



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

SECOND APPEAL NO. 71 OF 2015

1. Kashiram Dasaru Pakmode (Dead)
through his legal representatives-
 - 1A. Sau. Bebi W/o. Upasrao Fating
(now dead through legal heirs)
 - 1A-1. Upasrao S/o. Lahanuji Phating,
Aged about 78 years, Occ. Cultivation,
 - 1A-2. Subhash S/o. Upasrao Phating,
Aged about 50 years, Occ. Labour
 - 1A-3. Kishor S/o. Upasrao Phating,
Aged about 45 years, Occ. Cultivation
- All R/o. Ward No. 6, Shivaji Chowk,
Nagbhid, Tahsil- Nagbhid,
District – Chandrapur.
- 1A-4. Sau. Chaya W/o. Kishor Bangadkar,
Aged about 40 years, Occ. Household
R/o. Ravindranath Tagore Ward,
Treasury Colony, Tahsil & District
Bhandara.
 - 1B. Sau. Chhabi W/o. Nilkanth Agade,
Aged about 59 years, Occ. Household
& Cultivation, R/o. Nagbhid, Tahsil-
Nagbhid, District- Chandrapur.
2. Prabhakar S/o. Kashiram Pakmode
Aged about 53 years,
 3. Dinkar S/o. Kashiram Pakmode,
Aged about 53 years,

Both Cultivators, R/o. Talodhi
(Balapur), Tahsil- Nagbhid,
District- Chandrapur.

. . . APPELLANTS
(Ori Defd./Appellants)

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Shantabai W/o. Khatu Amborkar,
Aged about 74 years, Occ. Household &
Cultivation, R/o. Talodhi (Balapur), Tahsil-
Nagbhid, District- Chandrapur.

. . . RESPONDENT
(Org. Plaintiff/Resp.d.)

Shri Ashish Kadukar h/f. Shri Rohit Joshi, Advocate for appellants.
Ms. Sonal M. Tripathi, Advocate for respondent.

CORAM :- M. W. CHANDWANI, J.

RESERVED ON :- 11.10.2024

PRONOUNCED ON :- 02.01.2025

JUDGMENT :-

By consent of the parties, the matter is heard finally.

2. The appeal questions concurrent findings of the Trial Court recorded in Regular Civil Suit No. 49/1991 vide judgment and decree dated 27.01.2004 and the First Appellate Court recorded in Regular Civil Appeal No. 52/2004 vide judgment and decree dated 28.08.2014 whereby, the suit of the respondent for possession came to be allowed by the Trial Court and the First Appeal filed by the appellants came to be dismissed by the First Appellate Court.

3. The present respondent is the sister of Kashiram Dasru Pakmode, the original defendant, who claims that she purchased the suit property from her father vide registered sale-deed dated

19.02.1965 for a consideration of Rs.500/-. She wanted to construct the suit house therefore, she shifted to another house and repaired the suit house. Kashiram, the father of the present appellants was residing in the ancestral house, which was in a dilapidated condition. In the year 1980, during rainy season, Kashiram demanded the possession of the suit house until his house is repaired. Accordingly, the respondent permitted him to reside there temporarily. However, he failed to vacate the suit premises and therefore, the respondent filed the suit for possession and other ancillary reliefs.

4. Kashiram contested the suit *inter alia* contending that in 1948, he separated from his father. In the said oral partition he was allotted the southern $\frac{1}{2}$ portion of the ancestral house, whereas, the northern portion was allotted to his brother Yashwant. Since then, he was in possession of the suit house. The respondent obtained a nominal sale-deed of the suit house from his father- Dasru. She tried to get the suit house vacated but could not succeed and therefore, Dasru, father of Kashiram purchased another house for the respondent. Kashiram also came up with a case that the respondent relinquished her right on 08.07.1975 in presence of the panchas and hence, sought dismissal of the suit. In the alternative, Kashiram also took a defense that he became the owner by adverse possession. During the pendency of the suit, Kashiram died on 25.04.1998 and the appellants were

brought on record. The Trial Court framed the following issues and also answered the same while decreeing the suit.

