

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

**SECOND APPEAL NO. 124 OF 2018
WITH
CIVIL APPLICATION NO. 1951 OF 2018**

Shivaji Ramchandra Jojar
Age: 40 years, Occu.: Agri.,
R/o Village Talni, Tq. Hadgaon,
Dist. Nanded

..APPELLANT

VERSUS

1. Lakshmikant Shridhar Kakde
Age: 42 years, Occu.: Agri.,
2. Parmeshwar Shridhar Kakde
Age: 32 years, Occu.: Agri.,
3. Ramchandra Rajaram Jojar
Since deceased – LRs on record
4. Jyoti Ashok Jojar
Age: 18 years, Occu.: Education
5. Vitthal Ramchandra Jojar
Age: 32 years, Occu.: Agri.,
6. Shankar Ramchandra Jojar
(Died) Through L.Rs.
- 6-A. Varsha Shankar Jojar
Age: Major, Occu.: Household,
- 6-B. Priyanka Sumit Kadam
Age: Major, Occu.: Household,
- 6-C. Devanand Shankar Jojar
Age: Major, Occu.: Agri.,
- 6-D. Gajanan Shankar Jojar
Age: Major, Occu.: Agri.,

6-E. Anjali Hankar Jojar
Age: Minor u/g of real mother
Respondent No.6-A

6-F. Aniket Shankar Jojar
Age: Minor u/g of real mother
Respondent No.6-A

All R/o Village Talni,
Tq. Hadgaon, Dist. Nanded

..RESPONDENTS

....
Mr. M.V. Ghatge, Advocate for appellant
Mr. S.S. Gangakhedkar, Advocate for respondent nos.1 and 2
Mr. M.R. Sonawane, Advocate for respondent nos. 4 and 5
Mr. J.R.Patil, Advocate h/f Mr. R.M.Sharma, Advocate for respondent no.6-D

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CORAM : R.G. AVACHAT, J.
RESERVED ON : 06th SEPTEMBER, 2022
PRONOUNCED ON : 10th NOVEMBER, 2022

JUDGMENT :

1. Heard learned counsel for the appellant and respondents as well.
2. The challenge in this second appeal is to an order (deemed decree) dated 16th August, 2011 passed by learned Civil Judge Junior Division, Hadgaon rejecting an application (Exh.69) moved by the appellant herein resisting execution of a decree for possession passed in Regular Civil Suit No. 1 of 2001 and order (deemed decree) dated 28th November, 2017 passed by learned Ad-hoc District Judge-1, Nanded in Regular Civil Appeal No. 101 of 2011 confirming the order of rejection of the application (Exh.69). As such, this second appeal is arising from the order passed by the executing

Court and confirmed by the first appellate Court in a proceeding under Order XXI Rule 97 r/w 103 of the Code of Civil Procedure.

3. The facts giving rise to this second appeal are as follows :-

The appellant is a real brother of a judgment debtor – Shankar (JD). Respondent Nos.1 and 2 are the decree holders. They had filed a suit (R.C.S. No.1 of 2001) against the JD for declaration of their title to an agricultural land admeasuring 2H 20R in Gut No.345 and for possession of 76R land therein. The decree passed by the trial Court attained finality. The decree holders then put up the decree for execution by initiating execution proceeding, being Regular Darkhast No.5 of 2005. The appellant herein preferred an application (Exh.69) resisting delivery of possession in execution of the decree. The application (Exh.69) was moved *inter alia* on the following grounds :-

(I) Shankar – JD did not contest the appeal (R.C.A. No. 101 of 2011) preferred by him against a decree passed by the trial Court in R.C.S. No. 1 of 2001 since he lost his interest in the subject matter of the suit.

(II) Ramchandra Jojar was a common ancestor. He had four sons – Shankar (JD), Ashok, Shivaji (appellant herein) and Vitthal. The appellant's father – Ramchandra Jojar purchased a land admeasuring 1H 62R from one Ramchandra Raut in the joint name of Shankar (JD), when Shankar was minor and Shankar's cousin – Pandit. As such, the land having been purchased by father in the

name of his minor son was a joint family property of Shankar and all his siblings including the appellant herein.

(III) Although the decree has been passed in respect of the land Gut No.345, the same is sought to be executed against the land in Gut No.344, a joint family property of the appellant and his family members.

(IV) The land sought to be taken possession of in execution of decree has been in possession of the appellant's family since 1980. Boundaries of the lands in Gut Nos.344 and 345 have not been fixed. The T.I.L.R. (surveyor) only measured the land in Gut No.345. The lands in original survey numbers and their boundaries were not taken into consideration. Neither the appellant nor his family members were served with the notice of measurement.

