



IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 349 OF 1992

Deorao s/o Kesu Aware
Deceased through LRs

- 1-a. Saraswati w/o Deorao Aware
Age : 60 yrs, occ : household
R/o Near Shivaji Statute, Galli
No. 3, Pot No. 93, Pundliknagar,
Garkheda Parisar, Aurangabad
- 1-b. Kishor s/o Deorao Aware
Age : 40 yrs, occ : private service
R/o as above.
- 1-c. Dattu Deorao Aware
Age : 35 yrs, occ : agri.,
R/o Dhondalgaon, Tal. Vaijapur,
District Aurangabad
- 1-d. Ravindra s/o Deorao Aware
Age : 30 yrs, occ : driver
R/o Near Shivaji Statute, Galli
No. 3, Pot No. 93, Pundliknagar,
Garkheda Parisar, Aurangabad

Appellants

Versus

- 1. Suryabhan Laxman Aware
(Died) Through LRs
- 1-a. Dadasaheb s/o Suryabhan Aware
Age : 58 yrs, occ : agri.,
R/o Akhatwada, Tal. Khultabad,
District Aurangabad.
- 1-b. Kaushyabai w/o Narayan Nawale
Age: 72 yrs, occ : agri.,
R/o Bolthan, Tal. Nandgaon,
District Nashik
- 1c. Sushabai w/o Baburao Bargal
Age : 62 yrs, occ : agri.,
R/o Mundwadi, Taluka Kannad,
District Aurangabad.

- 1-d. Tarabai w/o Sahebrao Gaikwad
Age : 60 yrs, occ : agri.,
R/o Belgaon, Taluka Vaijapur,
District Aurangabad
2. Vishwanath s/o Suryabhan Aware
Age : 40 yrs, occ : agri.,
3. Machindra s/o Suryabhan Aware
Age : 34 yrs, occ : agri.,
4. Gorakhnath s/o Suryabhan Aware
Age : 31 yrs, occ : agri.,

All above r/o Dhondalgaon,
Tal. Vaijapur, Dist. Aurangabad.

Respondents

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Mr. K.F. Shingare, Advocate for the appellant/s.
Mr. P.F. Patni, Advocate for the respondents.

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CORAM : SANDIPKUMAR C. MORE, J.

Judgment Reserved on : 11.03.2024

Judgment Pronounced on : 06.05.2024

Judgment :

1. The present Second Appeal is filed by the original plaintiff Deorao Kesu Aware, who has died during pendency of this appeal on 07.07.2005 and is being represented by his legal representatives as mentioned in the title clause. This appeal is directed against the judgment and decree dated 06.01.1992 passed by the learned 3rd Additional District Judge-Aurangabad (hereinafter referred to as “the learned first Appellate Court”) in Regular Civil Appeal No.223/1986 and also against judgment and decree dated 29.03.1986

passed by the learned Civil Judge, Junior Division, Vaijapur (hereinafter referred to as “the learned trial Court) in Regular Civil Suit No. 162/1982. The parties are referred by their original status in the suit for convenience and to avoid ambiguity.

2. The background facts giving rise to the present appeal are as under :

The original appellant/plaintiff filed R.C.S. No.162/1982 against the present respondents/defendants for declaration of his ownership over the land Survey No.488 (present Gut No. 761) to the extent of 16 Acres and also House No.549/2 situated at village Dhondalgaon, Taluka Vaijapur. The claim of the plaintiff is that he was adopted son of Tulsabai, who was wife of one Kesu Lalu. According to the plaintiff, Kesu received the suit properties alongwith other properties in partition. Tulsabai and Kesu was having their natural son who was also named as Deorao, but he died somewhere in the year 1936. Kesu had already died prior to that, in the year 1917. The name of natural son of Tulsabai, after the death of Kesu, was mutated in the record of rights of the suit properties and on his death, the name of Tulsabai was entered in the record of rights. Since Tulsabai was not

having any other issue, she adopted the plaintiff in the year 1953 vide Adoption Deed (Exh.49). Tulsabai died soon after execution of Adoption Deed, and therefore, the plaintiff has claimed that he has become owner of the suit properties. However, according to the plaintiff, his brother Ramrao, with the help of defendant No.1, forcibly dispossessed him from the suit land, and therefore, he was constrained to file the present suit for declaration and also for recovery of possession of the suit land.

