

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.381 OF 2021

WITH

**CIVIL APPLICATION NO.9583 OF 2021
IN SA/381/2021**

TUKARAM S/O SAKHARAMJI BHALERAO

VERSUS

PRALHADRAO S/O SAKHARAMJI BHALERAO
AND OTHERS

.....
Advocate for Appellant/Applicant : Mr. D. P. Palodkar
Advocate for Respondent No.1 : Mr. S. B. Ghatol Patil
.....

CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 16-09-2021.

ORDER :

1. Present appeal has been filed by the original defendant No.1 to challenge the concurrent findings and decree passed by the Court below.
2. Present respondent No.1 is the original plaintiff who filed Regular Civil Suit No.117 of 2014 for declaration of ownership and recovery of possession of the suit property. The said suit was entertained and tried by learned Joint Civil Judge, Senior Division, Parbhani and was

decreed on 02-04-2019. The original defendant No.1 then challenged the said Judgment and decree by filing Regular Civil Appeal No.47 of 2019. It was heard and dismissed by learned District Judge-4, Parbhani on 21-12-2019. Hence, this second appeal.

3. Heard learned Advocate Mr. D. P. Palodkar for appellant and learned Advocate Mr. S. B. Ghatol Patil for respondent No.1.

4. It has been vehemently submitted on behalf of the appellant that both the Courts below have not considered the evidence adduced by the defendant No.1 in proper perspective. The plaintiff had come with a case that he had received the suit property in an oral partition, however, the suit was for possession of the property then whether such suit which was the joint family property allegedly received in an oral partition was maintainable in absence of other members of the joint family as party defendants. The present appellant had denied that the suit property had gone to the share of the plaintiff though admittedly the property was standing in the name of plaintiff even prior to the alleged partition. Substantial questions of law are arising in this case as the plaintiff had failed to prove the oral partition.

5. Per contra, learned Advocate appearing for the respondent No.1/original plaintiff supported the reasons given by both the Courts below and submitted that no substantial questions of law as framed in the appeal memo are arising for determination. He prayed for the dismissal of the appeal at the threshold.

6. The story with which the plaintiff had come before the learned Lower Court is required to be considered in brief. The suit property and other properties were stated to be the properties purchased by the father of plaintiff as well as defendant No.1-deceased Sakharam Kashiram Bhalerao. Sakharam died in the year 2004 and his wife died in the year 2007 leaving behind three brothers excluding of plaintiff and defendant No.1 and two sisters who were married about 40 years ago. According to the plaintiff prior to his death deceased Sakharam had orally partitioned the joint family properties between the sons at the item of 'Gudhi Padwa' of 2003 in presence of sons and daughters. He had purchased the properties in the names of different family members and, therefore, he told that the person in whose name the property is purchased, would take that property in partition. The daughters had orally relinquished their share from the joint family property at that time. It is then contended that since

properties were standing differently in the name of concerned son, there was no question of giving effect to the oral partition. However, the defendant No.1 was residing in the suit property since prior to the partition. He did not vacate the same after the partition but requested plaintiff to accommodate him. Thus, plaintiff contended that the possession of the defendant No.1 over the suit premises is permissive in nature. It was also contended that the suit property is standing in the name of plaintiff in the record of Municipal Corporation as well as City Survey Record. Construction permission as well as electricity connection is also in his name. He was paying the taxes in respect of the building to the respective authorities. The defendant had taken disadvantage of the plaintiff and allowed defendants No.2 to 4 to occupy the suit property without consent and permission of plaintiff. Plaintiff issued notices to respondents No.2 to 4 and asked them to vacate the suit premises. After the service of the notice, one Shila Deshmukh who was occupying part of the premises, vacated it and handed over the possession to the plaintiff. Defendants No.3 and 4 did not respond. Defendant No.2 replied that he had entered into an agreement to lease to defendant No.1 and paid rent at the rate of Rs.3500/- per month to defendant No.1 regularly. Hence, the plaintiff asked for

the possession of the suit premises from all the defendants.

7. It was the defence of the defendant No.1 that their father was a rich person and he was having irrigated agricultural lands at village Ridhora purchased out of nucleus of joint family. Certain lands at village Aral and Darephal, plot in Parbhani etc. have been purchased by him from his own earnings. He denied that there was oral partition in the family in the year 2003. He admitted the fact that the agricultural lands from different gut numbers are recorded in the names of five brothers. Though he accepted the position that the suit property stands in the name of plaintiff, yet according to him the consideration has been paid by him. The father had every faith in him and he being the eldest brother was allowed to purchase the property in the name of plaintiff. He has incurred expenses in respect of education, food and clothes of the brothers. He had also stated that in the year 1979 there was a family arrangement and in the year 1985 it was decided to construct the house on the plot which was purchased as per the said family arrangement in the year 1979. He says that all the formalities to construct the house was completed in the name of plaintiff and he has made the construction. Loan was obtained by him from Narsimha Housing Co-operative

Society in the name of plaintiff between 1979 to 2012.

