

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

SECOND APPEAL NO. 762 OF 2022

- 1] Bhagwandas Pandharinath Mahale,
Age : 64 years, Occupation : Agriculture
- 2] Minakshi Bhagwandas Mahale,
Age : 54 years, Occupation : Agriculture
- 3] Prasad Bhagwandas Mahale,
Age : 39 years, Occupation : Agriculture

All R/o. Village Bolki, Taluka Kopargaon,
District Ahmednagar.

.....Appellants

Versus

- 1] Ramdas Pandharinath Mahale,
Age : 69 years, Occupation : Agriculture
- 2] Shivajirao Pandharinath Mahale,
Age : 62 years, Occupation : Agriculture

Both R/o. Village Bolkil, Taluka Kopargaon,
District Ahmednagar.

.....Respondents

[Orig. plaintiffs no. 1 & 2]

- 3] Alkatali Shivram Mhaske,
Age : 59 yers, Occupation : Household,
R/o. Loni Budruk, Taluka Rahata,
District Ahmednagar.

...Respondent/

Original defendant no. 4

....

Mr. Ameet R. Vaidya, Advocate for the appellants
Mr. S. R. Andhale, Advocate for respondent no. 1

....

AND
**CIVIL APPLICATION NO. 15843 OF 2022
IN
SECOND APPEAL NO. 762 OF 2022**

CORAM : RAJESH S. PATIL, J.

DATE : NOVEMBER 29, 2022

ORAL JUDGMENT : -

1. This Second Appeal is filed by original defendants against concurrent findings of both the lower Court.

2. The dispute is between siblings. Appellant no. 1 herein and respondent nos. 1 and 2 are *inter se* brothers and respondent no. 3 (original defendant no. 4) is sister of respondent no. 1, respondent no. 2 and appellant no. 1. Appellant nos. 2 and 3 are the wife and son of appellant no. 1.

3. Respondent nos. 1 and 2 filed suit being Reg. Civil Suit No. 73/2013 for partition and possession against the present appellants and Respondent no. 4. The said suit was decreed on 29.06.2018, and appellant no. 1 and respondent nos.1, 2 and 3 were granted 1/4th share in the suit property. The present appellants being dissatisfied, filed first appeal before the District Court. The said first appeal was also dismissed by the District Court by judgment and order dated 12.10.2022. Against the concurrent findings of both the courts below, the present second appeal has been filed by the appellants.

4. It is argued by the advocate for the appellants that there is no dispute that the suit property originally belonged to the mother (Bhagirathibai) of appellant no. 1 and respondent nos. 1 to 3. It is further argued that, Bhagirathibai, however, during her life time, transferred the entire property in the name of appellant no. 1's wife and son as per the provisions of Section 84 of the Maharashtra Land Revenue Code. Accordingly, mutation entry no. 429 was carried out.

5. It is further argued that Bhagirathibai had filed Reg. Civil Suit No. 232 of 2006 against appellant nos. 1 to 3 seeking therein declaration and injunction. In the said suit, temporary injunction was granted which was confirmed by High Court. However, Bhagirathibai died on 22.11.2012, hence, Reg. Civil Suit No. 232/2006 got abated. No steps were taken for setting aside abatement.

6. Hence, it is argued that under the provisions of Order 22 Rule 9 of the Code of Civil Procedure (hereinafter referred to as "CPC"), fresh suit filed by respondent nos. 1 and 2 was prohibited. Therefore, the decree could not have been passed by both the courts below.

7. On behalf of the respondents, learned counsel argued that during the life time of mother (Bhagirathibai), she had filed suit against the appellants wherein she had claimed ignorance of mutation entry no.

429. The Appellants claimed that by mutation entry no. 429 the suit property was transferred by her in the name of appellant nos. 2 and 3. Hence, she had claimed a declaration and injunction. Temporary injunction granted in the said suit was confirmed till High Court, however, during the pendency of the suit, she expired. Hence, the suit was abated. It is argued that, it is settled law that the mutation entries do not confer right in the parties. It is further argued that, on behalf of the present appellants, it was argued in the lower court that the suit was barred by principle of *res judicata* in view of the earlier suit filed by Bhagirathibai, however, in the second appeal the said argument about the *res judicata* is dropped and it is argued that in view of the provisions of Order 22 Rule 9 CPC, fresh suit was barred. It is further argued that suit of Bhagirathibai was for declaration and injunction and the suit of the present respondents was for partition and possession. Hence, the provisions of Order 22 Rule 9 CPC was not applicable. In view of the same, it was prayed that there is no substantial question of law and the second appeal should be dismissed since after the suit being decreed and the decree being confirmed by the appellate court, the present respondents filed execution application and today the executing Court has fixed date for executing the possession decree.

8. I have heard both the sides and taken into consideration the submissions advanced across the bar.

9. The argument of appellants that the provisions of Order 22 Rule 9 CPC is applicable to the present matter, does not hold any ground since Bhagirathibai had, on the first count, disputed the mutation entry no. 429, by which the appellants claimed that Bhagirathibai had transferred the suit land in the name of appellant nos. 2 and 3. Bhagirathibai had herself filed suit in the year 2006 disputing the said mutation entry and further seeking a declaration and injunction. Temporary injunction granted in the said suit was confirmed till High Court. After the death of Bhagirathibai in the year 2012, that suit had abated. The provisions of Order 22 Rule 9 CPC prohibited Bhagirathibai or her legal heirs from filing a fresh suit on the same cause of action. Therefore, appellant no. 1 himself and respondent nos. 1 to 3 who are the legal heirs of Bhagirathibai were precluded from filing a fresh suit on the same cause of action. The suit for partition and possession filed by respondent nos. 1 and 2, in my opinion, was not hit by the provisions of Order 22 Rule 9 of the CPC. It is settled law that mutation entry does not create any rights in favour of the parties.

10. Hence, there is no merit in the present second appeal. Second Appeal is dismissed.

11. In view of disposal of main appeal, pending civil application, if any, no more survives and hence same stands disposed off.

[RAJESH S. PATIL]
JUDGE