4. The application moved by the appellant herein was resisted by the decree holders (Respondent Nos.1 and 2) contending that all the grounds raised in the application were decided in the suit (R.C.S. No.1 of 2001). The decree passed therein has attained finality. All those issues cannot be reopened again.

5. The appellant availed an opportunity to lead evidence (oral and documentary) in support of his application resisting delivery of possession. The respondents – decree holders did not lead any evidence.

6. The executing Court framed following issue and answered the same in negative :-

“1. Does objection petitioner prove that, suit property is joint property of objection petitioner, respondent no.3 to 5 and Shankar?”

It held that the contention of the appellant that his brother – Shankar (JD) did not contest the first appeal, was proved to be wrong. It also held the appellant to have failed to adduce any evidence to prove the land in Gut No. 344 to be the joint family property. The first appellate Court confirmed the findings recorded by the executing Court. It framed following points and answered them in negative :-

“1. Whether objection petitioner proved suit property is his joint family property having his interest therein?”

2. Whether the judgment and decree passed by learned Trial Court is just and proper or requires interference?”

7. Mr. Ghatge, learned counsel for the appellant, would submit that subject matter of this second appeal is two lands in Gut Nos. 344 and 345. The decree pertains to land in Gut No.345, but it is sought to be executed against land in Gut No.344. When the decree was put to execution, during measurement the claim was made against land in Gut No.344, which is owned and possessed by the appellant and all his family members including Shankar (JD) by virtue of a sale deed dated 26th March, 1980. While

ascertaining the encroachment in land Gut No.345, the surveyor measured the land in Gut No.345 only, without measuring land in Gut No.344. The decree holders admitted Shankar's (JD) ownership and title over the land in Gut No.344 by virtue of Sale deed dated 26th March, 1980, but raised a new dispute by claiming that in 1980, wrong piece of land was delivered presuming to be Gut No.344 and altogether a new ground has been raised for decision whereof a full opportunity needs to be offered to the parties by remanding the matter back to the executing Court. In spite of these facts having been brought to the notice of the executing Court, it framed only one issue. The evidence produced by the appellant before the executing Court has not been taken into consideration. The Court ignored the presumption which arises in the circumstances when Shankar (JD) was minor and without any source of income, the land purchased by father – Ramchandra Jojar is necessarily a joint family property. The issue, as to whether the land in Gut No.344, possession of which sought to be recovered was a joint family property, was not a matter in issue in the suit, wherein the decree has been passed.

8. The decree talks about the land encroached in February 2000, whereas the objection is in regard to land, admittedly, in possession since 26th March, 1980. The decree is in regard to the land allegedly encroached by Shankar (JD). The objection is in regard to the land of joint family of

Ramchandra, father of the appellant, the judgment debtor and their two brothers. The claim in the suit was against Shankar in his individual capacity as he allegedly made an encroachment on the land in Gut No.345. During the earlier adjudication, the issues raised by the appellant in execution proceedings were never raised by Shankar (JD). Findings, if any, recorded without pleadings would be non-est. Although there are concurrent findings of facts recorded by both the Courts below, those are in total ignorance of admission of contesting respondents and is disregarding the evidence produced by the appellant. The High Court, in second appeal has, therefore, every jurisdiction to interfere with a perverse finding of fact. According to learned counsel, the following substantial questions of law arise in this second appeal :-

- “a. Whether the respondent decree holders prove that wrong property was delivered assuming to be Gut No.344?*
- b. Whether the respondents are entitled to recover possession on the basis of decree in RCS No.1/2001 against Gut No.344?*
- c. Whether the recovery of possession is barred by limitation?*
- d. Whether the appellant has proved the ownership and possession of Gut no.344 based upon the registered sale deed dt. 26/3/1980 and admission given by the respondent decree holders?”*

In memorandum of appeal, number of points have been raised to call upon this Court to answer them in this second appeal.

9. Learned counsel for the appellant has relied on the following authorities :-

(I) ***Rajgopal (Dead) by L.Rs. Vs. Kishan Gopal and Another, AIR 2003 SC 4319***

“(C) *Civil P.C. (5 of 1908), S.96, S.100, O.6 R.2 – Finding – Not based on pleadings – Suit for declaration of title – Plaintiff putting up case of dwyamushyayana adoption – No plea raised that adopted child was not given in adoption by natural father – Defendants in the written statement, only denied that adoption was in ‘Dwyamushyayana’ form – In the absence of any pleading whatsoever on the question as to who gave child in adoption, father or brother – Courts could not have gone into the same even if some evidence was adduced.*”

(II) ***Surendra Kumar Vs. Phoolchand (Dead) Through L.Rs. And Another, (1996) 2 SCC 491***

