularly the revenue entries of 1931-35 and subsequent documents speaks of the nature of property being ancestral one. The 7/12 extract at Exh. 85, the revenue entries of 1931-35 in the name of Ragi Sakharam Patil and also deceased Maya sufficiently establishes ownership. Similar appears to be the case in regard Gat No. 343 and 358. Rather the respondents herein from the admission given by the present appellant in the evidence are able to establish that it was Sakharam Patil, the common ancestral who was in possession of the property to which deceased Maya and the father of the respondents have succeeded.

20] In the aforesaid background, the claim put forth by the appellant that Section 32 M certificate issued under the provisions of the Bombay Tenancy and Agricultural Lands Act is in favour of their father cannot be accepted particularly when such documentary evidence was not brought on record before the Court below.

21] In the aforesaid background, there is no substance in the present second appeal which is against the concurrent findings. The appeal as such fails. It is dismissed.

JUDGE

Rvjalit