



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

SECOND APPEAL NO. 497 OF 2016

Jagannath Laxman Saykhede (Dead),
through Legal heirs :

- 1) Bhaskar Jagannath Saykhede,
aged about 80 years, Occ. : Retired,
- 2) Ramesh Jagannath Saykhede,
aged about 78 years, Occ. : Retired,
- 3) Meera Jagannath Saykhede (**Dead**),
through legal heirs :
- 3(1) Deepak S/o Sadanand Devgirkar,
- 3(2) Kiran S/o Sadanand Devgirkar,
- 3(3) Subhada D/o Sadanand Devgirkar,
- 3(4) Nivedita D/o Sadanand Devgirkar,
At present all R/o. Shriram Nagar,
Bhadrawati, Dist. Chandrapur.
- 4) Baby Jagannath Saykhede,
aged about 70 years, Occ. : Household,

Appellant Nos.1, 2 and 4
R/o. Gandhi Ward No.2, Hinganghat,
Tah. Hinganghat, Dist. Wardha.

.... **APPELLANTS**

// VERSUS //

Mangilal Jorawarmal Munot (**Dead**),
through legal heirs :

- 1) Mahendra Mangilal Munot,
aged about 50 years, Occ. : Business,

- 2) Rajendra Mangilal Munot,
aged about 37 years, Occ. : Business,

Both R/o. Gandhi Ward, Hinganghat,
Tah. Hinganghat, Dist. Wardha.
- 3) Narendra Jagannath Saykhede (**Dead**),
through legal representatives :
 - 3(1) Nanda Wd/o Narendra Saykhede,
aged about 58 years, Occ. : Housewife,
 - 3(2) Milind S/o Narendra Saykhede,
aged about 32 years, Occ. : Labour,
 - 3(3) Anuja D/o Narendra Saykhede,
aged about 30 years, Occ. : Nil.

All R/o. Plot No.20, Sai Nagar,
Hingna Road, Nagpur.
- 4) Suresh Jagannath Saykhede,
aged about 60 years, Occ. : Service,
R/o. Plot No.20, Sai Nagar,
Hingna Road, Nagpur.
- 5) Shree Siddheshwar Ganpati
Devasthan Trust, through President
Shri Sunil Bhaskar Saikhede,
(Shree Siddheshwar Ganpati
Devasthan Trust, Hinganghat)
(Temple situated at Gandhi Ward,
Hinganghat) i.e. on suit property.

.... **RESPONDENTS**

Ku. Sulbha B. Saikhede, Advocate for Appellants.
Mr. Sudhir Dhurve, Advocate for Respondent Nos.1 and 2.
Mr. Tanveer Ansari, Advocate for Respondent Nos.3(1) to 3(3).
Mrs. Varsha Warade, Advocate h/f. Mr. S. D. Chande, Advocate
for intervenor/Respondent No.5.

CORAM : SANJAY A. DESHMUKH, J.

DATE : 09th AUGUST, 2024.

ORAL JUDGMENT.

1. This appeal is preferred against the Judgment and decree passed by the District Judge-1, Wardha in Regular Civil Appeal No.56 of 2011, dated 28.07.2016, which was preferred against the Judgment and decree passed by Joint Civil Judge, Junior Division, Hinganghat in Regular Civil Suit No.42 of 1984 dated 07.03.2009. The respondent No.5 is added in this appeal as per order passed by this Court in Misc. Civil application No.882/2023. He is President/Trustee of the temple of God Siddheshwar, which is in existence in the suit property.

2. Brief facts of the plaintiff's case are as under :

(i) The property bearing No.407, Nazul Block No.9, admeasuring 1251 sq.ft. out of it half share, situated in Gandhi Ward No.2, Hinganghat, District Wardha is subject matter of suit. The plaintiff purchased the suit property by sale-deed on 13.10.1980 from the wife and daughters of late Gangadhar Laxman Saykhede who was brother of defendant Jagannath Laxman Saykhede.

(ii) The plaintiff contended that after the sale-deed he took possession of his half share in the suit property. His name was

recorded in the Record of Rights of suit property as per sale-deed of suit property.

(iii) The defendants encroached upon the suit property. The measurement of suit property was carried on 12.08.1997 and it was revealed that the defendants committed encroachment of 100.6 sq.mtr. i.e. 1082.85 sq.ft. in the suit property. Therefore, the plaintiff prayed for possession of that encroached area from the defendants and also claimed damages for its illegal occupation.

(iv) The defendants come with the defence that suit property is not partitioned. The sale-deed is not legal and valid. The possession of the defendants over the suit property cannot be disturbed. The suit for partition of suit property is not filed by the plaintiff. The suit is not maintainable. It is prayed to dismiss the suit.

(v) The learned trial Court partly decreed the suit and directed the defendants to hand over the possession of the encroached area of 1087.85 sq.ft. out of suit property to the plaintiff as per measurement Map. The defendants preferred first appeal bearing R.C.A. No.56 of 2011. It was dismissed. The first appellate Court held that the map is not proved. However, it directed to hand over possession of entire suit property as per sale-deed the length and

width and boundaries for effective execution of decree. Thus, the defendants were directed to vacate and deliver the possession of the **entire suit property** to the plaintiff.

