



(This order is modified and uploaded vide speaking to the minutes order dated 17.03.2025.)

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 484 OF 1994

Bapurao Laxmanrao Ghule
(Deceased through LRs)

.. Appellant

versus

Prabhakar s/o Balkrishnarao Ghule
(Deceased through LRs)

.. Respondent

Mr. A. S. Londhe, Advocate for appellant.

Ms. A. A. Mahajan, Ms. Vidya Takalkar and Mr. S. M. Tawar,
Advocates for Respondent Nos. 1/i to 1/vi, 2B, 2C, 2E, 3, 4 and 6.
Mr. R. R. Bhomkar, Advocate for Respondent Nos. 7 to 10.

CORAM : R. M. JOSHI, J.

RESERVED ON : 21st FEBRUARY, 2025.

PRONOUNCED ON : 11th MARCH, 2025.

PER COURT :

1. This appeal under Section 100 of Code of Civil Procedure takes exception to the concurrent findings recorded by the Trial Court and First Appellate Court and judgment and decree passed in Regular Civil Suit No. 2/1975 dated 10.12.1990 and confirmation thereof in Regular Civil Appeal No. 13/1991 by judgment and order dated 09.08.1994.

2. Parties are referred to as Plaintiff and Defendant for the sake of convenience.

3. In order to appreciate the submissions of rival parties, it is relevant to take note of facts of the case in brief which are recorded herein below :-

Plaintiff is an Advocate by profession. He claims to be the owner and in possession of suit house being House No. 786 situated at Mohalla, Rangar Galli, Aurangabad. It is his case that the said house originally belonged to his father, Yashwant, who died about 35 years ago of the filing of the suit. He further claims that his father had partitioned his properties amongst three sons i.e. Plaintiff Balkrishna, Defendant Laxmanrao and Ramchandrarao. It is claimed that the said partition has taken place about 48 years ago. In the said partition, Plaintiff Balkrishna and Ramchandra got 2 house properties out of which suit property is allotted to the share of Plaintiff. Laxman was given goodwill/capital in the cloth shop and hence no share was allotted to him in the said property or other house property. It is further case of the Plaintiff that since Laxman did not have any house for his residence, he was permitted to reside in the suit house as a tenant on monthly rent of Rs. 45/-. It is

claimed that Laxman during his lifetime had paid rent so also his heirs. It is claimed that Laxman died 10 years back and thereafter Defendant failed to pay rent to the Plaintiff. With these averments declaration is sought that the Plaintiff is the owner of the suit house and relief of recovery of arrears of rent of Rs. 1620/- is sought.

3. Defendant filed written statement at Exhibit 48 claiming his father Laxman to be owner and in possession of the suit house. It is contended that the suit house belonged to father of Laxman and his brothers. There is further denial of the fact that Laxman was residing in the suit house as a tenant on rent. Though it is stated in the written statement that in the tax register name of Plaintiff appears against the suit house, however, he claims that subsequently, the entry in the name of Balkrishna is challenged and now the said house stands in the name of Defendant. It is claimed in the written statement that Plaintiff had raised issue of his ownership in respect of the suit house in the execution proceeding filed against Laxman by the decree holders against him. It is claimed that the said application under Order 21 Rule 58 of Code of Civil Procedure raising objection to the execution/attachment stood dismissed. It is claimed that since then the suit is not filed as contemplated under

Order 21 Rule 58 read with Rule 63 of Code of Civil Procedure and as such the said order dated 12.11.1953 has become final. It is also claimed that the suit simplicitor for declaration without possession is not maintainable.

4. After issues were framed, Plaintiff Balkrishna's son **Arun** was examined as by that time Balkrishna died. He also led evidence of Parvatibai(PW 2), Raghunath(PW 3), Bhalchandra(PW 4), Vitthal (PW 5) and Choliram(PW 6). As against this, Defendant Digambar examined himself at Exhibit 76. Apart from oral evidence, documentary evidence is also relied upon by the parties. Trial Court decreed suit, which judgment is confirmed in First Appeal. Hence, this appeal.

5. This Court, by order dated 02.04.2024, framed following substantial questions of law :-

- (i) What will be the effect of rejection of objection petition under Order 21 Rule 58 of C.P.C. filed by the present respondent/original plaintiff Balkrishna Yashwantrao Ghule in the earlier proceeding, on the present litigation specially when he could not establish his ownership over the suit property in the said earlier proceeding ?

