

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 594 OF 2016

Anant Narayan Vedpathak
age 66 years, occ. Agriculture
r/o Govindpur, Tq. Kallam
Dist. Osmanabad.

Appellant

Versus

1. Narayan Janardhan Vedpathak
(Deceased)
2. Pramod Narayan Vedpathak
age 55 years, occ. Agriculture
r/o Samta Colony, Near School No. 11
Osmanabad, Tq. & Dist. Osmanabad.
3. Sow. Anuradha Pramod Vedpathak
age 46 years, occ. Household
r/o Samta Colony, Near School No. 11
Osmanabad, Tq. & Dist. Osmanabad.
4. Shivdip Pramod Vedpathak
age 11 years, minor, under guardianship
of mother Sow Anuradha Pramod Vedpathak
r/o Samta Colony, Near School No. 11
Osmanabad, Tq. & Dist. Osmanabad.
5. Kamal Devidas Dixit,
age 58 years, occ. Household
r/o Bhoom, Tq. Bhoom,
Dist. Osmanabad.

Respondents

Mr. P. S. Paranjape, Advocate for the appellant.
Mrs. A. A. Lomte, Advocate holding for Mr. S. J. Salunke, Advocate for
the respondents.

CORAM : R. M. JOSHI, J.
RESERVED ON : 25th APRIL, 2023.
PRONOUNCED ON : 4th MAY, 2023.

JUDGMENT :

1. This appeal takes exception to the judgment and decree dated 6th July, 2012 passed in Regular Civil Suit No. 195/2009 which was confirmed in Regular Civil Appeal No. 229/2012. Parties are referred to by nomenclature in the suit.

2. Plaintiff filed suit for partition and separate possession of 1/3rd share in 2 H land from Gat No. 535. Plaintiff is elder son of defendant No. 1 and brother of defendant No. 2. Defendants No. 2 and 3 are the wife and son of defendant No. 1. It is the case of plaintiff that the suit property is an ancestral property of plaintiff and defendants and that he asked for partition thereof on 1st January, 2009, and since the same was refused, the suit came to be filed.

3. Defendant No. 1 filed written statement wherein it is admitted that the suit property is the ancestral property however, it is claimed that there was already partition in respect of the said

property and plaintiff as well as defendants are in possession of their respective shares. It is further averred that the plaintiff has not included all joint family properties in the suit nor has made his sister as a party and hence, tenability of the suit was challenged.

4. After framing of issues, plaintiff examined himself (Exhibit 54) and claimed that the suit property is the ancestral property. He also examined Laxmikant (Exhibit 69) to prove that vide Partition Deed (Exhibit 70) Gat No. 535 was partitioned.

5. Learned counsel for plaintiff, apart from oral submissions, placed on record short notes of argument and substantial question of law. It is his contention that only defendant No. 1 has filed written statement and therein it is admitted that the suit property is ancestral property and therefore, on the basis of this admission itself, decree ought to have been passed by the Trial Court. To support his contention, he placed reliance on the provisions of Order 8 Rule 5 read with Order 12 Rule 5 of the Code of Civil Procedure contending that this is a case where there is specific admission about the suit property being ancestral property which ought to have resulted in passing decree on admission. This aspect

is not considered by both the Courts below. It is also argued that the Trial Court has relied upon the admission on the basis of suggestion made to the plaintiff in the cross-examination which is not probable and which, according to him, is apparently recorded out of misunderstanding. In this regard he also referred to further suggestion made to the plaintiff that he has filed a false suit though previous partition of the family properties was effected which is denied. To support his contentions, he placed reliance on following judgments :-

- (i) Lohia Properties (P) Ltd. Tinsukia, Dibrugarh, Assam
vs. Atmaram Kumar
(1993) 4 SCC 6
- (ii) Manoj A. S. Dhargalkar & others vs. Taramati Harichandra
Salgaonkar & others.
2000(4) BomCR 508.
- (iii) Laxman Zingraji Adhau vs. Sushila Zinguji Thakre & others
1995(4) BomCR 677.

