



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

SECOND APPEAL NO.547 OF 1992

1. Sakhubai w/o Rajaram Kardile
(Died. Through Lrs.)
 - 1-A) Dattatraya s/o Rajaram Kardile
(Since died through his L.Rs.)
 - 1-A-i) Laxmibai w/o Dattatraya Kardile,
Age : 60 years, Occu.: Household & Agri,
R/o.: Kada, Tq. Ashti, District : Beed.
 - 1-A-ii) Udhav s/o Dattatraya Kardile,
Age : 41 years, Occu.: Agril.,
R/o. : As above.
 - 1-A-iii) Santosh s/o Dattatraya Kardile,
Age : 37 years, Occu.: Agril.,
R/o.: As above.
 - 1-A-iv) Asha w/o Baban Satre,
Age : 36 years, Occu.: Household,
R/o.: Dongargaon, Tq. Ashti,
District : Beed.
 - 1-A-vi) Dwarka w/o Raosaheb Wani,
Age : 30 years, Occu.: Household,
R/o.: Dawalwadgaon, Tq. Ashti,
District : Beed.
2. Parwatibai w/o Masuji Jadhav,
Age : 48 years, Occu.: Household & Agril.,
R/o.: Wadwani u/v Sherik Bk.
Tq. Ashti, Now at Kada, Tq. Ashti,
District : Beed.
3. Kalabai w/o Malahari Kardile
(Died. Through L.Rs.)
 - 3-A) Malahari s/o Sonu Kardile,
Age : 75 years, Occu.: Agril.,

R/.: Kada, Tq. Ashti, Dist. Beed.

3-B) Ram s/o Malahari Kardile,
Age : 45 years, Occu.: Agril.,
R/o.: As above.

3-C) Balu s/o Malahari Kardile,
Age : 39 years, Occu.: Agri.,
R/.: As above.

3-D) Sunita w/o Ram Aglawe,
Age : 35 years, Occu.: Agril.,
R/o.: Chinchndi Patil,
Tq. & Dist. Ahmednagar.

.... **APPELLANTS**
(Orig.Deft.Nos.1 to 3)

VERSUS

1. Bapu Shripati Karande
(Died. Through his L.Rs.)

1-A) Karbhari s/o Bapurao Karande,
Age : 70 years, Occu.: Agril.,

1-B) Baban s/o Bapurao Karande,
Age : 67 years, Occu.: Agril.,

1-C) Rangnath s/o Bapurao Karande,
Age : 63 years, Occu.: Agril.,

1-D) Damodhar s/o Bapurao Karande,
Age : 60 years, Occu.: Agril.,

1-E) Hanuman s/o Bapura Karande,
Age : 57 years, Occu.: Agril.,

1-F) Yamunabai w/o Suryabhan Dhobale,
Age : 50 years, Occu.: Househld

.... **L.Rs. Of Added
Respondents.**

1-G) Kakasaheb s/o Bapurao Karande,
Age : 55 years, Occu.: Agril.,
All R/.: Kada, Tq. Ashti,
District : Beed.

1-H) Smt. Dwarkabai Talekar,

Age : 45 years, Occu.: Household,
R/o.: Ghatpimpri, Tq. Ashti,
District : Beed.

2. Karbhari s/o Bapu Karande,
Age : 41 years, Occu.: & R/o.: As above
3. Baban s/o Bapu Karande,
Age : 46 years, Occu. & R/o.: As above.
4. Rangnath s/o Bapu Karande,
Age : 32 years, Occu. & R/o.: As above.
5. Damodhar s/o Bapu Karande,
Age : 32 years, Occu. & R/o.: As above.
6. Kakasaheb s/o Bapu Karande,
Age : 30 years, Occu. & R/o.: As above
7. Housabai w/o Shankar Karande
(Deleted vide Registrar's order
dated 24/02/1993)

.... **RESPONDENTS**
(R. Nos.1 to 6 – Orig. Plaintiffs
R.No.7 Orig. Deft. N.4)

....
Mr. Milind Patil Beedkar, Advocate for the Appellants.
....

CORAM : SANDIPKUMAR C. MORE, J.

RESERVED ON : 22/03/2024
PRONOUNCED ON : 10/05/2024.

JUDGMENT :

1. The present appellants, who are the original defendant Nos.1 to 3 in RCS No.146 of 1986, have challenged the judgment and decree dated 20/08/1992 passed by the IInd Additional District Judge, Beed (hereinafter referred to as 'the learned first appellate

court') in RCA No.16 of 1989. Under the said judgment and decree, the learned first appellate court has modified the judgment and decree dated 04/01/1989 passed by the learned Civil Judge Junior Division, Ashti (hereinafter referred to as 'the learned trial court') in RCS No.146 of 1986.

