

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.761 OF 2017

1. Bandu Shivala Gangurde [Abated since dead]
2. Babulal Murlya Kokani
Age 42 years, Occ. Agri.
3. Dhedu Kumar Kokani
Age 55 years, Occ. Agri.
4. Dahilya Kalu Kokani
Age 37 years, Occ. Agri.

All R/o. Lavhardodi, Tq. Sakri,
Dist. Dhule.

...Appellants
(Orig. Defendants)

Versus

1. Smt. Hirabai Babulal Bagul (Kokani)
Age 42 years, Occ. Agri
R/o. Lavhardodi, Tq. Sakri,
Dist. Dhule.
2. Lalchand Bhavadu Kokani
Since deceased, through legal heirs,
- 2-A Smt. Chhabibai W/o Lalchand Bhoys
Age 43 years, Occ. Agri.
- 2-B Shantaram s/o Lalchand Bhoys
Age 30 years, Occ. Agri.
- 2-C Sunil Lalchand Bhoys
Age 23 years, Occ. Agri.
All R/o. Lavhardodi, Tq. Sakri,
Dist. Dhule.

..Respondents
(Orig. Plaintiff & Def No.2)

...

Mr. B.R. Waramaa, Advocate for Appellants.

Mr. A.S. Abhyankar a/w Mr. N.S. Shah h/f Mr. S.V. Natu, Advocate for
Respondent No.1.

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CORAM : S.G. CHAPALGAONKAR, J.

RESERVED ON : MAY 08, 2025

PRONOUNCED ON : JUNE 09, 2025

JUDGMENT :

1. The appellants/original defendants impugn judgment and decree dated 01.11.2017 passed by District Judge, Dhule in Regular Civil Appeal No.107 of 2010 thereby upholding judgment and decree dated 31.08.2006 passed by Civil Judge Junior Division, Sakri, District Dhule in Regular Civil Suit No.65 of 2006, as well as rejecting their cross objection. (Parties are hereinafter referred by their original status in Suit for brevity and convenience).

The facts in brief can be summarized as under :

2. Respondent no.1 (original plaintiff) instituted Regular Civil Suit No.65 of 2006 claiming relief of possession and perpetual injunction against defendants contending that in the year 1995 by way of family arrangement, her uncles gave her suit land. Eventually, on 03.11.1995, mutation entry no.65 has been certified. Since then plaintiff is cultivating suit land as owner. Defendant no.1, who is cousin of plaintiff, with aid of other defendants obstructed her peaceful possession and constructed a hut over portion of suit land. He is trying to forcibly dispossess her from suit land. Hence, plaintiff filed this suit for removal of hut and perpetual injunction against defendants restraining them from disturbing her peaceful possession over suit land.

3. The defendants by filing written statement refuted plaintiff's claim contending that suit property is ancestral land of defendant no.1 and Defendants are residing there since last 30 years. The Government establishments like Zilla Parishad School, Hospital and Residential Houses are also situated in Block No.56. The plaintiff in collusion with revenue officers created record of mutation entry no.62, which has been challenged before competent authority. Defendant No. 1 denied relationship with plaintiff and asserted his ownership and possession.

4. The Trial Court framed issues based on pleadings of parties, recorded oral evidence and concluded that plaintiff's uncles allotted suit land to her by way of family arrangement as per tribe customs and approved her title. However, her claim as to removal of encroachment made by defendant was discarded. Eventually, suit was partly decreed thereby perpetually restraining defendant nos.1 to 5 from obstructing peaceful possession of plaintiff over remaining suit land.

5. Aggrieved plaintiff filed appeal assailing denial of relief of removal of encroachment and possession whereas, defendants filed cross objection assailing decree of perpetual injunction. The learned District Judge after hearing parties allowed plaintiffs appeal and dismissed defendants cross objection. Consequently, passed the decree of mandatory injunction to remove temporary structures/huts

of defendants and to deliver vacant peaceful possession of portion of suit land to plaintiff, so also maintained the decree of perpetual injunction as passed by Trial Court. Hence, defendants have filed present second appeal.

Pertinently, during pendency of present appeal, appellant no.1 / original defendant – Bandu Shivala Gangurde expired. Prior to his death, he had filed pursis before Executing Court accepting the claim of plaintiff. Mr. Waramaa, learned advocate appearing for appellants expressed his inability to bring legal heirs, as they are not cooperating. In result, vide order dated 07.03.2025, appeal to the extent of appellant no.1 – Bandu, is declared to be treated as abated.

6. The second appeal has been admitted vide order dated 26.04.2019 on following substantial questions of law:

(I) Whether the mutation entry no.62 has conferred ownership to the plaintiff over the entire suit land ?