Issue	Findings
1. Whether plaintiff proves her title over the suit house ?	Yes
2. Whether plaintiff proves that she allowed the defendants to reside in the Suit house for 3-4 months on 12/07/1980 ?	Yes
3. Whether plaintiff proves that defendant refused to vacate the suit house and prepared false grampanchayat record in collusion with members of grampanchayat ?	Yes
4. Whether plaintiff is entitled for possession of the suit house ?	Yes
5. What order and decree ?	As per final orders
6. Whether the instant suit is properly valued and proper court fees is paid thereon ?	Yes

5. An unsuccessful attempt was made by the appellants before the learned District Judge, Chandrapur. Feeling aggrieved with the decree of possession passed by the Trial Court and affirmed by the First Appellate Court, the present appeal came to be filed.

6. The following substantial question of law came to be framed on 08.06.2016:-

“i) Could the Sale Deed dated 19/02/1965 executed by Dasaru Pakmode confer any title on the respondent/plaintiff in view of the partition of the year 1948, whereunder the suit property was allotted to the share of the original defendant No. 1 Kashiram Dasaru Pakmode ?

ii) Are not the contents of 30 years old document required to be proved independently ? Have not the learned Courts below erred in appreciating that presumption under Section 90 extends only to execution and attestation of document and the contents have to be proved independently ?”

7. Mr. Rohit Joshi, learned counsel appearing on behalf of the appellant submits that the suit property is the southern part of the ancestral house owned by Dasru, father of Kashiram, Yashwant and the respondent. In 1948, Kashiram got the suit property in oral partition, whereas, Yashwant got the northern portion of the house. According to him, once Kashiram, the father of the appellants got the suit house in the oral partition, there was no authority left with Dasru to sell the property to the respondent in the year 1965. According to him, though Dasru was the sole owner, in wake of the blending of his share in the common hotchpot; carrying out partition of the said property and giving the suit property to Kashiram is permissible and therefore, since 1948, Kashiram is the owner of the suit property and hence, there is no question of Dasru selling the property to the respondent, his daughter.

8. To show that self acquired property can be blended in common hotchpot and subjected to division in oral partition, the learned counsel for the appellant relied upon the decision of the Supreme Court in the case of *Kisansing Mohansing Balwar Vs. Vishnu Balkrishna Joglekar*¹, wherein it has been observed that a transaction by which a father makes a division of his self-acquired property between his sons will be regarded as a transaction by which he, in the first instance, effects a severance of status between his sons; in the

1 1951 ILR 148

second instance, he naturally throws into the hotchpot his self-acquired property and then divides it between his sons whether equally or unequally in accordance with his pleasure. Such a transaction cannot possibly be regarded as one of the five transactions mentioned in the Transfer of Property Act which requires registration, namely sale, mortgage, exchange, lease for more than one year or a gift.

9. He also submits that the Trial Court and the First Appellate Court failed to consider that the presumption under Section 90 of the Indian Evidence Act is not applicable to contents of the document and only realization of formal proof can be dispensed with.

10. Conversely, the learned counsel appearing on behalf of the respondent submitted that the suit house is different than the house which has been referred to by the appellants. According to her, there is no dispute that deceased- Kashiram got the southern portion of the house owned by Dasru which fell in his share in the partition whereas, the northern portion fell in the share of Yashwant. According to her, the suit house is different than the house which has been referred to by the appellants. Further, Kashiram did not challenge the sale-deed executed by his father in favour of the respondent in the year 1965 and therefore, without challenge to the said sale-deed, the defense of the appellants that the respondent is not the owner of the suit property

does not stand. According to her, there is ample evidence on record which shows that the respondent is the owner of the suit property. One Gram Panchyat record shows her name as the owner of the property. The notice came to be issued in the year 1990 for terminating the license and therefore, according to her, the Trial Court has considered all these aspects and rightly decreed the suit in favour of the respondent. The First Appellate Court also did not find any substance in the appeal of the appellants and therefore, the same came to be dismissed.