2. Background facts are as under :

The original respondent Nos.1 to 6 had filed RCS No. 146 of 1986 for declaration of their right to take water from old and new wells, situated in land Survey No.338/A/1 at Kada, Taluka : Ashti and for permanent injunction restraining present appellants / defendants from exercising their aforesaid rights of taking water. According to the plaintiffs, present dispute relates to two wells situated in the aforesaid land. They claimed that they are having 8 annas share in the new well. One Balaji was a common ancestor of plaintiffs and appellants / defendants, who was having three sons namely; Shripati, Prabhati and Shankar. All of them are no more. Plaintiff No.1 Bapu is a son of Shripati, whereas plaintiff Nos.2 to 6 are children of Bapu and wives of Shripati. Shripati died when plaintiff No.1 Bapu was of two years old and Shankar also died on 17/07/1972. Prabhati appears to be died issueless. According to the plaintiffs, plaintiff No.1 joined military services in the year 1941. In

the year, 1948 he had come back to village on leave and at that time water from old well was insufficient. As such, Shankar and plaintiff No.1 jointly dug new well in the aforesaid land Survey No.338/A/1. Construction of the said well was completed in the year 1959. Thereafter, in the year 1964 there was partition between plaintiff No.1- Bapu and Shankar. Since the new well was dug before that partition, the plaintiffs were having half share i.e. 8 annas share in the new well. However, after death of Shankar in the year 1972, the present appellants / defendants filed RCS No.51 of 1972 against the plaintiffs for getting permanent injunction by contending that there was no share of plaintiffs in the new well. However, by application Exhibit-50 the present appellants / defendants under a compromise requested the court to delete the issue in respect of share in old and new well in that suit. However, the said pursis got destroyed as being the part of 'D' file within the stipulated period and therefore, the said compromise was not placed on record. Thus, the plaintiffs claimed share in the water of both the wells.

The appellants / defendants contested the suit by filing their written statement at Exhibit-22. They admitted relationship between the parties and also death of Shankar on 11/07/1972. However, they contended that partition between plaintiff No.1- Shankar and Bapu did not take place in the year 1964 but it had taken place before 40 years orally and after that partition Shankar

had dug the new well. The appellants / defendants have admitted share of the plaintiffs to the extent of 6 anna in the old well. According to them, since the new well was dug after the partition by deceased Shankar, plaintiffs have no right or share in the water of new well. They denied the fact of any compromise pursis Exhibit-50 in the old suit. They contended that there was a dispute between Shankar and plaintiff No.2 Karbhari, who was allegedly adopted by Shankar but later on the said adoption deed was cancelled under a decree of court. According to them, Shankar had borne entire expenses, labour charges for digging the new well. As such, they claimed for dismissal of the suit.

The learned trial court by framing issues, tried the suit and partly decreed the same by declaring that the plaintiffs are having 6 annas share in the old well. However, the learned trial court rejected the claim of the plaintiffs in respect of half share in the new well. Feeling aggrieved with the rejection of share in the new well, the plaintiffs filed the aforesaid RCA No.16 of 1989 and the learned first appellate court modified the decree of the learned trial court and granted half share to the plaintiffs in new well by maintaining the share in the old well as declared by the learned trial court as it is. Hence, this appeal.

3. Heard the learned counsel for the appellants / defendants.

However, respondents despite service, remained absent.

4. The learned counsel for the appellants / defendants submits that the learned first appellate court has definitely erred in granting share to the plaintiffs in the new well by ignoring the evidence on record which indicates that Shankar had dug the new well after partition by his own expenses. He pointed out that the learned first appellate court unnecessarily brought aspect of Order-II Rule 2 of CPC for holding that the appellants / defendants were estopped from claiming the fact that Shankar had dug the new well after partition specially when they themselves had relinquished the said aspect of plaintiffs not having share in the new well, in the earlier suit. He pointed out that the plaint in earlier suit has not been filed on record by the appellants / defendants and in absence of the plaint, there cannot be any observation that they were precluded from saying that the plaintiffs were not having any share in the new well. In support of his submissions, he relied on following citations.

A) Jayantilal Chimanlal Patel vs. Vadilal Purushottamdas Patel, reported in (1017) 13 SCC 409 &

B) Gurbux Singh vs. Bhooralal, reported in AIR 1964 SC 1810.

