

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

SECOND APPEAL NO.183 OF 2022

WITH

**CIVIL APPLICATION NO. 5155 OF 2022
IN SA/183/2022**

1] Mansukh Kisan Rakshe,]
Died, Through LR's.]

1-A] Sudam Mansukh Rakshe]
Age : 36 Years, Occu : Agri.]

1-B] Ganesh Mansukh Rakshe]
Age : 34 Years, Occu : Agri.]

1-C] Pushpa Pandurang Walunj]
Age : 40 Years, Occu : Household,]

Applicant Nos.1-A to 1-C]
R/o Pune-Nagar Highway, Gavanewadi,]
Tal. Shrigonda, District. Ahmednagar.]

... Appellants
(LR's of Defendant No.1)

Versus

1] Tarabai Aba Rakshe]
Age : 52 Years, Occu : Houshold]

2] Mahesh Aba Rakshe]
Age : 30 Years, Occu : Agri]

3] Dipak Aba Rakshe]
(Orig.Plaintiff No.)]

... Respondents Nos.1 to 3
(Plaintiff Nos. 1 to 3)

4] Popat Kisan Rakshe]
Age : 69 Years, Occu : Agri,]

5] Suresh Kisan Rakshe]
Age : 67 Years, Occu : Agri,]

6]	Sahebao Kisan Rakshe	]	
	Age 57 Years, Occu : Agri.	]	
	All R/o At Gavanewadi,	]	
	Tal. Shrigonda, Dist. Ahmednagar	]	... Respondent Nos.4 to 6 <i>(Defendant Nos.2 to 4)</i>

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Mrs. Anjali Dube (Bajpai), Advocate for Appellants
Mr. Rahul A. Tambe, Advocate for Respondent Nos. 1 to 3 (Caveator)

. . .

CORAM : MANGESH S. PATIL, J.

DATED : 05 APRIL 2022.

ORDER :

1. By way of this appeal under section 100 of the Code of Civil Procedure (for short, “the CPC”), the original defendant no.1 is challenging the concurrent judgments and orders passed by the courts below holding the respondent nos.1 to 3, who are the original plaintiffs, to be entitled to perpetual injunction restraining him from causing obstruction to their possession in the suit properties, *albeit* the declaration claimed by them of having become owner on the basis of Mutation Entry No.495 was refused. The respondent nos.4 to 6 are the original defendant nos.2 to 4. The parties are hereinafter referred to by their status in the suit.

2. One Kisan Maruti Rakshe was the common ancestor. He had five

sons, Aba and defendant nos.1 to 4. The plaintiffs are the widow and sons of Aba. They averred that Kisan Rakshe died on 01/02/1978. After his demise, all the ancestral properties were inherited by them jointly though they were living separately and cultivating different portions of the suit properties. It was also averred that some of the suit properties were acquired from the nucleus of the joint family but in the name of the defendant no.1 being a 'Karta' of their family. They then averred that since the dispute arose amongst all of them, they agreed to get the suit property divided. They submitted an application to the Revenue Officer on 01/06/2004 for effecting partition and separation of share of each one in the suit properties. Accordingly Mutation Entry no. 495 was certified. However, the defendant no.1 started obstructing their possession in the share allotted to them and claimed the declaration and injunction.

3. The defendant no.1 contested the suit by filing a written statement. He did not dispute the relationship and also did not dispute that three of the suit properties, namely, Gut no.25, 144 and 150 were the ancestral properties. He also did not dispute that his father Kisan Rakshe died on 01/02/1978. He contended that after demise of Kisan Rakshe, a partition had taken place in the year 1980 and each of these brothers got separated and received separate portion. In the year 1981 and 1993, he purchased couple of suit properties, namely, gut no.142 and 95 from his separate income and those

were not the joint family properties. He further contended that the Mutation Entry No.495 was subsequently cancelled. He prayed for dismissal of the suit and preferred a counter claim. He averred that the plaintiffs had no concern with the properties purchased by him which were in his exclusive possession. They were disturbing his possession and claimed injunction.

4. The plaintiffs contested the counter-claim by filing a written statement and denied to have ever obstructed him.

5. The defendant nos.2 to 4 admitted the claim in the suit by filing their separate praceipes.

6. The trial court concluded that all the suit properties were the ancestral and joint family properties and the partition was effected in the year 2004 and the plaintiffs being in possession of the suit properties were entitled to injunction. However, it also held that since they were claiming ownership on the basis of Mutation Entry no.495, which was subsequently cancelled, they were not entitled to the declaration. The trial court also dismissed the counter-claim discarding the stand of the defendant no.1 of being in exclusive possession of the properties purchased by him.

7. The defendant no.1 preferred an appeal before the lower appellate court, which dismissed it by concurring with the most of the

observations and the conclusions of the trial court.

8. Learned advocate Mrs. Anjali Dube (Bajpai) for the defendant No.1 would vehemently submit that the document which was in fact an application (Exh.65) moved before the revenue authorities was not duly proved. He is an illiterate person. The courts below have ignored this fact and have based their conclusions on the so called admissions given by him unmindfully. The trial court erred in holding the document to be an agreement. There was ample evidence to show that the ancestral properties were partitioned in the year 1980 and it is thereafter that couple of properties, namely, gut no.95 and 142 acquired by him under different sale deeds in the years 1981 and 1993. The observations and the conclusions drawn by the courts below were grossly perverse and arbitrary. They failed to take into account the material circumstances and have given importance to irrelevant ones. Substantial questions of law arise for determination in the second appeal and it be admitted.