(II) Whether effective decree could have been passed by the Courts below without the description of the encroached area or the cultivable area to be segregated from the area described in para 01 of the plaint ?

(III) Whether the first appellate Court was justified in reversing the finding of the lower Court and granting mandatory injunction for the removal of the structures of the defendants and directing them to deliver vacant and peaceful possession of the portion of the suit land, in absence of description of the said portion of suit land ?

(IV) Whether interference is required in the decree passed by both the Courts below ?

7. Mr. Waramaa, learned advocate appearing for appellants vehemently submits that plaintiff's claim is based on mutation entry no.62. However, it does not confer any title on plaintiff. He would submit that the suit property is ancestral property of defendant No. 1. There is construction of public buildings like Zilla Parishad School, Hospital, Gram Panchayat Office etc., on the suit property. The plaintiff has not described suit property/encroached area or property possessed by her in para 1 of the plaint. The learned District Judge granted decree of mandatory injunction and removal of construction of structures without requisite specifications of the alleged encroachments. According to him, in absence of description of property and measurement map from competent authority, the decree could not have been passed. According to him, plaint sans compliance of Order VII Rule 3 of Civil Procedure Code, which requires to provide description of property sufficient to identify it, particularly in case of encroachment, a sketch showing location and extent of encroachment to be filed along with plaint. He would therefore urge that plaintiff has miserably failed to prove her title, possession or encroachment by defendants.

8. Per contra, Mr. Abhyankar, learned advocate appearing for respondent submits that plaintiff is daughter of Gokul Kokani, who

recorded his oral evidence and asserted that suit property was part and parcel of his joint family along with cousin brothers namely Shivalya Bhurya Kokani, Kalghu Bhurya Kokani, Bavarya Bhurya Kokani and Bagadya Bhurya Kokani. By way of family arrangement and as per prevailing customs of Kokani community, the suit land has been given to plaintiff. She was put in possession of suit land. Consequently, mutation entry no.62 is certified. The plaintiff has acquired title. He would submit that defendant no.3 – Babulal Kokani during his cross-examination admitted relationship with plaintiff. He admits that in the year 1995, Shivalya Bhurya Kokani, Kalghu Bhurya Kokani, Bavarya Bhurya Kokani and Bagadya Bhurya Kokani recorded suit property in the name of plaintiff as per mutation entry no.62. He would submit that since date of mutation entry, plaintiff's name is continuously appearing in record of rights. As such plaintiff has acquired title and lawful possession. Defendants could not establish any right, even they could not establish their adverse possession. Mr. Abhyankar would further submit that plaintiff has raised claim against present defendants to the extent of illegal construction raised by them in the suit land. The plaintiff is claiming ownership over entire block no.56. The description of property is properly given. He would submit that since defendants have raised temporary structures within boundaries of block no.56, absence of specific dimensions of encroached area would not frustrate plaintiff's claim. According to

him, there is no dispute as to boundaries. The defendants have no right over suit property. Therefore, both Courts have concurrently recorded finding as to ownership of plaintiff. The Appellate Court has rightly issued directions for removal of encroachment/temporary structures and huts of defendants and deliver vacant peaceful possession of that portion to plaintiff.

9. Mr. Abhyankar would further submit that appellant/defendant no.1 has accepted plaintiff's claim by filing pursis below Exhibit-45/C in R.D. No.33 of 2012. Certified copy of the same is placed on record of this Court. Later on, appellant no.1 – Bandu expired. His legal heirs are not brought on record. The decree to the extent of defendant no.1 has attained finality. Hence, entire appeal shall abate, as right claimed by defendants was joint. They had not set up independent and distinct claim. He would therefore urge that second appeal may be dismissed.

10. Having considered submissions advanced on behalf of respective parties and substantial questions of law as framed at the time of admission of appeal, it is apposite to determine extent of right conferred upon plaintiff over suit property based on mutation entry no.62 and her entitlement for reliefs as claimed in the suit. The plaintiff asserted that her uncles allotted suit land to her by virtue of family arrangement for maintenance in the year 1995. Since then,

she acquired title and possession. The father of plaintiff entered into witness box as PW-2 and asserted that he had undivided share in ancestral property along with his cousins and as per customs of Kokani community, suit land is given to plaintiff for her maintenance. Consequently, mutation entry no.62 has been effected. Pertinently, this version of plaintiff's father gets support from admission of defendant no.3 recorded during his cross-examination. Although defendants in written statement denied relationship with plaintiff, in cross-examination, Defendant No. 3 admitted that plaintiff is daughter of Gokul and Gokul is son of Tukaram. Defendant admitted that he is son of Shivalya, who was son of Tukaram's brother Bhurya. The learned District Judge has rightly explained the relationship between the parties, on the basis of admissions elicited during cross-examination of witness and other evidence on record. Pertinently, genealogy filed by plaintiff at Exh 50/c is not seriously disputed. As such, there cannot be quarrel as to relationship between plaintiff and Defendant No.1.

