

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD
SECOND APPEAL NO.549 OF 2014

Pratap s/o Mohanrao Patil ... Appellants.
(Deceased, through his L.Rs.)
1) Smt.Pushpabai w/o Pratap Patil
and others.

VERSUS

Trimbakrao Mohanrao Patil ... Respondents
(Deceased, through his L.Rs.)
1(A) Ambirbai Trimbakrao Patil
Deceased) and others.

Mr. Krishna K. Kulkarni, Advocate for the appellants
Mr. Mr. N. V. Gaware i/by Mr. S. A. Ambad, Advocate for the
respondents

CORAM : SUNIL P DESHMUKH, J.

DATE : 30-11-2015

PER COURT :

1. Heard learned counsel appearing for the appellants and
learned counsel appearing for the respondents.

2. The present appellants/plaintiffs had instituted Regular
Civil Suit No.537/1992 seeking injunction in respect of suit land
bearing Plot No.59, S.No.38, CTS No.3501, admeasuring 50' x 70'
against defendant no.1 who happens to be elder brother of the

deceased plaintiff Pratap, putting restraint upon him from alienating the suit plot.

3. The Plaintiffs have pleaded that the suit plot had been kept apart from the partition which had already taken place amongst four brothers in respect of other properties and that suit plot had been purchased from the joint family income. Learned counsel for appellants, in the course of hearing, has referred to various events and submitted that ultimately list of properties had been prepared in 1983, which was signed by the plaintiff and defendant No.1 and there-under, is reference to the suit plot. The suit plot was divided equally between the two brothers. Defendant No.1 contracted to sell the suit plot to defendant No.2 in its entirety and as such, cause of action had arisen to institute the suit, seeking injunction.

4. Defendants appeared in the suit. They filed written statement and denied all the material allegations and contentions raised by the plaintiffs. It has been stated by defendant No.1 that while the suit plot had been purchased, there was no joint family of the plaintiff and defendant No.1. They had separated way back in 1955/56. Then defendant no.1 had started commission business

(Adat Shop) and from the income of the same, suit property was purchased in his name in 1972 by payment in installments. Defendant no.1 had denied his signature on the list of properties (Vatap Patrachi Yadi) which the plaintiffs claimed to be of defendant no.1.

5. With reference to the pleadings, the trial court had framed issues, *inter alia*, whether the plaintiffs could prove that the suit plot was property of joint family; whether the plaintiffs could prove that in the partition of 1983, half of the suit plot had been given to plaintiffs; whether defendant No.1 could prove that the suit plot is his self acquired property; whether the suit is barred for non-joinder of necessary parties; and whether there is any cause of action for the plaintiffs. Answering that the plaintiff has not been able to establish the suit plot to be a part of joint family property and that half of the suit plot had not been given in the alleged partition of 1983 to the plaintiff. It had been held by the trial court that the suit plot is a self acquired property of defendant No.1. The trial court also held that the suit is barred for non-joinder of other two brothers as necessary parties.

6. As such, the matter was carried into appellate court by

the plaintiff in Regular Civil Appeal No.240/2007 against the dismissal of the suit.

7. The appellate court framed necessary points for determinations that, whether plaintiffs could prove that the suit plot was joint family property and that in 1983 partition, half of the suit plot was allotted to plaintiffs and whether the property is self acquired property of defendant no.1 and answered the same as they were answered by the trial court.

