

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 783 OF 2017
WITH CA/15225/2017 IN SA 783/2017

Hari Amrut Patil,
Age 82 years, Occ. Agriculture,
R/o. Pimpalsim, Tq. Dharangaon,
Dist. Jalgaon.

... Appellant.
(Orig. plaintiff)

VERSUS

1) Shivaji Girdhar Patil,
Age 82 years, Occ. Agriculture.

2) Gopichand Shridhar Patil,
Age 60 years, Occ. Agriculture.
Both are r/o. Pimpalsim, Tq.
Dharangaon, Dist. Jalgaon.

...(Orig. Defts. No. 1 & 2)

3) Deepak Sukhdeo Patil,
Age 55 years, Occ. Agriculture.

4) Mangala Dhondu Patil,
Age 57 years, Occ. Agriculture.
Both r/o. Pimpalsim Tq. Dharangaon,
Dist. Jalgaon.

5) Vimalbai Bhaskar Patil,
Age 65 years, Occ. Agriculture,
C/o. Dipak Sukdev Patil,
At Pimpalsim, Po. Satkheda,
Tq. Dharangaon, Dist. Jalgaon.

6) Anusayabai Dhondu Patil
Since deceased her legal heirs
i.e. respondent Nos. 3 to 5 and
7 & 8 already on record.

7) Surekha Balu Patil,
Age 47 years, Occ. Agriculture,
C/o. Adhikrao Wamanrao Jagtap,
Serial Number, 216, Sant Tukaram
Nagar, Near Water Tank, Bhosari,
Pune – 39.

8) Yogita Nitin Patil,
Age 43 years, occ. Agriculture,
R/o. Sarve No. 72/3/3, Shiv Sai
Nagar, Colony Number 1, Dighi,
Pune 411 015.

9) Indubai Bhikan Patil,
Age 70 years, Occ. Agriculture,
R/o. At Po. Kalali, Tq. Amalner,
Dist. Jalgaon.

... Respondents
(Orig. defendatns)

...

Advocate for the Appellant : Mr. B. R. Waramma.
Advocate for the Respondent No. 1 : Mr. S.P. Brahme.

CORAM : MANGESH S. PATIL, J.

DATE : 01.04.2022.

JUDGMENT :

This is a second appeal by the original plaintiff who has been seeking perpetual injunction restraining the respondents who are the original defendants from obstructing his possession over the suit property described as plot No. 9/1 admeasuring 2-3-4 Are equivalent to 223 square meters more particularly described in paragraph No. 1 of the plaint, claiming to be its exclusive owner.

2. He averred that the suit property was originally owned by his father and thereafter by him. Though the names of the respondent Nos. 3 to 9 were appearing in the revenue record, he was in exclusive possession as its owner but to avoid any objection on the ground of non joinder of parties he arrayed them as defendants. He averred that in the southern portion of the suit property he has erected a cattle shed and even some part of the suit property has been secured by a wire fence. He then averred that the respondent Nos. 1 and 2 (defendant Nos. 1 and 2) were threatening to take forcible possession of the southern side half portion admeasuring 60 feet x

20 feet and were asserting that he was the owner of only the northern side half of the suit property. Even they succeeded in getting their name mutated in the Grampanchayat record without there being any right, title or interest vesting in them. He, therefore, prayed perpetual injunction. In the alternative he claimed that he became owner of the suit property by adverse possession having been continuously in possession of the suit property for more than 12 years and sought a declaration to that effect.

3. The respondent Nos. 1 and 2 contested the suit by their joint written statement. They denied ownership and possession of the appellant over the entire suit property. They contended that they were distant relatives of the appellant. Their paternal grand father and his paternal grand father were real brothers. One Bapu was the common ancestor. Bapu had four sons, grand father of the appellant Khandu, their grand father Nathu, Shankar and Onkar. Bapu died on 04.01.1933. Since Khandu was the eldest amongst his sons, his name was mutated in the revenue record of all the ancestral properties by Mutation Entry No. 159, including the suit property Gat No. 9. However, subsequently, his name was recorded as a karta of the entire family by Mutation Entry No. 276. The land Gat No. 9, therefore, was the ancestral and joint family property. The southern half portion of that property was sold by Khandu to one Manga Dagdu and the Gat No. 9 was divided in two parts. The southern half was sold to Manga Dagdu and the northern half continued to be the joint family property. Mutation Entry No. 477 was recorded to that effect and subsequently it was allotted Gavthan No. 9/1 which was subsequently allotted plot No. 13.

