

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

**SECOND APPEAL NO.103 OF 2020
WITH
CIVIL APPLICATION NO.2758 OF 2020**

Shriram S/o Apparao Shinde
and others

...APPELLANTS

(Orig Defendant Nos.5 to 8)

VERSUS

Pandurang S/o Yadav Tat
Since Died through L.Rs

Trivenibai W/o Pandurang Tat
and others.

...RESPONDENTS

...

Mr.S.V. Natu Advocate for Appellants.

Mr. V.D. Salunke Advocate for Respondent Nos.1-A, 1-C to 1-E.

Mr.P.R. Katneshwarkar Advocate h/f. Mr.P.M. Nagargoje
Advocate for Respondent No.1-F.

...

CORAM: SMT. VIBHA KANKANWADI, J.

DATE : 21st SEPTEMBER, 2021

ORDER :

1. Present Appeal has been filed by original defendant Nos. 5 to 8 challenging the concurrent Judgments and decree passed by the Courts below.

2. Present Respondents – original plaintiffs filed Regular Civil Suit No.169 of 1988 before Joint Civil Judge, Junior Division, at Kaij, District-Beed, for declaration of ownership and perpetual injunction. The said Suit came to be decreed on 31st December 2015. The present appellants – original defendants No. 5 to 8 preferred Regular Civil Appeal No. 21 of 2016, which came to be dismissed by learned District Judge, Ambajogai, District-Beed on 31st January 2020. Hence this Second Appeal.

3. Heard Mr. Natu, learned Advocate for appellants, Mr. Salunke, learned Advocate for Respondent Nos. 1-A, 1-C to 1-E and Mr. Katneshwarkar learned Advocate holding for Mr. Nagargoje, learned Advocate for Respondent No. 1-F.

4. It has been vehemently submitted on behalf of the appellants that plaintiffs had come with the case that Trivenibai was the wife of the original plaintiff - Pandurang. She died intestate on 28th February 1970. Defendant Nos. 1 to 4 are the daughters from said Trivenibai. One Murlidhar Maruti Shinde was the real brother of Trivenibai. Defendant No. 10 is the son of real sister of Trivenibai. There was no partition between plaintiff and

deceased Trivenibai. According to the plaintiff he has not executed any document regarding provision for maintenance in favour of Trivenibai. In spite of this position, her brother Murlidhar managed to get Trivenibai's name mutated for the Mutation Entry No.166 to the suit land. Trivenibai was never in possession of the suit land. On the contrary, the plaintiff was the real owner and possessor of the same. After death of Trivenibai, plaintiff performed marriage with one Kaushalyabai on 9th June 1970. However, in view of the long standing customs of his family, said Kaushalyabai was named as Trivenibai. Murlidhar got Mutation Entry No. 279 executed in collusion with defendant No. 10 showing succession of defendant Nos. 1 to 4 to the suit land. No notice was given in respect of the same to the plaintiff. It is the case of the plaintiff that he had given the land for cultivation on *Batai* basis to Rambhau, Shrikisan and Haridas. Defendant Nos. 1 and 2 constituted defendant No. 1 as general power of attorney and executed registered deed dated 11th December 1984. Defendant No.10 had then entered into the agreement of sale in favour of different defendants. Defendants No.5 to 8 are those persons. Then the plaintiff had sought declaration and consequential reliefs.

5. It has been further submitted that only defendant No.5 appeared and filed the written statement admitting the relationship between the parties, however, it was stated that Trivenibai, who expired, was the member of the joint family of the plaintiff till her death. Plaintiff had allotted the suit land to Trivenibai in partition. The other contentions have been denied by him and he stated that he has become the owner of the property. It is contended that after due inquiry names of defendant Nos. 1 to 4 have been mutated in the ownership as well as cultivation column. They have given power of attorney to defendant No.10 and in view of the agreement to sale, he was put in possession of the property. It has been submitted on behalf of the original defendant Nos. 5 to 8 that the Courts below have not appreciated the evidence properly so also the law points are not considered at all. Perusal of the Judgment of the First Appellate Court would show that there is no compliance of Order 41 Rule 31 of the Code of Civil Procedure. Points have not been properly formulated and have not been dealt with. It was not considered that the suit was not within limitation. The mutation entry was effected on 1st January 1970 and it was sanctioned on 2nd February 1970. It is hard to believe that the plaintiff would not have knowledge about the said mutation entry

at any earlier point of time. Substantial questions of law are, therefore, arising in this case. Learned Advocate for the appellants also submitted that if this Court comes to the conclusion that the Appeal deserves to be admitted, then there should be stay to the impugned Judgment and decree. Status-quo was granted by this Court by order dated 2nd March 2020 and at least that should be continued till the disposal of the Second Appeal.

