

Hanmant Bapu Lohar and another Vs. Maruti Nagu Lohar and others	...	Appellants
	...	Respondents

CORAM : R. G. KETKAR, J.
RESERVED ON: 8TH APRIL, 2015
PRONOUNCED ON: 20th APRIL, 2015

P.C. :

Heard Mr. Warunjikar, learned Counsel for appellants and Mr. Bodake, learned Counsel for respondents No. 1, 4A to 4D, 5A to 5D, 6, 7, 9A, 10A, 11 to 13 and 15 at length.

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also held that each daughter of deceased Nagu has 1/36th share in the property described in paragraph 1 of the plaint. As the defendant No.2 had already sold his share in the property to plaintiff and defendant No.1, the learned District Judge directed that his share be distributed in between plaintiff and defendant No.1.

3. In support of this Appeal, Mr. Warunjikar submitted that the learned trial Judge dismissed the Suit on the grounds that the Suit is bad for non-joinder of necessary parties namely, Vishnu Dhondi Shirke; Suit is bad for non-inclusion of Gat No.949 and 953 sold by the plaintiff to the said Vishnu Shirke. He submitted that the learned trial Judge further held that the defendant No.1 failed to prove that there was previous partition in the year 1962 between him, defendant No.2 and the plaintiff. Aggrieved by this decision, plaintiff preferred Appeal. Defendants No.1 and 7 to 9 preferred cross-objections. Defendants No.3 to 6 and 10 to 16 also filed cross-objections as regards findings against issue No.9.

4. Mr. Warunjikar submitted that during the pendency of the Appeal, plaintiff filed application on 08.04.2003 at exhibit-63 for amending the plaint for inclusion of Gat Nos.949 and 953 in Schedule A. The said application was allowed on 08.07.2003. On 26.08.2003, plaintiff filed application for amending the plaint by adding Vishnu Dhondi Shirke as a party defendant. The said application was also allowed. After amendment, Vishnu Shirke appeared and filed his written statement at exhibit-73. After amendment, both the parties filed a purshis that necessary issues are already framed and it was not necessary to frame additional issues. Both the parties orally agreed that they had already adduced evidence on record. Hence, it is not necessary to send the original record and proceedings to the trial Court for recording evidence.

5. Mr. Warunjikar submitted that in that event, the learned District Judge should ever exercised power either under Order 41 Rule 25 C.P.C. or should have remitted the matter to the trial Court after setting aside the trial Court's judgment. Being the last fact finding Court, the learned District Judge ought not to have considered the evidence and decided the Appeal. He submitted that the learned District Judge committed error in deciding the Appeal instead of remanding it to the trial Court. He further submitted that perusal of the order of the District Court shows that there is no adjudication of cross-objections filed by defendants No.1, 7 and 9 as also of counter-claim filed by the defendant No.1. This is also evident from the perusal of the operative part of the order. He, therefore, submitted that Appeal requires consideration as it involves substantial question of law.

6. On the other hand, Mr. Bodake supported the impugned order. He submitted that the learned trial Judge dismissed the Suit only on the ground of non-joinder of Vishnu Dhondi Shirke as also for non-inclusion of Gat No.949 and 953. He submitted that Survey No.37/5D + 6E admeasuring 14 Ares became Gat No.301 and Survey No.37/1 admeasuring 33 Ares became Gat No.291 in consolidation proceedings. These lands are already included in Schedule 'A' attached to the plaint. As far as the other issues are concerned, the learned trial Judge decided those issues in favour of the plaintiff. He further submitted that defendants No.1 and 7 to 9 did not challenge the order dated 08.07.2003 below exhibit-63 thereby allowing inclusion of Gat No.949 and 953 as also order permitting the plaintiff to implead Vishnu Dhondi Shirke. He submitted that the parties filed Purshis to the effect that necessary issues are already framed and it is not necessary to frame additional issues. They also orally agreed that it was not necessary to record evidence. He, therefore, submitted that this is not a case where for the first time

District Court is appreciating the evidence on record. The Suit was dismissed only on the technical grounds. He invited my attention to the judgment of the District Court, and in particular paragraph 20 thereof.

