

Sequeira

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

***SECOND APPEAL NO. 527 OF 2016
Along with
CIVIL APPLICATION NO. 644 OF 2016***

Shri Vitthal Sahebrao Salunke

Deceased through legal heirs

1a. Bhauso Vitthalrao Salunke & Ors. ... Appellants / Applicants

Vs.

Shri Manikrao Sahebrao Salunke & anr. ... Respondents

Mr.S.G.Karandikar a/w Ms.Savita Prabhune, for Appellants /
Applicants.

Mr.Sushant Prabhune, for Respondent No.1.

***CORAM : N.M.Jamdar, J.
Wednesday, 27 July 2016.***

Oral Order :

The Appellants challenge the Judgment and Order dated 24 February 2016 passed by the learned District Judge, Baramati setting aside the Judgment and Order passed by the Civil Judge, Junior Division, Baramati dated 28 September 2011. The learned District Judge by the impugned order decreed the Suit filed by the Respondent-Plaintiff and dismissed the counter-claim of the

Appellants.

2. Suit was filed by the Respondent-Plaintiff for a declaration that the suit property solely belongs to the Plaintiff and the Sale deed executed by Defendant No.1 in favour of Defendant Nos.2 to 4 on 2 July 2007 is not binding on the Respondent-Plaintiff and for injunction. It was a case of the Respondent-Plaintiff that partition took place in the year 1949 in the family consisting of the Plaintiff and Defendant No.1 and their father and all three respectively started enjoying the property in their own right. In the year 1950, the Plaintiff for making provision for maintenance of his mother, on his own made an application to the revenue authorities for mutating her name and he was paying the proceeds generated from cultivating the suit land to her. After the death of the mother, since the Defendant No.1 started claiming right in the property and also executed the Sale deed in favour of Defendant Nos.2 to 4, the Suit had to be filed with the prayers mentioned above. The Appellants filed Written statement as well as counter-claim and contended that the property was given to the mother in the partition for her maintenance and she became owner thereof and after her death, both the Appellants as well as Defendant No.1 were entitled the half share and therefore the Appellant, in exercise of his legitimate right executed the Sale deed. In the counter-claim the Appellant prayed for partition of the suit property. The learned Civil Judge, dismissed the Suit and allowed the counter-claim. In the Appeal filed by the

Respondent-Plaintiff, the learned District Judge reversed the order passed by the learned Civil Judge and decreed the Suit and dismissed the counter-claim.

3. Mr.Karandikar, the learned counsel for the Appellants submitted that on his own showing the Respondent-Plaintiff had given the property to the mother Gajrabai for maintenance. He submitted that being her son the Respondent-Plaintiff was under obligation to maintain his mother and in discharge of this obligation the property was given. He submitted that under Section 14(1) of the Hindu Succession Act 1956, an explanation is appended whereby it is clarified that the property of a Hindu female acquired by inheritance or devise or at a partition, or in lieu of maintenance or arrears of maintenance or by way of purchase or by prescription or in any other manner whatsoever, is of her absolute property. Mr.Karandikar stressed on the phrase '*in other manner whatsoever*' and submitted that giving an application to the revenue authorities to mutate the name pursuant to maintenance is covered under the phrase 'in other manner whatsoever'. He submitted that once the mother had a right of maintenance under the provisions of the Act, then she had acquired the property in her own right and upon her death the property must come to the Appellants as well as Respondent-Plaintiff in equal share and it cannot revert back to the Respondent-Plaintiff. Mr.Karandikar, relied upon the decision of the Division bench of this Court, in the case of *Bapusaheb Bhausahab*

Patil and another V. Smt. Gangabai and others – AIR 1972 Bombay 16 and in the case of *V. Tulasamma and others Vs Sesha Reddy (Dead) by L.Rs. - (1977) 3 Supreme Court Cases 99*. Mr. Sushant Prabhune, the learned counsel for the Respondent on the other hand contended that, the partition took place in the year 1949, the application to revenue authorities was made in the year 1950 and at that time father was alive, as he passed away in the year 1956. He submitted that in the decision of *V. Tulasamma* it is clarified that there has to be a legal obligation and secondly, there has to be a joint family property and thirdly, the claim firstly falls on the husband and upon the death of the husband on the other heirs.

