



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

**SECOND APPEAL NO.588 OF 2023
WITH
CIVIL APPLICATION NO.10709 OF 2024
IN
SECOND APPEAL NO.588 OF 2023**

1. Baburao s/o. Bapurao Kakde,
Age 72 yrs., Occupation: Agriculture,
2. Sarojabai w/o. Baburao Kakde,
Age 61 yrs., Occupation: Household,
3. Rajkumar s/o. Baburao Kakade,
Age 38 yrs., Occupation: Service,
4. Sanjeev s/o. Baburao Kakade,
Age 36 yrs., Occupation: Agriculture,
5. Keshav s/o. Baburao Kakade,
Age 34 yrs., Occupation: Agriculture,

All appellants above residing at : Yewari,
Tq. Jalkot, Dist. Latur.

..Appellants
(Original defendants)

Versus

1. Balaji s/o Bapurao Kakde,
Age : 63 yrs., Occupation : Agriculture,
2. Dilip s/o Bapurao Kakde,
Age : 62 yrs., Occupation : Agriculture,
3. Vijaykumar s/o Bapurao Kakde,
Age : 56 yrs., Occupation: Teacher,

All respondent above residing at: Yewari,
Taluka : Jalkot, District: Latur.

..Respondents
(Original Plaintiffs)

...
Mr. Hemant Surve, Advocate for the Appellants.
...

CORAM : S. G. CHAPALGAONKAR, J.

DATE : 11th NOVEMBER, 2024.

ORDER:-

1. The appellants/original defendants take exception to the judgment and decree dated 09.12.2016 passed by the 3rd Joint Civil Judge, Junior Division, Udgir in Regular Civil Suit No.166/2010, which has been confirmed by Ad-hoc District Judge-1, Udgir in Regular Civil Appeal No.04/2017 vide order dated 03.05.2023, under Section 100 of the Code of Civil Procedure. (Hereinafter, parties are referred as per their original status for the purpose of convenience and brevity).

2. The respondents/original plaintiffs instituted Regular Civil Suit seeking declaration of ownership and perpetual injunction in respect of agriculture land bearing survey no.108 admeasuring 5H 88R situated at village Yewari, Tq. Jalkot, Dist. Latur.

3. It is the case of plaintiffs that suit land was exclusively owned and possessed by their father Bapurao, particularly in terms of partition of ancestral property effected by him in the year 1975. After allotment of shares to plaintiffs and defendant no.1, Bapurao had retained suit property for himself as per partition. The relation between deceased Bapurao and defendant no.1-Baburao were strained. Bapurao had instituted Civil Suit against defendant no.1 seeking decree of perpetual injunction in respect of

suit property. Even Bapurao was required to file criminal proceeding against defendant no.1. Bapurao during his lifetime executed registered will and bequeathed suit property in favour of plaintiffs. Bapurao expired on 27.09.2005 and after his demise, plaintiffs acquired title. The defendants are not at all concerned with the suit property. However, on 20.06.2010 the defendants denied ownership of plaintiffs and obstructed their cultivation, which is cause of action for filing suit.

4. The defendants refuted pleadings in the suit contending that during partition in the year 1975, Bapurao had allotted exclusive shares to plaintiff nos.1 to 3 and defendant no.1 however retained suit land for his maintenance. Therefore, suit property was never subjected to partition. Upon death of Bapurao, there was partition of suit land between plaintiffs and defendant no.1 in presence of panchas, which was reduced in writing on stamp paper of Rs.100/-. The defendant no.1 was put in exclusive possession of his share in terms of partition dated 23.05.2006.

5. The Trial Court framed issues, recorded evidence of parties and concluded that Bapurao was exclusive owner of the suit land and same has been bequeathed by him in favour of plaintiffs under registered will. The Trial Court recorded negative findings as regards to defendants claim as to partition dated 23.05.2006.

Consequently, decreed the suit of the plaintiffs. The Appeal filed by defendants is dismissed by District Judge-1 at Udgir vide impugned order dated 03.05.2023.

6. Mr. Hemant Surve, learned Advocate appearing for the appellants vehemently submits that although Bapurao partitioned ancestral property in the year 1975 and allotted independent shares to his sons i.e. plaintiff nos.1 to 3 and defendant no.1, he retained suit property for his maintenance. It was never subjected to partition. The suit property never lost its status as ancestral property. Therefore, Bapurao had no exclusive domain over the same and he could not have legally bequeathed the same in favour of plaintiffs by way of will. In support of his contentions he placed reliance on the judgments of the Supreme Court of India in cases of ***Shyam Narayan Prasad Vs. Krishna Prasad and Ors.***¹ and ***C. N. Arunachala Mudaliar Vs. C. A. Muruganatha Mudaliar and another***².

