

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

SECOND APPEAL NO. 235 OF 2011

Sanjay S/o Baburao Mathpati,]
Age : 50 years, Occ : Business,]
R/o. Mathpati Niwas, Shivaji Nagar,]
Parbhani]

... Appellant
(Original Plaintiff)

Versus

1. Baburao S/o Vishwanthrao Mathpati,]
Age : 70 years, Occ : Business,]
R/o Mathpati Niwas,]
Shivaji Nagar, Near Parbhani,]
Tq. & Dist. Parbhani]
2. Radhabai W/o Baburao Mathpati,]
Age : 64 Years, Occ : Household,]
R/o Mathpati Niwas,]
Shivaji Nagar, Near Parbhani,]
Tq. & Dist. Parbhani.]
3. Vijay S/o Baburao Mathpati,]
Age : 50 Years, Occ : Business,]
R/o Sarda building, Vidya Nagar,]
Parbhani, Tq. & Dist. Parbhani.]
4. The Sub-Registrar,]
Sub Registrar Office,]
Administrative Building, Parbhani.]
5. The State of Maharashtra,]
Through Collector Parbhani.]
6. Shindhu W/o Chandrashekhar Dhanmane,]
Age : 48 years, Occ : Household,]
R/o Khinvasara Building, Shahunagar,]
Beed, Tq. & Dist. Beed.]

7. Jaishri W/o Anil Savle]
 Age : 43 Years, Occ : Household,]
 R/o : Kabra Nagar, Nanded,]
 Tq. & Dist. Nanded.] **... Respondents**
 (Original Defendants)

...

Mr. P. V. Balkhande, Advocate for Appellant.

Mr. P. S. Paranjape, Advocate for Respondent Nos.1 and 3.

Mr. Kiran Nagarkar h/f. Smt. Smita Kulkarni, Advocate for Respondent No.6.

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CORAM : BHARAT P. DESHPANDE, J.

RESERVED ON : 12th AUGUST 2022

PRONOUNCED ON : 24th AUGUST 2022

JUDGMENT :

The appellant/original plaintiff filed Regular Civil Suit No.148 of 2005 for partition against respondents. The learned trial court vide its judgment and order dated 7th April 2009, dismissed the said suit. Appellant preferred an Appeal vide Regular Civil Appeal No. 74 of 2009. Vide Judgment and decree dated 26th April 2011, the learned first Appellate Court dismissed the said appeal.

2. The plaintiff is therefore before this Court in Second Appeal challenging concurrent findings.

3. The Second Appeal was admitted on 13th June 2011 on the following substantial questions of law :

“(A) Whether the defendant / plaintiff did not get proper opportunity to prove his case due to incorrect framing of issues ?

- (B) *Whether the courts below failed to give findings on questions of fact that arose between the parties in view of pleadings, due to incorrect issues ?*
- (C) *Whether the Courts below erred in ignoring the admission of the respondents in respect of appellant's right to have share in ancestral property namely house no. 59 of Komti Galli, Parbhani?*
- (D) *Whether the appellant / plaintiff did not get an opportunity to lead evidence in rebuttal?"*

4. Heard Mr. P. V. Balkhande, learned advocate for appellant, Mr. P. S. Paranjape, learned advocate for Respondent Nos.1 and 3 and Mr. Kiran Nagarkar h/f. Smt. Smita Kulkarni, learned advocate for Respondent No.6.

5. With the assistance of learned counsels appearing for respective parties, I have perused record and proceedings.

6. Learned counsel for appellant strongly contended that the trial court failed to frame issues properly and therefore opportunity was not given to the plaintiff to prove his case effectively.

7. He then submitted that learned first Appellate Court also failed to consider the aspect of improper issues and thereby arrived at wrong conclusion. He then submitted that there is clear admission on the part of defendant no.1 with regard to one property bearing House No.59, wherein plaintiff is having share, however, in spite of such admission both the courts

below failed to accept the case of plaintiff for partition of that property and instead of that rejected entire claim. He then submitted that plaintiff was not given any opportunity to lead evidence in rebuttal in connection with the counter claim filed by defendant no.1. With these submissions, learned counsel for appellant forcefully submitted that the suit needs to be remanded for framing proper issues and to be decided afresh.

8. Per contra, learned counsels appearing for respondents forcefully submitted that entire suit filed by the plaintiff is misconceived on facts and evidence. There are concurrent findings of fact and that no question of law is involved, so as to allow present Appeal. He then submitted that evidence of the plaintiff itself disprove his entire case. Both the courts below rightly appreciated evidence and arrived at proper findings.

9. In order to consider questions of law framed while admitting the matter, it is necessary to look into the pleadings of the respective parties, so as to find out whether issues were properly framed and opportunities were given to the plaintiff to prove it.

10. The parties are hereinafter called as 'plaintiff' and 'defendants' for the sake of convenience.

11. The plaintiff filed a suit for partition by metes and bounds claiming half share in the properties mentioned in para no.1. Plaintiff is the

son of defendant nos.1 and 2 and brother of defendant nos. 3, 6 and 7. Defendant nos.4 and 5 are the Government Officers. The purpose of joining them is not at all established.