3. While admitting the appeal, this Court by order dated 03rd July, 2017 formed the following substantial questions of law :

(1) *Whether the finding recorded with regard to partition between Gangadhar and Jagannath being proved is based on proper appreciation of the evidence on record?*

(2) *The appellate Court having found the measurement map at Exh.135 not to be duly proved, whether the decree of the trial Court could have been modified directing possession of the suit property as described in the sale-deed at Exh.87?*

4. The learned Advocate Ku. Sulbha B. Saikhede for the appellants submitted that the suit property is not partitioned between the defendant Jagannath and his brother late Gangadhar. The plaintiff further contended that the Cadastral Surveyor, who draw up the map of the suit property, is not examined. A temple of God Siddeshwar, situated in the suit property is deliberately not shown in the Map. It is prayed to allow the appeal and set aside the judgments

and decrees of both the Courts. The learned Advocate for the appellants is relying upon the following authorities :

- (i) ***Balwani Singh & Anr., Vs. Daulat Singh (Dead) By LRs. & Ors.***, reported in ***1997 (7) SCC 137***, in which it is held that mutation of a property in the revenue record does not create or extinguish title nor has it any presumptive value.
- (ii) ***P. Kishore Kumar Vs. Vittal K. Patkar***, reported in ***2023 LiveLaw (SC) 999***, in which it is held that vender cannot transfer a title better than he himself has on the principle “NEMO DAT QUOD NON HABET” that “No one can confer a better title than what he himself has”.

5. The learned Advocate Mr. Sudhir Dhurve for the respondent Nos.1 and 2 submitted that there is concurrent findings of both the Courts in favour of the plaintiff. The sale-deed executed by wife and daughter of brother of defendant is not challenged and not cancelled by the competent Court. No such declaration is prayed by the defendants. The encroachment is proved as per the Map Exhibit-135. The partition of suit property has taken place between the defendant Jagannath and his brother late Gangadhar. He pointed out the documents filed by the plaintiff particularly the Revenue

Record at Exhibit Nos.86, 90 and 101 i.e. nazul maintenance of Khasara. These documents show that the name of plaintiff is mutated as per the sale-deed of the suit property. He also pointed out the admissions of the witnesses and the sale-deed of the suit property at Exhibit-87. He submitted that the plaintiff is absolute owner of the suit property. He continued to pay the taxes of the suit property to Municipal Council, Hinganghat. He pointed out the tax receipts at Exhibit Nos.92 and 95. He further submitted that the plaintiff succeeded in proving his case. The defendants have no such right, title and interest in the suit property. It is lastly prayed to dismiss the appeal.

6. Learned Advocate Mrs. Varsha Warade holding for Mr. S.D. Chande, learned Advocate for the intervenor respondent No.5 supported the case of the defendants and submitted that the temple of God Siddheshwar is in existence in the suit property. The property of trust of God cannot be sold out. She is relying upon the authority of *Sri Ganpathi Dev Temple Trust Vs. Balkrishna Bhat (Dead) through LRs.*, reported in *(2019) 9 SCC 495*, in which it is held that, “Religious and charitable Endowment and trust Archaka or Pujan. Archaka is obliged to protect property of temple as guardian of deity

who is deemed in law to be a minor and initiate proceedings in that regard when required.

7. Perused the judgment of the trial Court, first appellate Court and record and proceedings.

8. The admitted facts are that Jagannath and Gangadhar are the brothers. Gangadhar died and his wife and daughters sold out their half share i.e. suit property to the plaintiff. The Measurement Map Exhibit-135 shows that the suit property was measured. However, the Cadastral Surveyor who carried out measurement was not available for recording his evidence. Therefore, Babarao Savarkar (PW-3), who was knowing that surveyor, who measured the suit property, was examined to prove the Map Exhibit-135.

9. The defendants came with the stand that suit property is not yet partitioned. The four boundaries shown in the sale-deed of the plaintiff are not correct. There is a temple of God Siddheshwar, which is not shown in the measurement Map Exhibit-135.

10. The plaintiff claimed that suit property is partitioned. The learned Advocate for the respondent Nos.1 and 2 pointed out the

cross examination of the witness of defendant in which there is admission that some part of suit property is in possession of the plaintiff. However, the oral admissions i.e. evidential admission is weaker piece of evidence. It is well settled that judicial admission are stronger than the evidential admissions. Judicial admissions means admission in pleadings or notice reply etc. As per Section 31 of the Evidence Act, 1872 an admission is not conclusive proof and as per Section 58 of it the admitted fact need not be proved. However, the proviso of Section 58 of it provides that the Court may in its discretion require the facts admitted to be proved otherwise than by such admission. On the basis of oral admissions, generally right cannot be created or extinguished. The right can be created and extinguished only by the legal modes prescribed by the law. Thus, admission as to possession of plaintiff over the suit property pointed out by learned Advocate for respondents in the evidence of defendants are of no use to infer that there is partition and that the plaintiff is in possession of the suit property. The seller of suit property are not examined to prove the partition of the suit property as to when and how it was effected. Thus, best possible evidences is not adduced by the plaintiff. The earlier and subsequent conducts of the owners of suit property does not corroborates the partition of it. Thus, an oral admission as to possession of plaintiff over suit property

is not sufficient evidence to infer partition of suit property and further proof of partition is necessary as per Proviso to Section 58 of the Indian Evidence Act, 1872. The said admission is not sufficient evidence of partition.

