

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 376 OF 1992

1. Gopal s/o Sakharam Rajgude
age 31 years, occ. Agril.,
r/o Kaudgaon, Tq. Ambad
Dist. Jalna.
2. Kamalabai w/o Pralhad Chavan } Abated vide Court order
age 35 years, occ. Agril., } dated 13.06.2012.
r/o Kawadgaon, Tq. Ambad, }
Dist. Jalna. }

Appellants

Versus

1. Sakharam S/o Narayan Rajgude
age 64 years, occ. Agriculture
r/o Kawadgaon, Tq. Ambad
Dist. Jalna.
2. Janabai w/o Sakharam Rajgude
occ. Agril.,
r/o Kawadgaon, Tq. Ambad,
Dist. Jalna.
3. Chaturabai w/o Dattu
age 38 years, occ. Agril.,
r/o Gondi, Tq. Ambad
Dist. Jalna.

Respondents

Mr. P. V. Patil, Advocate holding for Mr. S. J. Salunke, Advocate for the appellants.

Mr. A. H. Kasliwal, Advocate for respondent No. 3.

CORAM : R. M. JOSHI, J.
RESERVED ON : 31st MARCH, 2023.
PRONOUNCED ON : 11th APRIL, 2023

JUDGMENT :

1. This second appeal is admitted to the extent of Ground No. i, ii and iii of the appeal memo by order dated 24th August, 1992. Appellants are original plaintiffs in Regular Civil Suit No. 205/1983 which came to be decreed and the said judgment is reversed by the First Appellate Court in Regular Civil Appeal no. 182/1986 by passing impugned judgment dated 14th February, 1992. Being aggrieved by the judgment of the First Appellate Court, the present appeal is filed under Section 100 of the Code of Civil Procedure.

2. The substantial questions of law framed in terms of ground No. i, ii and iii of appeal memo are as under :-

i. Whether the plaintiffs can sue for the property left by the Ashrabai ? Whether the title of the land was with Ashrabai ?

ii. What is the effect if the husband gives the property to his wife separately and after death ? Whether plaintiff can claim right by way of partition and possession to the same ?

iii. Whether the defendant No. 3 can get any valid title to the property when the defendant No. 2 executed the sale deed without any title to suit

property or whether the defendant No. 3 get valid title to the property on the basis of the sale deed executed by the defendant No. 2 without any right ?

3. The facts as they appear on the basis of pleadings on record can be narrated in short as under :-

Plaintiffs filed suit for partition and separate possession of the land bearing Survey no. 74 admeasuring 29 acres 6 R. It is the case of the plaintiffs that their mother, Asarabai, was owner of the suit property. She died in the year 1973 and plaintiffs being children and defendant No. 1, husband, were the only legal heirs left behind by her. Defendant No. 2 is the second wife of defendant No. 1. It is further case of plaintiffs that in the year 1976, defendant No. 3 in collusion with defendants No. 1 and 2 executed sale-deed in respect of the suit land and on the basis of the same, she encroached upon the suit property. Thus, it is claimed that defendant No. 3 is the trespasser upon the suit property.

4. Defendants filed written statement denying the ownership of Asarabai, mother of plaintiffs, over the suit land. It is also contended that plaintiffs have wrongfully shown name of

defendant No. 2 as Janabai whereas her name is also Asarabai. It is claimed that the mutation entry relied upon by the plaintiffs is wrong. Defendant No. 1 claimed himself to be the owner of suit land till 1976 and he sold the same to defendant No. 3. Asarabai was nominal party to the said deed due to the mutation entry.

5. Learned counsel for the appellants state that the Trial Court has rightly decreed the suit and has directed partition of the suit property by separating share of plaintiffs in the suit land. According to him, the First Appellate Court has committed error in reversing the said finding. It is submitted that the findings recorded by the First Appellate Court are contrary to the evidence on record as well as the law on the point involved in the present case.