11. Having heard the respective counsels and having gone through the judgments impugned, it is seen that Dasru, the father of Yashwnat, Shantabai and Kashiram, sold the suit house by a registered sale-deed (Exh.105). The defense of Kashiram, the father of the appellants was that, he got the suit house which is a part of their ancestral property in partition whereas, remaining northern portion fell in the share of his brother- Yashwant. The said oral partition took place in 1948 whereas, the sale-deed in favour of the appellants has been executed in the year 1965 by Dasru when he was not the owner of the suit house in wake of partition in the year 1948.

12. The crux of the argument of the learned counsel for the respondent is that, the house which fell in the share of Kashiram is

different than the suit house. Perusal of the record, in particular the Akhiv Patrika (record of rights) (Exh.144) goes to show that the house/land situated at no. 244 stands in the name of Dashrath with a note that the said house fell in the share of Dashrath in the partition. Considering the submission of the learned counsel for the appellants, I find that this house is subject matter of partition in the year 1948 and $\frac{1}{2}$ portion of this house mentioned in Exh.141 fell in the share of Kashiram. The record, in particular, another Akhiv Patrika (Record of Right) (Exh.146) further reveals that Dashrath also owned one more house in his name. The note in the Akhiv Patrika (Record of Right) (Exh.146) goes to show that the said property has been purchased by Dasru. Thus, it is not the case that Dasru had only one house.

13. That being said, the appellants may be correct in saying that they got the house by way of partition in the year 1948. Therefore, Kashiram got the southern portion of the ancestral property. However, the submission of the appellants that the said house is the suit house is not a correct one for more than one reasons. Firstly, the sale-deed which was executed on 19.02.1965 by Dasru does not speak about identification no. 244 mentioned in the Akhiv Patrika of the ancestral house which demonstrates that the respondent has purchased another house other than the ancestral one. This is also fortified by sale-deed (Exh.123) executed in favour of Dasru whereby, Dasru

purchased a house from one Jankibai. Rather, Dinkar (appellant no. 3/DW3), who has been examined on behalf of the appellants has initially admitted that Dasru purchased the house where Yashwant is residing.

14. Needless to mention that, even the sale-deed executed by Dasru in favour of the plaintiff speaks about the remaining portion of the house towards northern side wherein Yashwant is residing. Therefore, just because Yaswant is residing in northern portion of the suit house, the suit house cannot be said to be the ancestral house which Kashiram got in partition. In view of the material available on record, the stray admission by the respondent's witness Kashiram Madankar contrary to his examination-in-chief admitting the four boundaries of the suit house as of the ancestral house will not help the appellants.

15. Sofaras, the submission of the learned counsel for the appellants that the sale-deed (Exh.123) has not been proven in accordance with law of evidence is concerned, let me say that Kashiram, in his written statement has admitted execution of the sale-deed with a rider that the said sale-deed is a nominal one. Thus, the fact remains that execution of sale-deed of the suit house is admitted. Once the sale-deed is admitted, though with a rider, it is not obligatory

on the part of Shantabai to formally prove the sale-deed as per the Indian Evidence Act. Whether the sale-deed is a nominal one is another aspect. Therefore, the decision of the Supreme Court in the cases of *City Municipal Council, Bhalki by its Chief Officer Vs. Gurappa (dead) by L.Rs.*² and *Union of India Vs. Vasavi Co-operative Housing Society Ltd.*³ stating that onus is upon the plaintiff to prove his title independently will not be applicable to the case in hand. In wake of the findings of the Trial Court that the suit house is different than the ancestral house, which is a correct finding and for the reasons mentioned above, the substantive question of law no.1 does not arise.

16. Likewise, in wake of the admission of Kashiram in his written statement regarding execution of the sale-deed by his father in favour of Shantabai, even substantial question of law no. 2 does not arise.

17. In view thereof, the appeal fails and consequently it is dismissed.

(M. W. CHANDWANI, J.)

² 2016 (5) Mh.L.J. 1

³ 2014 (3) Mh.L.J. 244