11. Though, the trial Court held that by the measurement Map Exhibit-135 an encroachment in the suit property is proved the first appellate Court held that the measurement map and encroachment is not proved. The Appeal or Cross objection are not filed by the respondents against the said finding of first appellate Court. The first appellate Court directed to hand over possession of suit property as per sale-deed even though encroachment is not proved. The law does not permit to grant such relief, which is not prayed by the plaintiff. However, the first appellate Court erred in directing defendants to hand over the possession of entire suit property as per sale-deed Exhibit-87 as held in the case of ***P. Kishor Kumar*** cited *supra* by the defendant that Vendor cannot confer title better than he has. The plaintiff's claim for possession without partition is not sustainable in the eyes of law. It will be forcible partition which is illegal.

12. Both the Courts failed to consider that there is no evidence of partition of suit property as per defence taken by the defendants. Even on preponderance of entire evidence, partition of suit property is not proved. First appellate Court failed to consider the basic principle of civil trial that “first plead and then prove”. When the relief is not pleaded and claimed, the first appellate Court ought not have directed the defendants to hand over the possession of the suit property as per the sale-deed of the plaintiff.

13. The learned trial Court has relied upon the revenue record and held that partition of suit property was effected. The object of revenue record is to serve the fiscal purpose of state exchequer. The revenue record does not confer the title. The said revenue record of City Surveyor does not show partition was effected. The partition between the Jagannath and his brother Gangadhar is not proved and mere entries to the revenue record, that too are not about partition. Therefore, it is not sufficient evidence to infer that there was partition. The recitals of sale-deed Exhibit-87 is not sufficient evidence of partition without any material corroboration. The revenue record does not confer title to the plaintiff as held in the case of **Balwani Singh** cited *supra* by the defendants. The partition is not proved and co-owner cannot be dispossessed by the other co-

owner on the basis of sale-deed, unless the suit for partition is filed and share is carved out and separate possession is taken.

14. After purchasing the property of co-owners, the purchaser has to file suit for general partition as per Section 44 of the Transfer of Property Act, 1882. Such suit is not filed by the plaintiff for partition and, therefore, question of encroachment on the part of defendants in the suit property does not arise. The plaintiff failed to prove partition and the first appellate Court erred in re-appreciating evidence in its proper perspective. Thus, modification of decree of the trial Court in view of the sale-deed Exhibit-87 to hand over the possession to the plaintiff is not legal and correct.

15. Both courts failed to take into consideration that there is temple of God Siddeshwar of which there is Trust. Excluding the property of that temple half share is not sold to the plaintiff. Thus sale-deed for half share is not found genuine and legal. The material fact of existence of temple in the suit property is suppressed by the plaintiff. Therefore, he is not entitled to any relief. The interest of trust property temple of God Siddeshwar must be protected in view of the judgment of *Sri Ganpati Dev Temple Trust* cited supra by respondent No.5.

16. The learned trial Court and first appellate Court failed to consider the basic legal concept of the co-ownership and right to partition and then to have possession of co-owner over it. Both the courts thus erred on facts and law. They failed to appreciate the evidence properly. Therefore, both the substantial questions of law are answered that finding of partition was not legal and proper as well as on appreciation of evidence of revenue record the direction of modification of decree of the trial Court is not justifiable on law and facts.

17. The first appellate Court erred in directing to the defendants to hand over the possession of the suit property as per the sale-deed Exhibit-87. For the facts, law and reasons discussed above, judgment and decree of the trial Court as well as first appellate Court are not sustainable in the eyes of law. Therefore, those deserves to be set aside. The appeal deserves to be allowed. For the reasons stated above, the argument of learned Advocate for the plaintiffs/respondents Shri Durve is not acceptable that partition and encroachment is proved.

18. The defendant/appellant was compelled to file this appeal. He must have incurred some amount for this appeal.

Therefore, the appellants are entitled for costs of **Rs.10,000/-** (Rs. Ten Thousand only) for it. Hence the following order :

- (i) The appeal is **allowed**.
- (ii) The impugned judgments and decrees of the first appellate Court passed in R.C.A. No. 56 of 2011, dated 28.07.2016 and trial Court in R.C.S. No. 42 of 1984, dated 07.03.2009 are quashed and set aside.
- (iii) The suit is **dismissed**.
- (iv) The contesting respondent Nos.1 and 2 shall pay costs of **Rs.10,000/-** (Rs. Ten Thousand only) of appeal to the appellants within three months. If the costs is not paid within three months, the respondent Nos.1 and 2 shall pay interest @ 9% per annum over it.
- (vi) The record and proceedings be sent back to the trial Court.

19. In view of disposal of second appeal, pending application(s), if any, shall stand **disposed**.

(SANJAY A. DESHMUKH, J.)