

(2017) 10 BOM CK 0105
In the Bombay High Court
Case No : 244 of 2003

Madhusudan Vishwanath Mule

APPELLANT

Vs

Gajanan Vishwanath Mule, & Ors.

RESPONDENT

Date of Decision : 31-10-2017

Acts Referred:

Citation : (2017) 10 BOM CK 0105

Hon'ble Judges : V.M. Deshpande

Bench : SINGLE BENCH

Advocate : Abhijit L. Deshpande

Final Decision : Dismissed

Judgement

1. The present appeal is filed against judgment and decree passed by learned Civil Judge Junior Division at Malkapur dated 23.4.1998 in Regular Civil Suit No.44 of 1995 which was confirmed by learned Ad hoc Additional District Judge at Buldana on 13.3.2003 in Regular Civil Appeal No.67 of 1998.

2. By these two judgments and decrees, both the Courts below dismissed the suit for partition, possession, declaration, and mesne profit filed by the present appellant.

3. According to the plaint, the plaintiff and defendant Nos.1 to 4 are real and stepbrothers and sisters. The plaintiff being in service as a Talathi in Revenue Department was not residing in ancestral village Rohinkhed during his service period. He took voluntary retirement and, thereafter, started demanding his share in the property. The suit was restricted for the following properties: (i) two storeyed house at village Rohinkhed, Taluka Motala, District Buldana;

(ii) an open land admeasuring 20"x20" feet adjacent to the house.

According to the plaint, these properties were ancestral properties and remained to be partitioned. In the plaint itself, it is averred that ancestral agricultural property at village Rohinkhed was partitioned and accordingly necessary

mutation was done in the revenue record. It is stated in the plaint that in respect of the suit property respondent No.1/defendant No.1 Gajanan got mutated his name in the revenue record. It is the further averment in the plaint that since the suit property was not partitioned, he is entitled to 1/5th share in the same.

4. Defendant Nos.1 and 2 filed their written statement contesting the claim of the plaintiff. Defendant No.3, who used to reside with the plaintiff, also filed his written statement and admitted the plaintiff's claim. Defendant No.4, the sister, was proceeded ex parte.

5. As per the written statement, there was oral partition in the presence of the panchas and in the said oral partition one acre more in agricultural field was given to the plaintiff and in lieu of that he gave up his right in the suit properties. It is also stated that at the time of oral partition various movables were taken from the suit property by the plaintiff.

6. The plaintiff entered into the witness box. On behalf of the defendants, defendant No.1 examined his son Sachin and also examined one Kashiram, Rama, and one Sitaram.

7. Learned Judge of the Trial Court, after appreciating the evidences and pleadings, dismissed the suit. An appeal carried against the said is also dismissed. Hence, this second appeal.

8. The present second appeal was admitted on 28.9.2005 on the following substantial question of law:

"Whether finding recorded by the lower appellate Court that plaintiff had admitted in his evidence that at the time of partition and one acre of agricultural land was given to him in excess and, therefore, he waived his right in the suit premises is based on evidence/admission or is perverse?"

9. I have heard learned counsel Shri Abhijit L. Deshpande for the appellant. Learned counsel for the respondents chose not to remain present at the time of hearing. According to learned counsel for the appellant both the Courts below ought to have drawn adverse inference against defendant No.1 for not entering into the witness box. He also submitted that the evidence of Sachin, son of defendant No.1, cannot be looked into since mathematically at the time of partition the age of said defence witness cannot be more than 5 to 6 years. To keep aside the evidence of Sachin, learned counsel for the appellant relied upon a pronouncement of the Honourable Apex Court in the case of Janki Vashdeo Bhojwani and anr ..vs.. Indusind Bank Ltd. and ors, reported at AIR 2005 SC 439. It is also the submission of learned counsel for the appellant that the evidences of Kashiram and other witnesses examined on behalf of the defendants sans detail and are not clear and, therefore, both the Courts below ought to have granted decree as claimed by the plaintiff.

10. The appellant/plaintiff, respondent No.1/defendant No.1, and defendant No.4 are real brothers and sister. Whereas, defendant Nos.2 and 3 are stepbrothers of

appellant/plaintiff and respondent No.1/defendant No.1. It is not in dispute that defendant No.3 used to reside with the plaintiff. Whereas, defendant No.2 used to stay with defendant No.1.

11. From the averments made in the plaint and also from the evidence of the plaintiff, it is clear that there took oral partition in respect of agricultural land in the year 1984. Thus, according to the plaintiff, there was partition for agricultural land only. In the cross-examination, the plaintiff has specifically admitted that the noting of said oral partition was taken and the copy of the said was given to the patwari. He also admitted the following:

"VERNACULAR MATTER OMITTED"

12. From the aforesaid admission, it is clear that the plaintiff himself has admitted the defence of defendant Nos.1 and 2 broadly to the extent that in the partition one acre additional agricultural land was given to the plaintiff. No reason is coming on record as to what was the reason or cause of allotting one acre more of agricultural land in addition to the share for which the plaintiff was entitled to.

13. The plaintiff himself has stated in the plaint as under: "VERNACULAR MATTER OMITTED"

14. In my view, the appellant was working as a Talathi and who spent his entire life outside village Rohinkhed was never to be returned to the said place. Therefore, it appears that one acre more agricultural land was given to him and in lieu of the said he gave up his right in the suit property. The evidences of DW2 Kashiram and DW4 Sitaram clearly show that these independent persons were present at the time of partition. Further, their evidence show that in the said partition one acre extra agricultural land was given to the appellant/plaintiff and in lieu of that he gave up his right in the suit properties. Their evidences withstood to the cross-examination and there is nothing to disbelieve their version. DW3 is one Rama, a tractor driver whose evidence shows that in the year 1994 the appellant/plaintiff called him along with his tractor for transporting certain movables from village Rohinkhed to Nandura where ultimately the appellant/plaintiff is residing permanently.

15. The Court cannot forget the fact that the appellant was working as a Talathi in the Revenue Department. Thus, he knows the procedure for taking entries in the revenue record. He has admitted in his cross-examination that the noting was given to the Patwari of village Rohinkhed and defendant No.1 mutated his name after partition. It is rather surprising that till the plaintiff entered into the witness box, he never objected the mutation entry.

16. Though there is some force in the submission of learned counsel for the appellant about the evidence of Sachin, in view of the admission given by the appellant in the plaint as well as in his evidence and clinching evidence of defence witnesses Kashiram, Rama, and Sitaram, in my view it is proved on

record that the plaintiff got extra one acre of land and in lieu of that he gave up his share in the suit properties.

17. Non-examination of defendant No.1 by himself is hardly material especially when in his written statement it is his case that partition was effected in the presence of the panchas and those pancha witnesses were examined by the defendants. Further, it was never the case of the plaintiff that partition was not effected in the presence of pancha witnesses.

18. In that view of the matter, the evidences of independent witnesses cannot be brushed aside lightly.

19. Aforesaid discussion on the basis of available pleading and evidences on record show that the present appeal does not involve any substantial question of law and hence the appeal is dismissed. However, there shall be no order as to costs.