4. The respondent Nos. 1 and 2 further contended that later on by virtue of an oral partition amongst Khandu and all his brothers, the suit property was divided into two parts. The northern half admeasuring 60 feet x 20 feet was allotted to the share of Khandu and the southern half of equal dimension was allotted to their grand father Nathu. Since thereafter, a further partition had taken place amongst the heirs of Nathu wherein a

portion admeasuring 60 feet x 10 feet has been allotted to the respondent Nos. 1 and 2 respectively. Subsequently, even the Grampanchayat record was mutated. The portion in possession of the appellant was allotted property No. 8, whereas the portions in their possession was allotted property No. 8A and 8B. Since long they were paying grampanchayat taxes of their part. They have erected wire fencing and a cattle shed. Thus they contended that they were the owners of southern half portion of the suit property in exclusive possession and prayed to dismiss the suit.

5. The respondent Nos. 5, 7 and 8 admitted the claim by passing a praecipe. The other respondent Nos. 3 and 6 did not appear, whereas the suit was dismissed as against the respondent Nos. 4 and 9.

6. The trial court framed necessary issues including that of appellant's title as also the claim of the respondent Nos. 1 and 2 of their title and possession over the southern half. At the conclusion of the trial, it held that the appellant was the owner in exclusive possession of the entire suit property, refuted the stand of the respondent Nos. 1 and 2 and decreed the suit.

7. The respondent Nos. 1 and 2 preferred an appeal before the District Court which once again scanned the evidence, quashed and set aside the judgment and decree of the trial court and dismissed the suit. Hence this second appeal.

8. Learned advocate Mr. Waramaa for the appellant would submit that the lower appellate court has recorded a perverse and illegal finding. It has not appreciated the evidence in proper perspective. Though the respondent Nos. 1 and 2 were coming with a case of existence of a deed of partition of the year 1960 they did not produce it on the record and in the absence of such deed of partition on the record the district court ought not to have upheld their stand. It also ignored the vital admissions given by the respondent No. 1 Shivaji (D.W. 1) and Suresh (D.W. 3). It ignored that the

mutation record of the suit property was standing in the name of appellant's grand father. Mr. Warmaa would further submit that even it misread the admission of appellant's witnesses stating that the suit property was the ancestral property which is not synonymous with a joint family property but the district court treated it like that and used it against the appellant. He would further submit that the respondent Nos. 1 and 2 specifically admitted partition amongst their grand fathers in the year 1960 and in spite of that they were putting up a false plea regarding partial partition to the effect that the suit property was the joint family property. The observations and the conclusions drawn by the lower appellate court are perverse and arbitrary and not borne out from the correct appreciation of evidence. The trial court had given sound reasons while decreeing the suit and the lower appellate court has grossly erred in reversing it without there being cogent and convincing reasons. He, therefore, submit that the second appeal be admitted on the substantial questions formulated in the appeal memo.

9. Per contra, learned advocate Mr. Brahme for the respondent Nos. 1 and 2 would support the judgment and order of the district court. He would submit that there were several circumstances which were come on record, which were skipped or overlooked by the trial court but have been correctly appreciated by the district court. This court in the second appeal cannot act as a third fact finding court. Since the view taken by the district court is a plausible view, this court cannot reappreciate the evidence to reach some different conclusion.

10. I have carefully considered the rival submissions and perused the entire record and proceeding of the trial court.

11. There is no dispute about the genealogy. One Bapu Laxman was the common ancestor who had four sons, Khandu, Nathu, Shankar and Onkar. The appellant is the grand son of Khandu, whereas the respondent Nos. 1 and 2 are the grand children of Nathu from his two sons Giridhar and

Shirdhar. Obviously, though it was a suit for perpetual injunction simplicitor but a cloud was created over the title of the appellant. Both the courts below rightly appreciated the extent of the dispute and correctly formulated the issue/point of title.

12. True it is that the revenue record of the suit property stands in the name of the appellant. However, it is trite, as has been noted by the district court, the entries in the revenue record do not confer any right or title and are meant for fiscal purposes albeit they have presumptive value. Though the suit property was mutated in the name of Khandu alone by virtue of various mutation entries, it was also a matter of record that in the grampanchayat record, the suit property was shown to be comprising of three portions. The one in the name of the appellant which was allotted property No. 8 and the other two portions standing in the name of the father of the respondent Nos. 1 and respondent No. 2 as plot Nos. 8B and 8A respectively and even there was a record to demonstrate that they had paid the Grampanchayat tax. The district court also noted the fact that in spite of such revenue and grampanchayat record favourable to the appellant and the respondent Nos. 1 and 2 respectively, neither side had ever made any attempt to question such record it, therefore, refused to draw any conclusion and rightly so on the basis of such record.

