

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
(Civil Appellate Jurisdiction)

SECOND APPEAL NO. 208 OF 2008

(Vinayak Bhau Mhadnak and
others Appellants

Versus

Shri Atmaram Dharmaji Mhadnak
and others Respondents)

Mr. S.S.Kanetkar, Advocate for appellants.
Mr. S.P. Thorat, Advocate, for Respondents.

CORAM : R.K.Deshpande, J.
DATED : 3rd AUGUST, 2015.

P.C.

In Regular Civil Suit No. 9 of 1985, the trial Court passed the decree for partition and separate possession. The plaintiffs and the defendants are held entitled to 1/3rd share each in the suit property. The trial Court, however, directed that the newly constructed portion of the suit house bearing Gram Panchayat House No. 150 be allotted to the share of the original defendant No.2.

This judgment and decree dated 04.07.2001 passed by the trial Court was the subject matter of challenge in Regular Civil Appeal No. 133 of 2001 by the original defendant No. 2. Though, the lower appellate Court has dismissed the

appeal as a whole on 20.01.2007, but it modified the decree by setting aside the decree relating to allotment of House No. 150 to the share of the deceased defendant No.2. As a result, the parties are held entitled to 1/3rd share in House No. 150 also. The lower appellate Court further directed the partition of Gram Panchayat House No. 954 constructed by the plaintiff Nos. 1 to 7 on agriculture land Survey No. 43/6 and the defendants are held entitled to 1/3rd share in that property also. The plaintiffs have not challenged such modification, but the original defendant No. 2 is before this Court in this second appeal.

Shri Kanetkar, the learned counsel appearing for the appellants has urged that the courts below ought to have accepted the theory of partition effected by memorandum of partition dated 06.02.1982 and should have dismissed the suit. Undisputedly, the document is not registered one and the Courts have recorded the finding that it being a partition deed, is not admissible in evidence for want of registration. Shri Kanetkar, the learned counsel appearing for the appellants has relied upon two decision of the Apex Court; (I) in the case of ***Siromani and another vrs. Hemkumar and others***, reported in **AIR 1968 SC 1299**, and (II) in the case of ***Digambar Adhar Patil vrs. Devram Girdhar Patil and another***, reported in **AIR 1995**

SC 1728, in support of his proposition that even if the document is not registered, it can be used for collateral purpose for ascertaining the actual intention of the parties to get severed.

The partition dated 06.02.1982 is an unregistered document and it is signed by the plaintiff No. 3 and the defendant Nos. 1 and 2. It is not signed by plaintiff Nos. 1, 2, 4 and 6. The Courts below have held that such a partition which is not signed by the other coparceners cannot be acted upon or enforced against them. There is some dispute as regards Karta of family and according to defendant Nos. 1 and 2, it was the plaintiff No. 3 – the mother of other plaintiffs, and in that capacity she put her thumb impression. As against this, the contention of the plaintiffs is that Atmaram – plaintiff no. 1 was the Karta and he has not signed the document. The courts have accepted the theory advanced by the plaintiffs and no substantial question of law arises out of such findings recorded by the Courts below. The principle of law laid down in the decisions cited by Shri Ketkar, the learned counsel for the appellants, are not disputed, but the same would not govern the facts of the present case.

The another ground raised is that, though the trial Court has not passed a decree for partition

in respect of the Gram Panchayat House No. 954, the lower appellate Court has included that property for partition. The courts below ought to have dismissed the suit on the sole ground that this property which is found to be ancestral was not included in the plaint for partition and separate possession.

With the assistance of the learned counsel appearing for the parties, I have gone through the contents of the plaint and the description of the property. I find that the property is described in the plaint at Sr. No. 21 as Survey No. 43/6. Even otherwise, it is the appellant-defendant who is getting advantage of division of such property which has been constructed by the plaintiff. Hence, no substantial question of law arises on this ground also. The trial Court did not frame any issue as to whether House No. 954 was available for partition and separate possession and this was not made the subject matter of challenge in an appeal by the defendant. Hence, no substantial question of law arises.

The issue of non-joinder of parties was also not framed by the trial Court. In the memo of appeal, I do not find any ground of non-joinder of necessary parties raised. It cannot, therefore, be permitted to be raised in second appeal for the

reason that it deprives the plaintiff a right to join such persons as party defendant to the suit, more particularly, in the absence of any finding of the courts below that such persons were the necessary parties to the suit. No substantial question of law arises. The second appeal is, therefore, dismissed. Consequently, the civil applications stand dismissed.

(R.K.DESHPANDE, J.)

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