

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

SECOND APPEAL NO.381 OF 2018

APPELLANT : Shri Vitthal s/o Gamana Modak,
Aged about 50 years,
Occu: Agriculturist, R/o Jalka,
Tah. Warora, District Chandrapur.

...V E R S U S...

RESPONDENTS :1] Smt. Bebi w/o Motiram Vidhate,
Aged about 60 years,
Occu: Household, R/o Wadala,
Tah. Bhadravati, District – Chandrapur.

2] Sau. Shalu s/o Vikram Behare,
Aged 47 years, Occu: Household,
R/o Dongargaon, Tah. Warora,
District – Chandrapur.

3] Sau. Chhaya w/o Manohar Khapane,
Aged about 40 years,
Occu: Household, R/o Chikni,
Tah. Warora, District – Chandrapur.

4] Shri Sudhakar s/o Gamana Modak,
Aged about 57 years,
Occu: Agriculturist, R/o Jalka, Tah.
Warora, District – Chandrapur.

Shri M.B. Turankar, counsel for the Appellant.
Shri A.P. Thakare, counsel for the Respondent Nos.1 to 4.

CORAM : ANIL S. KILOR, J.
DATE : 13th DECEMBER, 2021

ORAL JUDGMENT :

1. This appeal is arising out of the judgment and decree dated 03.12.2016 passed in Regular Civil Appeal No. 88/2009 by the learned District Judge-2 at Warora, District Chandrapur, modifying the judgment and decree dated 27.10.2009 passed by the 2nd Joint Civil Judge Junior Division, Warora and thereby held that the plaintiffs are entitled to 1/5th share each in the field bearing Survey No.192/1, area 1.60 HR situated at Village Jalka, Taluka Warora, District Chandrapur and further held that the plaintiff Nos. 1 to 3 are entitled for partition and separate possession of their respective 1/5th share in each of the suit house properties. Whereas, the entitlement of the plaintiffs in suit field properties bearing Survey Nos. 192/2, 192/3, 229/1 and 229/2 have been denied.

2. The brief facts of the present case are as under:
(parties are referred to as per their status before the trial Court).

Plaintiffs and defendants are daughters and sons of deceased Gamana Modak. The suit properties as agricultural field bearing Nos. 192/1, 192/2, 192/3, 229/1 and 229/2 were the ancestral properties of deceased Gamanna Modak after his death. It is the case of the plaintiffs, that the suit properties devolved upon the plaintiffs and defendants by way of survivorship. Accordingly, the plaintiffs claimed $1/5^{\text{th}}$ share in each suit field. It is further case of the plaintiffs that Gamana Modak owned two houses at village Jalka, bearing Malmatta Nos. 35 and 196. The plaintiffs have also claimed $1/5^{\text{th}}$ share in each of the suit house properties.

3. Defendant Nos. 1 and 2 by filing written statement resisted the suit. Defendant No.2 is the contesting defendant, and he denied the claim of the plaintiffs.

4. The learned trial Court after considering the oral as well as documentary evidence available on record, decreed the suit in favour of the plaintiffs vide judgment and decree dated 27.10.2009 and thereby, it is held that the plaintiffs and the defendants have 1/5th share in the suit properties.

5. Defendant No.2 feeling aggrieved by the same, preferred an appeal, namely Regular Civil Appeal No. 88/2009, before the learned District Judge-2 at Warora, District - Chandrapur.

6. The learned First Appellate Court vide its impugned judgment and decree, dated 03.12.2016 modified the judgment and decree of the trial Court dated 27.10.2009 and thereby, it is held that the plaintiffs are entitled for 1/5th share in one suit field property i.e. 192/1 and in both the house properties. However, the claim of the plaintiffs in respect of suit field properties bearing survey Nos. 192/2, 192/3, 229/1 and 229/2 have been denied.

7. The defendant No.2/appellant, by way of the present Second Appeal, has assailed the said judgment and decree dated 03.12.2016.

8. I have heard learned counsel for the respective parties.

9. Shri Mohan B. Turankar, learned counsel for the appellant submits that though the plaintiffs have admitted that the appellant is in possession of the house property, both the Courts below have wrongly held that the defendant No. 2/appellant has failed to point out that the suit house was received by him in partition. Thus, according to the learned counsel for the appellant, the said finding is perverse and without any evidence.

10. He further submits that, the plaintiffs have no share in the property and the findings recorded by the learned Lower Appellate Court while holding that the plaintiffs have 1/5th share in the suit field property No. 192/1 is perverse and not supported by evidence.

11. *Per contra*, Shri A. P. Thakre, learned counsel for the respondent Nos.1 to 4 supports the impugned judgment and decree and submits that, after considering the oral as well as documentary evidence, the Court has rightly modified the judgment and decree of the trial court. He submits that First Appellate Court is the last Court of findings of facts and this Court cannot interfere into the finding of facts recorded by the First Appellate Court, unless the findings are perverse and not supported by the evidence.

12. To consider the rival contention of the parties, I have gone through the record and also perused the judgment and decree of both the Courts below.

13. The learned First Appellate Court has observed that no evidence has been brought on record by the defendant No. 2 /appellant to show that both the suit houses were received by him in the partition, as his share.

14. Admittedly, the mutation entries of both the suit houses is in the name of Gamana, father of the plaintiffs and defendants.

15. Mere fact of having possession over the suit house properties is not sufficient or admission by the plaintiffs in that regard is not sufficient to hold that defendant No. 2 has received the suit house properties in partition, more particularly, in absence of any evidence in support of the same. Thus, I do not find any perversity in the findings recorded by the learned First Appellate Court that the plaintiffs and defendants have 1/5th share in both the suit house properties.

16. As regards, suit field No. 192/1, since this field was received by Gamana Modak in partition which was taken place in respect of all the suit fields, before coming into force of the Hindu Succession (Amendment) Act, 2005 (39 of 2005), the Court has held that the plaintiffs being daughters have share only in the field, which was received by their father in the partition.

17. Accordingly, the learned Lower Appellate Court has held that the plaintiffs and the defendants have 1/5th share in the suit field property bearing field No.192/1. I do not find any perversity in the said findings recorded by the learned Lower Appellate Court and in absence of any perversity, the said findings of fact cannot be disturbed.

18. In the facts and circumstances of the case, I do not find any substantial question of law involved in the present appeal. Accordingly, I pass the following order:-

ORDER

- a] The appeal is dismissed.
- b] Pending application(s), if any, stand(s) disposed of. No order as to costs.

[ANIL S. KILOR, J.]

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