(ii) Whether the original plaintiff Balkrishna Ghule can put up theory of oral partition specially when he had come with the theory of written partition before

the Court of Deputy Director, Land Records, Aurangabad ?

(iii) What was the effect of non carrying out the amendment during the pendency of suit in respect of bringing legal heirs of one of the defendants ?

6. Learned counsel for Defendant/Appellant submits that the Court below committed error in not considering the evidence on record in proper perspective. Similarly, the Courts have failed to consider the effect of order dated 12.11.1953 passed under Order 21 Rule 58 of Code of Civil Procedure wherein the claim of Plaintiff about ownership of the suit house was rejected. It is submitted that the Courts below have committed error in not considering the judgment relied upon in the earlier proceeding between Ramchandra and Balkrushna for the reason that there is no affirmation to the translation of the judgment which is in Urdu language. It is his submission that in the proceeding before the Deputy Director of Land Records, a theory of written partition was propounded by the Plaintiff and as such it was not open for him now to claim in this suit that

there was a oral partition. Thus, on the basis of material on record, he seeks setting aside of the impugned judgments and decree.

7. Learned counsel for Plaintiff/Respondent supported the impugned judgments and decree. It is contended by relying upon judgment of this Court in case of Chandrabhagabai Madhao and another vs. Premchand Kasturchand Jain and others, **1990(2) Mh.L.J. 1006** that the proceeding under Order 21 Rule 58 of Code of Civil Procedure are summary proceedings and therefore the same would not effect the merits of the case. It is also submitted that since the parties to the suit were different in the previously instituted proceeding, in the present suit, question of application of res judicata does not arise. It is also pointed out that there was admission given by Laxman to the effect that plaintiff Balkrishna is the owner of the suit house. In view of this, according to learned counsel for Respondent, no further evidence is required to be adduce by the Plaintiff in order to substantiate his case. It is further argued that Defendant though claimed that Laxman is the owner of the suit house, however, there is absolutely no whisper in the pleadings about how he has acquired the said ownership. As against this, Plaintiff has not only pleaded the source of his ownership i.e. by way of

partition and has also proved the same by examining witnesses more particularly Parvatibai (PW 2). It is thus contended that the findings of fact recorded by the Courts below being consistent to the evidence on record cannot be interfered with in exercise of powers/jurisdiction under Section 100 of Code of Civil Procedure.

8. At the outset, it needs to be recorded that Plaintiff has pleaded that Yashwant, father of Plaintiff and his brother was owner of the suit house as well as other properties including cloth shop. He has specifically averred about Yashwant effecting partition of properties long back and suit house being given to the share of Plaintiff whereas another house to Ramchandra and cloth shop to Laxman. From the record and more particularly execution proceeding against Laxman indicates that there is no dispute about the fact that Laxman was conducting business of cloth. It is stated in the said proceeding by him as it appears from the order dated 12.11.1953 that he used to store the cloth in the suit house. Apart from this, defendant in his cross examination has admitted that his father was conducting cloth business. In this regard no explanation is forthcoming from Defendant as to how his father has acquired the

said business. Defendant did not adduce any other evidence in order to substantiate the same.

9. Plaintiff examined Parvatibai as a witness to prove that the suit house and other properties belonged to father of Plaintiff and that during his lifetime partition thereof came to be effected. Thus, the contention of Plaintiff about previous partition is duly supported by evidence on record more particularly evidence of Parvatibai who is close relative of Plaintiff and Defendant. Per contra, there is vague pleading in the written statement with regard to the ownership of Laxman in respect of the suit house without specific pleading as to the source of the said title. Moreover, there is absolutely no material on record to hold that any right, title or interest has been acquired by Laxman in the suit house. Pertinently, in order dated 12.11.1953, there is specific finding recorded by the Execution Court about Laxman deposing on oath contending that the suit house belongs to Balkrishna. Needless to say that there cannot be any better evidence than admission of the party to prove the fact. There is no explanation forth coming from the side of Defendant to the said evidence led by Laxman before the Execution Court. Defendants claim through their father and, admission of father in absence of any explanation would

become estoppel against them. Needless to say that admission given on oath in a judicial proceeding must be given due weightage. This Court, therefore, finds no reason or justification to cause any interference in the findings of fact recorded by the Courts below, with regard to the ownership of plaintiff over the suit house.