9. Learned Advocate Mr. Rahul Tambe for the plaintiffs would submit that no substantial question of law arises in this second appeal. There are concurrent findings of facts by both the courts below, taking plausible view on correct appreciation of evidence that was available before them. This court in exercise of the powers under section 100 of the CPC cannot undertake a

fresh scrutiny of facts by re-appreciating evidence and the second appeal be dismissed.

10. At the outset, it is necessary to point out one important defect which I could notice. As is mentioned hereinabove, the trial court had partly decreed the suit and dismissed the counter-claim. Still, the defendant no.1 preferred one composite appeal. Even though by the impugned judgment and order, the lower appellate court has dismissed the appeal, the illegality has perpetuated even in filing this second appeal. At no point it has been made clear in the appeal memo as to which part of the judgments and orders of the courts below, the defendant no.1 is intending to assail. It is not clear as to if he intends to challenge both the decisions, one decreeing the suit partly and the other dismissing his counter-claim. This is, indeed, an important circumstance which, in my considered view, goes to the root of the maintainability of the second appeal.

11. Be that as it may, treating this to be an appeal seeking to put up a challenge to the judgment and decree in the suit of the plaintiff as also in the counter-claim, it is a matter of record that both the courts below, which are the fact finding courts, have concurred in partly decreeing the suit and dismissing the counter-claim. The scope of an appeal under section 100 of the CPC in such circumstances where there are concurrent findings of facts is very limited.

12. Suffice for the purpose to refer to the decision and observation of the Supreme Court in the matter of **Hero Vinoth (minor) Vs. Seshammal; (2006) 5 SCC 545**, para 19 and **Narayanan Rajendran and Ors. Vs. Lekshmy Sarojini and Ors.; (2009) 5 SCC 264**, para 64 :

“19. It is not within the domain of the High Court to investigate the grounds on which the findings were arrived at, by the last court of fact, being the first appellate court. It is true that the lower appellate court should not ordinarily reject witnesses accepted by the trial court in respect of credibility but even where it has rejected the witnesses accepted by the trial court, the same is no ground for interference in second appeal when it is found that the appellate court has given satisfactory reasons for doing so. In a case where from a given set of circumstances two inferences of fact are possible, one drawn by the lower appellate court will not be interfered by the High Court in second appeal. Adopting any other approach is not permissible. The High Court will, however, interfere where it is found that the conclusions drawn by the lower appellate court were erroneous being contrary to the mandatory provisions of law applicable or its settled position on the basis of pronouncements made by the Apex Court, or was based upon inadmissible evidence or arrived at by ignoring material evidence.”

“64. Now, after 1976 Amendment, the scope of Section 100 has been drastically curtailed and narrowed down. The High Courts would have jurisdiction of interfering under Section 100 C.P.C. only in a case where substantial questions of law are involved and those questions have been clearly formulated in the memorandum of appeal. At the time of admission of the second appeal, it is the bounden duty and obligation of the High Court to formulate substantial questions of law and then only the High Court is permitted to proceed with the case to decide those questions of law. The language used in the amended section specifically

incorporates the words as "substantial question of law" which is indicative of the legislative intention. It must be clearly understood that the legislative intention was very clear that legislature never wanted second appeal to become "third trial on facts" or "one more dice in the gamble". The effect of the amendment mainly, according to the amended section, was:

(i) The High Court would be justified in admitting the second appeal only when a substantial question of law is involved;

(ii) The substantial question of law to precisely state such question;

(iii) A duty has been cast on the High Court to formulate substantial question of law before hearing the appeal;

(iv) Another part of the Section is that the appeal shall be heard only on that question."

13. Bearing in mind the limitations on the powers of this court, I now propose to deal with the matter in issue. As can be gathered, the defendant is coming with a case that the ancestral properties were partitioned in the year 1980 after demise of the common ancestor Kisan Rakshe in 1978. However, as has been concurrently held by the courts below, there was no sufficient, cogent and reliable evidence to substantiate this stand except the vague averment in the written statement and equally vague testimonies of defendant no.1 and his witnesses. On the contrary, as was rightly noticed by the courts below though the documents (Exhibit-65) was in the form of an application submitted to the revenue authority, the contents of the application clearly demonstrated that these brothers had made that joint application seeking separation of the

revenue record to the extent of share of each one in all the suit properties including the ones stated to have been acquired by defendant no.1 subsequently. They also noticed that this application purportedly bore his signature. During his cross examination, he also gave clinching admissions touching all these aspects regarding dispute in the family, in the year 2004 and submission of application for separation of the shares. True it is that the Mutation Entry no.495 effected on that basis was subsequently quashed and set aside, but the fact remains that this was a joint application of which defendant no.1 and also all other brothers were the signatories containing statements regarding they having reached division/partition.

14. Therefore, even if the mutation entry was subsequently cancelled, this was an important piece of evidence available before the courts below to take a plausible view that ancestral properties and also the properties acquired subsequently were the joint family properties and were sought to be divided amongst all the five brothers by effecting a mutation and the suit properties were allotted to the share of the plaintiffs as mentioned therein. Right in the teeth of such clinching evidence and admissions by the defendant no.1, both the courts below have concurrently held that all properties, the ancestral properties as also the properties acquired subsequently, which were put into common hotch-potch were partitioned in the year 2004 and the plaintiffs were in exclusive possession of the suit properties, which was the share allotted to

them. In view of such a plausible view taken by the courts below, no substantial question of law arises for determination in this second appeal. It is dismissed.

15. Pending Civil Application stands disposed of.

(MANGESH S. PATIL, J.)

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