7. Having considered submissions advanced and upon perusal of concurrent judgments delivered by Trial and First Appellate Court, it can be gathered that there is no dispute that in the year 1975 Bapurao had partitioned ancestral property amongst his sons. Admittedly, after allotment of individual share to his sons, suit

¹ (2018) 7 SCC 646.

² (1953) AIR (SC) 495.

land was retained by him and exclusively enjoyed during his lifetime. The long standing revenue entry depicts exclusive enjoyment of property by Bapurao during his lifetime. The Trial Court on appreciation of evidence arrived at finding of fact that defendant no.1 could not prove his case that Bapurao retained property only for maintenance purpose and there was no allotment of share in his favour during partition of the year 1975. The Trial Court recorded positive findings based on admission given by DW-1-Baburao coupled with long standing entries in revenue record depicting that suit land was allotted to his share and he exclusively enjoyed the same during his lifetime. The aforesaid finding of fact is affirmed by First Appellant Court. Both the Courts have concurrently recorded findings that Bapurao was competent to bequeath suit property by way of will, execution of which cannot be disputed.

8. Although Mr. Surve, learned Advocate endeavours to contend that suit property was retained by Bapurao as ancestral property for his maintenance, there is no evidence to support such contention. Mr. Surve further endeavours to contend that even assuming that Bapurao enjoyed his share after partition of 1975, status of the property would remain as ancestral property. However his contentions cannot be countenanced for simple reason that in the year 1975 Bapurao partitioned ancestral property and

allotted exclusive shares to his sons while retaining part of it for himself. Once there is partition and severance of coparcenary property, Bapurao has acquired absolute title and share retained by him during partition has lost status of ancestral property.

9. It is trite that property falling to share of single catercorner on partition would be treated as his separate property and he would be competent to alienate / deal with it as per his wish. His sons who had already received individual shares in ancestral property during partition could not claim further right in the exclusive share allotted to Bapurao, as a result such partition. The reference can be made to observations of Supreme court in case of ***Rohit Chauhan Vs Surinder Singh and Others***³. Similarly in Case of ***M. Yogendra Vs. Leelamma N.***⁴ the Supreme Court of India observed thus:

“29. It is now well-settled in view of several decisions of this Court that the property in the hands of sole coparcener allotted to him in partition shall be his separate property for the same shall revive only when a son is born to him. It is one thing to say that the property remains a coparcenary property but it is another thing to say that it revives. The distinction between the two is absolutely clear and unambiguous. In the case of former any sale or alienation which has been done by the sole survivor coparcener shall be valid whereas in the case of a coparcener any alienation made by the karta would be valid.”

10. Reliance of Mr. Surve on the judgments in cases of ***C. N. Arunachala Mudaliar*** and ***Shyam Narayan Prasad*** (supra) is

³ (2013) 9 SCC 419.

⁴ (2009) 15 SCC 184.

misplaced. In case of ***C. N. Arunachala Mudaliar*** (supra) the Supreme Court of India concluded that father who has acquired ancestral property is not competent to sale immovable property without consent of his sons and sons would have equal right with his father. Such observations would apply as long as coparcenary exists. However, in present case admittedly Bapurao has partitioned ancestral property and allotted exclusive shares to his sons while retaining his own share. As such, there was severance of joint family and no coparcenary was in existence after partition of 1975. Similarly, in case of ***Shyam Narayan Prasad*** (supra) the Supreme Court of India observed in paragraph no.12 as under:

“12. It is settled that the property inherited by a male Hindu from his father, father’s father or father’s father’s father is an ancestral property. The essential feature of ancestral property, according to Mitakshara Law, is that the sons, grandsons, and great grandsons of the person who inherits it, acquire an interest and the rights attached to such property at the moment of their birth. The share which a coparcener obtains on partition of ancestral property is ancestral property as regards his male issue. After partition, the property in the hands of the son will continue to be the ancestral property and the natural or adopted son of that son will take interest in it and is entitled to it by survivorship.”

11. The case in hand pertains to partition implemented by father thereby allotting individual shares to sons while retaining his exclusive share hence aforesaid observations has no application in facts of the case. In my view, share which

fallen to his exclusive occupation and ownership will loose status of ancestral property.

12. In that view of the matter, no substantial question of law is made out in this Second Appeal. Hence, same is dismissed in limine.

13. In view of dismissal of Second Appeal, present Civil Application does not survive and stands disposed of.

(S. G. CHAPALGAONKAR)
JUDGE

Devendra/November-2024