

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***CIVIL APPELLATE JURISDICTION*****SECOND APPEAL NO. 102 OF 2009****ALONGWITH****CIVIL APPLICATION NO.449 OF 2009****ALONGWITH****CIVIL APPLICATION NO. 476 OF 2009****Ramchandra Bhagoji Chavan & Ors.****..... Appellants****VERSUS****Anna Pandurang Chavan & Ors.****..... Respondents**

Mr.Rajesh Patil, i/b. Ms.Poonam Bhosale for the Appellants.

Mr.A.Palkar, A.G.P. for the Respondent no.5.

Mr.Umesh Mankapure for the Respondent nos. 1 to 4.

CORAM : R.D. DHANUKA, J.**DATE : 5th DECEMBER, 2016****P.C.**

By this appeal filed under section 100 of the Code of Civil Procedure, 1908, the appellants (original defendants) have impugned the judgment and decree dated 26th September, 2008 passed by the learned District Judge - 2, Karad, dismissing the regular civil appeal filed by the defendants by which the defendants had impugned the judgment and decree dated 31st January, 2005 passed by the III Joint Civil Judge, Junior Division, Karad thereby decreeing the suit filed by the respondents (original plaintiffs) and declaring that the plaintiffs and the defendant no.8 in common are entitled to 1/4th share in the suit properties. It was further declared that the defendant nos. 1 to 4 in common, were entitled to 1/4th share in the suit properties and defendant nos. 5 to 6 in common were entitled to 1/4th share in the suit properties and it was held that defendant no.7 was entitled to 1/4th share in the suit properties. The learned trial judge appointed the Court Commissioner

for effecting partition of the suit properties and ordered an enquiry under Order 20 Rule 12 of Code of Civil Procedure.

2. It was the case of the original plaintiffs that the suit properties described in paragraphs 1-A and 1-B in the plaint were ancestral joint properties of the plaintiffs. It was their case that since the defendant nos. 1 to 3 and 5 and 7 had fraudulently got entered their names in respect of the suit property in collusion with the officers of the revenue department and obstructed the joint cultivation of the plaintiffs or the suit properties, the plaintiffs filed a suit inter alia praying for partition and separate possession. In paragraph (2) of the order passed by the learned trial judge genealogy is set out. Insofar as the plaintiffs are concerned, the plaintiffs claimed to be the son of Pandu who was one of the son of Nana.

3. The suit was resisted by the defendant nos. 1, 5 and 7 by filing written statement. In the written statement filed by those defendants, it was contended that the plaintiffs were nowhere related with their family and were not residing with the joint family. The defendants also opposed reliefs of partition claimed by the plaintiffs.

4. The learned trial judge framed five issues. The plaintiffs examined plaintiff no.1 and one more witness viz. Mr.Natu who was one of the relatives of the plaintiff. The second witness examined by the plaintiffs was however not available for cross examination.

5. The learned trial judge after considering the oral and documentary evidence led by both the parties held that the plaintiffs had proved that they were joint family members of the defendants' family and had also proved that the suit

properties were joint family of the plaintiffs and the defendants and were thus entitled to 1/4th share in the suit properties. The plaintiffs were entitled to partition and separate possession.

6. Being aggrieved by the judgment and order dated 31st January, 2005, the defendants filed Regular Civil Appeal No.17 of 2005. The learned District Judge formulated three points for determination and after considering the oral and documentary evidence, rendered a finding that the plaintiffs had proved that the plaintiffs were the members of the joint family constituted by the plaintiffs and the defendants and decedents of Pandu Nana Chavan. The plaintiffs had also proved that the suit property mentioned in paragraphs (1) and (2) of the plaint were the ancestral property belonging to the joint family of the plaintiffs and the defendants. This decree passed by the first appellate court is impugned by the defendants in this second appeal.

7. Mr.Patil, learned counsel for the defendants invited my attention to the averments made in the plaint, in the written statement and also the oral and documentary evidence led by the parties. It is submitted by the learned counsel that admittedly it was disputed by the defendants in the written statement that Pandu was not the son of Nana and was not a part of joint family of Nana. He submits that the plaintiffs had failed to prove that Pandu was one of the legal heir of Nana and did not produce any document in support of the said plea. He submits that insofar as evidence of Mr.Natu who was the second witness examined by the plaintiffs is concerned, since he was not available for cross examination, his evidence could not be considered by the learned trial judge.

8. It is submitted by the learned counsel that the defendants had applied for

copies of the alleged heirship certificate under the provisions of the Right to Information Act. He submits that according to the document which is now made available to the defendants under the provisions of Right to Information Act, it clearly indicates that there was no heirship certificate issued in favour of Pandu during the relevant period. He submits that the plaintiffs had relied upon the marriage certificate obtained from the office of the Tahsildar in the year 2007. He submits that the Government also has filed an affidavit pursuant to the order passed by this court in this second appeal showing that the documents prior to 1943 in the office of the Tahsildar were not traceable. He submits that since the documents in the office of Tahsildar were not traceable for the relevant period, the plaintiffs could not have filed any such alleged heirship certificate before the trial court issued to them in the year 2007.

