

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.

SECOND APPEAL NO. 316 OF 2019

1. Rajkumar S/o. Parshuram Upare,
Aged about 34 years, Occ.: Agriculturist,
R/o. Sasti, Tah. Rajura, Distt. Chandrapur.
2. Sachin Charandas Chandekar,
Aged 32 years, Occ.: Agriculturist,
R/o. Gadchandur, Tah. Korpana,
Distt. Chandrapur.
3. Chhotu Pandurang Dhandekar (dead)
Through his legal heirs:
3-A. Smt. Lata Chhotu Chandekar,
Aged 27 years, Occ.: Household,

3-B. Nandkishor Chhotu Chandekar,
Aged 8 years, Occ.: Education,
Minor through his mother
Smt. Lata Chhotu Chandekar,

Both R/o. Virur Station, Tah. Rajura,
Distt. Chandrapur.
4. Narayan Dhondur Chandekar (dead)
(through following legal heirs)
4-A. Prabhakar Narayan Chandekar (dead)
Through his legal heirs.
4-A-i ~~Santosh Prabhakar Chandekar~~
4-A-ii ~~Kamlabai Prabhakar Chandekar~~
4-A-iii ~~Suresh Prabhakar Chandekar~~
4-A-iv ~~Sangita Kishor Dudhe~~
4-A-v ~~Sujata Gulab Niranjan.~~

4-B. Pandurang Narayan Chandekar
(Dead through Legal Heirs)

4-B-i. ~~Smt. Indubai Pandurang Chandekar~~
4-B-ii. ~~Kalidas Pandurang Chandekar~~
4-B-iii ~~Sharda Dilip Dudhe.~~

4-C. Shobhabai Parshuram Upare,
Aged 45 years, Occu.: Household,
R/o. Sasti Colony, Sasti, Tah. Rajura,
Distt. Chandrapur.

.... APPELLANTS.

// **VERSUS** //

Ramesh Udhav Chandekar,
Aged 36 years, Occu.: Cultivation,
R/o. Virur Station, Tahsil : Rajura,
Dist. Chandrapur.

.... RESPONDENT.

Shri A.A.Dhawas, Advocate for Appellants.
Ms Parita M.Lakhani, Adv. h/f. Shri M.P.Kariya, Adv. for Respondent

CORAM : ANIL S. KILOR, J.
DATED : JANUARY 13, 2023

ORAL JUDGMENT :

1. Heard.
2. **ADMIT.** Heard finally by consent of the learned counsel for the parties.
3. In this appeal, the judgment and decree dated 15/12/2018 passed by District Judge-1, Chandrapur in Regular Civil Appeal No.149 of 2009 is under challenge. The learned lower appellate Court vide said

judgment and decree dismissed the suit filed by the plaintiff/ appellant for declaration and permanent injunction by reversing the judgment and decree passed by the trial Court, dated 25/08/2003.

4. This Court on 27th September 2019 framed the following Substantial Questions of Law: (The parties are referred as per their status before the trial Court)

“i) Whether the appellate Court was justified in allowing the appeal and setting aside the decree granted by the trial Court in favour of the appellants without appreciating the fact that one of the attesting witnesses to the will deed dated 13.12.1997 had been examined by the appellants to prove the same and that, therefore, it could not be said that the appellants had failed to support their case before the trial Court with appropriate evidence?

ii) Whether the appellate Court, in the facts and circumstances of the present case, ought to have remanded the case to the trial Court for fresh consideration?

iii) What would be the effect of findings rendered in respect of the said will in the judgment and order passed in Regular Civil Suit No. 50 of 2006, on claims made by the appellants in the present case?