7. I have considered the rival submissions made by the learned Counsel appearing for the parties. I have also perused the material on record. It is not in dispute that plaintiff instituted Suit for partition and separate possession of his share. The learned trial Judge held that the plaintiff proved that the suit properties mentioned in Schedule 1A and 1B are the joint family properties of plaintiff, defendants No.1 and 2. The learned trial Judge held that defendant No.1 failed to prove that there was partition of suit properties in the year 1962 between him, plaintiff and defendant No.2. The learned trial Judge also held that the alleged partition was not valid. Though defendant No.1 claimed that Grampanchayat property No.47 and 69 mentioned in Schedule-B at serial No.2 and 3 are his self-acquired properties, he failed to establish the said fact. Defendant also failed to prove that 1/3rd share in agricultural landed properties bearing Survey No.89/1, 37/65A + 6E, Survey No.37/1 at village Nadoli and 1/3rd share in Survey No.163 of Village Nade are his self-acquired properties. The learned trial Judge however, held that the Suit is bad for non-joinder of Vishnu Shirke as also bad for non-inclusion of Gat No.949 and 953.

8. Aggrieved by that decision, Appeal was preferred by the plaintiff. During the pendency of the Appeal, plaintiff took out application dated 08.04.2003 at exhibit-63 for amending the plaint for inclusion of Gat Nos.949 and 953 in Schedule A. The said application was allowed on 08.07.2003. On 26.08.2003, plaintiff filed application for impleading Vishnu Dhondi Shirke as a party defendant. That application was also allowed. Perusal of paragraph 9 of the appellate Court's judgment shows that Vishnu Shirke filed written statement exhibit-73. After the

amendment, both the parties filed a purshis that necessary issues are already framed and it was not necessary to frame additional issues. The parties also orally agreed that as they have adduced evidence on record, it is not necessary to record further evidence.

9. Mr. Warunjikar submitted that in such situation, the learned District Judge ought to have remitted the matter to the trial Court. I do not find merit in this submission. As indicated earlier, except issues No.6 and 7, all the issues were decided in favour of the plaintiff. The Suit was essentially dismissed on the ground of non-joinder of Vishnu Shirke and non-inclusion of Gat No.949 and 953 sold by the plaintiff to the said Vishnu Shirke. The said defect was rectified by the plaintiff in the Appeal. Mr. Warunjikar further submitted that in any case, the counter-claim set up by defendant No.1 was not adjudicated upon. The learned District Judge also did not deal with the cross-objections filed by defendants No.1 and 7 to 9. It is not possible to accept this submission. Defendants No.1 and 7 to 9 preferred cross-objections as issues No.2 to 5 were decided against them. Perusal of paragraph 20 of the District Court's judgment shows that the learned District Judge has dealt with the case made out by defendant No.1 that after the death of his father, partition had taken place between him, plaintiff and defendant No.2. After considering the evidence on record, the learned District Judge recorded that defendant No.1 did not establish previous partition. The learned District Judge considered cross-examination of defendant No.1. Defendant No.1 did not given any account. Defendant No.1 also did not examine any person in whose presence, partition was effected. He also did not give details as to which property was allotted to which of his brother. The learned District Judge, therefore, disbelieved the case of the defendant No.1 that after the death of the father, partition was effected among plaintiff, defendant No.1 and defendant No.2. At

the same time, the learned District Judge also held that the plaintiff did not depose that Gat No.951 is joint family property. The learned District Judge held that 5 Gunthas of Gat No.951 was purchased by defendant No.1 on 27.03.1980. Plaintiff did not depose that the said property was purchased from the income of the joint family. The learned District Judge, therefore, declined to pass decree of partition in respect of 5 Gunthas of Gat No.951 purchased by defendant No.1.

10. As noted earlier, Survey No.37/5D + 6E admeasuring 14 Ares became Gat No.301 and Survey No.37/1 admeasuring 33 Ares became Gat No.291 in consolidation proceedings. This is evident from Schedule 'A' to the plaint as also extract of consolidation proceedings. The plaintiff amended the plaint and impleaded Vishnu Shirke and also included Gat No.949 and 953.

11. In the light of the aforesaid discussion, I do not find that the learned District Judge committed any error in passing the impugned order. In my opinion, the Second Appeal does not raise any question of law much less any substantial question of law. Accordingly, the Second Appeal fails and the same is dismissed.

12. In view of the dismissal of the Second Appeal, nothing survives in Civil Application No.16 of 2007 for stay and the same is disposed of as such.

(R. G. KETKAR, J.)