3. On the contrary, defendants denied all the adverse allegations made against them. According to them, Tulsabai never adopted the plaintiff in the year 1953. Moreover, the plaintiff even after attaining majority somewhere in the year 1958, did not raise any objection about their cultivation over the suit land till 1976, despite knowing about the alleged title. Thus, the defendants claimed that they have perfected their title over the suit land by way of adverse possession. As such, they prayed for dismissal of the suit.

4. Learned trial Court, after conducting the trial, dismissed the suit of plaintiff by holding that Tulsabai was not absolute owner of the suit properties and after her death, the plaintiff could not establish his title over the suit land and

on the basis of alleged Adoption Deed. On the contrary, the learned trial Court has held that the defendants have established their title over the suit land by way of adverse possession.

5. Plaintiff thereafter filed the aforesaid Regular Civil Appeal before the learned first Appellate Court. The learned first Appellate Court though observed that Tulsabai became absolute owner of the suit property and the plaintiff also established his ownership over the suit land on the basis of Adoption Deed, but dismissed the appeal only on the ground that the defendants established the fact that they acquired title over the suit land at the time of filing the suit by way of adverse possession. Hence, this Second Appeal.

6. Learned Counsel for the appellant/plaintiff submitted that the learned first Appellate Court has rightly held that Tulsabai had become absolute owner of the suit property after death of her natural son Deorao. Moreover, it is also properly held by the learned first Appellate Court that the plaintiff being adoptive son of Tulsabai, had established his title over the suit property on the basis of Adoption Deed. However, it is submitted by the learned Counsel for the appellant that the learned first Appellate Court definitely

erred in holding that the defendants became owner of the suit property by way of adverse possession. Learned Counsel for the appellant relied on the judgment in the case of ***Shripad Gajanan Suthankar vs Dattaram Kashinath Suthankar and others*** reported in ***AIR 1974 SC 878***.

7. On the other hand, learned Counsel for the respondents strongly opposed the submissions made on behalf of the plaintiff/appellant. According to him, the learned trial Court has properly appreciated the evidence on record, but the learned first Appellate Court wrongly relied on the mutation entry to hold that Tulsabai had become absolute owner of the suit property. He also pointed out that Adoption Deed was suspicious and the suit land was fraudulently inserted in the said Deed to show that Tulsabai was owner of the same. He pointed out various documents on record to show that even the name of natural father Trimbak of the plaintiff was recorded in the record of rights of the suit land and there was valid partition between himself and brother Suryabhan and accordingly they had become owner of the same. According to learned Counsel for the respondents, entries in revenue record cannot establish any title. As such, he prayed for dismissal of the appeal. He also relied on the

judgments in the cases of *State of H.P. vs Keshav Ram and others* reported in *AIR 1997 SC 2181* and *Prabhakar Gones Prabhu Navelkar vs Saradchandra Suria Prabhu Navelkar* reported in *(2020) 20 SCC 465*.

8. Heard rival submissions and also perused documents on record alongwith the impugned judgments and record and proceedings.

9. It is significant to note that before hearing the appeal, substantial questions of law were formulated by this Court on 12 February 2024, which are as follows :

- (i) Whether Tulsabai had become owner of the suit property?
- (ii) Whether interpretation of Adoption Deed is properly made?