10. Now, question arises as to what is the effect of rejection of claim of Plaintiff Balkrishna in the proceeding of execution under Order 21 Rule 58 of Code of Civil Procedure and the claim of Plaintiff before the Deputy Director of Land Records about oral partition. In order to appreciate the contention of the parties, it would be relevant to take note of Order 21 Rule 58 of Code of Civil Procedure which reads thus :-

58. Adjudication of claim to, or objections to attachment of, property-

(1) Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the court shall proceed to adjudicate upon the claim or objection in accordance with the provisions herein contained :

Provided that no such claim or objection shall be entertained-

- (a) where, before the claim is preferred or objection is made, the property attached has already been sold; or
- (b) where the Court considers that the claim or objection was designedly or unnecessarily delayed.

(2) x x x

(3) x x x

(4) x x x

(5) Where a claim or an objection is preferred and the Court, under the proviso to sub-rule (1), refuses to entertain it, the party against whom such order is made may institute a suit to establish the right which he claims to the property in dispute; but, subject to the result of such suit, if any, an order so refusing to entertain the claim or objection shall be conclusive.

11. This provision indicates that where objection is raised with regard to the attachment of the property in execution of a decree on the ground that such property is not liable for attachment, the Court shall proceed to adjudicate upon the claim or objection. Sub-section (5) indicates that where a claim or objection is preferred and the Court under the proviso to sub-rule (1) refuses to entertain it, the party against whom such order is made may institute a suit to establish the right which he claims to the property in dispute.

Subject to the result of such suit if any, the order so refusing to entertain the claim or objection is conclusive. Rule 63 prior to amendment of 1977 to the Code of Civil Procedure provides that a party whose objection is refused was required to institute a suit within a period of one year and on failure thereto the order of refusing to entertain the claim or objection was to become conclusive.

12. In the instant case, there is no dispute about the fact that objection was raised in the year 1953 in respect of attachment of the suit house in a decree passed against Laxman. Balkrishna has claimed title of the suit property and objection was raised for attachment thereof on that ground. The provisions quoted above clearly indicate what was required to be decided by the Executive Court as an objection to attachment. In case no suit is filed within a period of one year, order of refusal to entertain the objection was said to be conclusive, which necessarily means that the decision on the objection between the parties is conclusive. That could not be applied to the proceedings in respect of declaration sought before the Civil Court of the ownership of the suit property. Non filing of the suit under Rule 63 as then it stood is concerned, from the facts appearing on record, it can be safely said that there was no further

action by the Execution Court in respect of the suit property for the purpose of execution of decree. Thus, there seems no occasion arose for the Plaintiff to file any suit. In any event, said order passed by the Execution Court would not bar the suit before the Civil Court for declaration of title against Laxman. Most importantly, said objection for the attachment of suit property was between Plaintiff and DH of Laxman and not against Laxman. This Court, therefore, finds no substance in the contention of Defendant that present suit is barred by aforementioned provisions in view of order passed by the Execution Court refusing to entertain objection to the attachment of the suit property. The substantial question of law therefore is answered in negative.

13. As far as order passed by the Appellate Court permitting Plaintiff to carry out amendment in the plaint to bring legal heirs of deceased Defendant No. 3 on record is concerned, there is no dispute about the fact that no legal heirs of Defendant No. 3 were brought on record and amendment to the plaint remained to be carried out. This is not the case of partition that on death of any party entire suit would stand abated. Pertinently, this is not a case wherein Defendant No. 3 or his legal representatives claim to have been

denied any opportunity of hearing. Moreover, since the assets of deceased Laxman were properly represented by other Defendants i.e. essentially by Defendant No.1, no prejudice muchless any irreparable loss is caused to the legal heirs of Defendant No. 3 by order passed by the First Appellate Court permitting to carry out amendment.

14. As a result of above discussion, the substantial questions of law framed herein above are answered in negative. Insofar as findings of fact recorded by Trial Court and First Appellate Court, for want of perversity, no substantial question of law arises in that regard. Having regard to the scope of Section 100 of Code of Civil Procedure, this Court cannot and does not wish to disturb the fact finding done by the Courts below. Thus appeal sans merit. Hence, it stands dismissed.

15. Pending application if any, does not survive and stands disposed of.

(R. M. JOSHI)
Judge