5. Heard the learned counsel for the appellants / defendants. Also perused the entire documents on record alongwith record and proceedings of the original suit.

6. It is significant to note that there is no dispute between the parties in respect of 6 anna share of the plaintiffs in the old well. The appellants / defendants have rightly admitted the said position. However, according to them, the plaintiffs were not having any share in the new well since it was dug by Shankar after partition. The learned trial court has rejected the claim of the plaintiffs in respect of share in the new well. While rejecting the said claim, it is observed by the learned trial court that the plaintiffs could not produce memorandum of partition which was attached to the application on the basis of which mutation entry No.662 was certified in respect of partition between the parties. The learned trial court has observed that since the plaintiffs could not produce the said partition deed which was available in the Tahsil Office, an adverse inference against them needs to be drawn in respect of their theory of partition in the year, 1964. The learned trial court also observed that though the issue in respect of share in the old and new well was deleted by the appellants / defendants vide Exhibit-50 i.e. the alleged compromise pursis in their earlier suit, but in the

said suit no such issue was in dispute between the parties and the dispute was only in respect of obstruction by the plaintiffs to their land. Moreover, the learned trial court also observed that it was impossible to believe that defendant No.1 had obtained three bogus receipts from three deferent persons. By observing this, the learned trial court has rejected the claim of the plaintiffs in the new well.

7. However, after going through the observation of the learned first appellate court, it is evident that the learned first appellate court has given utmost importance to Exhibit-50 which is not on record and admittedly destroyed through lawful procedure as being the part of 'D' file of the earlier suit. The learned first appellate court has held that when the present appellants / defendants, who were plaintiffs in the said suit had in fact relinquished their claim in respect of share in new as well as old well, they are now estopped from raising same issue in this suit in view of Order-II Rule 2 of CPC. The learned counsel for the appellants / defendants vehemently argued that the learned first appellate court has unnecessarily brought the aspect of Order-II Rule 2 of CPC on record for allowing the share of the plaintiffs in the new well. He relied on the judgment of the Hon'ble Apex Court in case of **Jayantilal Chimanlal Patel** (supra). It has been observed in the

aforesaid case that for raising plea under Order-II Rule 2 of CPC, the party must bring on record the copy of plaint and prove the same as per law. In absence of such copy of plaint, the plea under Order-II Rule 2 of CPC cannot be taken and even under the application as per Order- 41 Rule 27 of CPC the plaint cannot be brought on record by way of an additional evidence. In tat event, the court has to proceed or to deal with the merits of case on the basis of available evidence only. The Hon'ble Apex Court for such observation has referred its earlier judgment of constitution bench in case of **Gurubux Singh** (supra).

8. Admittedly, in the instant matter the appellants / defendants have not produced the copy of plaint in the earlier suit i.e. RCS No.51 of 1972. Therefore, the observation of the learned first appellate court that the appellants / defendants were precluded from raising the theory that Exhibit-50 was filed by them in view of the compromise between themselves and the plaintiffs accepting share in both the wells, was bad in law. The observation of the Hon'ble Apex Court in the aforesaid case that in absence of proof of plaint by the appellants / defendants in the earlier suit appears applicable to the present matter. However, even the said aspect of

Order-II Rule-2 of CPC kept aside, the dispute between the parties has too be decided in the light of evidence on record.

9. For that purpose, second substantial question of law is important, which is as follows :

“Whether the learned first appellate court has erred in granting half share to the original plaintiffs in the newly constructed well despite the same was dug after the partition between the parties?”.

As such, theory of partition is having immense importance in this matter.

10. It is the case of the plaintiffs that plaintiff No.1 joined military service in the year 1941 and when he came to the village in the year 1948 on leave, he found that the old well was short of water and thereafter he alongwith Shankar started digging new well and the said process continued till 1959. On the other hand, the appellants / defendants are claiming that the partition vide mutation entry No. 662 in the year 1964 had actually effected 40 years back orally and the plaintiffs and Shankar had started cultivating their share separately since then. It is significant to note that the plaintiffs have relied upon mutation entry No. 662, which has been certified on 09/01/1964 for their contention of partition in the year 1964.

On going through the said mutation entry, it appears that there was partition between the plaintiffs and Shankar in the year 1964 as per the memorandum of partition. The learned trial court has negatived this theory merely because the plaintiffs could not produce that memorandum of partition which could have been easily obtained from Tahasil Office. However, the said mutation entry is definitely having presumptive value unless it is rebutted by the appellants / defendants with the help of reliable evidence.

