

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

**SECOND APPEAL NO.406 OF 2021
with
CIVIL APPLICATION NO.10732 of 2021**

Shri Raghunath s/o Sitaram Suryawanshi = **APPELLANT**
(Orig.Plaintiff)

VERSUS

1. Shri Subhash s/o Sitaram
Suryawanshi & Ors. = **RESPONDENTS**
(Orig.Defendants)

Mr. Anirudha A Nimbalkar, Advocate for Appellant.

CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 28th October, 2021.

PER COURT :-

1. Present appeal has been filed by the original plaintiff, challenging concurrent findings and decisions. He filed Regular Civil Suit No.135/2005 for declaration of ownership and permanent injunction before the 2nd Joint Civil Judge, JD., Kaij, District Beed. The said suit was dismissed on 14.12.2013. An appeal, bearing Regular Civil Appeal No.7/2014, preferred by the plaintiff, has been dismissed by learned District Judge-1, Ambejogai, on 5.9.2020. Hence, this Second Appeal.

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2. Heard learned Advocate appearing for the appellant.

3. In view of decision in the case of Ashok Rangnath Magar Vs. Shrikant Govindrao Sangvikar – (2015) 16 SCC 763, it is not necessary to hear the respondents at the time of admission of the Second Appeal, if the appellant satisfies that there are substantial questions of law involved in the case and, therefore, it is now required to be seen as to whether such substantial questions of law are involved in this matter.

4. It has been vehemently submitted on behalf of the appellant-plaintiff that both the Courts below have failed to appreciate the material facts, evidence that was led by the parties. The material admissions given by the defendants in their written statements have not been considered. Both the Courts below have taken up the view that family properties are partitioned twice. They failed to consider that when the partition had already taken place in the year 1987, what was the necessity of second partition in the year 1996.

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Mutation entries have been relied, however, that piece of revenue record appears to be confusing and it cannot be taken as true when the Civil Court is deciding the rights of the parties. The first partition-deed, which reflects in Mutation Entry No.581, would reveal that the plaintiff and his brother late Bharat, were given 1/4th share, i.e. 64 Ares from the area, admeasuring 2 hectares and 58 Ares in Survey No.53. The said mutation entry does not mention any land in the name of defendant No.1 and 5 of the said land. Conversely, it will have to be presumed that no land from said survey number was allotted to deft.Nos.1 and 5 in the year 1987. The remaining land, admeasuring 1 hectare and 30 Ares stood in the name of father of the plaintiff and the defendants and, therefore, the plaintiff can definitely claim the said land. One more factor, which would support the above ground is that the subsequent partition was allegedly effected in the year 1996 after death of their father and late Bharat. Certain land was allotted to defendant No.1 and another portion was allotted to late Bharat. So, the portion of land admeasuring 1 hectare and 39 Ares in Survey No.53,

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which stood in the name of father of the plaintiff; deft.Nos.1, 5 and late Bharat, was distributed in the second partition. In the way the plaintiff is contending. Still when question was raised in respect of title of the plaintiff, he filed the suit. Substantial questions of law are arising in this case, in view of the fact that whether the Civil Courts could have so much relied on the revenue record when they were supposed to decide title on the basis of contentions raised and evidence that is led.

5. It is to be noted from the pleadings that the plaintiff was claiming to be owner of 33 gunthas land from Survey No.53 and to be owner of the cattle-shed, which was near the road going on towards Janegaon. He claimed that he received the title in the partition. In his plaint, he has not given the date of partition between himself and the defendants. This contention of the plaintiff was denied by defendant No.1, 3 and 4. The plaintiff relied on Mutation Entries and 8-A Extract. However, if we consider Exhibit-66 – Mutation Entry No.581, then as regards Survey No.53 is concerned,

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part of it is shown to be given to Bharat; defendant No.1 and the present plaintiff. But, then there is also another Mutation Entry No.878, which appears to have been taken on 18.1.1996 under the nomenclature "*Watani*" (Partition). It shows that Survey No.53 has been given to Bharat. That portion, which was earlier shown in the name of the plaintiff is then missing. Important point to be noted is that the plaintiff is not saying that he is not relying on the mutation entries. He is not coming with a case also that he had no knowledge about the mutation entries and still he is owner of the property. If he had the knowledge about both the mutation entries, especially the second one, he has not put forward that he had ever challenged that mutation entry. In fact, that would have been the best possible time to challenge that entry without waiting for any further action. He is relying for several extent on the second mutation entry, i.e. 18.1.1996. Therefore, he cannot just take benefit of that mutation entry No. 878. He cannot then deviate himself or challenge the said partition. If we consider cross-examination of the plaintiff, then it can be seen that he admitted the

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fact that since life time of their father, all the three brothers had started residing separately. Mutation entries were also taken in respect of the respective properties in the name of the brothers. His father had left 6 acres and 13 gunthas land in Survey No.53. He also admitted the mistake of the Revenue Officer, when earlier, the area admeasuring 8 Acres and 13 gunthas, stated in his examination-in-chief. He admits that no portion of land of his ownership remained in 33 Ares land and he came to know about it in the year 1995. Still whey he waited till 2005, is a question for institution of the suit. Some portion of the land has been sold by him from Survey no. 53 and after death of their father, partition document has been prepared and he had knowledge about the said mutation entry and the application given. If still he has kept quite then the Court cannot help to such negligent person.

6. Here the present appellant-plaintiff had come before the Court and, therefore, burden was on the plaintiff to prove everything. Onus had not shifted on the shoulders of the defendants to prove or disprove anything. In order to prove the

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partition, that too in absence of any document, circumstantial facts are the only factors those are required to be considered to come to the conclusion. Both the Courts below on the preponderance of probabilities and evidence adduced, have come have arrived at right conclusion and, therefore, no substantial question of law is arising in this case, requiring admission of the Second Appeal. It deserves to be dismissed at the threshold. Accordingly, it is dismissed. Consequently, the Civil Application for stay stands rejected.

(SMT. VIBHA KANKANWADI)
JUDGE

BDV