10. It is to be noted here that the defendants in their written statement had claimed that no such Adoption Deed which is at Exh. 49, was executed by Tulsabai. However, during the course of argument, such execution was not seriously disputed. On the contrary, defendants came with the case that even though it is held that the plaintiff had become adoptive son of Tulsabai, but whether he had established his ownership over the suit land being adoptive son of Tulsabai who claimed her ownership only on the basis

of mutation entry in revenue record. Therefore, even though there is certain observation of the learned trial Court about manipulation in the said Adoption Deed (Exh.49) in respect of insertion of suit land by scoring certain portion, but it is to be seen as to whether the plaintiff has succeeded in showing that Tulsabai had in fact become absolute owner of the suit property. If it is proved by the plaintiff, then only he will establish the right over suit property being an adoptive son of Tulsabai. As such, the main substantial question of law which appears to be involved in this appeal is, whether Tulsabai had acquired absolute ownership over the suit property. For that purpose the evidence on record needs to be scrutinized.

11. It is the case of plaintiff that one Lalu was the original ancestor and having four sons namely Laxman, Kesu, Patilba and Gopaji. Laxman had two sons namely Trimbak and Suryabhan i.e. defendant No.1 and defendant Nos.2 to 4 are sons of defendant No.1. Plaintiff has claimed that suit land having total area of 20 Acres was allotted to Kesu in partition, whereas Laxman got Survey No.71 at Nalegaon alongwith other lands in the same partition. Kesu was having wife Tulsabai and son Deorao. After death of Kesu somewhere

in the year 1917, the suit land devolved upon Tulsabai and Deorao and after death of Deorao in the year 1936, the suit land devolved upon Tulsabai being widow of Kesu and as such she became absolute owner of the suit property and as she was not having any other issue, she adopted plaintiff by virtue of Adoption Deed (Exh.49) and accordingly plaintiff became owner of the suit land.

12. It is significant to note that the plaintiff has not examined any independent witness in respect of the alleged partition among the sons of Lalu. There is only documentary evidence on record. Even though there are so many documents on record, but to establish his ownership, the plaintiff has to prove theory of partition among the sons of Lalu and allotment of suit land to the share of Kesu. It is significant to note that the claim of plaintiff is only based on mutation entries in the record of right of the suit land. However, the Hon'ble Apex Court in the case of State of Haryana vs Deshav Ram (supra) has clearly opined that entry in revenue record cannot form basis for declaration of title. Thereafter this Court as well as the Hon'ble Apex Court in number of judgments have observed that the entry in revenue record cannot establish title of the party. Learned Counsel for

the appellant/plaintiff has vehemently argued that the learned first Appellate Court has held Tulsabai as absolute owner of the suit property on the basis of entry in the revenue record, and therefore, the plaintiff being adoptive son of Tulsabai, has clearly established his title. In view of the same, let us consider the documents on record.

13. Exh. 35 is the certified copy of Assal Shetwar (असल शेतवार) and on perusal of the same, it is evident that in the year 1917 the suit land stood in the name of Deorao Kesu who must be the natural son of Kesu. There is no record available prior to the said entry in respect of the title of Kesu. It is significant to note that from the said entry it cannot be ascertained whether Deorao was possessing the suit land absolutely or as a co-parcener, because the plaintiff has not brought any document on record in support of partition among all four sons of Lalu and subsequent allotment of the suit land to Kesu. Therefore, in the light of the observation of Hon'ble Apex Court in the case of ***State of Haryana vs Keshav Ram*** (supra), the entry at Exh. 35 in the name of Deorao Kesu in respect of the suit land cannot conclusively establish absolute ownership of Deorao. Same is the case with the name of Tulsabai appearing in the document at Exh. 36

