

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

SECOND APPEAL NO.744 OF 2017

Dhondiba s/o. Tuljaram Ingale,
Age : 63 years, Occ. Priest (Pujari),
Jawahar Chowk, Tuljapur,
Tq. Tuljapur, Dist. Osmanabad ..Appellant

Vs.

1. Bhimrao s/o. Khanderao Ingale,
Age : 66 years, Occ. Priest (Pujari),
Jawahar Chowk, Tuljapur,
Tq. Tuljapur, Dist. Osmanabad
at present Varad Vinayak Society,
Building B-12, Gopalwadi Road,
Daund, Tq. Daund, Dist. Pune
2. Ashok s/o. Shivajirao Ingale,
Age : 73 years, Occ. and r/o.
As above
3. Shashikala Madhukar Ingale,
Age : 71 years, Occ. Household,
r/o. As above
4. Tanaji s/o. Khanderao Ingale (died),
through his L.Rs.
- 4-A. Smt. Indumati Tanaji Ingale
Age : 76 years, Occ. Household,
r/o. Vasudeo Galli, Behind Court,
Tuljapur, Dist. Osmanabad
- 4-B. Pawan s/o. Tanaji Ingale,
Age : 58 years, Occ. Nil,
r/o. As above

4-C. Sanjay s/o. Tanaji Ingale,
Age : 49 years, Occ. Service,
r/o. As above

4-D. Rani Tanaji Ingale,
Age : 44 years, Occ. Household,

4-E. Sunita Rajendra Wadadekar,
Age : 50 years, Occ. Household,
r/o. Near Fort, Mangalwedha,
Dist. Solapur

4-F. Anita Madhukar Dhamale,
Age : 46 years, Occ. Service,
r/o. Nar Sushiladevi College,
Khadgaon Road, Latur

..Respondents

Mr.M.P.Tripathi, Advocate for appellant

CORAM : R.G. AVACHAT, J.
RESERVED ON : APRIL 07, 2021
PRONOUNCED ON : APRIL 23, 2021

ORDER :-

This appeal is directed against the judgment and decree passed by learned Joint Civil Judge, Junior Division, Tuljapur, on 30.11.2013 in R.C.C. No.28 of 2008 and confirmed by the judgment passed by learned District Judge-2, Osmanabad, on 22.12.2016 in R.C.A. No.18 of 2014. By the

impugned judgment and decree, the suit of the appellant (plaintiff) for possession of the house property, described in the plaint, came to be dismissed. Hence, this Second Appeal.

2. Heard learned counsel for the appellant. Perused the impugned judgments. In my view, no substantial question of law arises in this Second Appeal. The appeal is, therefore, liable to be dismissed for the reasons given herein below.

3. The appellant claimed to be the owner of the suit property. It is his case that the suit property came to the share of his father in partition that took place way back in December, 1952. Since the partition was not effected by metes and bounds, the father of the appellant had filed a suit for partition of the joint family properties. It was a suit bearing R.C.S. No.75 of 1987. The father of the appellant died on 15.02.1989. The father of the appellant was in possession of the suit property during his lifetime. On his demise, the appellant continued in possession of the suit property. However, in December, 2007, respondent no.2 herein (defendant no.2)

dispossessed the appellant from the suit property. The appellant used to let out the suit property to the pilgrims who would visit Tuljapur for Darshan of Goddess Tuljabhavani. Since respondent no.2 dispossessed the appellant from the suit property, the appellant filed the suit for possession and mesne profits. Both the Courts below dismissed the suit holding the appellant to have no title to the suit property and consequently, not entitled for the relief of possession.

4. Mr.Tripathi, learned counsel for the appellant, would submit that the father of the appellant, admittedly, had 1/3rd share in the house property bearing C.T.S. Nos.1427, 1428, 1429. The suit property was allotted to the share of the appellant's father in the partition. Since the partition was not effected by metes and bounds, the father of the appellant had filed suit (75/1987) for partition of the family properties. Respondent no.2 herein was party to the said suit. The case of respondent no.2 that he had purchased the suit property from the father of the appellant under an unregistered sale deed dated 10.09.1973, was not a matter directly and substantially

in issue in the said suit. Learned counsel produced on record a copy of the judgment in R.C.S. No.75 of 1987 and R.C.A. No.97 of 1999. According to learned counsel, respondent no.2 did not lead any evidence in proof of the sale deed. A copy of the evidence recorded in R.C.S. No.75 of 1987 was not admissible in evidence in the suit under this appeal. Respondent no.2 did not prove that the value of the suit property was below Rs.100/- when the alleged sale deed was executed. According to learned counsel, substantial questions of law, as have been mentioned in Grounds II to XI of the appeal memo, do arise for consideration in this Second Appeal. He, therefore, urged for admission of the Second Appeal.

5. Admittedly, the father of the appellant had 1/3rd share in the property bearing C.T.S. Nos.1427, 1428, 1429. The suit property came to the share of the father of the appellant in a partition that took place in December, 1952. Since the partition was not effected by metes and bounds, the appellant's father instituted suit (75 of 1987) for partition and separate possession of his 1/3rd share in the joint family

properties. Respondent no.2 herein was a party to the said suit. He claimed to have had purchased the suit property from the father of the appellant under the unregistered sale deed dated 10.09.1973. Said sale deed was duly proved in the said suit. The appeal preferred against the judgment and decree passed in R.C.S. No.75 of 1987, came to be dismissed. The decree passed in R.C.S. No.75 of 1987 attained finality. Said decree comes in the way of the appellant herein.

True, no specific issue had been framed in the suit (75 of 1987) as regards execution of the sale deed dated 10.09.1973. The matter, directly and substantially in issue in the said suit (75 of 1987) was, whether the suit property was joint family property of the father of the appellant herein and the defendants in the said suit. The said suit was dismissed holding the appellant's father to have failed to prove his case. In the said suit, respondent no.2 herein was defendant no.2. He had contested said suit contending that the father of the appellant had sold him the present suit property under the unregistered sale deed dated 10.09.1973. In proof of the said

sale deed, the attesting witnesses thereto were examined. Said sale deed was admitted in evidence. It was the suit that dates back to 1987. Till this date, neither the father of the appellant and on his demise, nor the appellant herein challenged the execution of the said sale deed.

6. In the suit under this appeal, the said sale deed was tendered in evidence. It was referred to by respondent no.2 in his evidence. Both the courts below admitted the said sale deed in evidence relying on Section 90 of the Evidence Act. The witnesses examined on behalf of the appellant have testified the appellant to have not been in possession of the suit property since 1973. The Municipal/Revenue record also did not support the appellant's case. As such, based on the evidence in the suit, both the Courts below have concurrently held the appellant to have failed to prove his title to the suit property and his alleged dispossession from the suit property at the hands of respondent no.2.

7. It is, therefore, reiterated that no substantial question of law does arise in this appeal although, learned

counsel for the appellant may be right in contending that the copies of evidence recorded in R.C.S. No.75 of 1987 relating to proof of execution of the sale deed, came to be admitted in the suit without examination of any of the witness in proof of the sale deed. It is reiterated that the sale deed was referred to by the defendant in his evidence. Both the Courts below admitted the sale deed in evidence, relying on Section 90 of the Evidence Act. Since execution of the said sale deed, the appellant has not been in possession of the suit property.

8. For the reasons given herein above, the Second Appeal is dismissed.

[R.G. AVACHAT, J.]

KBP