8. Perusal of the judgments of both the courts below indicates that the plaintiffs have not been able to bring forth the source from which income was generated to purchase the property. The plaintiffs did not give details of the source from which, income would have been said to have been generated and that the plaintiff had admitted in cross examination that defendant no.1 had started mercantile business (Adat Shop) in the market yard which is not claimed to be a business being carried on by the jointly family. The courts have considered that the Vatni Patrachi Yadi (list of partition) dated 10.10.1983 cannot be relied on for want of other two brothers being signatories to the same. It has further been considered that having regard to the position of law,

the partition deed requires registration. Under the circumstances, such unregistered document shall not be amenable for consideration for the purpose for which it is being produced in the matter. The courts have also considered that defendant No.1 has denied his signature over the same. The courts have also found that in the description of the property in the plaint and the one in the evidence (Vatap Patrachi Yadi), there is discrepancy. The courts have considered that there is no convincing evidence on record to show as to why this property was being kept away from the properties partitioned amongst the brothers which has been acquired after 1955. The courts, in the absence of rebuttal of evidence of defendant no.1 of having his Adat Shop and earning own income, had considered that there is sufficient evidence on record to show that the suit plot had been a self acquired property of defendant No.1.

9. Learned counsel for appellants Mr. Kulkarni has strenuously urged this court to consider the defence about the suit being filed by defendant no.2 bearing Special Civil Suit No.337 of 1997 against defendant no.1, claiming specific performance of agreement for sale of the suit plot and that according to the learned counsel, in the same, defendant no.1 has admitted the

partition among the brothers having taken place in 1983.

10. In the suit for specific performance by defendant no.2, plaintiff in present suit and his other two brothers have been added as parties and the suit by defendant No.2 is remanded for re-trial. Learned counsel for the defendants, however, points out that against such remand order, there is Appeal from Order by defendant no.2 before this Court which is pending.

11. Learned counsel for the appellants further points out that an application referable to Order XLI Rule 27 of the Code of Civil Procedure was filed by the plaintiff at the appellate stage, however, the same has been rejected being belated. He contends that there is one more litigation among parties and other two brothers and in the same, defendant no.1 has accepted the position of partition having taken place in 1983. In the circumstances, according to him, findings in respect of the suit plot being not a joint family property and being a self acquired property of defendant no.1, are likely to mar the defence being taken by the present plaintiffs in the suit filed by the defendant no.2 (Special Civil Suit No.330 of 1997) before the Civil Judge, Senior Division, Latur.

12. Be that as it may, the position emerges that there are concurrent findings of facts of the courts on appreciation of evidence on record, that the plaintiffs have failed to prove the suit plot to be a joint family property and that it is a self acquired property of defendant no.1. Learned counsel for the appellants has not been able, despite taking me through the record, to find out the flaw in the findings of the courts on the basis of evidence.

13. Learned counsel for the appellants, during the course of his submission, purported to rely on the judgment of the Apex Court in the case of K. R Digambar Adhar Patil Vs. Devram Girdhar Patil reported in AIR 1995 SUPREME COURT 1728 in order to buttress his submission that the partition deed is not necessary to be registered. However, in the present case, having regard to the findings given in respect of other aspects involved in the matter, said decision relied on can hardly be said to hold sway over the case of the appellants.

14. It is to be taken into account that plaintiffs have not been able to give evidence with regard to the source of income from which the suit property can be said to have been purchased by the joint family. Although it is being contended that the

plaintiffs have been able to prove execution of document of 1983, indicating partition between two brothers and defendant no.1, it has to be considered that in the absence of primary evidence with regard to source of income from which the property has been purchased and having regard to the contentions and denial by defendant no.1 about execution of the document, the findings given by the courts below in respect of the same, at the second appeal stage, do not require further re-appreciation and also findings being not appearing to be away from the factual position as emerging from record and evidence, the second appeal does not appear to involve any question to be considered as substantial question of law. In the circumstances, the second appeal does not deserve any consideration. Second Appeal as such stands dismissed.

15. However, apprehension is expressed by learned counsel for the appellants about findings in the matter coming in the way while evidence would be recorded in the suit filed by defendant no.2 and despite the plaintiffs herein being parties to the same, they may not be able to adduce evidence if issues were to be similar to the ones which have arisen for consideration in this matter.

16. In the circumstances, this order may not preclude leading legally admissible evidence by appellants.

17. Second Appeal stands disposed of.

(SUNIL P. DESHMUKH, J.)

JPC