

Sequeira

***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION***

***SECOND APPEAL NO. 394 OF 2014
Along with
CIVIL APPLICATION NO. 936 OF 2014***

Shri Vinayak Govind Patil & ors. ... Appellants.
V/s.
Shri Ashok Govind Patil & anr. ... Respondents.

Mr.K.S.Dewal a/w Jayesh Joshi, for Appellants / Applicants.
Mr.Sandesh Patil, for Respondent Nos.1 and 2.

***CORAM : N.M. Jamdar, J.
Thursday 21 April, 2016.***

Oral Order :-

By this Appeal, the Appellants challenge the concurrent Judgment and Order passed by the District Judge, Thane and the learned Civil Judge, Junior Division, Wada dismissing the Appeal and Suit filed by the Appellants.

2. The Suit was filed by the Appellants, through Power of Attorney holder i.e. Appellant No.1, for partition of the properties. The properties at Chinchghar, Wada were listed in the plaint. Parties are related. Appellant No.1 and Respondent No.1 are brothers. Others are sisters and mother. The first group of properties were listed in the name of the father-Govind. The second group was in the name of the Respondent No.1. The Suit was filed on a simplistic basis that the properties are joint family properties, no partition has taken place and the Appellants are

entitled to share in the same. Written statement was filed by the Respondents. It was contended that there was a deed of partition on 17 November 1999 between father and Defendant No.1 pursuant to which mutation entries were carried out. It was contended that there was an oral partition pursuant to which properties came to the share of the Respondent No.1 who was the elder son and some properties were kept by the Appellants for the Appellant No.1 and Respondent No.1 and some properties came to the share of Respondent No.1. It was also contended that Govind executed a Will on 23 September 2004 by virtue of which he bequeathed the properties that came to his and share of his wife, to the children of Respondent No.1. It was stated that the Appellant No.1 was fully aware of the oral partition however, had suppressed the fact of the oral partition. Accordingly, it was asserted that since the partition has already taken place, there is no question of partitioning the property.

3. Both the Courts after assessing the evidence on record came to the conclusion that the Respondents had established that there was a partition in the property, the Appellants could not establish that the Will executed on 23 September 2004 was bogus and not binding, and that the Appellants were not entitled to the share in the property. Both the Courts took note of the conduct of the Appellants in not disclosing various facts which were within the knowledge of the Appellants and thus statements made in the depositions recorded in the earlier round of litigation. Accordingly, both the Courts proceeded to dismiss the Suit and Appeal which orders have been challenged in the Appeal.

4. The learned counsel for the Appellants submitted that the burden was upon the Respondents to demonstrate that there was previous partition having accepted the position that there was an existence of joint family property. He submitted that the deed of 1999 was only between the father and Respondent No.1 and that too only in respect of two properties. He submitted that no evidence has been led to demonstrate that there was an oral partition of the properties. As per the version of Respondent No.1, if the partition took place, then no share is given to the sisters or to the mother. He submitted that the partition did not take place by metes and bounds and the revenue record continue to be in the name of father and Respondent No.1. He also submitted that the Will executed, is a questionable document.

5. Firstly, the case of the Appellants in the plaint has to be noticed. The plaint only states that there has been no partition and that Appellants are entitled to share in the property. There is no reference to the Deed of 1999, even though in the earlier round of litigation the Appellant No.1 has referred to this deed and has commented upon the same. The Appellants have also not mentioned in the plaint that after the deed of 1999 was executed the Appellant No.1 executed specific affidavit on 10 February 2000 giving no objection to the registered partition deed of 1999. In the earlier round of litigation i.e. in Civil Suit No.30 of 2000 instituted by the uncle of Respondent No.1, the Appellant No.1 categorically deposed that the property in which he had built a chawl had come to his share by way of partition and therefore, the Plaintiff therein had given him a permission. He also admitted that the entire chawl built

upon this property was being utilised by him alone. None of these facts have been mentioned in the plaint. It would have been a different matter if the plaint contained these averments and had given an explanation. Both the Courts have held against the Appellants holding that the Appellants have not come to the Court with clean hands and are not entitled to any relief. Both the Courts have followed the law laid down by the Apex Court in the case of *S.P.Chengalvaraya Naidu (dead) by L.Rs v. Jagannath (dead) by L.Rs. And Ors.*¹ The Court in that case had held that where a preliminary decree was obtained by withholding an important document from the court, the party concerned deserved to be thrown out at any stage of the litigation. The approach of both the Court is thus in consensus with the settled legal position.

6. Further the Suit, when it was instituted, was instituted by the Appellant No.1 as a Power of attorney holder of his sisters and the mother. The learned Civil Judge examined the Power of attorney and found that there was no reference to all the properties and though there was a reference to institution of legal proceedings there was no reference to instituting a partition Suit. The filing of partition suit has serious implications for family and therefore, the learned Civil Judge rightly noted the absence of any authorisation on behalf of the Appellant No.1 for instituting a partition Suit. He has also rightly held that subsequently Power of attorney executed after the evidence was over would not make any difference. Though the Appeal has been filed in the District Court by all the Appellants except Appellant No.1, none of the other Appellants

1- SC / 0192 /1994

have given their separate evidence. Since the sisters had not given their separate evidence, the learned District Judge has noted that even though as per the oral partition and the Will they have not received any share, no specific grievance is made by them by participating in the suit proceedings.

7. As regards the oral partition is concerned, in the Will executed by father Govind, there is a clear reference to the same. The Will which has been duly attested and registered has been accepted by both the Courts. Except by stating that the thumb impression of the father appears in the Will as instead of his signature and the deed is forged nothing further has been submitted to discredit the Will. It was also stated that the Will did not contain signature of the mother. What is important are the recitals in the Will which has a reference to the earlier oral partition. The Appellant No.1 himself has admitted the factum of partition in the earlier Suit. In the examination of witness, Questions have been put, indicating that the oral partition was not equal. Both the Courts have also taken note of receipt of compensation by the Appellant No.1 in respect of laying of pipeline through the fields.

8. Cumulatively therefore, the complete non-disclosure of material facts in the plaint, admissions of the Appellant No.1 in the earlier suit, institution of Suit through Power of attorney which did not give power to the Appellant No.1 to institute the Suit on behalf of the others, the finding of the fact has been used by both the Courts that there was an oral partition of the suit property and thereafter by executing the Will the

father has bequeathed certain properties to the children, cannot be set aside under the limited jurisdiction under Section 100 of the Code of Civil Procedure. All the arguments that have been made in this Appeal were advanced before the Courts below and turn on assessment of evidence. Each piece of evidence has been examined by both the Courts and they have drawn the conclusions which are legally tenable. It is not possible to interfere with the finding of fact that there was an oral partition. Once there was an oral partition, the suit filed for partition of the property, was rightly dismissed by the Courts below.

9. No question of law arises. Second Appeal is dismissed. Civil Application stands disposed of.

10. At this stage, learned counsel for the Appellants seeks continuation of the order of status-quo granted on 15 July 2014. Considering the facts and circumstances of the case, the same is extended for period of eight weeks from today.

(N.M. Jamdar, J.)