

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.82 OF 2013

SHAHAJI S/O BHAGWAN YADAV

VERSUS

TUKARAM S/O SIDRAM GAVANE AND OTHERS

....

Advocate for Appellant : Mr. K. K Kulkarni

Advocate for Respondents : Mr. A. V. Lavate h/f Mr.S. J. Salunke

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CORAM : SMT.VIBHA KANKANWADI, J.

DATE : 30-09-2021.

ORDER :

1. Present appeal has been filed by the original plaintiff to challenge the concurrent finding and decree passed by the Courts below.
2. Present appellant filed Regular Civil Suit No.52 of 1992 for declaration and injunction in respect of land Survey No.28/3 admeasuring 4 Acres 28 Gunthas situated at village Hadgaon, Taluka Kaij, District Beed, before learned Civil Judge, Junior Division at Kaij, District Beed. The said suit came to be dismissed on 30-09-2004. He preferred Regular Civil Appeal No.58 of 2004. Learned Ad-hoc District

Judge-2, Ambajogai, District Beed, dismissed the appeal on 08-05-2012. Hence, this second appeal.

3. Heard learned Advocate Mr. K. K. Kulkarni for appellant and learned Advocate Mr. A. V. Lavate holding for Advocate Mr. S. J. Salunke for respondents. In order to cut short, it is stated that both of them have made submissions in support of their respective contentions.

4. At the outset, it is to be noted that the plaintiff had come with a case that the suit land is his ancestral land and the defendants were never in possession of the suit land. He had taken sugarcane crop in the year 1991-1992, however, the defendants raised quarrel on 11-02-1992 with him and tried to dispossess him, hence the suit. In order to base his title over the suit land, he contended that there were three lands i.e. Survey No.28/1, 28/3 and 28/5 which were the ancestral lands of one Kisan and Digambar who were the real brothers. Partition had taken place between them. Survey No.28/1 and 28/3 went to the share of plaintiff's father Bhagwan and his brothers Kashinath and Shamrao. Survey No.28/5 was allotted to Digambar who is the father of one Dhondiram and Pandurang. After two properties fell to the share of Kisan, Kisan's son Bhagwan and

his brothers started cultivating those lands as per allotment. Subsequently Digambar and his son taking disadvantage of the condition of plaintiff's father and brother, told them that the earlier partition has been changed and, therefore, plaintiff's father and his brother filed Regular Civil Suit No.403 of 1955. Subsequently Digambar and Dhondiram confirmed the partition as per the earlier allotment and, therefore, the suit did not proceed further. There was further partition amongst the family between Bhagwan and his brothers Kashinath and Shamrao and Survey No.28/1 and 28/3 were allotted to Bhagwan alone and his brothers took shares from other lands, thereby the plaintiff was claiming to be the exclusive owner of Survey No.28/1 and 28/3. In view of the alleged obstruction, he prayed for injunction.

5. The defendants resisted the claim by filing written statement that they are in actual possession of the property. In fact, old Survey No.28 was divided into five pieces. Plaintiff and his brother got 08 Aana share in the land comprising in three pieces and the remaining 08 Aana portion was allotted to Digambar and Dhondiram. Further, there was again partition between plaintiff's father and his brothers as well as plaintiff himself. They were possessing 6 Acres

26 Gunthas land when the consolidation scheme was implemented in the year 1970-71. But name of plaintiff in respect of property allegedly held by his father Bhagwan to the extent of 8 Acres 7 Gunthas is wrong. Area of 1 Acres 10 Gunthas has been wrongly entered in the name of Apparao and Bhagwan. Plaintiff's uncle and father had filed Regular Civil Suit No.403 of 1955, however, that was not carried forward. As per the situation then prevailing it has been shown by way of rough sketch appended to the written statement. Plaintiff is not possessing the suit land and, therefore, not entitled to the injunction.

6. Both the Courts below have held that the plaintiff has failed to prove his ownership and possession over the suit land bearing Survey No.28/3 admeasuring 4 Acres 20 Gunthas in view of the partitions alleged. He has also failed to prove that the defendants are obstructing his possession and thereby the suit and the appeal came to be dismissed by the respective Courts.

7. At the outset, though voluminous documents appear to have been filed by both sides, it is clear that the revenue entries stand in the name of plaintiff, however, that document that is the 7/12 extract cannot be a document of title. Both the Courts below have

correctly held that since the matter was in issue before the Court earlier also, that is in Regular Civil Suit No.403 of 1955 wherein as per the pleadings of the plaintiff's predecessor, a document of partition was executed but it appears that it was not filed in this proceeding, adverse inference has been rightly drawn against the plaintiff. The oral evidence has also been adduced and it has been concluded by both the Courts that plaintiff has failed to prove the actual possession. Defendant No.1 had purchased in all two Aana share from Pandurang about 20 years ago. It appears that there was no challenge to the said sale deed in the past or also in the present suit. Plaintiff could not prove the documents of possession and it appears that they only relied on the 7/12 extract. On the contrary, it was held that the defendants have proved their possession over the suit property since the date of sale deed. It has been rightly observed by the First Appellate Court that when earlier suit, that is Regular Civil Suit No.403 of 1955 was filed for recovery of possession as per the partition, it can be said that the plaintiff was not in possession even prior to the date of the suit. When the source of devolving of title by way of partition has not been proved at all, though the best piece of evidence available with the plaintiff, then definitely both the Courts below justified in drawing adverse

inference and refusing the discretionary relief of injunction. No substantial questions of law are arising in this case requiring admission of the second appeal, it is liable to be dismissed, accordingly it is dismissed.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-