

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

SECOND APPEAL NO. 129 OF 2018

Ismailkhan Ashrafkhan,
Aged 69 years, Occ.: Agriculturist,
R/o. Pathanpura, Murtizapur, Tq.
Murtizapur, Dist. Akola.

.... **APPELLANT.**

// VERSUS //

Ataullakhan Ashrafkhan,
Aged about 75 years, Occ. Nil,
R/o Kalyanwadi, Pola Chowk, Old
City, Akola, Tq. & Dist. Akola.

.... **RESPONDENT.**

Shri U.J. Deshpande, Advocate for Appellant.
None for the Respondent.

CORAM : ANIL S. KILOR, J.
DATED : NOVEMBER 15, 2021

ORAL JUDGMENT :

1. The challenge raised in the this appeal is to the judgment and decree passed by Ad-Hoc District Judge-2, Akola, dated 12/09/2017, allowing the appeal filed by the plaintiff and thereby setting aside the judgment and decree dated 28/07/2015 passed by 2nd Joint Civil Judge, Junior Division, Murtizapur in Regular Civil Suit No.86/2013, declaring that the plaintiff has half share in the suit property and is entitled to partition and separate possession of his half share in the suit property.

The facts in brief are as under: (The parties are referred as per their status before the trial Court):

2. The plaintiff and the defendant are the real brothers. It is the case of the plaintiff that they had jointly purchased the suit field, admeasuring 8 Acre 10 Gunthe, out of filed bearing survey No.18, total 36 Acres, 34 Gunthe, presently Gat No.71, survey No.18/2, situated at Palsoda, Tq. Murtizapur, District Akola, (hereinafter referred to as “suit property”) by registered sale deed dated 28.01.1967 for consideration of Rs.1,000/- from one Mohammad

Yusuf Mohammad Yakub. The consideration for the suit property was jointly paid by them and the names of the plaintiff and defendant are recorded in the revenue record so also the plaintiff and the defendant are cultivating the suit property and taking crop jointly.

3. Thereafter the plaintiff left Murtizapur and came to reside at Akola for doing labour work and he has been doing business of Dalya-Tatya and continued the same business, due to which he could not reach to Murtizapur and cultivate the suit property personally. Therefore, he handed over possession of the entire suit property to the defendant for cultivation and the defendant started cultivating the entire suit property. From last year the defendant used to give Rs. 4,000/- as “Thoka” (commonly known as “rent”) to the plaintiff. Thereafter, on 20.07.2013, the plaintiff approached the defendant for demanding amount of Thoka, at that time, the defendant flatly refused the same and abused him in filthy language and told that the defendant himself is the owner of the suit property.

4. Thereafter, the plaintiff approached to the Revenue Authority and inquired about the same and got certified copy of the mutation entry. Surprisingly, he came to know that, in the revenue record there is mutation entry No.30, dated 30.09.1980 and said entry indicates that, there was oral partition in between the plaintiff and the defendant and the entire property is in the share of the defendant. The said mutation entry also indicates that the plaintiff was present before the Revenue Authority and there is thumb impression of the plaintiff. It is the case of the plaintiff that the plaintiff never received any notice from the revenue authority in respect of the said mutation entry and the plaintiff never remained present before the said authority and put his thumb impression.

5. It is stated that the plaintiff came to know the above fact on 25.06.2013 when he received certified copy of the revenue record. Thereafter, the plaintiff reported the matter to the Police Station, Murtizapur on 27.07.2013, but the police have not taken any action. Thereafter, on 12.08.2013 the plaintiff issued legal notice to the defendant by registered post and demanded partition of the suit

property from the defendant. The defendant falsely replied the notice and denied to comply with the notice. Hence, the plaintiff instituted the suit for declaration that he is the owner of the half of the suit property on the basis of the sale deed dated 28.01.1967, partition and separate possession of the suit property.

