



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

927 SECOND APPEAL NO. 824 OF 2016

Eknath S/o. Ananda Bonde
died through his legal heirs:

1. Shantabai Wd/o Eknath Bonde
Age : 75 years, Occu: Household,
2. Bhagwan S/o. Eknath Bonde
Died through his legal heirs:
2-A Shriram S/o Bhagwan Bonde,
Age 22 years, Occu : Education
2-B Lokesh S/o Bhagwan Bonde,
Age 12 years, Occu : Education
2-B Krishna S/o Bhagwan Bonde,
Age 10 years, Occu: education,
3. Sunandabai Mohan Rothe
Age : 56 years, Occu : Household,
4. Anandabai Kishor Kale
Age : 54 years, Occ : Household,
5. Shobhabai Ramesh Jagtap
Age : 50 years, Occu : Household,
6. Kokilabai Onkar Rothe
Age : 48 years, Occu : Household,
All R/o Kinhi Tq. Bhusawal
District. Jalgaon

...Appellants

VERSUS

Raghunath Ananda Bonde,
Age- 66 Years, Occu- Agri.,
R/o. : Kinhi, Tq. Bhusawal,
Dist. Jalgaon.

...Respondent

...

Mr. S. B. Bhapkar, Advocate for Appellants
Mr. Anand Chawre, Ms. Vandana Sadawarte, Mr. M. S. Sapkal for
Respondent

...

CORAM : ROHIT W. JOSHI, J.
DATE : 2ND APRIL, 2025

ORAL JUDGMENT .:

1. The appellant in the present appeal is the original defendant and respondent is the original plaintiff. The parties are related to each other are real brothers. The plaintiff had filed a suit for declaration, partition and separate possession against defendant being the Regular Civil Suit No.32 of 2002. The said suit is decreed by the learned Trial Court vide decree dated 18.10.2011. The defendant challenged the said decree for partition passed in the Regular Civil Suit No.32 of 2002 by filing an appeal being Regular Civil Appeal No.215 of 2011 which came to be dismissed vide judgment and decree dated 16.09.2016. Against these concurrent decrees the present appeal is filed.

2. The suit property is an agricultural land bearing Gut No.25/4 admeasuring 1.08 HR situated in village Kanhale, Tah. Bhusawal, Dist. Jalgaon. The learned Counsel for the appellant has raised two principal contentions in the present appeal. He has drawn my attention to the earlier Civil Suit filed by respondent/plaintiff being Regular Civil Suit No.155 of 1994 with respect to the suit property. Both the plaintiff and defendant were parties to the said Suit. In the said Suit, the plaintiff had come up with the contention that both the brothers i.e. plaintiff and defendant had half share each in the suit property which was

separately demarcated by them by dividing the suit property. The plaintiff claimed that half portion towards the northern side of the property was in his possession, whereas, the other half portion on the southern side was in possession of the defendant. The plaintiff contended that the defendant i.e. his brother was creating obstruction in possession and peaceful enjoyment of the half portion on the northern side of the suit property and therefore the earlier suit was filed seeking a declaration and consequential relief of perpetual injunction. The prayer clauses in the earlier Civil Suit i.e. Regular Civil Suit No.155 of 1994 read as under:-

(a) It will be declared that the plaintiff is in lawful possession of the suit property i.e. half portion admeasuring 0.54 HR on the northern side in land bearing Gut No.25/4 totally admeasuring 1.08 HR situated in village Kanhale, Tah.Bhusawal, Dist. Jalgaon.

(b) Grant a decree for perpetual injunction restraining the defendant as also his servants or agents from disturbing possession of the plaintiff over the suit property.

3. The said suit was dismissed by the learned Civil Judge, Junior Division, Bhusawal vide judgment and decree dated 24.11.1999. It is held that the defendant was in possession of the entire property in as

much as the plaintiff himself had delivered possession of the suit property i.e. half share in Gut No.25/4 to the defendant. In that view of the matter it was held that the plaintiff was not entitled for the relief of declaration and perpetual injunction as prayed in the said Suit. It is admitted position on record that the said judgment and decree has assumed finality in as much as the plaintiff has not challenged the aforesaid decree passed against him.

4. The plaintiff has subsequently filed a suit for partition and separate possession with respect to the same property being Regular Civil Suit No.32 of 2002. The prayers in the Regular Civil Suit No.32 of 2002 are as under :-

- a) pass a decree for declaration that the plaintiff has half share in the suit property described in paragraph No.1 of the plaint.
- b) grant a decree for partition and separate possession with respect to the suit property granting half share in the suit property or such appropriate share to which he may be entitled
- c) in the event it is not possible to partition the property physically, partition be effected in accordance with the provisions of the partition Act.

5. The said Civil Suit came to be decreed by the learned Trial Court

and the appeal preferred by the defendant is also dismissed.

6. In the light of aforesaid developments, the learned Advocate for the appellant/original defendant has vehemently argued that the subsequent Suit was barred by Section 11 of the Code of Civil Procedure, 1908 (for short "CPC"). The contention of the learned Advocate is that once declaration of ownership sought in the earlier civil suit was refused to the plaintiff, subsequent suit for the same relief could not have been entertained.