6. Per contra, learned Advocates appearing for concerned respondents submitted that both the Courts have decided the matter on merits. Though only two points have been framed by the First Appellate Court, yet it is required to be seen that there is substantial compliance. All the points those were raised on behalf of both the parties have been considered and therefore, merely because the wordings those were used while framing the points are not sufficient. Infact when the marriage was subsisting and there was absolutely no reason for effecting partition, name of Trivenibai could not have been mutated. The said Mutation Entry No.166 is bogus. No document of partition dated 15th June 1969 was produced before the trial Court. The suit has been properly decreed and the appeal has been rightly

dismissed. As regards the status-quo is concerned, the factual aspects are that in the suit, injunction application was filed at Exhibit-5. It was rejected and therefore, one Shriram, Annapurnabai and Daulat filed Misc. Civil Appeal No. 69 of 1999. That appeal came to be allowed and one Balaji Tat, Sunil Tat, Shivaji Tat etc. filed Writ Petition No.1119 of 2003, wherein this Court had directed the parties to maintain status-quo by order dated 27th August 2003. After the appeal was filed, application was filed at Exhibit-5 and it has been rejected. Again the applicants approached this Court by filing Writ Petition No.14290 of 2019 and status-quo was granted, however, that Writ Petition came to be disposed of. Under such circumstance, the position remained that there was no injunction during the pendency of the appeal. Now no order of status-quo can be clamped on the respondents as they have substantial right over the suit property. They possessed the same and cultivated.

7. At the outset, it can be seen from the Judgment passed by the First Appellate Court that only two points have been framed, which are running thus:-

"1) Whether appellants prove that, the judgment and decree under appeal is erroneous and not based on correct perspective?

2) Whether interference of this court is required in the impugned judgment & decree?"

8. The findings are given in the negative. Definitely, it will have to be considered, as to whether this amounts to compliance of Order 41 Rule 31 of the Code of Civil Procedure. The compliance of that provision is mandatory in view of the decision in ***Santosh Hazari vs. Purushottam Tiwari, 2001(3) SCC 179***. Another important point about limitation also appears to have not been considered though it may not have been pleaded. In view of the fact that point of limitation is a point of law, it can be raised by the parties at any stage. It deserves to be considered. Consequently, whether defendants No.5 to 8 were the bona fide purchasers for value without notice, is also required to be considered. Therefore, definitely case is made out for admitting the appeal.

9. As regards stay to the impugned decree is concerned, definitely part stay can be granted in respect of the declaration. However, as regards the injunction is concerned, the documents

on record would show that the First Appellate Court had rejected application Exhibit-5 in Regular Civil Appeal No.21 of 2016 on 23rd October 2019. That means the said Court had not considered that the present appellants are in possession of the suit property. Though the orders of status-quo were granted by this Court in the past, it is absolutely not mentioned as to what was the status in respect of the suit land as on the date when the status-quo was granted. Further, the First Appellate Court had dismissed the appeal on 31st January 2020 and in the order passed by this Court on 2nd March 2020 also it is only stated that the status-quo as on today be maintained. It was not clarified by the appellants, as to whether immediately after the pronouncement of Judgment by the First Appellate Court, the First Appellate Court has granted any protection in favour of the appellants. Under such circumstance, the said status-quo cannot be continued further.

10. With these observations, Second Appeal stands **admitted**.

11. Issue notice to the respondents.

12. Learned Advocate Mr. V.D. Salunke waives notice for Respondent Nos.1-A, 1-C to 1-E, Mr. P. R. Katneshwarkar Advocate h/f. Mr. P.M. Nagargoje waives notice for Respondent No.1-F.

13. Notice to other Respondents is made returnable on 1st February 2022.

14. Call Record and Proceedings.

15. Civil Application No. 2758 of 2020 stands partly allowed. There shall be stay to the decree in respect of declaration passed by the trial Court till the hearing and disposal of the Second Appeal.

16. The prayer for injunction / stay to the entire decree stands rejected.

[SMT. VIBHA KANKANWADI , J.]