9. It is submitted by the learned counsel that the mutation entry annexed at Page 23 of the affidavit in reply filed by the plaintiffs in the civil application does not refer to the partition between the family of Nana. He submits that the said entry is registered at serial no.1382 whereas the learned trial judge has considered the entry registered at serial no.1359.

10. Learned counsel for the defendants submits that even if the extract of the revenue record was produced by the plaintiffs through their one of the witness and even if the said document is marked as exhibit, the contents thereof cannot be considered as proved.

11. Mr.Mankapure, learned counsel for the plaintiffs on the other hand submits that the plaintiff no.1 who was one of the witness examined by the plaintiffs in his examination in chief had proved the contents of the various documents annexed to

the plaint. He also invited my attention to the cross examination of the said witness and would submit that the deposition of the plaintiff no.1 in his evidence remain uncontroverted and was unshattered. He also invited my attention to the re-examination of the plaintiff no.1 in which the said witness had deposed about the heirship of Pandu. He submits that though the plaintiff no.1 was cross examined further, the further deposition of the plaintiffs in the re-examination was not shattered by the defendants.

12. Learned counsel invited my attention to the documents annexed at Ex.23 of the civil application which was considered by the learned trial judge as well as the first appellate court. He submits that in the said document, a reference was made by the revenue authority on the heirship register after demise of Nana. He submits that if the said document is considered and read with the documents produced by the government in the affidavit in reply filed before this court, it is clear beyond reasonable doubt that the mutation entries were effected on the basis of heirship certificate.

13. It is submitted by the learned counsel that the witness examined by the plaintiffs had not only proved the existence of the documents referred to and relied upon but also the contents thereof.

14. Insofar as the submission of the learned counsel for the defendants that the documents annexed at ex.23 of the reply to the civil application pertains to the other family members and the said documents does not indicate the name of the Pandu is concerned, it is submitted that the said documents records the partition of the property between the family of Nana and his brothers. He submits that the name of one of the family member who was appointed as manager was indicated

in the said document.

15. A perusal of the record indicates that the relationship of Pandu was admitted by the defendants in the written statement. In view of the dispute raised by the defendants, the plaintiffs had examined plaintiff no.1 and one Mr. Natu. A perusal of the affidavit in lieu of examination in chief of the plaintiff no.1 clearly indicates that he had deposed about the contents of the documents produced by him. A perusal of the cross examination of the said witness indicates that the deposition of the plaintiff no.1 to prove the heirship of Pandu has not been shattered in the cross examination and that part of the evidence remained uncontroverted. In the re-examination, the said witness clarified the factual position. Though the defendants were given opportunity to cross examine the said witness on the clarification made in the examination in chief, there was no cross examination on the issue of heirship. I am not inclined to accept the submission of the learned counsel for the defendants that any finding is recorded based on the evidence of Natu.

16. A perusal of the record further indicates that the extract of revenue entry produced by the plaintiffs clearly indicates that there is a reference to the heirship register. The extract of the revenue entry was proved beyond reasonable doubt before the learned trial judge. I am thus not inclined to accept the submission of the learned counsel for the defendants that no proof was produced by the plaintiffs to prove the heirship of Pandu or that he was son of Nana.

17. Pursuant to the directions issued by this court, the Tahsildar has filed an affidavit on 27th April, 2010 before this Court thereby annexing copy of the mutation entries. A perusal of those mutation entries annexed at Ex.A to the said reply clearly indicates that even those documents concerning the entry no. 1359,

there is reference to the heirship register of Nana. If both these documents i.e. one relied upon by the learned A.G.P. and the document which was marked as exhibit before the learned trial judge are compared, it clearly indicates that there was sufficient proof of heirship of Pandu placed and proved by the plaintiffs on record before the learned trial judge.

18. A perusal of the judgment and decree passed by the learned trial judge clearly indicates that the learned trial judge has considered this document as proved as authentic and has rightly rendered a finding of fact.

19. A perusal of the judgment and decree passed by the first appellate court clearly indicates that the first appellate court had independently considered the oral and documentary evidence led by both the parties and have rightly confirmed the decree passed by the learned trial judge.

20. Insofar as civil application filed by the appellants (original defendants) for production of additional documents under Order 41 Rule 27 of Code of Civil Procedure is concerned, in my view those documents would not assist the case of the defendants. None of these documents relied upon in the civil application would even prima facie indicate that no heirship certificate was issued in respect of Nana. On the contrary, the affidavit filed by the government annexing the documents would clearly indicate that the heirship certificate was issued and the heirship register was considered by the revenue authority while recording the said entry. I am thus not inclined to grant any relief in the civil application.

21. The findings recorded by the two courts below are concurrent findings and being not perverse, cannot be interfered with by this court in this second appeal

filed under section 100 of the Code of Civil Procedure, 1908. No substantial question of law arises in this appeal. The appeal is devoid of merits and is accordingly dismissed. No order as to costs.

22. In view of dismissal of Second Appeal No.102 of 2009, Civil Application No.449 of 2009 for stay is also dismissed. Civil Application No.476 of 2009 for production of the documents is also dismissed.

23. On oral application made by Mr.Patil, learned counsel for the defendants, ad-interim order passed by this court on 5th March, 2009 in Civil Application No.476 of 2009 to continue for a period of eight weeks.

(R.D.DHANUKA, J.)