

Sequeira

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

***SECOND APPEAL (St.)NO. 17708 OF 2016.
Along with
CIVIL APPLICATION (St.)NO. 17709 OF 2016
(For stay)***

Shri Shital Appasaheb Mirje

... Appellant/
Applicant

V/s.

Shri Mahaveer Appasaheb Mirje.

... Respondent.

Mr.D.A.Nalawade i/b Mr.Ajay Khairnar, for the Appellant -
Applicant.

Mr.Surel Shah, for Respondent.

***Coram : N.M. Jamdar, J.
Monday, 11 July, 2016.***

P.C. :-

The Appellant challenges the concurrent Judgment and Orders passed by the Civil Judge Junior division, Kolhapur and District Judge, Kolhapur decreeing the Suit filed by the Respondent-Plaintiff and dismissing the Appeal filed by the Appellant.

2. The Suit was filed by the Respondent-Plaintiff against the Appellant for injunction in respect of the suit property which is one half share on the northern side of shop - unit Nos.16, 17A, 17B, 17C and 18 admeasuring 1056 sq.ft. According to the Respondent-Plaintiff, pursuant to oral partition, a memorandum was effected on 9 January 2005 and the suit property on the northern side came to

be allotted to the Respondent-Plaintiff and southern side was allotted to the Appellant. It was his contention that since the Appellant was disturbing his possession, the Suit for injunction had to be filed. The Appellant contended that there was no such oral partition and the Appellant was in possession of entire five galas / shop units. The learned Civil Judge accepted the factum of partition and decreed the Suit for injunction. The Appeal filed by the Appellant was dismissed.

3. The learned counsel for the Appellant submitted that the factum of partition is doubtful. The share of the sister and mother has not been provided in the deed. Thereafter no partition has taken place by meets and bounds. Accounts of partnership firms have not been settled and subsequent to the factum of partition, affidavits have been filed before authorities which do not disclose partition. He also submitted that the oral evidence led by the Appellant showing that the Appellant is in possession of all five shop units has not been discussed by both Courts. The learned counsel for the Respondent supported the decision of both the Courts and submitted that the parties have acted upon the partition and no evidence is produced by the Appellant to show possession of all five shop units.

4. As regards the partition deed is concerned, both the Courts have rendered a finding that after examination of necessary witnesses

the deed has been duly proved. This deed dated 9 January 2005 provides for distribution of property in detail. It has come on record that pursuant to this deed all the brothers have given applications to the revenue authorities and necessary entries have been made. It has also come on record that one of the properties situated in Karnataka has been sold by the Appellant, as an owner, subsequent to the partition therefore, there is finding of fact recorded by both the Courts that parties have acted upon said partition. It is not possible to interfere with this factual finding. As regards the accounts of the firms, the deed itself states that the firms have become defunct and the process of settling the account will be completed; merely on this basis the finding of fact cannot be reversed.

5. As regards the share of mother and sister is concerned, they have not raised any objection, neither have any of the other brothers. Subsequently, by relinquishment deed of 3 December 2005, mother and sister have relinquished their share. It may be that, in the affidavit dated 26 August 2005 there is no mention of the partition deed but that alone will not lead to a conclusion that there was no partition at all.

6. As regards the grievance made by the learned counsel for the Appellant for non-consideration of evidence regarding possession is concerned, the Appellant had relied upon the deed of partition

which specifically allots northern side of the said suit property to the Respondent-Plaintiff and the southern side to the Appellant. Once this document was proved, onus shifted on the Appellant to demonstrate as to how the Appellant was in possession of the entire property. It is the case of the Appellant that, the Appellant is carrying on business from the entire suit property. The good evidence would have been documentary evidence such as bills, receipts, correspondence, permits, etc. Nothing has been produced by the Appellant. Instead he has chosen to lead oral evidence of some of the witnesses who are not clear, as can be seen from their admissions in the evidence, as to from how many galas the Appellant is carrying on his business. In absence of any documentary evidence, mainly on the basis of this oral evidence, when both the Courts have not found sufficient, finding of fact that the Appellant is not in possession cannot be disturbed. In absence of any cogent material which would be available in normal course of conduct, the concurrent finding of fact that the Appellant is not in possession of the entire property cannot be disturbed. In the circumstances, no question of law arises to warrant interference under Section 100 of Code of Civil Procedure. Second Appeal is accordingly dismissed.

7. The Civil Application is disposed of accordingly.

(N.M. Jamdar, J.)