5. The facts in brief are as follows: (The parties are referred as per their status before the trial Court)

That, the plaintiff No.4 and his brother Udhao Chandekar were the cultivators and were residing jointly. Both the brothers have purchased the land Survey No.60 area 11.15 acres of Mouza : Chinchala by registered Sale Deed dated 28/05/1973. After purchase, both the brothers were cultivating the land Survey No.60 jointly. Udhao Chandekar encroached on the Government land. Later on Revenue Authority granted 'Patta' measuring 00-32 hector out of field Survey No. 217 to Udhao Chandekar. Thus, Udhao Dhondur Chandekar became the owner of field Survey No.217, area 00-32 hector and half portion of land Survey No.60. (The said property hereinafter is called as 'suit property')

6. The plaintiff Nos.1 to 3 are the grandsons of plaintiff No.4 and Udhao Dhondur Chandekar. During the lifetime of Udhao Chandekar he was cultivating the land together with plaintiff No.4. As there was no issue to Udhao Dhondur Chandekar and he was age old, he executed registered Will Deed of his share in Survey No.60 and Survey No.217 in favour of the plaintiff Nos. 1 to 3 in presence of panchas vide Will-Deed No.1364 on 13/12/1997. Udhao Dhondur Chandekar was residing with plaintiff No.4 till the death. Udhao Dhondur Chandekar died on 19/10/1999 at Gadchandur. Even after his death, plaintiff No.4

continued the possession of field Survey No.60 and 217. The possession of plaintiff No.4 over field Survey No.217 and half portion of Survey No.60 was on behalf of the plaintiff Nos. 1 to 3. Thus, after the death of Udhao Chandekar, the plaintiff Nos. 1 to 3 came into the possession of the property of Udhao through Narayan Dhondu Chandekar. The possession of Narayan Dhondu Chandekar was for himself and on behalf of plaintiff Nos.1 to 3. Thus, the plaintiff Nos. 1 to 3 became the owners of field Survey No.217 of Mouza : Wirur Station, area 00.32 hector and southern half portion of Survey No.60 of Mouza : Chinchala after the death of Udhao Dhondu Chandekar. Accordingly, suit for declaration and permanent injunction was filed.

7. The suit was proceeded *ex parte* as the defendant failed to file written statement though the summons were served upon him and he appeared in the matter. The learned trial Court after scrutinizing the oral as well as documentary evidence, decreed the suit in favour of the appellants/plaintiffs and thereby declared the plaintiff Nos.1 to 3 as owners of the suit property and permanently restrained the appellant from disturbing peaceful possession of the plaintiffs.

8. The defendant carried the appeal against the said judgment and decree vide Regular Civil Appeal No. 149 of 2009, which came to be allowed vide impugned judgment and decree dated 15/12/2018 and thereby the suit filed by the appellants was dismissed.

9. After going through the record, it is revealed that undisputedly, the learned lower appellate Court has observed that the deceased Uddhav Chandekar had two wives by name Saibai and Somabai. Whereas, there are no pleadings to that effect made by either parties to the suit. There is no basis for recording such finding by the learned lower appellate Court. Thus, the said finding is perverse.

10. Further, the learned appellate Court has observed that to prove the Will no attesting witness was examined by the plaintiff. This finding is contrary to the record as one Mr. Madan Borkar was examined, who was attesting witness to the Will. Even though, it was revealed by the learned lower appellate Court that some error was committed by the learned trial Court recording the findings and decreeing the suit. The learned lower appellate Court ought to have remanded the matter back for fresh trial as the suit was decreed *ex parte*. However, recording the perverse finding and the findings which are contrary to the record, the learned lower appellate Court allowed the appeal and dismissed the suit.

11. Thus, I have no hesitation to hold that the impugned order is cryptic and suffers from perversity and accordingly it needs to be quashed and set aside and further the matter is required to be remanded back to the District Judge, Chandrapur for fresh decision on the appeal. I have answered the substantial questions of law accordingly and proceed to pass the following order:

- i) The second appeal is partly allowed.
- ii) The impugned order dated 15/12/2018 passed by learned District Judge-1, Chandrapur in Regular Civil Appeal No. 149 of 2009 is hereby quashed and set aside.
- iii) The Regular Civil Appeal No.149 of 2009 is restored back to its file.
- iv) The learned District Judge-1, Chandrapur is directed to decide the appeal afresh, according to law, after hearing both the parties, within a period of six months from today.
- v) The parties are directed to appear before District Judge-1, Chandrapur on 09/02/2023 at 11:00 a.m.

The Second Appeal stands **disposed of** accordingly. The parties to bear their own costs.