

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.823 OF 2012

PADMABAI W/O TUKARAM DANGE
VERSUS
NAVLING S/O BABURAO TOMPE AND ORS

...
Mr. K. K. Kulkarni, Advocate for the appellant.
Mr. S. A. Wakure, Advocate for respondent Nos.1 to 3.
...

CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 22.09.2021

ORDER :-

1. Present appeal has been filed by the original plaintiff challenging the concurrent finding and decree. She had filed Regular Civil Suit No.76 of 2000 before the learned Civil Judge Junior Division, Tuljapur, Dist. Osmanabad for declaration and injunction. The said suit came to be dismissed on 31.01.2007. She preferred Regular Civil Appeal No.50 of 2007 and the said appeal has been dismissed by the learned Principal District Judge, Osmanabad on 17.03.2012. Hence, this second appeal.

2. Heard learned Advocate Mr. K. K. Kulkarni for the appellant and learned Advocate Mr. S. A. Wakure for respondent Nos.1 to 3.

3. It has been vehemently submitted on behalf of the appellant that both the Courts below have not considered the evidence as well as

pleadings of the parties properly and have given perverse finding. Plaintiff was claiming that agricultural land bearing Gut No.127 admeasuring 4 H 20 R of village Honala, Tq. Tuljapur, Dist. Osmanabad was the ancestral Property of plaintiff as well as defendants. There are few tamarind trees in the suit land. According to the plaintiff, her father had 1/3rd share and the defendants jointly had 2/3rd share. She is the only successor of her father and, therefore, after demise of her father, the said 1/3rd share has devolved on her and she states that the area of her 1/3rd share is 1 H 40 R with the right in the fruits of tamarind trees every year. When the defendants disputed, she filed the suit for declaration of her ownership and injunction. The defendants came with the specific case that there was oral partition in the year 1979. Plaintiff has consented to it. Further, her father had certain loan to repay and, therefore, the plaintiff allowed the defendants to retain more land to clear the said loan. Accordingly, Mutation Entry No.8 was effected and sanctioned in the year 1979. As per that partition, plaintiff got 96 R land and the tamarind trees were given exclusively to the defendants.

4. After the evidence, the learned Trial Judge has given findings in negative to all the issues those were framed. The learned first Appellate Court has also held that the plaintiff has also failed to prove her title to 1 H 40 R land. It has been then submitted on behalf of the appellant

that both the Courts below have failed to consider that the parties are rustic and had approached the Rural Court in respect of mofussil pleadings. The Hon'ble Supreme Court in ***Des Raj and Ors. Vs. Bhagat Ram (deceased by Lrs) and Ors., [AIR 2007 SC (Supp) 512]*** has stated that "Such pleadings should be construed liberally. Failure to use specific terminology does not mean that requirements of statute are not satisfied." Therefore, taking into consideration the mofussil pleadings, it ought to have been considered that, when her father as well as defendant Nos.1 and 2 have equal share, then she is also entitled to possess equal land. However, the land which is in her possession is less. She has also stated that the Mutation Entry No.8 has been effected behind her back. That does not extinguish her entitlement nor take away her ownership in respect of any part of the property. Further, he also submitted, when query was raised, as to how suit for simplisitor injunction would be then maintainable and why suit for partition was not filed. He relied on the decision in ***Managobinda and others Vs. Brajabandhu Mishra, [AIR 1986 ORISSA 281]***, wherein it has been held that "when the suit was for declaration of exclusive title, confirmation of possession and permanent injunction, the question related to title of both the parties and evidence had been laid about it and both the parties were aware about the same. The mere technicality that the issue was

not expressed in the pleadings in suit would be of formal nature and should not be allowed to preclude the Court from granting the relief. Under Order 7 Rule 7 Court has inherent power to grant either general relief or other relief which appears to it to be legitimate and proper in any case even though such reliefs have not been specifically asked for.” Substantial questions of law are, therefore, arising in this case requiring admission of the second appeal.

5. Per contra, the learned Advocate for respondent Nos.1 to 3 relied on the judgments by both the Courts below and submitted that no substantial questions of law arising in this case as the plaintiff had not filed any suit for partition and separate possession.

6. At the outset, it is to be noted that the suit was for declaration of ownership and permanent injunction. Unless the plaintiff would have shown with specific pleadings as to how land admeasuring 1 H 40 R had devolved on her, that too by describing it by specific boundaries, it cannot be said that she is the owner of a particular area. If we see the plaint in this case, then she has given the description of the suit property as admeasuring 4 H 20 R and then she has prayed for the declaration of her 1/3rd share in the same and injunction. She has kept intentionally vague as to when her father expired, but then she has stated that till her

father expired, the property was in the name of grandfather of plaintiff Nos.2 and 3, namely, Arjun. Now, when Arjun expired, that has not come on record. Whether plaintiff's father Nagappa predeceased Arjun is also not cleared. But then she says that in the year 1979, taking disadvantage of her illiteracy, defendant Nos.2 and 3 have got the Mutation Entry No.8 effected and sanctioned on 25.11.1979, which was in respect of partition. She then claims that in the year 1998, she came to know about the Mutation Entry No.8 when defendants started making encroachment over her property. She took out 7/12 extract on 26.02.1998 and then it was held that 19 R land was shown by defendant Nos.2 and 3 in the name of grandfather and further 19 R was shown in the name of defendants. She also then says that she had talked to defendant No.1 and Arjun that the property should be divided in three equal parts, but it has not been got done. The simple fact that can be gathered from her pleading as well as examination-in-chief would show that at one place she wanted to say that there was partition between them, yet, according to her it was not properly reflected in the mutation. The partition appears to have been effected somewhere in the year 1979 and for which the suit in the year 2000 would be definitely beyond the period of limitation. It is unbelievable that since 1979 till 2000, the plaintiff would not even taken the 7/12 extract at any point of time.

The decision in *Desh Raj and Ors.(Supra)* has also been relied by the learned Advocate for the appellant on the point of limitation stating that since the defendants have not claimed adverse possession, then the suit would be within limitation. It appears that the plaintiff want to glow hot and cold at same time. At one place, she wants to get her exclusive ownership declared and at another place, she still wants that her remaining area as alleged by her should be given to her. In her cross-examination, she has specifically admitted that she possess the area which has been shown in her name in the 7/12 extract. That means, her contention about the fact that in the year 1998 there was attempt to dispossess her appears to be incorrect or not proved.

7. The plaintiff either will have to go with the partition, which had taken place in the year 1979 or ought to have filed suit for partition. The prayer for partition now cannot be entertained under Order 7 Rule 7 for the simple reason that only ancillary/general relief which could be asked but not asked can be granted. Order 7 Rule 7 of the Code of Civil Procedure cannot override the need to claim entire relief or necessary reliefs. The Court cannot make out a third case, which has not been pleaded and was not in mind of the parties when they went to trial, while considering the prayer under Order 7 Rule 7. Here, when alternative efficacious remedy to file a suit for partition could have been

the remedy, if the plaintiff would have come with the specific case of property still being joint or ancestral but she is now coming with the specific case of her own 1/3rd share, then the case cannot be considered under Order 7 Rule 7 of the Code of Civil Procedure also. On that point, substantial questions of law cannot be framed. Taking into consideration the pleadings, evidence and the reasons given by both the Courts below, no substantial questions of law as contemplated under Section 100 of Code of Civil Procedure are arising in this case requiring admission of the second appeal. Hence, the second appeal stands dismissed.

[SMT. VIBHA KANKANWADI, J.]

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