



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

902 SECOND APPEAL NO. 173 OF 1992

**YESHWANT SITARAM BADHE AND OTHERS
VERSUS
KASHINATH YOGAJI GAIKWAD AND OTHERS**

Mr. Vivek Bhavthankar, Advocate for the appellants
Mr. V. R. Sonwalkar, Advocate for respondent nos. 1/I to 1/IV
None for other respondents.

**CORAM : R. M. JOSHI, J.
DATE 22nd JANUARY, 2025**

PER COURT :-

1. This appeal under Section 100 of the Code of Civil Procedure takes exception to the judgment and decree passed by the first Appellate Court in R.C.A. No. 46/1990 which came to be allowed and the judgment and decree passed by the trial Court in R.C.S. No. 213/1983 came to be set aside.
2. Parties are referred to as 'plaintiffs' and 'defendants' for the sake of convenience.
3. Plaintiff filed suit against defendants contending that he is brother of defendant nos.2 to 5. It is also claimed that he received the share in the joint family properties in a partition. The properties received are described in paragraph 2 of plaint. It is further stated that these

properties are also mutated in his name in revenue record. He further claimed that defendant nos.2 to 5 sold their share in favour of defendant no.1. This defendant however in collusion with defendant nos.2 to 5 causes interference in the possession of plaintiff over suit property. With these averments declaration as well as injunction is sought against defendants.

4. Defendant no.1 filed written statement opposing the suit. He claimed ownership of suit property sold by defendant nos.2 to 5 to the extent of their share. It is claimed that this defendant has pre-emptory right of purchase of the property of plaintiff. Counter claim is also filed seeking partition of suit property with further relief of right to purchase portion of land owned by plaintiff.

5. Trial Court framed issues vide Exhibit 79. Defendant examined himself at Exhibit 104 and also led evidence of Yashwant (Exhibit 107), Kisan (Exhibit 114) and Sheshrao (Exhibit 116). Whereas defendant no.1 led his own evidence at Exhibit 118. To support his case he examined Balabhau (Exhibit 128), Abha (Exhibit 129) and Reshmaji (Exhibit 131).

6. Thus, there is no dispute about the fact that plaintiff is owner in respect of the 1/5th share of suit properties, whereas defendant no.1 is

the owner of $\frac{4}{5}$ th share.

7. Learned Trial Court decreed the suit and dismissed counter claim. Defendant no. 1 aggrieved by this judgment filed Regular Appeal being R.C.A. No.46/1990. Appeal came to be decided in favour of defendant no.1, hence this appeal.

8. Heard leaned counsel for both sides.

9. Parties are at ad idem with the fact that suit properties are ancestral properties originally held by plaintiff and defendant nos.2 to 5 jointly. There was partition of suit properties between them. Plaintiff got $\frac{1}{5}$ th share in the said properties. The defendant no.1 purchased $\frac{4}{5}$ th share therein from defendant nos.2 to 5. Thus, it is clear that contesting defendant no.1 does not dispute the fact that plaintiff is owner of $\frac{1}{5}$ th share in the originally held properties jointly by him with defendant nos. 2 to 5.

10. Even otherwise, during the course of hearing learned counsel for the defendant no.1, on instructions, has made candid statement that this defendant does not dispute the ownership of appellant/original plaintiff over $\frac{1}{5}$ portion of suit properties. He, however, contends that in absence of specific description of the property in plaint, no injunction could have been granted and as such there is no reason to cause

interference in the judgment and decree passed by the first Appellate Court.

11. Since admittedly the parties i.e. plaintiff and defendant no.1 are sharing suit properties, it was absolutely necessary for plaintiff to mention the description of property in respect of which he seeks injunction. Learned counsel for the appellant has attempted to convince the Court that on the basis of sale deed such order can be passed but undeniably description of the suit properties with boundaries etc. has not been provided in the plaint.

12. Once there are two owners of suit properties and there is no evidence forth coming of actual/physical partition of the same unless the description is given of the property which is allegedly held by the plaintiff, question of granting any injunction does not arise. The first Appellate Court therefore has rightly dismissed the suit filed by the plaintiff. However, the first Appellate Court has committed error in ignoring the admission given by the defendant no.1 with regard the ownership of the plaintiff over 1/5th share in the suit properties. The first Appellate Court therefore ought to have maintained the decree passed by trial Court to the extent of declaration that plaintiff is owner of 1/5th share of the suit properties. Undisputedly the counter claim dismissed and there is no appeal against same, however admission of the

defendant ought to have been considered by the first Appellate Court, which has been ignored completely by first Appellate Court. Resultantly following substantial question of law arise in this appeal stands answered in affirmative.

“As to whether the first Appellate Court has ignored the admission of the defendant with regard to the ownership of plaintiff over 1/5 share from gut no.4 and therefore committed error in dismissing the suit for declaring plaintiff to be owner of suit properties.”

13. As a result of the above, appeal is partly allowed. Suit is decreed to the extent of declaration that the plaintiff is the owner of 1/5th share in the suit properties jointly held by him with defendant nos.2 to 5 (now purchased by defendant no.1).

14. Parties to bear their own cost.

(R. M. JOSHI, J.)

ssp