

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

Second Appeal No. 47 of 2019

Ashok S/o Omkarappa Mudnaik

Versus

Anil S/o Omkarappa Mudnaik and others

Office Notes, Office Memoranda of
Coram, appearances, Court's Orders
or directions and Registrar's order

Court's or Judge's Order

Shri P.W.Jasutkar, Advocate for the appellant.

Shri S.D.Chopde, Advocate for the respondents.

CORAM : ANIL S. KILOR, J.

DATED : 29th MARCH, 2023.

In the present second appeal, the judgment and decree dated 3rd January, 2018 passed in Regular Civil Appeal No. 137 of 2014, allowing the appeal and setting aside the judgment and decree dated 29th April, 2014 passed by learned Civil Judge, Junior Division, Asthi in Regular Civil Suit No. 20 of 2013, is under challenge.

2. It is the case of the plaintiff that the plaintiff and defendant nos. 1 and 2 are real brothers. The defendant nos. 1 and 2 sold out field survey no. 83, area 0.81 HR, at mouza Chekbandi to defendant no.3 on 23rd June, 2011 by registered sale-deed.

3. The plaintiff sent a notice to defendants No.1 and 2 but it was falsely replied. Therefore, for right of pre-emption, to declare that the sale-deed executed by the defendants no.1 and 2 in favour of defendant no.3 is illegal and for possession, the plaintiff filed the suit.

4. The defendants denied the right of plaintiff on the ground that the defendants No.1 and 2 had informed the plaintiff through relatives to purchase the suit property but he refused and as defendants no.1 and 2 were in need of money, they sold it out. It is stated that it was within the knowledge of the plaintiff. It is also the defence that the plaintiff has no right to pre-emption.

5. The learned trial Court after examining and scrutinizing the oral as well as documentary evidence passed the judgment and decree dated 29th April, 2014 decreeing the suit.

6. The appellants feeling aggrieved by the same carried an appeal before the District Judge-2, Wardha vide Regular Civil Appeal No. 137 of 2014, which came to be dismissed vide judgment and decree dated 3rd January, 2018. The same is under challenge in the present appeal.

7. I have heard learned counsel for the respective parties.

8. This Court vide order dated 12th January, 2023 has framed following substantial questions of law:

(I) Whether the learned First Appellate Court is right in reversing the findings recorded by the trial Court as regards partition?

(II) Whether the learned First Appellate Court is right in holding that there was a partition in absence of any pleadings to that effect in the written statement of the defendants?

9. The learned counsel for the appellant submits that though there were no pleadings as regards partition and despite the fact that no issue was framed in this regard, the learned lower Appellate Court reversed the judgment and decree of the trial Court holding that there was a partition which has proved that the property was partitioned between the defendant nos. 1 and 2 and other brothers. He therefore submits that learned lower Appellate Court has committed grave error in reversing the judgment on a point which was not in issue before the trial Court.

10. The learned counsel for the respondent submits that it is a settled law that when the parties know each other's case very well and such a pleading is

implicit in an issue, the judgment and decree passed by the Appellate Court would not vitiate.

11. It is submitted that in the cross-examination, in clear terms, the plaintiff has admitted the fact of partition and also he has stated the said fact to his lawyer but it was not mentioned in the plaint. He therefore, submits that no error has been committed by the learned lower Appellate Court in reversing the judgment and decree of the trial Court. In support of his contention, he has placed reliance of Hon'ble Supreme Court in the case of V. Prabhakara Vs. Basavaraj K (Dead) by legal representatives and another¹ and Bhagwati Prasad Vs. Chandramaul²

12. In the light of rival submission of the parties, I have perused the record and the impugned judgment and decree.

13. In this case, the appellants and the respondent nos. 1 and 2 are the real brothers and the respondent no.3 is the purchaser in whose favour the respondent nos 1 and 2 executed the sale deed of the suit property.

14. The suit was filed for right of pre-emption, declaration and the possession and it was decreed declaring that the sale-deed of respondent no.3 is illegal

1 (2022)1 SCC 115

2 AIR 1966 SC 735

and further it was directed to the respondent nos. 1 and 2 to execute the sale-deed in favour of the plaintiff/appellant after receiving the consideration towards the sale at market price.