which is certified copy of Khasra Pahani for the year 1954-55. Admittedly, from the aforesaid document, it appears that the name of Tulsabai Kesu was entered into the record of rights of suit land for the year 1954-55 or even prior to it, but the subsequent document at Exh. 37 which is certified copy of Pahani Patrak of the suit land for the year 1955-56 to 1958-59 indicates the name of Trimbak Laxman i.e. the natural father of plaintiff. Moreover, it is also mentioned therein that there was partition between natural father Trimbak of the plaintiff and the other son of Laxman i.e. present defendant No.1 and according to the said partition, only 4 H. 5 Gunthas land was given to the share of Trimbak Laxman and rest of the land having area of 16 Acres 10 Gunthas, which is obviously the present suit land, is given to defendant No.1. Therefore, though the names of Deorao Kesu and Tulsabai were recorded by virtue of certain entries in documents at Exhs. 35 and 36, but document at Exh. 37 is also there on record showing the names of natural father of plaintiff and defendant No.1 in respect of the suit property. As such, if the entry by which name of Tulsabai has been mutated in record of rights of the suit land is to be believed, then the subsequent entry of the names of natural father of plaintiff and defendant No.1 also has to be considered for proving their

title over the said land.

14. It is already settled that the mutation entries in the revenue record do not confer any title to the persons whose names are appearing therein. Under such circumstances, it was for the plaintiff to prove by cogent evidence as to what was the holdings of main ancestor Lalu and how he distributed the ancestral lands held by him among his four sons namely Kesu, Gopaji, Patilba and Laxman. Unless that is done, it cannot be said that the plaintiff has established his title even being an adoptive son of Tulsabai over the suit land merely on the basis of entry of Tulsabai's name in record of rights of the suit land. Thus, it appears that the learned first Appellate Court has definitely erred in believing Exh. 36 being a document of proof of title of Tulsabai over the suit land.

15. Therefore, the substantial question of law, whether Tulsabai had become owner of the suit land, does not survive. On the contrary, it can be said that the plaintiff has failed to establish his title over the suit land even Adoption Deed (Exh.49) is accepted as it is.

16. Further, there are ample documents on record to

show that the suit land was being cultivated by natural father of plaintiff and the defendants subsequently as per their arrangement. It is not in dispute that the plaintiff purchased the part of suit land to the extent of 4 Acres 5 Gunthas from the remaining legal representatives of his natural father Trimbak Laxman. It is extremely important to note that when the plaintiff has claimed that he is also entitled for remaining part of the suit land which is now being cultivated by the defendants, then why he did not raise any objection at the time of acquiring the portion of suit land which appears to be allotted to his natural father as per document Exh. 37. As such, there is no iota of evidence to show that Kesu had acquired the suit land entirely in the partition with his three other brothers. Thus, the Adoption deed in favour of plaintiff is also not sufficient to establish his ownership over the suit land. As such, the substantial question of law in that respect also does not survive.

17. Learned Counsel for the respondents/defendants heavily relied on the judgment of the Hon'ble Apex Court in the case of *Prabhakar vs Saradchandra* (supra) and submitted that the finding in respect of ownership of Tulsabai as well as plaintiff over the suit land recorded by the learned

first Appellate Court on the basis of documents at Exhs.36 and 49 namely the entry for the year 1954-55 and Adoption Deed, needs to be declared perverse without there being any cross objection. On perusal of the aforesaid judgment, it appears that the Hon'ble Apex Court has observed that the cross-objection need not to be filed when respondent does not want any alteration in ultimate result of dismissal of suit. He even without filing appeal against any part of decree can challenge only a finding relating to the title to the suit property recorded against him and for that no filing of Cross-objection or appeal is necessary. In this matter also, it is already observed in the earlier part that the learned first Appellate Court has definitely erred in relying upon the entry in revenue record for establishing the title of Tulsabai over the suit land. Further, if title of Tulsabai is not proved, then the title of plaintiff acquiring through Adoption Deed executed by Tulsabai is also to be held as not proved. Therefore, the finding of the learned first Appellate Court to that effect under Point Nos.1 and 2 needs to be set aside. As such, the present Second Appeal stands dismissed by dismissing the original suit in its entirety.

(SANDIPKUMAR C. MORE, J.)