

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

MISC. CIVIL APPLICATION NO. 270 OF 2018

IN

SECOND APPEAL NO. 196 OF 2002

Dattatraya Rambhau Gadekar __ Vs. __ Kaushlyabai Prakash Gadekar and ors

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Mr. K.P.Sadavarte, Advocate for applicant/appellant.

Mr. A.J.Thakkar, Advocate for Respondent Nos.1 to 3

CORAM : AVINASH G. GHAROTE, J.

DATE : 13/09/2022

1] Heard Mr. Sadavarte, learned counsel for the applicant/appellant and Mr. Thakkar, learned counsel for respondents.

2] A grievance is raised that this Court by the judgment dated 28.2.2017, has erroneously passed a decree for partition and separate possession, in spite of noting the fact that the suit filed before the learned trial Court was a suit for permanent injunction.

3] Mr. Thakkar, learned counsel for the respondents, does not dispute that RCS No. 130/1998 (Kousalyabai vrs. Dattatraya) was a suit for permanent injunction, in which a decree was claimed of restraining the defendants/applicants from disturbing the possession of the plaintiff over the land in question. The suit was dismissed by the learned trial Court by its judgment dated 27.11.2000 and RCA No. 1/2001 there against was

also dismissed by the judgment dated 29.10.2001. The Second Appeal arose out of those two judgments.

4] Though this Court in the judgment dated 28.2.2017 has noted that the suit before the trial Court was for permanent injunction, but in para 2 noting that there was no dispute regarding the entitlement of the share, a precept has been issued to the Collector under Section 54 of the CPC for carrying out measurement in respect of land of original Survey No.10 and to equally divided it in two separate halves.

5] Since the suit before the trial Court was a suit for permanent injunction and none of the parties had claimed any partition or separate possession, the Court of its own accord could not have passed a decree of partition and separate possession, as is reflected from the judgment in Second Appeal No. 196/2002 dated 28.2.2017. This clearly indicates an error apparent on the face of record, as the suit for permanent injunction has been treated as a suit for partition and the decree for partition has been passed, considering which the present application for review of the judgment dated 28.2.2017 is allowed. The judgment dated 28.2.2017 is hereby set aside and the Second Appeal is restored back to file.

6] List the matter for final hearing on Thursday, **15.9.2022.**