

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

SECOND APPEAL NO.188 OF 2012

Kisan S/o Ramsing Patil,
Age-61 years, Occu:Agri.,
R/o-Wadi, Taluka-Soygaon,
District-Aurangabad.

**...APPELLANT
(Orig. Defendant)**

VERSUS

Anil S/o Baliram Patil,
Age-37 years, Occu:Agril.,
R/o-Wadi, Taluka-Soygaon.
Dist-Aurangabad.

**...RESPONDENT
(Orig. Plaintiff)**

...
Mr.Narsing B. Jadhav Advocate for Appellant.
Mr. Prashant K. Nikam Advocate with Ms. Meenal P. Nikam
Advocate for Respondent.
...

CORAM: ANIL S. KILOR, J.

DATE : 19th MARCH, 2021

ORAL JUDGMENT :

1. By the present appeal the defendant is challenging the Judgment and decree dated 30th September 2010 passed by the learned District Judge-3, Aurangabad in Regular Civil Appeal

No. 180 of 2004, reversing the Judgment and decree passed by learned Civil Judge (Junior Division), Soygaon, District-Aurangabad in Regular Civil Suit No. 5 of 2001 dated 12th July 2004, dismissing the suit filed by the respondent for possession on the basis of title.

2. I have heard respective learned counsels for the parties.

3. The brief facts of the present case are that (parties shall be referred to as per their original status in the suit), it is the case of the plaintiff that he is the owner of land Gut No. 140 admeasuring 4 H. 10 R. of village Banoti, Taluka-Soygaon, District-Aurangabad, which was an ancestral property. The defendant is the uncle of plaintiff and is the owner of land Gut No. 139 which is adjacent towards southern side of the plaintiff's land. The land Gut Nos. 140 and 139 were in the shape of Survey No. 40 and at the time of family partition, northern side portion of the said land was allotted to the share of father of the plaintiff, whereas southern side half portion was allotted to the share of defendant. The revenue authorities have accordingly made *pot hissas* as per possession i.e. 40/1 and 40/2. However,

during the consolidation scheme Gut No. 40/1 became 140 and 40/2 as 139. It is the further case of the plaintiff that the defendant in the year 1997 dispossessed the plaintiff from the portion to the extent of 1 H. 26 R. He, therefore, filed suit for possession and perpetual injunction on the basis of title.

4. The suit was dismissed by the learned trial Court vide Judgment and decree dated 12th July 2004. The plaintiff feeling aggrieved by the said Judgment and decree, preferred an appeal vide Regular Civil Appeal No. 180 of 2004 before the District Judge-3, Aurangabad. The learned lower appellate Court allowed the appeal and thereby decreed the suit and directed the defendant to handover possession of 1 H. 26 R. land of Gut No. 140.

5. Learned counsel for the appellant / defendant submits that the learned lower appellate Court wrongly saddled the burden of proof regarding partition on the shoulder of defendant whereas it is the burden of the plaintiff.

6. He further submits that learned lower appellate Court ignored the material evidence available on record while reversing

the Judgment and decree of the trial Court.

7. Learned counsel appearing for the respondent / plaintiff supports the impugned Judgment and decree and submits that the learned lower appellate Court has rightly reversed the Judgment and decree of the trial Court after scrutinizing oral as well as documentary evidence available on record. By arguing so, he submits that no substantial question of law is involved in the present appeal and therefore, the same may be dismissed.

8. To consider rival submissions of the parties, I have gone through the record and proceedings and relevant documents and both the Judgments and decrees.

9. The learned lower appellate Court while reversing the Judgment and decree of the trial Court, has held that there was partition between the father of the plaintiff and the defendant and equal shares were allotted to both of them and not as pleaded by the defendant on the basis of fertility of land. While arriving at this conclusion, the learned lower appellate Court has

considered the revenue entries as well as the material admissions given by the defendant in his cross-examination.

10. The learned lower appellate Court also considered the oral evidence of other witnesses examined by the defendant and the plaintiff. The learned lower appellate Court thereupon has observed that the defendant failed to prove his case that the partition was effected according to the fertility of the land and as there is a cart-way in the suit land, the partition was carried out keeping in mind the cart-way, and accordingly eastern portion of the said cart-way was allotted to the defendant and western portion of cart-way was allotted to the plaintiff's father. This case of the defendant found to be not correct after considering the revenue entries and other material evidence available on record.

11. In the present matter, admittedly, the defendant asserted that the partition was effected according to the fertility of the land and looking at the cart-way. Therefore, it is rightly held that the burden to prove it is to be of the defendant. I do not find any error committed by the learned lower appellate Court while holding that the partition was effected not as per the fertility of the land or looking at the cart-way but equal partition

was effected and the land was divided between the father of the plaintiff and defendant by allotting northern side portion of the said land to the share of father of the plaintiff and southern side portion to the share of defendant. Thus, I reject the contention of the defendant that partition was effected according to the fertility of the land and looking at the cart-way.

12. The learned lower appellate Court has considered oral as well as documentary evidence in detail and recorded its findings and therefore, the contention of the appellant that material evidence brought on record through the witnesses of the defendant has not been considered, is not correct.

13. Accordingly, I do not find any substantial question of law involved in the present appeal.

14. Second Appeal is dismissed. No order as to costs.

15. Pending civil application is also disposed of.

[ANIL S. KILOR, J.]