11. It is to be noted here that the appellants / defendants had come with the case that the partition between the plaintiffs and Shankar was not effected in the year 1964 but it was effected much before that and it was an oral partition. However, the appellants / defendants did not adduce any evidence of independent witness and therefore, the mutation entry No. 662 at Exhibit-36 having presumptive value, definitely negatives the case of the appellants / defendants about partition between Shankar and plaintiff No.1 much prior to 1964. Therefore, considering the said mutation entry it appears that partition between the parties must have taken place in the year, 1963-1964. Obviously, when it is accepted that partition had taken place between the parties in the year 1963-1964, then the inevitable inference is that the new well was dug

when the families of plaintiff No.1 and Shankar were joint in nature. The appellants / defendants have not seriously disputed or specifically denied the pleading of the plaintiffs that construction of the new well was stated in the year 1947 and it was completed in the year 1959. Therefore, it would definitely mean that the new well was dug and constructed much prior to the partition between the parties. Therefore, specially when the appellants / defendants have failed to establish their theory of partition much prior to the year 1964, then obvious inference comes forward that the new well was dug when the families of Shankar and plaintiff No.1 were joint in nature. Admittedly, there is no documentary evidence on record to show that plaintiffs are having 8 anna share in the new well in the record of rights of the land. But in view of the mutation entry No. 662 in respect of the partition between the parties in the year 1964 it can safely be inferred that new well was constructed with the help of joint family funds as no partition had effected between the parties till then. Therefore, it is evident that plaintiffs have established their claim of 8 anna share in the new well as claimed.

12. It is extremely important to note that the earlier suit i.e. RCS No.51 of 1972 filed by the present appellants / defendants, they had claimed that plaintiffs and deceased Shankar had 3/4th share in

the old well and the new well was exclusively owned by them. However, the certified copy of Roznama Exhibit-35 in the said civil suit indicates that the present appellants / defendants had filed pursis Exhibit-50 requesting to delete issue Nos.3 & 4 in that suit which were in respect of share in the old and new well. The plaintiffs have claimed that the said Exhibit-50 was in fact compromise between themselves and appellants / defendants, whereby their share in both the wells were admitted by the appellants / defendants. Unfortunately, certified copy of that Exhibit-50 is not available as it has been destroyed being the part of 'D' file but it cannot be ignored that the present appellants / defendants had in fact deleted those issue Nos.3 & 4 relating to the shares of the parties in old and new wells. It is significant to note that on going through the judgment of said civil suit i.e. RCS No.51 of 1972 it is evident that the plaintiffs have denied the contention of the appellants / defendants in the said suit that plaintiff were not having any share in the new well as it is exclusively owned by them. As such, deletion of material issue in that suit relating to the shares of the parties in both the wells at the hands of the present appellants / defendants is of immense importance. There is no plausible explanation from the present appellants / defendants in the present subsequent suit as to why they had to relinquish or delete those issues. Even though they succeeded in securing

injunction in their favour in respect of obstructions to the land. Thus, it appears that there is no finding of court in respect of share of the parties in both the wells in the earlier suit. Therefore, this aspect needs to be decided on the basis of evidence in the present suit.

13. Though the appellants / defendants examined certain persons who worked in construction of the new well, but according to the appellants / defendants the work was only of deepening of existing new well. In absence of any reliable evidence from the side of appellants / defendants that there was an oral partition between the parties much prior to 1964, it has to be accepted that the partition between the parties took place for the first time in the year 1963-1964 as per mutation entry No.662. Therefore, on that count also it needs to be held that the new well was also constructed with the funds of joint family of plaintiff No.1 and Shankar. It is important to note that though the learned trial court had set aside the ad-interim injunction granted in favour of the plaintiffs vide order below Exhibit-9 in the present suit but the appellants / defendants had preferred MCA No.118 of 1986 against the said order before the then District Judge, Beed and the said District Judge by setting aside the order of the learned trial court below

Exhibit-9, granted injunction in favour fo the plaintiffs for taking water from the new well. The said situation continued since long and the evidence on record has also tilted in favour of the plaintiffs. Therefore, though the learned first appellate court erroneously considered the aspect of Order-II Rule-2 of CPC in favour of the plaintiffs specifically in absence of proof of plaint which was not filed on record, but considering the other evidence on record the finding of the learned first appellate court holding that the plaintiffs are having half share in the water of new well appears reasonable in the circumstances of the present case. Thus, considering all these aspects, the present second appeal stands dismissed and disposed of accordingly.

(SANDIPKUMAR C. MORE, J.)