

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.604 OF 1992**

Shri. Vasudeo Vishnu Mehendale & Anr. Appellants

Vs.

Shri. Anant Dinkar Vinod (since deceased) Respondents
by LRs Smt. Chandrabhagabai
alias Indirabai Dinkar Vinod & Anr.

Mr. Dhananjay Lonkar, Advocate for the Appellants.
Mr. C.P. Deogirikar, Advocate for the Respondents.

Coram : Smt. R.P. SondurBaldota, J.

Date : 20th February, 2015.

P.C.

1 Original appellant no.1 and appellant no.2 are the defendants to Regular Civil Suit No.31 of 1979 filed by original respondent no.1 and respondent no.2. During the pendency of the appeal, appellant no.1 and respondent no.1 died. Their heirs have been brought on record. The parties shall hereinafter referred to by their original nomenclature.

2 The plaintiffs filed the suit herein for possession of the suit property, which was gifted to them by their grandfather, Vishnu Vinayak vide Gift Deed dtd.29th August, 1940. The defendants are two

of the sons of Vishnu, who in the year 1977 started disputing the right of the plaintiffs to the suit property. Vishnu died in the year 1990. According to the plaintiffs, at the time of the gift, they were minors and therefore, Vishnu was cultivating the land on their behalf and giving them the earnings of the suit property. When the age of Vishnu advanced, the defendants with the intention of grabbing the suit property and in connivance with the Talathi, got the revenue records mutated to show that they are the tenants in respect of the suit property. On realising this, the plaintiffs in the month of December, 1997 demanded possession of the suit property from them. When the defendants refused to handover the possession, the plaintiffs filed suit for possession alleging that the defendants are the trespassers in respect of the suit property.

3 The defendants contested the suit contending that the Gift Deed is a false and bogus documents. They also claimed that since the year 1930, both had been cultivating the land as the tenants with the rent @ Rs.50/- per month. It was further claimed that they had been paying the amount of Rs.50/- every year to the plaintiffs.

4 The plaintiffs examined plaintiff no.1 in support of their case. The defendants examined defendant no.1. On appreciation of the evidence and in view of the fact that the tenancy court had rejected the claim of tenancy of the defendants, the trial court decreed the suit by it's judgment and order dtd.14th August, 1987. Being aggrieved by

the judgment and decree, the defendants approached the District Court with Regular Civil Appeal No.1006 of 1987. The District Court dismissed the appeal by its order dtd. 25th August, 1992 confirming the decree of the trial court. The defendants thereafter approached this court by way of the Second Appeal. The appeal was admitted for consideration of the following questions of law:

(a) Is the gift deed dtd. 29.08.1940 void and inoperative against the appellants?

(b) Is it permissible for the Appellants' father Vishnu Vinayak as a co-parcener to take a gift of the suit land which is admittedly co-parcenary property to the plaintiffs, who are strangers and outside the coparcenary circle?

(c) Has the appellate court correctly interpreted the gift deed. Exh.19 and the text of Hindu Law and the judgments of the Supreme Court ?

5 Undisputedly, there were neither any pleadings nor any claim made by the defendants of the suit property being part of co-parcenary property. The written statement of the defendants does not even say that the property is ancestral property much less co-parcenary property. All the three questions of law framed are on the basis of the

suit properties being co-parcenary properties. This fact is neither pleaded nor proved by the appellants. The contention is being taken up for the first time at the stage of Second Appeal. This cannot be permitted. Consequently, the questions of law as framed do not arise from the proceedings. Hence, the appeal is dismissed.

(Smt. R.P SondurBaldota, J.)