

CASE NO.:
Appeal (civil) 7295 of 2002

PETITIONER:
Venkatrao Anantdeo Joshi and others

RESPONDENT:
Sau. Malatibai and others

DATE OF JUDGMENT: 15/11/2002

BENCH:
M.B. SHAH & D.M. DHARMADHIKARI.

JUDGMENT:

J U D G M E N T

Shah, J.

Leave granted.

In appeal from Order No.48 of 1997, the High Court of Bombay, bench at Aurangabad by its judgment and order dated 12.7.2001 dismissed the appeal and confirmed the order passed by the Additional District Judge, Latur in Regular Civil Appeal No.314 of 1993 directing the trial Court to frame a specific issue on the point of tenancy and to refer it to the competent Court for its determination under the Tenancy Act.

Before deciding the question involved, brief resume of facts is necessary. Appellant No.1 Venkatrao Anantdeo Joshi and his mother Bhagirathibai (since deceased) filed Civil Suit No.51 of 1973 for partition against Anantdeo (father of appellant No.1 since deceased) and Malatibai (wife of appellant No.1). It was alleged that Anantdeo and Malatibai were residing separately from appellant No.1 and his mother at different place. The suit was filed for partitioning the joint family property, namely, agricultural land in Survey No.60/A admeasuring 7 acres 3 gunthas, a house and plot at village Hippalgaon, Taluka Nilanga, District Latur. It was contended that Anantdeo had transferred a portion of ancestral property in Survey No.60/A in favour of defendant No.3 (Malatibai) by a registered sale deed dated 25.4.1973. It is alleged that Anantdeo was the person of easy virtue and was having drinking habits and was staying in the company of one Baburao @ Tukaram Khandekar and Malatibai. The so-called transfer in favour of Malatibai was illegal. By judgment and decree dated 10.10.1979, preliminary decree for partition was drawn up holding that Venkatrao and Bhagirathibai were entitled to 2/3rd share in the entire property. The Court considered the various contentions raised by Anantdeo and arrived at the conclusion that it was joint family property and that defendant No. 1 had no right to transfer it. The Court directed the Collector or any Gazetted subordinate officer to effect the partition of the suit property and separate possession and also directed the Court Commissioner to effect the partition of the suit house and the plot. The Court also directed mesne profits from the date of the suit until delivery of possession.

Against that preliminary decree, Anantdeo and Malatibai had filed Regular Appeal No.130/1979, which was dismissed on 31st December, 1981. Thereby, the preliminary decree for partition

became final. Pending the said appeal, respondent No.3 Baburao filed a suit being Regular Civil Case No.288 of 1981 for injunction against Anantdeo and Malatibai, that is, father and wife of the present appellant No.1 praying that they should be permanently restrained from causing interference into the peaceful possession over the suit land and claimed tenancy rights over the suit property bearing Survey No. 60/A. A compromise decree was obtained on 23rd November, 1981.

Anantdeo died on 8.1.1987. Thereafter, appellant No.1 and his mother sold the entire suit property in favour of rest of the appellants by registered sale deed dated 23.8.1989. Thereafter, on 24.10.1989, appellants applied for passing of the final decree for partition in Civil Suit No. 51 of 1973. The trial Court partly allowed the said application and held that appellants were entitled to 2/3rd share of the suit property. The contention of respondent No.3 was negated by holding as under:

"Under such situation to my mind the opponent no.3 was aware about the dispute between the original plaintiffs and Anantdeo and opponent no.1 and hence he could have suo moto joined as defendant in the earlier suit raising the contention that he is tenant in the suit land. 'Batai Patra' alleged to have been executed by Anantdeo in favour of opponent no.3 is not produced on record. Moreover, there is no entry in the record of right of the suit land to that effect. Hence, I am of the opinion that the opponent no.3 cannot be said to be in possession of suit land on the basis of 'Batai Patra' and his possession over the suit land is in other capacity.

.For these reasons I hold that the opponent no.3 is not having right over the suit land since 1977 as contended by him. Therefore, I answer this point in the negative."

The decree was sent to the Collector for effecting partition.

Against that order, appellants preferred appeal [RCA No.314 of 1993] in respect of remaining 1/3rd share, which was declined by the trial Court. Baburao filed separate appeal claiming tenancy rights qua the agricultural land. In that appeal, the Additional District Judge vide its judgment and order dated 22.1.1997 held that claim of Baburao of being a tenant of agricultural land requires to be decided by a competent authority under the Tenancy Act. Hence, the issue is required to be raised before such Court.

Against that judgment and order, the appellants filed Appeal from Order in the High Court. The High Court dismissed the same by impugned judgment. Hence, this appeal.

At the time of hearing of this appeal, learned counsel for the appellants submitted that the plea of tenancy raised by Baburao is on the face of it, bogus so as to defeat the rights of the appellants which are crystallised at the time of passing of the preliminary decree. Presuming that pending the suit for partition, even if batai patra is executed, it would not confer any rights on Baburao as it is hit by principles of lis pendens. In any case, as the preliminary decree becomes final, it was not open for Baburao to raise such contention at the time of passing of final decree for partition.

With regard to lis pendens, learned counsel for the appellants rightly referred to the judgment and decree passed in Regular Civil Suit No.51 of 1973 and contended that presuming that the so-called batai patra was at all executed by Anantdeo, it was not open to him to

execute the same pending disposal of the suit filed by appellant No.1 for partition of the property. In that suit, appellant no.1 and his mother had challenged the transfer of land out of Survey No.60/A and also for partition of the suit property. By elaborate judgment and order, the suit filed by the appellants was decreed to the extent that they were entitled to 2/3rd share in the suit properties. The Court had also directed mesne profits. Till the date of the decree, it was contended by Anantdeo that he was in possession of portion of the suit land and remaining portion was in possession of Malatibai, in view of sale deed in her favour. It has also been specifically contended that for some time, property was in possession of Baburao prior to marriage of Shakuntala Bai and then in possession of one Pandurang Saokar and lastly it was in possession of Malatibai and himself. The Court specifically arrived at the conclusion that Anantdeo was in possession of the suit property and so-called transfer was without any legal and family necessity as alleged and, therefore, appellants were entitled to 2/3rd share in the suit property. In the Revenue Records also, there is no mutation in favour of Baburao. Further, so called compromise decree in Civil Suit No.288 of 1981 against Anantdeo and Malatibai would not confer any title against the appellant.

Further, in a suit for partition where preliminary decree is passed, at the time of passing of the final decree it was not open to the respondent to raise the contention that he was a tenant of the suit premises. Section 97 of the CPC specifically provides that where any party aggrieved by the preliminary decree does not appeal from the said decree, he is precluded from disputing its correctness in any appeal which may be preferred from the final decree. [Ref. Mool Chand and Others v. Dy. Director, Consolidation and Others [(1995) 5 SCC 631].

In the result, the appeal is allowed accordingly and impugned judgment and order passed by the High Court confirming the judgment and order passed by the Additional District Judge, Latur in RCA No.314/93 is set aside. The order passed by the trial Court is restored. There shall be no order as to costs.