4. The main question is whether the propositions of law by advanced Mr. Karandikar arise in the factual matrix of the present case. In the plaint, the Appellant has asserted that it is out of his own goodness he had provided sustenance to his mother. In the counter-claim an assertion is made by the Appellants that the right of maintenance was created at the time of partition itself. I have gone through the evidence of both, the Appellants and Respondent-Plaintiff. There is absolutely nothing placed on record to show that any right was created in favour of Gajrabai at the time of partition. Mr. Karandikar has placed heavy reliance on the use of phrase 'maintenance' by the Appellant in the plaint. According to him once the Appellant himself has admitted that he had given the property to the mother by way of maintenance, the ingredients of Section 14 of

the Act are attracted. This submission cannot be accepted. There is no evidence on record that there was any collective decision at the time of partition that it shall be the duty of Defendant No.1 alone to maintain the mother. It is one year after the entries were made in the revenue record pursuant to partition and when both the Appellants and Respondent-Plaintiff were enjoying the properties independently, that this application to the revenue authorities was made by the Defendant No.1. A suggestion was put to the Respondent-Plaintiff during the trial that this application was by consent of both the sons, which he has denied. The phrase 'maintenance' used by the Respondent-Plaintiff is used in common parlance and it is not used in the sense contemplated under Section 14 of the Act as the factual matrix shows. Therefore, the theory put forth by the Appellant is that the application and grant of maintenance was by consent of all the parties and decided at the time of partition is falsified in the evidence. As rightly contended by Mr.Prabhune, firstly there has to be a legal obligation. In the present case nothing is shown that the Respondent-Plaintiff was under any legal obligation. The entirely unilateral act of providing sustenance out of an independent volition cannot be said to be covered under the phrase 'in any manner whatsoever'. This phrase will take its colour from the categories mentioned preceding to it in this provision. The learned District Judge therefore has rightly concluded that by mere mutation entry, the independent property of

the Respondent-Plaintiff could not have been said to be transferred in the name of the mother Gajrabai. The conclusion reached by the learned District Judge therefore, is not contrary to any legal position or is perverse.

5. There is no evidence that the partition was inequitable or that it was agreed that it is Respondent-Plaintiff who will maintain the mother. Father was alive at the relevant time. The clear case put forth by the Appellant that maintenance was given at the time of partition is falsified. The Appellants admittedly, did not provide any maintenance and if his argument is to be accepted the Respondent-Plaintiff who provided the sustenance to his mother during her life-time on his own goodness will have to forego half the property while the Appellants who have not provided any maintenance, will have his half share. So the Appellant wants to acquire seventy five percent share without providing sustenance to the mother, while depriving the Defendant No.1 who gave sustenance to the mother, half of his share.

6. Mr.Karandikar, then submitted that a single appeal from the Judgment and Decree passed by the learned Civil Judge, which disposed of the Suit and the counter-claim, could not have been filed. This submission is without merit. Firstly, in the Appeal memo filed before the District Court, the Appellants had prayed for decreeing the Suit as well as dismissing the counter-claim. The

Appellants raised no objection whatsoever. Even in the Second Appeal this ground is not taken and advanced orally. Even otherwise when the Suit is decreed, the consequential declaration of the ownership right of the Respondent-Plaintiff over the entire property and cancellation of the Sale deed follows. If this decree is maintained then nothing survives in the counter-claim of the Appellants. In the circumstances, the argument advanced orally for the first time cannot be considered, and even if it is considered it has no merit.

7. No other argument was advanced. No substantial question of law arises. Second Appeal is accordingly dismissed. In view of the above, Civil Application is also disposed of.

8. Mr.Karandikar seeks grant of protection for some time. The learned counsel for the Respondent states that no protection is necessary as even execution proceedings are not filed and it will take atleast six weeks for the Respondent to file execution proceedings. In view of this statement of the learned counsel for the Respondent which is accepted, no further orders.

(N.M.Jamdar, J.)