12. The suit properties are as under :-

- (i) House No. 1133 situated in ward no. 9 in the municipal limits of Parbhani that is plot no. 61 admeasuring east-west 52 fit and north-south 72 fit half portion constructed containing six rooms of RCC bounded as under.

East – Road.

West – House of V. K. Swami.

North – House of Vasantrao Kulkarni.

South – Road and open space.

- (ii) House No. 59 (old) situated in Komti Galli, Parbhani containing 4 Khan Malvad and Madi.

13. The plaintiff claimed that he along with defendant nos.1, 2 and 3 constitutes a joint Hindu family. Their family was having two properties and some business establishments. He is only claiming partition and separate possession with regard to the properties mentioned above, i.e. House No.1133 and House No. 59 (old). Admittedly, the plaintiff is occupying two rooms in House No.1133. It is the specific contention of plaintiff that House No. 1133 was constructed by defendant no.1 out of the income received from joint family business, and therefore, the said property belongs to the joint Hindu family.

14. Defendant nos.1, 2 and 3 filed written statement opposing contentions raised by the plaintiff. It is their case that the House No.1133 is self acquired property of defendant no.1, who purchased the plot and thereafter constructed house therein independently from his own income. The plaintiff is not having any right in the said property. As far as House No.59 (old) is concerned, it is the contention of defendants that the said House No. 59 is in dilapidated condition. The said house is the only property belonging to joint Hindu family. The defendants further submitted that open space abutting to House No. 59 was partitioned amongst the brothers of defendant no.1 and his share in that open space was sold by him vide registered sale deed dated 02nd January 2004. The plaintiff had no concern with the said open space abutting to House no. 59. The plaintiff though aware about the sale deed, never challenged it before any court of law.

15. Defendant Nos.1, 2 and 3 raised counter claim stating therein that the plaintiff was allowed to occupy two rooms in House No.1133 and his use of such two rooms was only permissive. Since defendant no.1 is intending to sell the said house, he prayed that the plaintiff be evicted and possession be handed over to the defendants of the said two room.

16. On the basis of rival contentions raised in the pleadings, learned Civil Court framed issues vide Exhibit-39, which reads as under :-

मुद्दे	निवाडा
1. घर क्र. ११३३ ही वडिलोपार्जित मिळकत आहे असे वादी सिध्द करतो काय?	नाही
2. दावा मिळकती मध्ये १/२ हिस्सा आहे असे वादी सिध्द करतो काय?	नाही
3. दावा घरा पैकी दोन खोल्या मध्ये राहण्याची परवानगी वादीला १९८८ मध्ये देण्यात आली होती आणि त्या खोल्याचा ताबा मागण्याचा प्रतिवादीला अधिकार आहे का?	होय
4. कोणता आदेश तथा हुकुमनामा?	अंतिम आदेशाप्रमाणे

17. The plaintiff stepped into the witness box by filing affidavit in evidence at Exhibit-63, wherein he reiterated his contentions on oath. During cross examination glaring admissions have been brought on record. The plaintiff was born on 1st September 1960. He admits that defendant no.1/his father and his uncles were separated by registered partnership dated 19th April 1976. This partition was in connection with House No.59. He admits that some portion of the said house was sold by his family. He admits that he is not aware how much portion was sold and which portion is remaining. He then admits that the existing portion of House No.59 is in dilapidated condition. The said Partition Deed was shown to him at Exhibit-61 and he admits that such document was executed between his father and uncles.

18. Further, the plaintiff admits in his cross examination that his family runs a shop by name 'Vijay Stores', even prior to his birth. He never contributed any amount towards the said business and it was run by his father

independently. He admits that the said shop is the property of his father. He then admitted that he was taking education up to 18 years of his age. He further admits that house property no. 1133 is in Shivaji Housing Co-operative Society, having old plot no.61. This plot was purchased by his father/defendant no.1 on 10th December 1965. This plot is the self acquired property of his father/defendant no.1.

19. During further cross-examination, the plaintiff admits that defendant no.3 started separate business in the name of 'Seema Saundarya Bhandar' in the year 1980, whereas, he himself started his own business in the year 1992. He then claimed that there was oral partition between them. During such oral partition, the shop "Seema Saundarya Bhandar" was allotted to defendant no.3. The plaintiff then specifically admits that he reside in two rooms in House No.1133 as per the permission of his father/defendant no.1.

20. No witness was examined by the plaintiff in support of his contentions.

21. Defendant No.1 stepped into the witness box and filed his affidavit at Exhibit – 64. He was cross examined on behalf of plaintiff. Defendant No.1 admitted in his examination-in-chief that House No.59 belongs to joint family property and the legal share of plaintiff can be given to him and they are always prepared for that. However, the plaintiff wants to grab other properties without impleading all other legal heirs. The cross

examination of DW-1 is further proves the case of defendants and not of the plaintiff. One Nandkumar Khotkar was examined by the defendants as their witness, and thereafter, evidence of defendants was also closed.