11. It is admitted by Defendant / Babulal that Sakhya was original owner of S. No 811 (present Block No. 56). Tukaram is son of Sakhya. plaintiff's father Gokul is son of Tukaram. As such Gokul had right in ancestral property along with his cousins. He has not received any land out of joint family property but his cousins recorded suit land block no.56 in the name of plaintiff, which is apparent even

from admission given by defendant No. 3 during his cross-examination. In that view of the matter, mutation entry no.62 assumes importance. It records that plaintiffs uncles Shivlya and others partitioned and allotted suit land to plaintiff. It is trite law that family arrangement may be oral and need not be supported by any writing or reducing its recitals on paper by way of memorandum. The oral family arrangements are also approved and can be inferred from the conduct of parties, supported by lawful mutation record. The learned District Judge has rightly observed that defendant nos.1, 2, 4 and 5 have not adduced oral evidence before the Trial Court whereas, defendant no.3 during his evidence states that suit land is ancestral property of defendant no.1. Pertinently, defendant no.1 admitted claim of plaintiff by filing purshis before the Executing Court prior to his death during pendency of this appeal. His Legal heirs are not brought on record consequently, present appeal has been abated so far as appellant/defendant no.1. In this background, appellant nos.2 to 5 cannot assert any better right over suit property than the plaintiff. Hence, this Court do not find any reason to interfere with concurrent finding of fact as to possession of plaintiff over suit property, except portions occupied by defendants and Government establishments (as admitted by plaintiff in her cross examination). Pertinently, on the basis of Mutation Entry No. 62, this court has no reason delve in to issue of title of plaintiff. It is trite law that mutation entry itself is not

evidence of title. Even otherwise from prayers in plaint, it is clear that plaintiff has not sought for relief of declaration of ownership of suit property. She has restricted prayer for possession of encroached area by defendants on the basis of previous possession and injunction as to balance area in her possession. It that view of the matter this court upholds right of plaintiff to seek protection of possession and decree of injunction against defendants.

12. The next substantial question of law is as to description of encroached area or cultivable area as specified in para 1 of plaint. Mr. Waramaa, learned advocate appearing for appellants relied upon the provisions of Order VII Rule 3 of the Civil Procedure Code to contend that plaintiff failed to comply mandate as to providing sketch showing approximately as possible location and extent of encroachment. Careful reading of Rule 3 particularly as modified as per Bombay amendment, it can be observed that the approximate location of encroachment has to be shown by way of sketch along with plaint. The plaintiff has not annexed the map showing the exact area of encroachment, dimensions and its location. Although plaintiff asserts allotment of entire block no.56 admeasuring 4 H 14 R situated at Village Lavhardodi, Taluka Sakri, District Dhule, and alleges that defendants have raised temporary structures, as observed by Trial Court plaintiff could not specify boundary marks of huts. She admitted in cross examination that there are 16 houses of villagers in

suit land. She shown ignorance of its boundaries or dimensions. Therefore, the Appellate Court was not justified in directing removal of unspecified temporary structures and delivery of vacant possession of suit property to plaintiff particularly in absence of observance of mandate of order VII Rule 3 of CPC as applicable in State of Maharashtra.

13. Although Mr Abhayankar, persuaded this court to hold that entire appeal stands abated on death of Appellant No.1/Original Defendant No.1, this Court is not inclined to accept such contention as plaintiff asserted separate encroachment by each of defendants on suit property. Accordingly, Appellate Court has passed decree of mandatory injunction against them. Hence, looking the nature of relief claimed in suit, death of one of appellant would not entail abatement of entire appeal. Even there is no possibility of emerging inconsistent decrees.

14. In result, judgment and decree passed by the Appellate Court to the extent of mandatory injunction to remove temporary structures and huts of defendants with further direction to deliver vacant and peaceful possession of that portion of suit land to plaintiff cannot be sustained for want of particulars of alleged encroachments. Hence, Second Appeal is partly allowed. The judgment and decree as passed by Appellate Court to the extent of relief of mandatory injunction and possession is quashed and set aside. The decree passed

by Trial Court and confirmed by the Appellate Court as per Clause (6) of operative part is restored.

15. Second Appeal stands partly allowed accordingly.

(S.G. CHAPALGAONKAR, J.)