7. I have perused the prayer clauses in both the Civil Suits. The prayer clauses in earlier Civil Suit are a part of the decree which is at Exhibit-60. Perusal of the judgment at Exhibit-59 and extract of the plaint which is a part of the decree at Exhibit-60 will indicate that the plaintiff had come up with a specific case that he was in possession of northern half portion of the suit property and prayed for a decree of perpetual injunction restraining defendant from disturbing his possession over the same. As stated above, the said suit is dismissed holding that the defendant was in possession of the entire property. The prayer clause in the present suit is materially different in as much as the plaintiff now seeks a decree for partition and separate possession. He is not claiming to be in possession of any specific portion of the suit property as he did in the earlier Civil Suit. The issue to be considered is

as to whether the relief sought in the present suit was sought and refused in the earlier suit. If that be so, the present suit will be hit by *res judicata*. However, if the answer is in the negative then the present suit will be maintainable.

8. Having perused the judgment and decree in the earlier suit and plaint in the present suit, particularly the prayer clauses, I am of the opinion that the present suit will not be hit by Section 11 of the CPC. In the earlier suit the plaintiff claimed to be in possession of a specific portion of the suit property. This contention of the plaintiff is disbelieved and the suit was dismissed. In the present suit, the plaintiff has prayed for decree of partition and separate possession without claiming to be in possession of any specific portion in the suit property. The learned Courts held that both the brothers are co-owners of the suit property and accordingly granted a decree for partition in favour of the plaintiff. In the light and reasons recorded above, the decree for partition which is granted is not hit by Section 11 of the CPC.

9. I have also perused the judgments passed by both the learned Courts who have in my considered opinion rightly dealt with the controversy holding that the suit is not hit by Section 11 of the CPC.

10. The other contention raised by the learned Advocate for the appellant is that the subsequent suit i.e. Regular Civil Suit No.32 of 2002 out of which the present Second Appeal arises is hit by Order II Rule 2 of the CPC. Perusal of the written statement indicates that defence in respect to Order II Rule 2 of the CPC is not raised in the written statement. It is now well settled that a suit cannot be dismissed as barred by Order II Rule 2 of the CPC unless a specific contention in this regard is raised in the written statement.

11. That apart, in my considered opinion the plea of *res judicata* under Section 11 and plea of subsequent suit being barred by Order II Rule 2 of CPC are mutually destructive pleas. It is well settled that the judgment operates as *res judicata* in a subsequent suit when an issue directly and substantially falls for adjudication in the earlier suit and it is decided on merits in the earlier suit. Adjudication on merit is a *sine qua non* to attract Section 11 of the CPC. As against this, Order II Rule 2 of the CPC is a principle of law which states that all available reliefs must be claimed by the plaintiff in the same suit and if he omits to seek a particular relief in the earlier suit then subsequent suit for the omitted relief is barred. Thus, Order II Rule 2 of the CPC will be attracted when a particular relief is not claimed and therefore obviously not adjudicated.

12. In my considered opinion even otherwise Order II Rule 2 of the CPC will not come to the aid of the appellant in the facts of the present case. In the earlier suit as noted above the contention of the plaintiff was that he was in separate possession of a specific portion in the suit property. He sought a decree for perpetual injunction that he should not be dispossessed from the said portion. Threat of dispossession was the cause of action in the earlier suit. As against this, in the subsequent suit the case of plaintiff is that he has half share in the suit property and the cause of action is that despite a specific demand this half share is not given to him by his brother i.e. the defendant in the suit property. The term cause of action when construed in a narrow sense means infringement of a right. However, in a broader sense, the term cause of action includes facts constituting the right itself and the breach of the said right. Ready reference for this legal proposition can be had to the judgment of the Hon'ble Supreme Court in the matter of ***A. B. C. Laminart Pvt. Ltd. & Anr. Vs. A. P. Agencies, Salem***¹.

13. The right claimed in the subsequent suit is a right to seek partition of property jointly held whereas the right in the earlier suit was protection of possession of a property which was alleged to be in exclusive possession. The plaintiff failed to prove his separate possession over a de-marketed portion in the earlier suit and therefore

¹ AIR 1989 Supreme Court 1239

the said suit was dismissed. This cannot be a ground to prohibit filing of a fresh suit of partition and separate possession. In that view of the matter the contention of the learned Counsel for the appellant that the suit is hit by Order II rule 2 of the CPC is also liable to be rejected.

14. It needs to be mentioned that right to seek partition and separate possession of a property is a right of recurring nature. Till such time as a property remains joint, co-owner has a right to seek partition and separate possession of the property. It has been held by a catena of judgments that principles enshrined under Order IX Rule 9 and Order XXIII Rule 1 of the CPC are not applicable to suits for partition.

15. In view of the aforesaid, in my considered opinion no substantial question of law arises for consideration in the present Second Appeal.

16. The Second Appeal is therefore **dismissed**.

17. At this stage, learned Counsel for the appellant makes a request to continue the interim order dated 05.12.2016 for a period of eight weeks from today. Although, the prayer is vehemently opposed, having regard to the fact that the interim relief is operating for a period of around eight years, I am inclined to extend interim relief for a further period of eight weeks.

18. Pending Civil Applications, if any, stand disposed of.

[ROHIT W. JOSHI J.]

Narwade/