



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

SECOND APPEAL NO. 433 OF 2023

**ANNARAO VISHWANATH KHURDE AND OTHERS
VERSUS
SHAHAJIRAO VISHWANATH KHURDE.**

...

Mr. D.A. Mane, Advocate h/f. Mr. M.M. Patil, Advocate for appellants
Mr. A.R. Mate, Advocate h/f. Smt. Madhveshwari S. Mhase, Advocate
for respondent.

CORAM :S.G. CHAPALGAONKAR, J.

DATE : 15th JANUARY, 2024.

P.C. :-

Appellant/original defendant impugns the judgment and decree dated 29.4.2023 passed by District Judge, Nilanga in R.C.A. No. 72 of 2016, thereby upholding the judgment and decree dated 3.11.2016 passed by Civil Judge (J.D.), Nilanga in R.C.S. No. 203 of 2010.

2. For the sake of convenience, parties are referred as per their original status in the suit.

3. Respondent/plaintiff instituted R.C.S. No. 203 of 2010 for declaration, ownership and perpetual injunction in respect of the suit properties i.e. Land Survey No. 28/1A admeasuring 1 Hectare 86 R and land Surevey No. 26, admeasuring 1 Hectare 52 R, situated at village Hanmantwadi (Hadoli), Taluka Nilanga, Dist. Latur, contending that the suit properties are ancestral properties of the plaintiff and defendant. Those have been partitioned amongst them. The plaintiff received suit

lands as per the said partition of 1984, eventually mutation entries were effected. Previously, plaintiff was required to file R.C.S. No. 3 of 2008 seeking partition. However, defendants took plea of previous partition of 1984. The trial court accepted defendants' contention and dismissed the suit recording a finding that the suit property has been already partitioned on "Gudi Padwa" in the year 1984. According to plaintiff, defendant Vishwanath received 1 Hectare 30R land from Survey No. 28/1., whereas, defendant No.2 Bajirao received share admeasuring 1 Hectare 86 R. Plaintiff further contends that he had transferred 1 Hectare 22 R land in the name of mother under registered sale deed dated 21.6.2004. Lateron, his mother executed a Gift Deed dated 26.11.2009 in his favour. According to plaintiff, he is in exclusive ownership and possession of suit property since partition and carried development. However, defendants are obstructing his possession, hence, he was required to file present suit for declaration and injunction.

4. Defendants admitted relationship and also factum of partition that took place in the year 1984, but took the plea that suit is barred by principle of estoppel and denied the exclusive ownership of plaintiff over suit property. They accepted that the mother Gayabai executed Gift Deed in favour of plaintiff, with caveat that it is obtained by fraud. They specifically denied possession of the plaintiff over suit property.

5. Trial court framed issues , recorded evidence of parties and finally decreed the suit of plaintiff. Aggrieved defendants preferred Regular Civil Appeal No. 72 of 2016 before the District Judge, Nilanga which came to be dismissed on 29.4.2023.

6. Mr. Milind Patil, learned advocate for the appellant submits that defendants have specifically raised a dispute as regards to the allotment of suit property to the plaintiff in the family partition and is alleged possession over the same, but, trial court failed to frame issue on this aspect. Even the appellate court failed to frame appropriate point for consideration. As such, decree is vitiated for non framing of pivotal issue. The decree sans mandatory requirement under Order 14, so also, Order 41 Rule 31 of C.P.C. He further submits that courts below have erroneously assumed that previous partition of land would encompass admission as regards allotment of a particular share to the plaintiff. He would submit that plaintiff is trying to establish his right over the prime property having source of irrigation without proof of allotment of said land to him during partition.

7. Mr. Patil invites attention of this court towards admission of the plaintiff that he has no document or proof to support his claim as to allotment of a particular land. He would, therefore, urges to admit the appeal by framing substantial questions of law.

