

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

**APPEAL FROM ORDER NO. 830 OF 2014
WITH
CIVIL APPLICATION NO. 999 OF 2014 IN A.O. NO. 830 OF 2014**

Smt. Chandra @ Seema Rajkumar Hariyani
& Anr. ... Appellants/Applicants
Vs.
Rajkumar Pohumal Hariyani & Ors. ... Respondents

Mr. Dnyaneshwar J. Deshmukh, Advocate for the appellants/applicants.
Mr. S.P. Kanuga, Advocate for respondent nos. 3 to 14.

**CORAM: MRS.MRIDULA BHATKAR, J.
DATE : 22nd SEPTEMBER, 2015**

P.C.:

Admit. By consent, the Appeal is heard finally and disposed of at the stage of admission.

2. This Appeal from Order is directed against the order passed by learned Civil Judge Senior Division, Kalyan below Exhibit 5 in Special Civil Suit No. 30 of 2013. The plaintiff no. 1 is the wife of original defendant no. 1 and plaintiff no. 2 is a son of defendant no. 1. Defendant nos. 2 to 12 are siblings of defendant no. 1. A suit is filed by plaintiff no. 1 for maintenance, partition and separate possession claiming that the properties mentioned in the plaint are either ancestral or joint family properties purchased from joint income of the family. In Application Exhibit 5, the

appellant/plaintiff prayed that the temporary injunction against the defendants be passed that they should not create third party right, title, interest and shall not develop or dispose of developed parts of the properties and also not to interfere with the joint possession, occupation, cultivation etc in all the suit properties. In this matter, the Court while deciding this Application, the defendants claimed that defendant no. 1 separated from the joint family on 17th June, 1993 after receiving his share from the joint family property. He has executed a deed of separation in the year 1993 and therefore, defendant no. 1, who is husband of plaintiff no. 1 and father of plaintiff no. 2, has no right in the suit property. The learned trial Judge has believed the photocopies Exhibits 47 and 50 which are placed on record, i.e., the Agreement-cum-Separation Agreement executed by defendant no.1 and which was witnessed by plaintiff no. 1. Though it is a case of the plaintiff that it is a false and fabricated document, however, the learned trial Judge has accepted it and held that defendant no. 1 has separated from the joint family, then he has no right in joint family properties.

3. The learned counsel for the respondents supported the order passed by the learned Civil Judge Senior Division and has taken a same stand that defendant no. 1 has no right in the properties and, therefore, the plaintiff

no. 1 have no locus to claim any property jointly. He further submitted that there are no averments and pleadings in respect of description of properties in the plaint.

4. The learned counsel for the appellant has submitted that if the deed of 17th June, 1993 is accepted, then in the said deed, one property, i.e. Shankar Saw Mill, which was owned by Manganmal, paternal grandfather of the defendants was left out because it was solely owned by Manganmal. It is submitted by the learned counsel for the appellant that Manganmal died in the year 1998 and the said property is at present at the hands of defendant nos. 1 to 8.

5. The learned counsel for the respondents, in reply, has pointed out that Manganmal was not direct grandfather of defendants. He pointed out that Manganmal was brother of Damomal, who is direct grandfather of defendants. Manganmal in his lifetime gifted the property of Shankar Saw Mill to his daughter-in-law Parmeshwari w/o. Pohumal on 10th April, 1997. He further submitted that Parmeshwari is alive but in her life time she gifted this property by gift deed dated 15th July, 2004 in favour of defendant nos. 2 to 8 and under such circumstances, defendant no. 1 has no right in the said properties. At present, defendant nos. 2 to 8 are

running the said Saw Mill. In support of his submissions, he produced photocopies of these two gift deeds.

6. Perused the documents especially Deed of Separation of 1993. If that document is relied by the learned trial Judge, then a document is to be relied as a whole. It cannot be read and accepted in part. It appears that the learned trial Judge has committed error in ignoring the portion where description of Shankar Saw Mill is mentioned. After going through the portion in the Deed of Separation, it appears that respondent no. 1- Rajkumar did not waive his right in the said properties. Manganmal, being an absolute owner, has gifted the said properties to Parmeshwari and Parmeshwari gifted it to defendant nos. 2 to 8. The gift deeds which are produced in the Court are unregistered gift deeds. The trial Court will have to consider number of issues in respect of gift deeds including its admissibility in the evidence, therefore, at present I am of the view that I maintain the order of the trial Court in respect of other properties, however, in respect of the property i.e., Shankar Sawmill, the appellant has *prima facie* made out a case and the balance of convenience lies in her favour. As submitted by the learned counsel, defendant nos. 2 to 8 are in possession of the property and therefore on accepting this statement, following order is passed:

(i) The defendants shall not part with the property Shanker Saw Mill and shall not create any third party interest themselves or through their agents till further order of this Court.

7. With this, Appeal from Order is disposed of. Civil Application is also accordingly disposed of.

(MRIDULA BHATKAR, J.)

CERTIFICATE

Certified to be true and correct copy of the original signed
Judgment/Order.