6. The defendant strongly resisted the suit by filing written statement at Exh.12 and denied the same. He has admitted that the plaintiff and defendant are the real brothers. The plaintiff left Murtizapur and went to Akola for the business of Dalya-Tatya and continued to reside there since more than 40 years. He also admitted that they both have purchased the suit property for consideration of Rs.1,000/- from one Mohammad Yusuf Mohammad Yakub, vide registered sale deed dated 28.01.1967. However, he denied that the consideration of the same was jointly paid by them and their names were jointly recorded in the record of rights and the plaintiff had cultivated the suit property. He also denied that the plaintiff has handed over possession of the suit property to him and he used to give Rs.4,000/- per year as “Thoka” to the plaintiff.

7. The defendant has been cultivating the suit property for more than 40 years continuously without any interruption with the knowledge of the plaintiff and as such he has acquired title and ownership over the suit property. It is further pleaded that the orders of the revenue authorities remained unchallenged and the mutation entry of the defendant has been made on 30.09.1980. Therefore, the suit is barred by law of limitation.

8. I have heard Shri U.J. Deshpande, learned counsel appearing for the appellant. None for the respondent-sole, though served.

9. This Court, while issuing notice to the respondent vide order dated 28/03/2019, has framed following substantial question of law:

“Whether the plaintiff is the owner of the suit property, despite there being possession of defendant since 1957 and mutation entry recording partition of the year 1980?”

10. Shri Deshpande, learned counsel appearing for the appellant submits that it is the case of the defendant that there was an oral partition between the plaintiff and defendant and though the plaintiff failed to prove that there was no such oral partition, the learned lower Appellate Court has committed error in holding that no oral partition taken place between plaintiff and the defendant.

11. It is further submitted that in cross-examination the plaintiff has admitted that from the date of carrying out mutation entry in the name of defendant, the plaintiff never verified the mutation entry or he was not aware of the fact that whose name appears in the revenue record in relation to the suit property. It is further pointed out that the plaintiff has admitted that he is not aware of the name of owner entered in the 7/12 extract relating to the suit property. He further points out that the plaintiff has admitted that the alleged revenue entry was taken forty years back. By pointing out these admissions, he submits that the revenue entry which is standing for forty years and it was never challenged by the plaintiff, the said revenue entry is sufficient to hold that there was an

oral partition and in view of that the defendant became owner of the suit property.

12. For the said purpose, he has placed heavy reliance on the judgment of this Court in the case of *Atmaram Gano Nagrale Vs. Baliram Ganu Narale*¹

13. To consider the contentions raised by the appellant, I have gone through the record and also perused the judgments cited by the learned counsel for the appellant.

14. The learned lower Appellate Court while denying the claim of the defendant that there was oral partition between the plaintiff and the defendant, has rightly discarded the mutation entry.

15. The Hon'ble Supreme Court of India in the case of *Bhimabai Mahadeo Kambekar (Dead) through L.R Vs. Arthur Import and Export Company and others*², has held thus :

¹ 2010(1) BCR 716

² (2019) 3 SCC 191

“6.This Court has consistently held that mutation of a land in the revenue records does not create or extinguish the title over such land nor has it any presumptive value on the title. It only enables the person in whose favour mutation is ordered to pay the land revenue in question.”

16. Thus, it is clear that mutation entries are made for fiscal purposes and are not sufficient to prove and establish the title.

17. In this case, the defendant has not examined any witness in support of his case that there was oral partition and while taking mutation entry in the name of the defendant, the plaintiff was present before the Tahsildar and he had put his thumb impression.

18. No doubt, the mutation entry carries presumption, however, such presumption is rebuttable. The said presumption has been rebutted by the plaintiff by leading oral as well as documentary evidence. Therefore, the onus shifts on the defendant to prove that there was oral partition and the thumb impression was of the plaintiff which he failed to establish. Thus, in absence of any oral partition, as claimed by the defendant, even if, there is long

standing mutation entry in favour of defendant, the same is not sufficient to prove the title of the defendant over the suit land.

19. In that view of the matter, I answered the substantial question of law accordingly, in above terms.

Hence, I pass the following order:

The appeal is **dismissed**. No order as to costs.

(ANIL S. KILOR, J)

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