



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.320 OF 2023

Bapusaheb Shankarrao Dharme And Another

VERSUS

Nirmalabai Sunderlal Munot Died Through Lrs. Mahendra
Sunderlal Munot And Others

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Advocate for AppellantS : Mr. M.S. Kulkarni

Advocate for Respondents 1-3 : Mr. A.P. Bhandari

R/5, R/6/a To R/6/d Are Served through Paper Publication.

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WITH

CIVIL APPLICATION NO. 3307 OF 2024 IN SA/320/2023

WITH

CIVIL APPLICATION NO. 7832 OF 2023 IN SA/320/2023

CORAM : S. G. CHAPALGAONKAR, J.

Reserved on : January 31, 2025

Pronounced on : April 15, 2025.

FINAL ORDER :-

1. The appellants/original plaintiffs impugn judgment and decree dated 21.4.2023 passed by the District Judge, Aurangabad in Regular Civil Appeal No.200 of 2016 thereby upholding the judgment and decree dated 18.04.2016 passed by Civil Judge Senior Division, Aurangabad in Special Civil Suit No.308 of 2011.

2. The appellants/original plaintiffs instituted suit for declaration of ownership and perpetual injunction in respect of

the suit property which is part of Gat no.19, 20 and 21 in Ghardon Shivar, Taluka and District Aurangabad. According to plaintiffs, one Mainabai Shankarrao Dharne i.e. their mother was owner of the suit property. She died on 7.11.1988. Plaintiffs inherited suit properties from her. Eventually mutation entry no.980 was passed in their name. According to plaintiffs, Thakubai, who was cousin sister of Mainabai had entered her name for half portion of suit properties vide mutation entry no.348. However, she was never in possession of the suit properties. On the basis of aforesaid mutation entry, Thakubai transferred suit property in favour of Dr. Sayyed Mukhtar under sale-deed dated 5.3.1984. Sayed Mukhtar died on 10.11.1988. The defendants, who are legal heirs of Sayyed Mukhtar obtained letter of administration from Civil Court and entered their name towards half portion of the suit properties being successors of Dr.Sayyed Mukhtar. Thereafter, they executed registered sale-deed dated 19.4.2011 in favour of defendant nos.1 to 3.

3. On 12.5.2011 when defendants entered into suit properties and attempted to obstruct possession of plaintiffs, they got knowledge about aforesaid transaction and filed

present suit seeking declaration of ownership, perpetual injunction and that sale-deed dated 19.4.2011 is not binding upon them. Plaintiffs have also claimed for decree of perpetual injunction against defendants from disturbing their possession.

4. Defendant nos.1 to 3 filed written statement contending that suit land was originally owned by Dashrath and Sakharam Thoraji. They had mortgaged properties to Jayaji and Nana Dagdona for twenty years. After their demise, Mainabai i.e. mother of the plaintiff and Thakubai filed proceeding for redemption of mortgage. It was decreed on 13.1.1977. Although, said order was assailed by heirs of Jayaji and Tana in appeal before Additional Commissioner, it was dismissed on 16.9.1980. After decision of Additional Commissioner, Mainabai and Thakubai were put into the possession. Initially, name of Mainabai was mutated in record of rights. Later-on, on application of Thakubai, mutation record was corrected and name of Mainabai and Thakubai was entered in record of rights as owner and possessor of the suit properties.

5. Since Thakubai was owner of half portion, she transferred her share to Dr. Sayed Mukhtar and in-turn, legal heirs of Dr. Sayed Mukhtar transferred properties in the name of defendant nos.1 to 3 vide sale-deed dated 19.4.2011. The defendants also filed a counter-claim contending that when they had been to the suit field, they noted that the suit property is divided into parts and it is difficult for them to continue in possession of specific portion. As such, they claimed for relief of partition and separate possession.

6. Trial Court framed the issues, recorded evidence of parties and finally dismissed suit and decreed counter-claim filed by defendant nos.1 to 3 and directed that defendant nos.1 to 3/plaintiffs in counter-claim are entitled for partition and separate possession to the extent of half share in the suit property. Aggrieved plaintiff filed Regular Civil Appeal No.200 of 2016 before the District Judge at Aurangabad, who dismissed the appeal upholding judgment and decree as passed by the trial Court. Hence, this second appeal.