8. After considering the evidence on record, the learned Trial Judge held that the plaintiff has proved the oral partition that had taken place in the year 2003 and the suit property was allotted to the plaintiff. Thus, plaintiff has proved that he is the owner of the suit property. The possession of the defendant No1 is state to be illegal and, therefore, the plaintiff is entitled to recover the possession and also the mesne and profits.

9. As aforesaid, the appeal filed by the present appellant before the learned District Judge-4, Parbhani, has been dismissed.

10. Perusal of both the impugned Judgments would show that both the Courts have considered oral as well as documentary evidence in detail. Admittedly, the suit property stands in the name of plaintiff. The payment of taxes though it appears that some of the receipts are with the defendant No.1, they are in the name of plaintiff. The defence that has been raised by the defendant No.1 appears to be shaky. At one place he says that there is no oral partition and at another place he says that there was family settlement in the year 1979. He has not given details of the said family settlement as to

which property went to whom. He has not given reason for his contention that he had purchased the suit property in the name of plaintiff. At one place he says that his father was rich and having immovable property, then why the father would allow his eldest son to purchase the property in the name of his other son. Further, if defendant No.1 had the intention to purchase the property in the name of plaintiff, yet at the time of construction why all the documents should be in the name of plaintiff. Therefore, that reason is absolutely not convincing. In fact, the plaintiff has also produced documents on record to show that he has repaid loan. In all probabilities taking into consideration the cross of the defendant No.1, it supports the averment of the plaintiff that there was oral partition effected by father at the time of Gudhi Padwa 2003 thereby allowing the properties which were purchased in the name of each of the son. It is to be noted that the case of the plaintiff is supported by another brother PW.2 Madhukar. It was tried to be contended on behalf of the defendant No.1 that since PW.2 Madhukar had dispute with defendant No.1, he has supported plaintiff. In fact, those details of dispute have not come on record, however, even if we accept that there was such dispute, yet for him both the brothers are brothers. The details of the property which had gone to the

share of defendant No.1 have been given by the plaintiff and it has also come in the cross-examination. Then the question arises as to how the defendant No.1 would get more property which was the property of their joint family. A detailed scrutiny of the evidence led by the parties has been done by both the Courts below and by no stretch of imagination it can be said to be perverse. When defendant No.1 has failed to prove that the suit property is still joint family property, question of other members of the joint family are not at all necessary parties to the suit. Plaintiff was the exclusive owner of the suit property. The possession of the defendant No.1 was permissive in nature. He could not have handed over possession of the part of the premises to defendants No.2 to 4 without the consent of the plaintiff. The plaintiff was entitled to get the declaration and the decree for possession as directed by the learned Trial Judge. Hence, no substantial questions of law as contemplated under Section 100 of the Code of Civil Procedure are arising in this case requiring admission of the second appeal. The second appeal deserves to be rejected at the threshold and accordingly it is dismissed.

11. Perusal of the Judgment of the First Appellate Court would

show that in fact the said First Appeal was partly allowed in a sense that there was no disturbance to the decree passed by the learned Trial Judge but the objection that was raised by the appellant/original defendant No.1 in respect of Court fee on the valuation was allowed. The appeal was partly allowed to the extent of directing the plaintiff to pay Court fee on the valuation of Rs.45,00,000/-, when in fact it was valued before the learned Trial Judge at Rs.2,02,000/-. It is to be noted that when inquiry made with the learned Advocate for respondent No.1, he submitted a photocopy of the order regarding payment of additional Court fee as directed by the First Appellate Court and it has been taken on record. The said Court fees has been paid in Regular Darkhast on 26-03-2019. Under those circumstances, in fact the present appellant ought to have valued the appeal as it is before the First Appellate Court, that means on valuation of Rs.45,00,000/-. That means, Court fee ought to have been paid by the present appellant on the valuation of Rs.45,00,000/- as was directed in his first appeal. Yet, present appeal has been valued at Rs.2,0,2000/- and, therefore, directions are required to be given to the present appellant to pay the deficit court fees within a period of two months. Accordingly, the following order is passed.

ORDER

- 1) The second appeal stands dismissed at the threshold.
- 2) Civil Application No.9583 of 2021 for Stay stands disposed of in view of dismissal of the second appeal.
- 3) The appellant is directed to pay court fees on valuation of Rs.45,00,000/-(forty-five lakh).
- 4) The deficit Court fee be paid by the appellant with in a period of two (2) months from today.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-