15. The Hon'ble Supreme Court of India in the case of V. Prabhakara Vs. Basavaraj K (Dead) by legal representatives and another (Supra)

21. A relief can only be on the basis of the pleadings alone. Evidence is also to be based on such pleadings. The only exception would be when the parties know each other's case very well and such a pleading is implicit in an issue. Additionally, a court can take judicial note of a fact when it is so apparent on the face of the record. A useful reference can be made to the following passage in *Bachhaj Nahar v. Nilima Mandal*, (2008) 17 SCC 491:

"15. The relevant principle relating to circumstances in which the deficiency in, or absence of, pleadings could be ignored, was stated by a Constitution Bench of this Court in *Bhagwati Prasad v. Chandramaul* [AIR 1966 SC 735]: (AIR p. 738, para 10)

"10. ... If a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely, in the issues, and evidence has been led about them,

then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is: did the parties know that the matter in question was involved in the trial, and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. To allow one party to rely upon a matter in respect of which the other party did not lead evidence and has had no opportunity to lead evidence, would introduce considerations of prejudice, and in doing justice to one party, the Court cannot do injustice to another.”

16. The Hon’ble Supreme Court of India in the case of Bhagwati Prasad Vs. Chandramaul (Supra)

10. But in considering the application of this doctrine to the facts of the present case, it is necessary to bear in mind the other principle that considerations of form cannot over-ride the legitimate considerations of substance. If a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the title of both parties

to the suit are touched, though indirectly or even obscurely, in the issue, and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is : did the parties know that the matter in question was involved in the trial, and did they lead evidence about it ? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. To allow one party to rely upon a matter in respect of which the other party did not lead evidence and had had no opportunity to lead evidence, would introduce considerations of prejudice, and in doing justice to one party, the Court cannot do injustice to another.

17. Thus, from the above referred observations it is evident if a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence.

18. There is no doubt the general rule is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely, in the issues, and evidence

has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case.

19. In the teeth of above referred well settled law now, I revert back to the facts of the present case.

20. In the present matter, the defendant nos. 1 and 2 in their written statement has categorically claimed ownership of the suit land and it is the case of the defendant nos. 1 and 2 as the title was in their favour, it was transferred in favour of the respondent no.3 by way of sale-deed.

21. The plaintiff having knowledge about the partition and as he has admitted the said fact in his cross-examination, the plaintiff was knowing well the source of title of the defendant nos. 1 and 2 on which basis the pleadings in the written statement was made by the defendant nos. 1 and 2.

22. No doubt there is no specific pleadings made by the defendant nos. 1 and 2 as regards partition. However, as they claimed the title over the property and the plaintiff was knowing that the plea of partition and issue regarding the same by way of implication is involved in the trial, the objection to non framing of an

issue as regards partition, is formal in the facts and circumstances of this case.

23. The learned Appellate Court therefore rightly considered the issue as regards partition and after appreciating the cross-examination of the plaintiff on it and has held against the plaintiff and reversed the judgment and decree of the trial Court.

24. Considering the numerous admissions given by the plaintiff as regards partition and having knowledge about it, the plaintiff cannot take the advantage of a fact that no specific pleading was made by the defendant nos. 1 and 2 as regards the partition or no issue was framed by the trial Court. As I have already observed that having the complete knowledge to the plaintiff that on what basis the defendant nos. 1 and 2 are claiming title over the suit property, in fact the plaintiff ought to have disclosed the fact of partition in the suit by making all the brothers as a party. However, the plaintiff suppressed the fact of partition though knowing well about it and this fact makes the appellant disentitle to raise any challenge to the impugned judgment and decree on the ground that no pleadings were made by the defendant nos. 1 and 2 and no issue was framed as regards partition. Accordingly, I have

answered the substantial questions of law in above terms.

25. As there is no merit in the present appeal, second appeal is dismissed.

[ANIL S. KILOR, J.]

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