7. Mr. Mukul Kulkarni, learned advocate appearing for the appellants vehemently submits that Trial Court as well as Appellate Court failed to frame issues emerging from

pleadings of the parties in the suit and counter claim. According to him, Dr. Sayed Mukhtar or his predecessor-in-title Thakubai was never in possession of any portion of the suit property. The second purchaser/defendant nos.1 to 3 cannot seek relief of partition of the property after 28 years when such suit ought to have been filed in terms of section 44 of Transfer of Property Act within a period of limitation. He would further submit that Dr. Sayed Mukhtar had instituted RCS No.990 of 1988 against the plaintiffs seeking relief of injunction. The suit abated on 19.8.1992 even before that RCS No.682 of 1984 was filed by Dr.Sayed Mukhtar against the plaintiffs and it was withdrawn unconditionally. Thus, prayer of partition which is made in counter-claim is barred by Order II Rule 2 of the Civil Procedure Code on account of omission to claim such relief in R.C.S. No.682 of 1984 and RCS 990 of 1988. He would further submit that mere mutation entry in the name of Thakubai would not bestow title or possession in her favour in respect of suit property when Thakubai was never in possession, he could not have put doctor Sayed Mukhtar in possession at the time of execution of sale-deed dated 8.3.1984. Therefore, in absence of pleadings as to when the defendants came into possession of the suit property, present suit would be barred by limitation.

Therefore, he urges that substantial questions of law requires to be framed on aforesaid aspects and second appeal needs to be admitted.

8. Per contra, Mr. Bhandari learned advocate appearing for respondent nos.1 to 3 submit that both the Courts have rightly considered factual and legal aspects of the matter and recorded concurrent findings of fact, which calls no interference in Second Appeal. He would submit that so far as issue of limitation is concerned, both the Courts have recorded finding that the suit for partition raised by way of counter-claim is well within limitation. Further, defendants in counter-claim have not raised plea of adverse possession. Therefore, such contention cannot be considered.

9. Having considered submissions advanced by learned advocates appearing for respective parties, it can be observed that, undisputedly, suit land was received by Mainabai and Thakubai as per order passed by the revenue authorities in proceeding for Redemption for Mortgage. Although, name of Mainabai was recorded initially, name of Thakubai was taken on record as co-owner alongwith Mainabai. Both of them were enjoying possession of the

properties. Lateron, Thakubai transferred half portion of the land to Dr. Sayed Mukhtar and after Dr. Sayed Mukhtar's death, defendant no.4 to 6 were recorded as his heirs. Lastly, defendant nos.1 to 3 purchased the land from heirs of Doctor Sayed Mukhtar under sale-deed dated 19.4.2011.

10. So far as ownership of Thakubai is concerned, it is a matter of record that Thakubai and Mainabai were cousins. Their fathers had mortgaged the property and after death of their fathers, proceeding for redemption for mortgage was initiated by them and same was allowed by the order of Divisional Commissioner at Aurangabad. In this scenario, there cannot be dispute as regards to the title of Thakubai to the extent of one half share in the suit property. The aforesaid factual aspect is practically admitted by plaintiff during his cross-examination. Once it is held that Thakubai had title to one half share of the suit land, Dr. Sayed Mukhtar would get title as per registered sale-deed executed by Thakubai and in deference to that as per sale-deed executed by L.Rs. of Dr. Mukhtar, defendant nos.1 to 3 derived title under registered sale-deed of 2011.

11. Mr. Kulkarni, learned advocate appearing for the appellants submitted that, suit for partition could not have been entertained after 28 years when Thakubai or Mukhtar Ahmed never claimed such relief during their lifetime. Now, such plea is sought to be raised on behalf of defendant nos.1 to 3 on the basis of the sale-deed of 2011. It is pertinent to note here that, section 44 of the Transfer of Property Act would apply in facts of the present case. However, to seek partition, no specific limitation is provided under law. Learned District Judge has considered aforesaid aspects and recorded that defendant nos.1 to 3, being strangers, in absence of possession they had only remedy to seek partition. They have rightly filed the suit/counter-claim within one year from the date of purchase. Therefore, even by applying Article 113 of the Limitation Act, suit is held to be within the period of limitation. No error can be found in the order of the learned District Judge.