6. Learned counsel for defendants supported the judgment and decree of dismissal of the suit. It is contended that pleadings of the parties, issues framed and admissions given by plaintiff in the cross examination are sufficient to justify dismissal of the suit.

7. There cannot be two opinions about the preposition of law laid down in the judgment cited supra. However, it needs to be applied having regard to fact and circumstances of case, pleadings and evidence. There could be situation that admission of the fact in written statement may lead to passing of decree on admission, which may not be possible in another case.

8. No doubt, defendant no. 1, by filing written statement, has admitted that the suit property is ancestral property. The said admission however is not sufficient to decree the suit as the suit is for partition and determination of which depends upon various other factors such as previous partition of properties in suit and parties thereto. In the written statement, after admitting the suit property to be the ancestral property, it was specifically stated that there was oral partition in respect of the said property and the co-sharers were given possession of their respective shares therein. It is further averred that there are other properties of the joint family which are not included in the suit so also sister of the plaintiff is not joined as party defendant. Needless to say that the statements in written statement cannot be considered in isolation and effect thereto needs to be given on overall consideration of entire pleadings. The written

statement as a whole will have to be taken into account for the purpose of ascertaining as to whether it is an admission sufficient enough to pass decree on admission as contended by learned counsel for the plaintiff.

9. Since the suit is for partition and when it is specifically averred in the written statement that there are other properties of the joint family which are not included in the partition so also the sister of plaintiff is not made party to the suit, it was not open for the Trial Court to pass judgment on the basis of admission to the effect that suit property is the ancestral property. This Court, therefore, is not inclined to accept submissions made by learned counsel for the plaintiff in this regard.

10. In the light of pleadings as recorded aforesaid, if the evidence of plaintiff himself is considered, then the same makes it abundantly clear that plaintiff has admitted that there was in all 20 acres land out of which he and his brother possess 7 ½ acres and 5 acres land stands in the name of defendant No. 1, father. He candidly denied the suggestion that no partition of the joint family properties is effected. As far as this evidence of plaintiff is

concerned, it is sought to be argued that there is some error committed in recording evidence of plaintiff. This was so stated relying upon recording of negative suggestion made to plaintiff in cross examination about previous partition. First of all in view of Section 80 of Evidence Act, there is presumption as to document produced as record of evidence. Secondly, after going through entire cross examination of plaintiff, this Court finds no reason or justification in accepting the submissions made in that regard. Staet statement about partition recorded in evidence of plaintiff cannot be considered as stray statement as for more than one occasion, plaintiff admits about previous partition. Infact, he specifically claims that the house came to his share in the partition and the shop was given to the brother. He further claims that the partition took place in the year 1982. Even at one stage he admits that there was written partition though the case of defendant No. 1 is about oral partition of the properties of joint family. He further admits that he has a sister and she is not joined as party defendant to the suit. All these admissions on record leave no room for doubt that the entire evidence is recorded correctly.

11. In the light of these admissions of the plaintiff, it is clear that the suit property was already partitioned between plaintiff and defendants No. 1 and 2. As far as other properties are concerned, they are not included in the suit for partition so also sister of plaintiff who is necessary party is not joined as defendant. Perusal of the plaint does not show that it is a case of plaintiff that there was a partial partition of the properties of the joint family in the year 1982 and, when he claims that there was no partition at all, in that case, it is incumbent on the part of the plaintiff to include all joint family properties in the common hotchpotch. In absence of inclusion of all the properties of joint family and also for want of joining sister as defendant, the suit deserves to be dismissed and the same is rightly dismissed by the Trial Court. This Court finds no infirmity in the impugned judgment of the Trial Court which is confirmed by the First Appellate Court. Hence, no interference is called for therein. Hence, appeal stands dismissed.

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

(R. M. JOSHI)
Judge

dwb