6. On the other hand, learned counsel for respondents/defendants states that the plaintiffs led evidence which is sans pleadings and hence, the said evidence cannot be taken into consideration. By referring to the cross-examination of plaintiff No. 1, it is pointed out that there is clear cut admission of plaintiffs about want of pleadings in the plaint in respect of the previous partition. It is stated that the plaintiffs have failed to show any documentary

evidence which would confer title upon Asarabai, mother of plaintiffs, in respect of the suit land. Thus, according to him, the learned First Appellate Court was justified in reversing the judgment and decree passed by the Trial Court. He further submitted that the mutation entries are meant for the purpose of revenue and it neither creates nor extinguishes title of the party and thus, it does not have any presumptive value of title. He places reliance on judgment of the Apex Court in the case of Jitendra Singh vs. The State of Madhya Pradesh and others, **2021 SCC Online SC 802** to support the said submission.

7. The learned Trial Court has placed initial burden on plaintiffs to prove that their mother Asarabai was the owner in respect of the suit land and that they were jointly cultivating the same till the year 1976. Defendant No. 3 was called upon to prove that she is bonafide purchaser of the suit land whereas plaintiffs were asked to establish that the possession of defendant No. 3 over the suit land is illegal. Apart from this, the issues of non-joinder of parties as well as limitation were framed.

8. Plaintiff No. 1 examined himself at Exhibit 27 and contended that in the year 1969, there was a partition between defendant No. 1, Asarabai i.e. mother of plaintiffs and plaintiff No. 1. After death of his mother, he exclusively cultivated the suit land till the year 1976. This evidence of plaintiff however, is without pleadings in the plaint. It is nowhere claimed by plaintiffs in the plaint that there was any partition in the year 1969 between these persons. On the contrary, it was claimed that his mother was exclusive owner of suit property and after her demise, he and defendant No. 1 were cultivating said land jointly till the year 1976. In the cross-examination he admits that in the year 1974, his father performed second marriage and thereafter, one land was given to the share of plaintiff and the other property to the share of his step-brother. This admission on the part of plaintiffs shows that there was no partition effected between them in the year 1969 and if it was so, there was no reason or purpose for again giving any further share to plaintiff No. 1. This fact creates doubt about the claim of plaintiff regarding partition in the year 1969. Apart from the fact that there is no pleading about partition in the plaint, it is simply stated by plaintiffs that their mother Asarabai was the exclusive owner of the

suit land. It is however, not explained as to how she became owner thereof.

9. Perusal of evidence on record shows that except for mutation entry No. 108 (Exhibit 146), there is no other evidence to show that Asarabai was the exclusive owner and in possession of the suit land. Further, there is nothing on record to indicate that any partition was effected by defendant No. 1 with his first wife Asarabai and plaintiff No. 1. Partition deed referred in the mutation entry for the purpose of mutating name of Asarabai in the suit land, was not placed on record nor it is explained as to the reason for which it could not have been produced before the Trial Court. In absence of pleadings that there was partition as well as for want of partition deed, the factum of partition cannot be said to have been proved. The plaintiffs therefore have failed to discharge initial burden to prove their case. Thus no occasion arose for defendants to refute the case of plaintiffs by leading any evidence. In the circumstances, Trial Court is not justified in decreeing suit. On the contrary, learned First Appellate Court has rightly taken into consideration the evidence on record and reversed the decree in question challenged before it.

10. In order to succeed in seeking interference in the impugned judgment and decree passed by the First Appellate Court, it was incumbent on the part of the appellants to show that the First Appellate Court has committed error in appreciating evidence on record in proper perspective or has ignored any evidence led before it. Appellants have failed to show any perversity in the findings recorded by the First Appellate Court. The judgment impugned deals with the question by keeping in mind provisions of law, pleadings of the parties and evidence lead on record. Thus, no perversity is found in the said judgment. In the result, the appeal stands dismissed.

11. Pending civil application, if any, does not survive and stands disposed of.

(R. M. JOSHI)
Judge

dyb