12. Mr. Kulkarni, further submits that, plaintiffs are continuously in possession of the suit property since the date of redemption of mortgage. There is no evidence as to possession of Thakubai or Dr. Mukhtar. Defendants have admitted

possession of the plaintiffs. Both the Courts have also recorded findings to that effect. In these circumstances, plaintiffs are entitled to claim a title by way of adverse possession. Therefore, suit seeking decree of possession would be barred by limitation. It is difficult to accept aforesaid contentions raised on behalf of the plaintiffs. Pleadings in the suit or in written statement to the counter-claim nowhere suggests that plaintiffs had raised the plea of adverse possession. On the other hand, they are asserting their own title over the suit property. As rightly observed by learned District Judge, unless plaintiffs admits title of the Thakubai or present defendants, plea of adverse possession cannot be entertained. In that view of the matter, aforesaid contentions cannot be accepted.

13. Mr. Kulkarni, learned advocate appearing for the appellants further submits that Dr. Mukhtar had instituted two different suits during his lifetime. Firstly, Dr. Mukhtar had instituted R.C.S. No.682 of 1984, however, it was withdrawn by him. Similarly, subsequent suit i.e. R.C.S. no.990 of 1982 instituted by him seeking perpetual injunction has been abated on 19.8.1992. Therefore, relief of partition and separate

possession as claimed by way of counter-claim would be barred by law. Order II Rule 2 of Civil Procedure Code reads thus :-

2. Suit to include the whole claim :-

(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish and portion of his claim in order to bring the suit within the jurisdiction of any Court.

14. A reference can be given to observations of the Supreme Court of India in case of **Coffee Board Vs. Ramesh Exports Private Limited reported in (2014) 6 Supreme Court Cases 424**, wherein in paragraph no.11 observed thus :-

“11. The bar of Order 2 Rule 2 comes into operation where the cause of action on which the previous suit was filed, forms the foundation of the subsequent suit; and when the plaintiff could have claimed the relief sought in the subsequent suit, in the earlier suit; and both the suits are between the same parties. Furthermore, the bar under Order 2 Rule 2 must be specifically pleaded by the defendant in the suit and the Trial Court should specifically frame a specific issue in that regard wherein the pleading in the earlier suit must be examined and the plaintiff is given an opportunity to demonstrate that the cause of action in the subsequent suit is different.”

15. Pertinently, previous suits instituted by Dr. Sayed Mukhtar were on the basis of cause of action arose to him since he had purchased land under registered sale-deed and he claimed obstruction/threat of dispossession at the hands of present plaintiffs. The cause of action pleaded in previous suits

was totally different. Pertinently, no specif plea of bar under Order II Rule 2 is taken in written statement to counter-claim. No issue was framed in suit. However, when plaintiffs have instituted present suit seeking decree of declaration and perpetual injunction asserting their title and possession, defendants have got cause of action to raise the counter-claim and seek decree of partition. Cause of action pleaded in the two earlier suits is altogether different. Therefore, it is difficult to hold that bar under Order II Rule 2 of the Civil Procedure Code can be invoked in facts of the present case. In result, contention of the appellants/plaintiff on this point is also not acceptable.

16. In view of the fact that previous suits were based on independent cause of actions, present suit would not be barred by Order II rule 2 of the Civil Procedure Code. In the result, there is no merit in this Second Appeal. No substantial questions of law arises for consideration. Hence, it stands **dismissed**. Pending civil applications, if any, also stands **disposed off**.

17. At this stage, Mr. Kulkarni, learned advocate appearing for appellants submits that the interim protection

already granted may be continued for a further period of six weeks, so as to enable the appellant to approach the Supreme Court by filing the S.L.P.

18. Considering submissions advanced and nature of litigation, this order shall be kept in abeyance for a period of six weeks from today.

(S. G. CHAPALGAONKAR)
JUDGE.

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