22. First of all, it is clear from the pleadings of the plaintiff and defendants that issues were properly framed by the learned trial court. The plaintiff asserted that House No. 1133 was joint family property which has been specifically denied by the defendants. Hence the issue was rightly framed by the learned court asking the plaintiff to prove that it was joint family property. During evidence, the plaintiff himself has clearly admitted that plot as well as House No. 1133 is the self acquired property of defendant no.1. Thus, the submissions advanced by the learned counsel for the appellant/plaintiff regarding incorrect framing of issues is of no substance.

23. The findings of the learned trial court as well as that of the first Appellate Court in connection with claim of the plaintiff are fully justified in view of clear cut admissions of the plaintiff in his cross examination.

24. Though, defendant nos.1 to 3 admitted that House No.59 is the joint family property but contention of the plaintiff that he is having half right in it is not at all established. The entire focus of the plaintiff in his examination-in-chief is on the property bearing House No.1133, wherein he is occupying two rooms. Plaintiff failed to justify as to how he is entitled to half share when defendant Nos.1 and 2 being his parents, defendant no.3 being his

brother and defendant nos.6 and 7 being his sisters are entitled for their respective shares. Only because, the defendant nos.1 to 3 admitted that House No.59 is property belonging to joint family, plaintiff cannot be held entitled to claim partition.

25. First of all, he has to prove that he is having share in it and the court has to decide what is the share of the plaintiff. Simply claiming half share in the said house which is in dilapidated condition and when specifically plaintiff is not aware as to how much area of the said house belongs to joint family, it is difficult to grant such relief in favour of plaintiff.

26. The counter claim raised by defendant no.1 is regarding possession of two rooms, which were given to the plaintiff for permissive use. The plaintiff in his cross examination clearly admitted that he is residing in the said two rooms only as per permissive use. He also admitted that House No. 1133 and the plot therein is self acquired property of defendant No.1, i.e. his father. Thus, during the lifetime of defendant no.1, the plaintiff is not at all entitled for seeking partition of it. Plaintiff being independent member and residing in two rooms by way of permissive use, the defendant no.1 is certainly entitled for the relief of possession of those two rooms.

27. These aspects were properly considered by both the courts below. Therefore, submissions of the learned counsels for the appellant/plaintiff in this respect cannot be accepted. There is nothing on record to show that the

plaintiff was not given opportunity to lead evidence. In fact, plaintiff filed an application for amendment, which was rejected by the trial court. The plaintiff filed writ petition against the said rejection of amendment before this Court vide Writ Petition No.2944 of 2008. Vide order dated 17th October 2008, this court rejected the writ petition, thereby confirming the order passed by the Civil Court. Thus, it is clear from the record that plaintiff got full opportunity to prove his case. Learned trial court framed issues as per the pleadings of the respective parties. No infirmity or illegality is found while framing such issues.

28. It is also necessary to note here that no application for re-framing of issues was filed on behalf of plaintiff. Therefore, the questions of law framed at point (A) and (B) needs to be answered in negative.

29. Though, respondent Nos.1 to 3 admitted that House No. 59 is the ancestral property, plaintiff failed to lead any evidence to show what is the area of the said house and whether he is entitled for half share in it. Plaintiff filed before the trial court show claim of the plaintiff or both the houses as one half. There is absolutely no evidence lead by the plaintiff as to how he is claiming half share in both the houses. Therefore, only because, defendant admits that House No.59 belongs to joint Hindu family, the plaintiff cannot succeed in claiming partition of such joint family. In the result, the question of law framed at point (C) is answered in negative.

30. The counter claim raised by defendant nos.1, 2, and 3 is only with regard to possession of two rooms occupied by the plaintiff. The learned trial court rightly framed additional issue putting burden on the defendant. The plaintiff in his cross examination specifically admitted that his occupation of two rooms is permissive. He further admitted that House no.1133 on the plot No. 61 is the self acquired property of defendant no.1. Thus, the plaintiff is not having any right to claim partition of the self acquired property of his father during the lifetime of his father. The plaintiff was therefore given full opportunity by the trial court to lead evidence on both counts. There is no request made to the learned trial court to allow the plaintiff to lead evidence in rebuttal or with regard to plea raised in the counter claim. Thus, the question of law framed at point (D) is again answered in negative.

31. Having said so, the submissions of the learned counsel for the appellant/plaintiff are clearly devoid of merit. The Second Appeal, therefore, needs to be rejected.

ORDER

- (i) The Second Appeal stands dismissed with costs throughout.
- (ii) The proceedings are closed.

(BHARAT P. DESHPANDE, J.)

After pronouncing the Judgment and dismissal of Second Appeal, learned counsel for appellant is praying six weeks time to surrender two rooms in House No.1133.

2. Considering the fact that the appellant was in possession of two rooms in the said house since long, time of six weeks is granted to surrender possession.

3. Appellant shall submit the undertakings to that effect in the court today itself. Registry to accept the undertakings.

(BHARAT P. DESHPANDE, J.)