

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.342 OF 2021

WITH

CIVIL APPLICATION NO.11056 OF 2012

SHIVAJI RAGHUNATH KOVHALE

VERSUS

SHRIKANT RAGHUNATH KOVHALE AND OTHERS

...

Mr. B.A. Shinde, Advocate for the appellant

Mr. D.P. Deshpande, Advocate for respondent No.1

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 15th SEPTEMBER, 2021

ORDER :

1 Present appeal has been filed by the original defendant No.1 challenging the Judgment and Decree passed in Regular Civil Appeal No.139/2007 by learned Principal District Judge, Latur. The said appeal, which was filed by the original plaintiff, came to be allowed on 14.02.2012. The Judgment and Decree of dismissal of the claim of the plaintiff for partition of field Sy.No.121/A situated at village Haregaon, Tq. Ausa, Dist. Latur passed in Regular Civil Suit No.34/1996 by learned Civil Judge Junior

Division, Ausa was set aside and the share of the plaintiff as well as defendants were carved out from that property.

2 Present respondent No.1 is the original plaintiff, who had filed Regular Civil Suit No.385/1996 before Civil Judge Junior Division, Ausa for partition and separate possession. The suit properties were - Sy.No.121/A admeasuring 08 Acres 30 Gunthas, Sy.No.4/B admeasuring 29 Gunthas and Sy.No.55 admeasuring 04 Acres 01 Guntha situated at village Haregaon, Tq. Ausa. The learned Trial Judge had held that the plaintiff has proved that the suit properties are joint family properties of plaintiff and defendants. It was also held that plaintiff had proved that defendant No.1 is taking undue advantage of his name over Sy.No.121/A over 08 Acres 30 Gunthas. It was then also held that the defendant No.1 is denying to give share to the plaintiff and the plaintiff is entitled to get partition and separate possession. However, there appears to be a previous litigation i.e. Regular Civil Suit No.34/1996 between one Rajendra and defendant No.1 and it has been held to be binding on the parties to the suit. The suit came to be partly decreed. Plaintiff's share has been carved out from Sy.No.4/B and 55 only and there is no specific mention that the claim of the plaintiff to separate his share from Sy.No.121/A has been dismissed, but when that property has not been directed to be divided and separated as per the shares cared out, then it is

being to have been refused. Hence, the original plaintiff filed Regular Civil Appeal No.139/2007 and it has been allowed, as aforesaid. Now, the defendant No.1 has filed present Second Appeal.

3 Heard learned Advocate Mr. B.A. Shinde for the appellant and learned Advocate Mr. D.P. Deshpande for the respondent No.1. In order to cut short, it can be said that they have argued in support of their respective contentions.

4 At the outset, it is to be noted that the defendant No.1 had not challenged the findings to Issues No.1 to 4 given by the Trial Court. The defendants have not challenged the decree of partition and separate possession granted by the Trial Court in respect of agricultural land bearing Sy.Nos.55 and 4/B, by way of cross appeal or cross objection. As aforesaid, the defendant No.1-present appellant had not challenged the fact that the Trial Court held that even Sy.No.121/A is the joint family property of plaintiff and defendants, defendant No.1 is taking undue advantage of his name to the said property and he is denying to give the share to plaintiff. It was specifically held that the plaintiff is entitled to get partition and separate possession and this is in respect of the properties; yet, it appears that the learned Trial Judge made mistake in considering the effect of compromise decree passed in Regular Civil Suit No.34/1996. It appears that the said suit

was between the defendant Nos.7, 8 on one part and defendant No.1 on the other. They had compromised the said case, but it appears that the learned Trial Judge failed to consider that plaintiff was not party to the said suit. Under the said circumstance, two Issues were framed by the learned Principal District Judge, Latur, reflected in para No.34 of the Judgment. It has been then stated that those are pure Issues of law and it is not necessary that those issues should be referred back to the Trial Court for its findings. The Issues were in respect of valuation of the property, which is now not material, in this case. But then the first one was, as to whether the claim of the plaintiff regarding decree passed in Regular Civil Suit No.34/1996 as void, illegal and not binding on him, is within limitation ? The contentions in Regular Civil Suit No.34/1996 were taken note of, wherein the defendant No.1 had contended that somewhere in Gudi Padwa of 1995 the property was partitioned between the two sons of defendant No.1 i.e. defendant Nos.7 and 8. The first and the foremost fact that has been considered is, when the property was joint family property, then how the defendant No.1 without adding the co-sharers to the partition could have partitioned the said property between his sons. It is not in dispute that the said property i.e. Sy.No.121/A was the property of their father Raghunath and Raghunath was survived by plaintiff, defendant No.1, another brother defendant No.2, mother and sisters. By suppression of all these facts, it appears that the said

suit bearing Regular Civil Suit No.34/1996 was filed and a compromise decree has been obtained. Definitely, when other co-sharers were not party to that suit, that compromise decree is not binding on the plaintiff. In fact, plaintiff was not even required to seek a declaration to that effect. The Trial Judge committed mistake in holding that in absence of such a relief that the said compromise decree is not binding on the plaintiff; the claim of the plaintiff for effecting partition of that land cannot be decreed. The First Appellate Court has passed a very well reasoned order, that too taking into consideration all the legal aspects. No substantial questions of law are arising in this case, as contemplated under Section 100 of the Code of Civil Procedure, 1908. Hence, the Second Appeal stands dismissed. Pending Civil Application No.11056 of 2012 stands disposed of.

(Smt. Vibha Kankanwadi, J.)

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