



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

SECOND APPEAL NO.303 OF 2024

Baburao r/o Bapurao Kakde,
Age : 72 yrs., Occupation : Agriculture,
residing at: Yewari, Taluka: Jalkot,
District: Latur.

..Appellant
(Original Plaintiff)

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,
4. Jamubai w/oGangaram Wakade,
Age : 64 yrs., Occ : Agriculture & Household,

Respondent nos.1 to 4 above
residing at: Yewari, Taluka : Jalkot,
District: Latur.

5. Mirabai w/o Laxman Gound,
Age : 61 yrs., Occ : Agriculture & Household,
Residing at Hasarni, Taluka: Ahmadpur,
District: Latur
6. Sushilabai w/o Digambar Pawar,
Age : 56 yrs., Occ : Agriculture&
Residing at Jirga, Taluka : Jalkot,
District: Latur
7. Nandabai w/o Bhujangrao Garad,
Age : 50 yrs., Occ : Agriculture & Household,
Residing at Warkhed, Taluka: Palam,
District: Parbhani.

..Respondents
(Original Defendants)

...
Mr. Hemant Surve, Advocate for the Appellant.
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CORAM : S. G. CHAPALGAONKAR, J.
DATE : 11th NOVEMBER, 2024.

ORDER:-

1. The appellant/original plaintiff takes 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.75/2010, as well as judgment and decree dated 03.05.2323 passed Ad-hoc District Judge-1, Udgir in Regular Civil Appeal No.05/2017 in this second appeal filed 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 Plaintiff / appellant had instituted Regular Civil Suit No.75/2010 in the Court of Civil Judge, Junior Division at Udgir claiming relief of declaration of ownership and perpetual injunction in respect of land bearing survey no.108 admeasuring 5H 88R situated at village Yewari, Tq. Jalkot, Dist. Latur against defendants i.e. his real brothers and sisters.

3. It is a case of plaintiff that his father Bapurao partitioned ancestral property amongst plaintiff and defendant nos.1 to 3 and retained part of property for his own maintenance. After partition, plaintiff and defendant nos.1 to 3 were put into possession of their respective shares. However, Bapurao had retained land

admeasuring 5H 62R for his maintenance. Bapurao expired on 27.09.2005, thereafter, land retained by Bapurao was partitioned between plaintiff and defendant nos.1 to 3 with consent of defendant nos.4 to 7. The said partition was reduced into writing on stamp paper of Rs.100/-. The plaintiff was put into possession of his share since the date of partition. However, on 07.03.2010 defendant nos.1 to 3 entered the land and obstructed his possession under pretext that Bapurao bequeathed said property in their favour under Will. Hence, cause of action arose to file suit claiming relief of declaration of ownership and perpetual injunction.

4. The plaintiff's claim was refuted by defendants contending that Bapurao executed registered will and bequeathed suit land in their favour. Bapurao was exclusive owner of the suit land and competent to dispose same. The plaintiff raised his claim based on forged partition deed. They denied respective signatures thereon and prayed for dismissal of suit. The defendant nos.4 to 7, however, admitted claim of the plaintiff.

5. The Trial Court framed the issues and recorded evidence of parties and concluded that Bapurao was exclusive owner of land admeasuring 5H 88R out of survey no.108 and he bequeathed same in favour of defendant nos.1 to 3. Consequently, dismissed the suit. The plaintiff assailed judgment and decree of

the Trial Court before the District Court at Udgir vide Regular Civil Appeal No.05/2017. However, District Court pleased to dismissed the Appeal confirmed the judgment and decree of the Trial Court for similar reasons.

6. Mr. Hemant Surve, learned Advocate appearing for the appellant vehemently submits that although Bapurao had effected partition of ancestral property and allotted shares in the names of his sons, he had retained land admeasuring 5H 62R for his maintenance. Therefore, that much of the land was continued to be coparcenary property. He was not exclusive owner eventually, he had no right to bequeath the same. Therefore, the will dated 30.09.2002 executed by Bapurao would not confer any right in favour of defendants. In support of his contentions he placed his 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 after going through the impugned judgments, it can be gathered that there was no dispute that during lifetime of Bapurao he partitioned ancestral property and allotted respective shares to his sons

¹ (2018) 7 SCC 646.

² (1953) AIR (SC) 495.

including plaintiff. He retained portion of land admeasuring 5H 62R for himself. The revenue record transpires that after partition of coparcenary property Bapurao and his sons were individually enjoying respective portions of the land. The only issue that was raised for consideration of court was as to whether Bapurao was allotted land admeasuring 5H 62R towards his separate share during partition or it was retained by him as undivided coparcenary property for his maintenance as contended by plaintiff.

8. The Trial Court on evaluation of the oral and documentary evidence, concluded that Bapurao acquired exclusive ownership of the land admeasuring 5H 88R in pursuance of allotment of share during partition and he had every right to bequeath it by way of will. In support of such conclusion, Trial Court relied upon admissions of PW-1 i.e. Baburao. Further, fact that Bapurao had instituted suit for perpetual injunction against plaintiff asserting his individual right so also entries in the 7/12 extract, depicting severance of the joint family property and exclusive enjoyment. The plaintiff has also admitted about execution of will dated 30.09.2002 by his father Bapurao, thereby bequeathing entire property in favour of defendant nos.1 to 3. The Appellate Court on re-appreciation of the evidence, endorsed finding of fact recorded by Trial Court and concluded that Bapurao had acquired exclusive ownership of suit property after partition between himself and his

sons in the year 1975 and suit land was allotted to the share of Bapurao. The Trial Court has specifically observed that plaintiff could not bring any evidence on record in support of his contention that suit land was not allotted to share of Bapuraos but it was retained by him for his maintenance as undivided share. Pertinently, there is no dispute about partition of the property by Bapurao during his lifetime and the fact that Bapurao enjoyed share of the land to the extent of 5H 62R during his lifetime. In that view of the matter, no fault can be found in conclusion recorded by both the fact finding Courts.

9. Although Mr. Surve, learned Advocate endeavours to contend that land retained by Bapurao would continue status of coparcenary property or Bapurao was not competent to bequeath the same to defendant nos.1 to 3, it is difficult to countenance with his submissions. Once Bapurao had partitioned ancestral property amongst his sons and retained his share, he would be entitled to dispose of or bequeath the same as exclusive owner. It is trite that property falling to share of single coparcener 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 any 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 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. In present case, there is no dispute that Bapurao had partitioned ancestral property while retaining his share and enjoyed the same during his lifetime. In that view of the matter, particularly taking into account fact that Bapurao had executed registered will in favour of defendant nos.1 to 3, thereby bequeathing his share of the property and fact that defendant nos.1 to 3 have already secured probate certificate from competent Court, plaintiff cannot have any right to claim partition. The Trial Court as well as Appellate Court have concurrently held that plaintiffs claim regarding further partition of the property between himself and defendant nos.1 to 3 with consent of defendant nos.4 to 7 could not be established.

³ (2013) 9 SCC 419.

⁴ (2009) 15 SCC 184.

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

(S. G. CHAPALGAONKAR)
JUDGE

Devendra/November-2024