“(B) *Hindu Law – Joint family – Disputed property whether joint family property or self-acquired property – Presumption of property being joint property – When arises – Burden of proof – Property purchased by Manager of joint family in the name of the appellant who was then minor – Absence of material to establish that consideration money was paid out of appellant’s separate funds – Concurrent findings of the courts below that the property in question was joint property – such findings of fact made bearing in mind the correct legal position – No interference by Supreme Court called for – Practice and procedure*”

(III) ***Hero Vinoth (minor) Vs. Seshammal, 2006 (5) SCC 545***

“13. *Though as rightly contended by learned counsel for the appellant the scope for interference with concurrent findings of*

fact while exercising jurisdiction under Section 100 CPC is very limited, and re-appreciation of evidence is not permissible where the trial Court and/or the first Appellate Court misdirected themselves in appreciating the question of law or placed the onus on the wrong party certainly there is a scope for interference under Section 100 CPC after formulating a substantial question of law.”

10. Learned counsel for the respondents – decree holders would, on the other hand, submit that almost all the points raised by the appellant herein have been answered by the trial Court while deciding the suit, R.C.S. No.1 of 2001. The present proceeding is nothing but a desperate attempt to stall execution of the decree. The appellant herein is a real brother of the decree holder. He was not in possession of the suit land when the decree sought to be executed, was passed. As such, the appellant herein is claiming through the original judgment debtor. The decree sought to be executed is, therefore, equally binding on him. Learned counsel, ultimately, urged for dismissal of the second appeal, since no substantial question of law arise therein.

11. Considered the submissions advanced. Perused the evidence (oral and documentary) relied on.

12. It was a suit, R.C.S. No. 1 of 2001, filed by the respondents – decree holders against the elder brother of the appellant herein alleging him

to have made encroachment to the extent of 76R land in Gut No. 345 owned and possessed by them. The trial Court decreed the said suit. Almost all the grounds raised by the appellant herein were raised in the said suit. Those have been negated. True, whether the land in Gut No.344 was a joint family property of the appellant, the judgment debtor and their two brothers, was not a matter directly and substantial in issue in the said suit. The appellant has, in his application resisting execution of decree, made a false statement to the effect that the judgment debtor did not contest the first appeal preferred against the judgment and decree passed in R.C.S. No. 1 of 2001. The record indicates that the judgment debtor had hotly contested the appeal preferred against the judgment and decree passed by the trial Court. On having been unsuccessful in the first appeal, he preferred the second appeal. After having been failed in the second appeal, he unsuccessfully approached the Supreme Court in special leave petition.

13. There cannot be two views as to legal proposition sought to be advanced by learned counsel for the appellant herein relying on the authorities referred to herein above. The record indicates that the appellant was given ample opportunity to lead evidence in support of his application resisting execution of decree. He availed the said opportunity. Both, the executing Court and the first appellate Court, have answered all the points raised by the appellant in those proceedings.

14. Admittedly, in consolidation proceeding, Gut Nos. 344 and 345 came to be formed with consent of owners of the lands in survey numbers comprised in these gut numbers. This Court, while deciding second appeal arising from the judgment and decree passed in R.C.S. No.1 of 2001, has concluded the said issue. The same cannot be reopened again. Moreover, the judgment debtor has purchased the land in Gut No. 344 under a registered sale-deed dated 26th March, 1980. It is true that Shankar (JD) was minor when half of the land in Gut No.344 was purchased in his name by his father – Ramchandra. The remaining land in the very gut number was purchased by one Pandit, cousin of Shankar (JD). The record further indicates that both, Shankar and Pandit partitioned the said land in equal share. Admittedly, wife and children of vendor - Ramchandra Raut, who sold the land in Gut No. 344, had filed the suit for partition and separate possession of their share in the land Gut No.344. The suit was decreed. The decree has been executed. Shankar (JD) filed a suit, R.C.S. No. 29 of 2009 against wife and children of vendor - Ramchandra Raut for recovery of possession of his share in the land Gut No. 344. The said suit has been dismissed on 31st July, 2017. In this factual scenario, the appellant could not be heard to say that he is in possession of the land Gut No. 344 from the date of its purchase till date.

15. Subject matter of the suit, R.C.S. No. 1 of 2001, was 76R land encroached by Shankar (JD). The surveyor had measured the land and found

Shankar (JD) to have made encroachment as was alleged by the respondents – decree holders. The issue raised in the said suit pertains to the land in Gut No. 345. The issue was not individual centric. During hearing of the suit, the surveyor had found the judgment debtor in possession of the suit land. The claim of possession made by the appellant herein is necessarily an afterthought and only with a view to stall execution of decree passed against his elder brother.

16. Both, the executing Court and first appellate Court have rightly negated the claim raised by the appellant herein. In view of this Court, no substantial question of law arises in this appeal. Second appeal, therefore, fails. Same is thus dismissed. In view of dismissal of second appeal, civil application stands disposed of accordingly.

(R.G. AVACHAT, J.)

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