

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Second Appeal No.294 of 2012
(Dattatraya Kashinath Babar and others v. Shrirang Bhiku Babar and others)
And
Second Appeal No.296 of 2012
(Dilip Dnyandeo Babar v. Shrirang Bhiku Babar and others)

Office Notes, Memoranda of Coram,
appearances, Court's orders or directions Court's or Judge's orders
and Registrar's order

In Second Appeal No.294 of 2012 :

Shri G.S. Godbole i/b Shri V.S. Talkute, Advocates for Appellants.

Shri J.S. Kapre with Shri T.J. Kapre, Advocates for Respondents.

In Second Appeal No.296 of 2012 :

Shri Sukumar Ghanvat i/b Shri Shriram Choudhari, Advocates for Appellant.

Shri G.S. Godbole i/b Shri V.S. Talkute, Advocates for Respondents.

Coram : R.K. Deshpande, J.

Dated : 7th July, 2015

1. The Trial Court passed a decree for partition and separate possession in Regular Civil Suit No.90 of 1993 on 21-11-2009. This decree passed by the Trial Court was the subject-matter of challenge in Regular Civil Appeal No.409 of 2009 at the instance of the legal representatives of the original defendant No.1-Kashinath Bhiku Babar. The lower Appellate Court has modified the decree passed by the Trial Court. Second Appeal No.294 of 2012 is preferred by the legal representatives of the defendant No.1 and the defendant Nos.2 to 5.

2. Second Appeal No.296 of 2012 is preferred by the original defendant No.6-Dilip Dnyandeo Babar.

3. After hearing the learned counsels appearing for the appellants/defendants in both these second appeals and the learned counsels appearing for the respondents/plaintiffs, it appears that the matter is required to be remanded back to the Trial Court only on the one issue in respect of the partition of properties at Serial Nos.1 and 2 described in the plaint. It is found that the Courts below have recorded the finding that these tenanted properties are inherited by all the members of a family and, therefore, those properties are available for partition. The learned counsels appearing for the parties submit that such a finding is beyond the jurisdiction of the Civil court in view of the bar under Section 85 of the Bombay Tenancy and Agricultural Lands Act, 1948 and the issue should have been framed and referred to the decision of the Tenancy Court. Upon receipt of the findings from the Tenancy Court, the question of availability of the suit properties at Serial Nos.1 and 2 for partition should have been taken up for consideration.

4. Shri Godbole, the learned counsel appearing for the appellants in both these second appeals, has raised several grounds of challenge to the judgments delivered by both the Courts below in respect of the properties other than those at Serial Nos.1 and 2 in the plaint. According to him, the suit was dismissed against the defendant No.1e-Vijay Vilas Mohite by the Trial Court for failure to take necessary steps and hence for want of necessary party, the Trial Court could not have passed a decree for partition and separate possession. He submits that the lower Appellate Court also should have considered this aspect of the matter. It is a fact that the Regular Civil Appeal before the lower Appellate Court was preferred by the defendants, including the defendant No.1e, and was dismissed. It was not the point raised

before the lower Appellate Court that the Trial Court could not have granted any relief to the plaintiffs for want of necessary party. Thus, no substantial question of law arises in respect thereof.

5. Shri Godbole has also urged that prior partition was proved between the parties and, therefore, the Courts below should have accepted it on the basis of the admissions given by the plaintiff No.2 -Ramchandra Bhiku Babar. I have gone through the findings recorded by the lower Appellate Court and I find that the matter has been discussed in detail by the lower Appellate Court. It is held that no specific plea was raised about partition by giving materials particulars in the written statement. The lower Appellate court has taken a possible view of the matter, which does not give rise to any substantial question of law.

6. In the result, the following order is passed :

(I) The second appeals are dismissed so far as the challenge of the appellants to the decree passed for partition and separate possession in respect of the suit properties, excluding the properties at Serial Nos.1 and 2 described in the plaint.

(II) The findings recorded by both the Courts below in respect of the suit properties at Serial Nos.1 and 2 are hereby quashed and set aside and the matter is remanded back to the Trial Court to decide Regular Civil Suit No.90 of 1993 afresh in accordance with law only to the extent of the suit properties at Serial Nos.1 and 2 described in the plaint.

(III) The Trial Court shall frame an issue of tenancy and refer it for the decision of the Tenancy Court and upon receipt of it, shall proceed to decide the matter on its own merits.

(IV) It is made clear that during the pendency of the matter,

none of the parties shall create any third-party interest in the suit properties at Serial Nos.1 and 2 described in the plaint, nor shall part with the possession thereof. The Executing Court can proceed to execute the decree in respect of the other properties, excluding the properties at Serial Nos.1 and 2.

(V) The appellants/defendants shall be at liberty to file an application for permission to file documents in respect of the properties at Serial Nos.1 and 2 described in the plaint, which shall be decided by the Trial Court in accordance with law.

Judge.

Lanjewar