8. Per contra, Smt. Madhveshwari Mhase learned advocate for respondent would submit that defendants had previously obstructed plaintiff from enjoying the suit properties as per partition. Consequently, plaintiff was required to file R.C.S. No. 3 of 2008 seeking partition of suit property. In that suit, defendants took the plea of previous partition of 1984 and defeated plaintiff's suit. Pleadings and evidence recorded in that suit is sufficient to establish partition and allotment of suit lands to the plaintiff. Consequently, concurrent decree passed by courts below

upholding plaintiff's claim for declaration of ownership and perpetual injunction cannot be faulted with. She urges that no substantial question of law arises for consideration into the concurrent finding recorded by both fact finding courts on appreciation of evidence.

9. Having considered submissions advanced, and on perusal of reasoning adopted by courts below, it can be gathered that there is no dispute as regards to previous partition of 1984 between plaintiff and defendants, who are members of joint family. R.C.S. No. 3 of 2008 instituted by plaintiff seeking partition and separate possession was dismissed upholding defendants' stand as to the previous partition of suit properties. The only issue posed before this Court is as regards to the identification of properties fallen to the share of plaintiff and consequential claim for declaration of his ownership.

10. Mr. Patil, learned advocate for appellant endeavours to contend that though plaintiff could not establish his possession over particular area as claimed in the plaint, he is trying to grab the lands with amenities under the garb of previous partition. So as to find out correctness of aforesaid submissions, it would be necessary to make reference to the written statement that was filed by appellants in the previous suit i.e. R.C.S. No. 3 of 2008 filed by plaintiff. Defendants have specifically pleaded that in the year 1984, written partition was effected between plaintiff and defendants. Mutation Entry No. 211 dated 15.4.1984 was sanctioned in pursuance to such partition and they are in possession of respective shares. They further assert that plaintiff has transferred 1 Hectare 22 R land in favour of defendant No.2 mother from Survey No. 28A. Aforesaid statement in written statement would

clearly depict that property possessed by plaintiff was clearly defined and that was subject matter of sale deed executed by plaintiff in favour of mother – Defendant No.2 I.e Gayabai Vishwanath Gute. Same land was further subject matter of registered gift deed executed by Gayabai in favour of plaintiff. The four boundaries of area admeasuring 1 Hectare 22 R from Survey No. 28A has been specified in those documents. As such, there cannot be dispute as regards to the identification of share of land from Survey No. 28/1A. So far as land Gat No. 26 is concerned, admittedly, it was partitioned and possession of specified area was given to the plaintiff.

11. Smt. Madhaveshwari Mhase, learned advocate for respondent/plaintiff invited attention of this Court to the cross examination of defendant No.1 father of plaintiff and defendant/original defendant No.3 recorded in R.C.,S. No. 3 of 2008. He admits that he partitioned Survey No. 28/1A between himself and his 3 sons and allotted 4 and ½ Acre land to them. He specifies boundaries of the land received by him from Eastern side. Then, specifies boundaries of portion of land that was allotted to plaintiff and other sons. Similarly, he specifies allocation of share allotted to plaintiff in Survey No. 26. Aforesaid evidence of Vishwanath clarifies about allocation of lands possessed by himself and his sons after partition.

12. Perusal of judgment of the trial court would show that there is evidence indicating that plaintiff has dug a well under the Government Scheme and mutation entry to that effect is recorded. Similarly mutation entries as regards to the ownership and possession of plaintiff over the area admeasuring 1 Hectare 86 R from Survey No. 28/1A and

1/4th share in Survey No.26, has never been challenged. Pertinently, defendant Nos. 1 and 2 did not enter into witness box. The trial court concluded that plaintiff proved his ownership and possession over the suit property. Appellate court also concurred with the finding recorded by trial court in this regard.

13. No perversity in the concurrent finding of fact is discernible. No substantial question of law emerges for consideration. Hence, second appeal sans merit, stands dismissed.

14. Civil application, if any, stands disposed of.

[S.G. CHAPALGAONKAR, J]

At this stage, learned advocate for appellant seeks continuation of interim relief that was granted in Second Appeal. However, this court has confirmed the concurrent findings recorded by the courts below and for the reasons stated in the order, the request made cannot be considered. Hence, same is rejected.

[S.G. CHAPALGAONKAR, J]

grt/-