

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 678 OF 2022

Asaram Pandu Gayake (Deceased)
Through legal representatives
Prayagbai wd/o Asaram Gayake
& others

Appellants

Versus

Narmadabai Janardhan Jadhav

Respondent

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Mr. P.F. Patni, Advocate for the appellants.
Mr. M.M. Parghane, Advocate for the respondent.

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CORAM : SANDIPKUMAR C. MORE, J.

Dated : 24 January 2024.

Order :

1. Heard rival submissions on admission of this second appeal.

2. The present appeal is filed by the original defendants/respondents challenging the judgment and orders of both the Courts below. The present respondents i.e. the original plaintiff had filed suit for partition and separate possession of her share in the suit property mentioned in the plaint itself, situated at Sultanpur, Taluka Khultabad, District Aurangabad. The learned trial Court i.e. the Civil Judge (Junior Division), Khultabad decreed the said suit i.e. R.C.S.

No. 94/2009 on 21.12.2016 and thereby observed that the present respondent and the appellants are having one-eighth share each in the suit property. Feeling aggrieved with the said judgment and decree, the present appellants filed appeal before the first appellate Court i.e. the learned District Judge-7, Aurangabad bearing R.C.A. No. 22/2017. However, the learned first appellate Court, under judgment and decree dated 30.09.2021, has dismissed the appeal by upholding the decree passed by the learned trial Court. Thus, the present second appeal is filed on the concurrent finding of both the Courts below.

3. Learned Counsel for the appellants vehemently argued that present appeal involves substantial questions of law such as, the plaintiff/respondent had given admission that certain portion of suit land was acquired for Khultabad-Phulambri road and certain portion was acquired for percolation tank, but despite the same both the Courts below ignored the said admission and decreed the suit by holding that the entire portion of suit land was available for partition. He also pointed out that due to such admission, it was already brought on record that there was no availability of entire suit land for partition, but still both the Courts below

directed partition of the entire property.

4. On the contrary, learned Counsel for the respondent/plaintiff submits that there is no substantial question of law involved in the present appeal as the effect of such admission of the respondent/plaintiff in her cross-examination has been washed out by the cogent and reliable documentary evidence on record which was adduced by the present appellants only. According to him, it was already established in both the Courts below that the suit land was not acquired as admitted by the present respondent/plaintiff, on the basis of documentary evidence. He also pointed out that the present appellants could not even establish the said fact by adducing trustworthy evidence. On the contrary, their own evidence has established as to how the so called admission by the respondent/plaintiff is false.

5. Admittedly, the present respondent/plaintiff had given admission in her cross-examination that around 1 Acre land was acquired for Khultabad-Phulambri road from the suit premises and 2 ½ to 3 Acres land from the suit premises was acquired for percolation tank. However, though such admission is there, but 7/12 extracts of the suit property filed by the present appellants itself did not indicate any such

acquisition and the area of suit land was shown 3 H 61 R only without any acquisition. Further, the learned first appellate Court has also observed on the basis of oral and documentary evidence that the entire area of the suit premises i.e. 3 H 61 R remained intact without there being any proof of any acquisition, as admitted by the respondent / plaintiff. Moreover, the present appellants had also not taken any averment to such effect in their written statement. They never pleaded anything about non-existence of certain part of the suit property available for partition in their written statement. They also did not examine any Revenue Officer or concerned officer from Land Acquisition Department to establish the fact that the admissions given by the respondent/plaintiff had come in existence and the acquired portion was deducted from the entire suit land. The present appellants had in fact produced on record 7/12 extract at Exh.66 for the year 2002, 2003 and 2004-2005 which indicated that there was no entry in the same as regards the alleged acquisition.

6. It is settled that in civil proceedings no oral evidence contrary to the documents is permissible. Therefore, there cannot be any effect of such admission on

the part of respondent/plaintiff while deciding the shares of the parties. Learned Counsel for the appellants did not dispute the shares of the parties, and therefore, no substantial question of law is involved in this matter since availability of entire suit property for partition is established on the basis of documentary evidence. In view of the same, the second appeal stands dismissed at the admission stage.

(SANDIPKUMAR C. MORE, J.)