

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 193 OF 2014
ALONGWITH

CIVIL APPLICATION NO. 503 OF 2014
IN
SECOND APPEAL NO. 193 OF 2014

Mr. Tanaji Damu Kedari and Ors.

.....Appellants

: V/S :

Mr. Tukaram Kashinath Kedari and Ors.

.....Respondents

* * * * *

Mr. Sudhir V. Sadavarte, Advocate for the appellants.

Mr. S.A. Sawant i/by. Mr. Samir M. Suryavashi, Advocate for
respondents no.2, 3, 4, 5A to 5D.

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

23rd February, 2015.

P.C. :-

1). This Second Appeal arises out of the judgment and order dated 13th February, 2014 passed by the District Court in Regular Civil Appeal No. 296 of 2011 reversing the decree dated 31st January, 2011 of the trial Court. By it's order, the trial Court had dismissed Regular Civil Suit No. 1520 of 2008 filed by the respondents for partition of the suit property.

2). The brief statement of facts leading to the proceedings is as follows :-

. One Shripati was the common ancestor of the parties. He died on 15th December, 1960 leaving behind three sons, Damu, Kashinath and Raghu. He also left the properties at Gat No. 140, 143, 159, 166. On the death of Shripati, the revenue records were mutated by mutation entry no.1207 to note the names of the heirs of Shripati. The respondents, who are heirs of Kashinath and Raghu, filed suit for partition of all the properties contending that Shripati had died intestate and his three sons succeeded to the property, which properties are required to be partitioned, and in addition, the property at Survey no. 119/3B which had been received by way of re-settlement after the death of Shripati. The appellants contested the suit contending that the properties had been partitioned during the lifetime of Shripati himself and that since partition, the sons of Shripati have been enjoying the properties separately till date. Reliance has been placed upon the revenue records in support of separate occupation and cultivation of the properties.

3). Admittedly, the land at Gat no.140 was acquired by the State and compensation in respect thereof was paid. Similarly, a portion of the land at Gat no. 143 was acquired and the compensation paid. The acquisition had taken place in the year 1992 and the compensation paid

has been shared equally by the three branches of the heirs of Shripathi. As regards the land at Gat no.159, the same is seen to be occupied by all the three branches by constructing houses thereon. In the circumstances, the properties available for partition by metes and bounds were unacquired portion of the land at Gat no.143 and the lands at Gat no. 166 and Survey no. 119/3B.

4). There is no dispute that the suit properties, except the property at Survey no. 119/3B was owned by Shripati. There is also no dispute as regards the genealogy of the family of Shripati. This gives rise to presumption that the properties were joint. When the appellants claimed it to be partitioned during the lifetime of Shripati himself, it was necessary for them to bring in the necessary evidence. The appellants examined two witnesses i.e. appellant no.1 and one, Bhau Ganpat, a resident of the same village. Appellant no.1 deposed that, Shripati had partitioned the suit properties during his lifetime, prior to the year 1960. He did not state the particulars or details of the partition, though added that since partition, the parties have been cultivating the lands separately. The record shows that, at the time of his deposition in the year 2010 appellant no.1 was aged 57 years. This would mean that, prior to the year 1960, he was of an age, less than 7 years. In the circumstance, the probability or the chance of he having personal

knowledge of partition and it's details is remote. Also, there is nothing to indicate that he had personal knowledge of partition of the properties by Shripati during his lifetime. As regards the witness examined by the appellants, he has admitted in terms in his cross-examination that, after the death of Shripati, the father of the appellants was acting as Manager of the Joint Family property. He had received the compensation for acquisition of some of the properties on behalf of the joint family and distributed the same amongst the family members. Had the partition taken place during the lifetime of Shripati, there was no question of distribution of the compensation. He also admitted in terms that, no partition had taken place of the suit property at any point of time. As regards the land at Gat No.119/3B, he admitted that it was received by way of resettlement during acquisition by Damu as the Manager of the joint property. Thus, the evidence shows that no partition of the suit properties had taken place during the lifetime of Shripati. The contention of the appellants that, the land at Survey no.119/3B was received by their father by way of resettlement on acquisition of part of the land at Gat no.140, cannot be accepted for the simple reason that, the cash component of compensation for acquisition has admittedly been shared amongst all the family members.

5). The lower appellate Court found that, the trial Court had

essentially relied upon subsequent mutation entries and the 7/12 extracts for holding that the partition had already taken place. It had not considered the mutation entry no.1207 of the year 1960 which was made immediately after the death of Shripati. Mutation entry no. 1207 clearly indicates that, no partition had taken place during the lifetime of Shripati. Therefore, any subsequent evidence consisting of 7/12 extract and independent occupation of the suit property can be of no relevance as has been rightly held by the lower appellate Court. In the circumstances, the impugned judgment and decree is completely supported by the evidence on record, which has been correctly and properly appreciated by the Court. There is no substantial question of law arising for consideration of the Court. Hence, the Second Appeal is dismissed.

6). On the request of Mr. Sadavarte, learned Counsel appearing for the appellants, the ad-interim order is continued for a period of 6 weeks from today i.e. till 23rd March, 2015. The appellants shall not create any third party rights or part with possession of the properties in their possession.

7). With the dismissal of the Second Appeal, Civil Application No. 503 of 2014 does not survive. The same is disposed off as having become infructuous.

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(sr. no.2)

Mon,23Feb,2015

(SMT. R.P. SONDURBALDOTA, J)