



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 785 OF 2015

Smt. Sundrabai Ishvar Bhosale
and Another

...Appellants.

Versus

Smt. Banabai Dhondiram Patil

...Respondent.

*Mr. S. R. Ganbavale and mr. Shantanu Patil for the appellant.
Mr. Utkarsh Desai i/b Mr. P. S. Bhawake for the respondent.*

Coram : Sharmila U. Deshmukh, J.

Date : February 12, 2024.

P. C. :

1. Being dissatisfied by the judgment and order dated 4th February 2015 passed by the Appellate Court allowing the appeal declaring that the appellant is entitled to 1/2 undivided share in all the suit properties by partition, the original defendant is before this Court. For the sake of convenience, parties are referred to by their status before the trial Court.

2. Regular Civil suit No.918 of 2007 was instituted seeking perpetual injunction against the defendants in respect of the suit properties described in the plaint and in the alternative relief of partition and separate possession of the plaintiff's share in the suit properties was sought. It was pleaded that one Dhondiram Patil, who

was husband of the appellant, was the owner of the suit properties who expired on 10th February 2002 and upon his death, the plaintiff became the exclusive owner of the properties and is in possession thereof. It was pleaded that the defendant no.1 is alleging to be the sister of deceased Dhondiram Patil and defendant no.2 is son of defendant no.1 and after his death the defendants are seeking to dispossess the plaintiff from the suit properties and trying to mutate their names in the revenue record.

3. The defendants resisted the suit and filed their written statement. It was contended that all the ancestral properties are not included in the partition and it was also denied that the plaintiff is the exclusive owner and in possession of the suit properties. It was further pleaded that all the legal heirs of Dhondiram were not made party to the proceedings and as such the suit was bad for non joinder of parties. The case of defendants was that the father of Dhondiram and defendants, one Krishna was the original owner of suit properties and after the death of Krishna, Dhondiram being the karta, properties came to be mutated in his name and after the properties were mutated in his name, deceased Dhondiram alienated some of the properties in favour of third parties. It was contended that third party purchasers are necessary parties.

4. Parties went to trial and the trial Court framed and answered the issues as under :

मुद्दे	निष्कर्ष
१ वादीनी दावा मिळकतीबाबत त्यांची कायदेशीर मालकी व कब्जा शाबीत केला काय ?	नाही.
२ वादीनी प्रतिवादीकडून होणारी हरकत शाबीत केली काय ?	नाही.
३ वादी मागणीप्रमाणे निरंतर मनाई ताकीद मिळणेस पात्र आहे काय ?	नाही.
४ वादी वैकल्पीकरित्या दावा मिळकतीचे वाटप होवून मिळणेस पात्र आहे काय ? असल्यास त्यांचा हिस्सा किती ?	नाही.
५ वादी ही वैकल्पीकरित्या त्यांच्या हिश्याचा कब्जा मिळणेस पात्र आहे काय ?	नाही.
६ कोणता आदेश व हुक्मनामा ?	अंतिम आदेशाप्रमाणे

5. Upon consideration of evidence, the trial Court dismissed the suit as against which appeal came to be filed, being Regular Civil Appeal No. 155 of 2010. The appellate Court allowed the appeal and declared that the plaintiff is having half undivided share in the suit properties and is entitled to get her share by partition.

6. Heard Mr. Ganbavale, learned counsel appearing for the appellant and Mr. Utkarsh Desai, learned counsel appearing for the respondent.

7. Learned counsel appearing for the appellant would submit that the substantial question of law which arises in the present case is the perversity of findings on the basis of which appeal has been allowed.

He submits that the appellate Court has committed an error in law as the decree of partition and separate possession came to be passed not on merits but to end the litigation. He submits that there is perversity in the findings of the appellate Court as decree of partition has been passed although in the plaint it was not mentioned that the suit properties are ancestral properties.

8. *Per contra* learned counsel appearing for the respondent would submit that the properties which were sold by Dhondiram during his lifetime are not included in the plaint. He further submits that there was no challenge to the sale deeds executed by deceased Dhondiram by the defendants by filing counter claim and as such as regards the remaining properties, the appellate Court has rightly decreed the suit for partition by rejecting the prayer for perpetual injunction.

9. Considered the submissions and perused the record.

10. The plaintiff has come with the case that the properties stood in the name of Dhondiram and it is not disputed that the plaintiff is the wife of deceased Dhondiram. It is also not disputed that during his lifetime, Dhondiram has sold some of the properties and as such the plaintiff had sought perpetual injunction as against the defendants only in respect of the properties which remained after other properties were alienated. The plaintiff also sought in the alternative a decree of

partition seeking her half share in the remaining properties. The appellate Court considered the revenue record which disclosed that the name of Dhondiram was mutated in the revenue record in respect of the suit properties and after his death, the name of plaintiff is entered into record of rights. The appellate Court held that the evidence of defendants shows that the suit properties are ancestral properties and the defendant no.1 being sister of Dhondiram is having a share in the suit properties. As such the appellate Court has rightly negated the issue as regards the exclusive ownership of plaintiff in respect of the suit properties and has held that the suit properties are the ancestral properties and not the exclusive properties of Dhondiram. Having observed thus the appellate Court on the basis of the suit properties being ancestral properties has decreed half share in favour of the plaintiff and the defendant no.1. It cannot be disputed that the share of plaintiff as well as the defendant no.1 has been rightly decreed by the appellate Court although one of the observations is that to end the litigation, it is necessary to pass the decree for partition and separate possession. In spite of this observation, what can be noted is that the judgment of the appellate Court has taken into consideration the documentary as well as oral evidence brought on record and has adjudicated the matter on merits. The appellate Court also noted that as regards the properties which

were alienated by deceased Dhondiram during his lifetime, there was no counter claim filed by the defendant challenging those sale deeds. That being the position, the appellate Court was right in holding that the suit is not bad for not including other properties alienated by deceased Dhondiram.

11. The appellate Court noted that there is no specific pleading as regards the self-acquired properties and on the basis of evidence held that the suit properties are ancestral properties and in that context observed that merely not mentioning that suit properties are ancestral properties is not sufficient to deny the decree of partition. In the absence of counter claim being filed for challenging the sale deeds which were executed by Dhondiram and seeking any relief in respect of those sale deeds, the findings of the appellate Court do not demonstrate perversity and no substantial question of law arises in the present case. Resultantly, appeal stands dismissed.

12. In view of the disposal of second appeal, civil/interim application(s) taken out in this appeal, if any, does not survive and the same is disposed of.

[Sharmila U. Deshmukh, J.]