13. Faced with the situation, the district court scanned the testimonies of the witnesses to ascertain the factum of possession being claimed by both the sides. He precisely noted that the appellant's witnesses Pandharinath (P.W.1) and Mulchand (P.W. 3) specifically stated that he was the owner of the suit property, but during cross-examination they admitted that the respondent Nos. 1 and 2 were in possession of the southern side half portion and had even erected a cattle shed and wire fencing. True it is that one could not have simply on the basis of their admission that the suit property was the ancestral property could have treated it as admission of the fact of it being a joint family property. But the fact remains that these witnesses in

spite of being related to the appellant specifically admitted exclusive possession of the respondent Nos. 1 and 2 over the southern side half portion of the suit property. They precisely admitted that the southern half portion of the suit property was also in two parts, the respondent No. 1 was in possession of a portion measuring 60 feet x 10 feet of the southern most part and respondent No. 2 was in possession of an equal portion to its north. Conspicuously, Pandharinath (P.W. 1) himself owns a property situated to the south of the suit property and is a decedent of Manga Dagdu to whom the grand father of the appellant had sold the southern half portion from the entire Gat No. 9 of which the suit property is the northern half. Such being the testimonies of appellant's two witnesses, when apparently these admissions were not stray admissions but were giving the details of the possession of all these three persons, the inference drawn by the district court holding such admissions to be clinching is indeed a plausible view after correct appreciation of the evidence to discard the claim of the appellant of being in exclusive possession of the suit property.

14. As against this, the trial court had conspicuously overlooked the testimonies of these two witnesses and the clinching admissions given by them.

15. The entire emphasis of the submission of Mr. Waramaa has been on the fact that though the respondent Nos. 1 and 2 and their witnesses admitted and asserted existence of a written deed of partition, they had not produced it on the record and an adverse inference ought to have been drawn against them. With his assistance I have carefully gone through the testimonies of these witnesses. The so called statement of these witnesses regarding existence of a deed of partition was not with reference to the partition amongst their collaterals that is amongst the three sons of their grand father Nathu. They specifically stated that the partition amongst the three sons of Nathu, Abhiman, Girdhar and Shirdhar was an oral partition. They did not state that it was effected by executing any deed as has been

sought to be inferred by Mr Warmaa. According to him, had the details of the partition amongst Abhiman, Girdhar and Shridhar been brought on record, it would have been clear if the southern half portion of the suit property was also included in that partition and was allotted to the respondent nos. 1 and 2. True it is that the details of the partition that had taken place amongst Abhiman, Girdhar and Shridhar would have been of some help to test veracity of the stand of the respondent Nos. 1 and 2. But then, it is trite that a party has to stand or fall on his own legs. The appellant had come with a case that in the partition of year 1960 amongst grand fathers Khandu, Nathu and their brothers, the suit property was allotted to his grand father Khandu. If it was effected by virtue of some written deed, he should have taken steps to bring it on the record. If an adverse inference is to be drawn against the respondent Nos. 1 and 2 for not leading concrete evidence regarding allotment of the southern half portion of the suit property to their share, the argument of Mr. Warmaa can certainly be used with equal vehemence against the appellant himself. In spite of the appellant in his cross-examination stated about existence of a written deed of partition amongst his father Amrut and uncle Sukhdeo and Dhondhu of the year 1970, he himself could have produced it on the record to demonstrate that the suit property was treated by these three persons as the joint family property and it was allotted to the share of the appellant's father Amrut. If the line of the arguments of learned advocate Mr. Warmaa is to be accepted, in fact adverse inference is available to be drawn against the appellant himself for not producing such a deed of partition of the year 1970 to demonstrate that the suit property was being treated by his family as their exclusive property.

16. Though this was not a point considered by either courts below, I am referring these to justify the inference and the conclusion drawn by the district court adopting the line of arguments of the appellant's advocate Mr. Warmaa.

17. If such was the state of evidence which was available to be seen but

was overlooked by the trial court and the district court after reappreciation has taken a plausible view, this court cannot reopen the issue and indulge in a further fact finding exercise. In this regard, the following observations from the decision of the Supreme Court in the case of **Hero Vinoth Vs. Seshammal; (2006) 5 Supreme Court Cases 545** from paragraph No. 19 would be relevant :

“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, the 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.”

18. In the result, no substantial question of law arises in this second appeal.

19. The second appeal is dismissed with costs.

20. Pending Civil Application is disposed of.

(MANGESH S. PATIL, J.)

mkd/-