

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.373 OF 1997

Smt.Banubi Abdul Kadir Mukadam Appellant

VERSUS

Smt.Noorjehan Abdul Rajjak Karbelkar & Anr. Respondents

None for the Appellant.

Mrs.S.A.Mudbidri for Respondent no.1.

CORAM : R.D. DHANUKA, J.

DATE : 22nd SEPTEMBER, 2016

P.C.

None appeared for the appellant when the matter was called out.

2. By this second appeal filed by the appellant under section 100 of the Code of Civil Procedure, 1908, the appellant has impugned the part of the impugned judgment and decree passed by the learned trial judge on 21st July, 1989 in a suit for partition filed by the respondents (original plaintiffs). Some of the relevant facts for the purpose of deciding this appeal are as under :-

3. The parties in this order are described as per their status in the proceedings before the learned trial judge. The appellant herein was the original defendant no.1. The respondent no.1 herein was the plaintiff. The respondent no.2 herein was the original respondent no.2.

4. It was the case of the plaintiff that defendant no.1 is her cousin. The defendant no.2 was cousin of the plaintiff and the defendant no.1. The suit properties originally belonged to her grandfather Fajaluddin. According to the

plaintiff she had $\frac{1}{2}$ share in the suit property. She had asked for partition and separate possession of her share from the defendant no.1. Since the defendant no.1 refused to give her $\frac{1}{2}$ share in the suit properties, the plaintiff filed a Civil Suit No. 51 of 1984 in the Court of Civil Judge, Junior Division, Dapoli inter alia praying for partition and separate possession of the properties against the defendant no.1 herein and their brothers. The suit was resisted by both the defendants. The learned trial judge framed eight issues. The plaintiff and the defendant no.1 led oral and documentary evidence before the learned trial judge. By a decree and judgment dated 21st July, 1989, the learned trial judge decreed the said suit partly and declared that the plaintiff was having $\frac{1}{9}$ th share in the suit property. It was also declared that the defendant no.1 and the defendant no.2 were entitled to $\frac{2}{9}$ th and $\frac{1}{9}$ th share in the suit property respectively. Being aggrieved by the said judgment and decree dated 21st July, 1989, the plaintiff filed a Civil Appeal No.55 of 1989 in the Court of Joint District Judge, Ratnagiri. None of the defendants impugned the said decree passed by the learned trial judge. The first appellate court framed three issues.

5. By a judgment and decree dated 13th August, 1996, the learned Joint District Judge, Ratnagiri allowed the said appeal filed by the plaintiff and modified the decree passed by the learned trial judge thereby holding that the plaintiff and the defendant no.1 have $\frac{2}{5}$ th share each and the defendant no.2 has $\frac{1}{5}$ th share. It is held that the plaintiff is entitled to get partition and separate possession of her $\frac{2}{5}$ th share. The said $\frac{2}{5}$ th share be determined as far as possible in the property in which she had grown-up mango grafts.

6. Being aggrieved by the said judgment and decree dated 13th August, 1996, the defendant no.1 has filed this second appeal filed under section 100 of the Code

of Civil Procedure, 1908. The plaintiff as well as the defendant no.2 did not impugn the said order and judgment dated 13th August, 1996.

7. This matter appeared on board on 14th July, 1997. This court recorded the statement made by the learned counsel for the appellant (defendant no.1) that he has not made any grievance regarding the decree of the appellate court granting 2/5th share to the plaintiff. The grievance of the defendant no.1 was only in respect of the operative order dated 14th July, 1997 which reads as under :-

“ The said 2/5th share be determined as far as possible in which property, she has grown up mango grafts. ”

8. This court however noticed that there was no discussion as to why the plaintiff would be entitled to share any specific area. This court by an order dated 21st September, 1998 admitted this second appeal on the substantial questions of law which read thus :-

(i) That the appellant has proved that the “Bandh” was constructed by her through her husband by spending some amount and also planted mango trees in a portion of the land and that the trial court has upheld the said evidence which was not challenged at all by the respondent no.1 and as such, the order passed by the learned lower appellate court that the said portion which was developed by the appellant should be given in the share of the respondent no.1, is improper, bad in law and without considering the relevant evidence in that behalf.

(ii) That the learned lower appellate court was wrong and erroneous in passing the impugned order of giving the portion of the land in the share of the respondent no.1, which was

developed by the appellant, particularly when the observations, findings and conclusions arrived at by the learned trial court was not at all distributed and/or upset by the learned lower appellate court, which has resulted in miscarriage of justice and vitiated the order.

(iii) That it is pertinent to note that the mango graft trees were grown up and planted by the appellant and not by the respondent no.1, and as such, the impugned order as passed by the learned lower appellate court is wrong and erroneous, on the basis of the wrong assumptions without an iota of evidence to that effect, and that there is non-application of mind, which has resulted in miscarriage of justice, and as such, this is a substantial question of law to be considered.

9. Ms. Mudbidri, learned counsel for the plaintiff invited my attention to the findings recorded by the learned trial judge and also the findings recorded by the first appellate court. My attention is also invited to the order passed by this court on 14th July, 1997. It is submitted by the learned counsel that in view of the statement made by the defendant no.1 through her counsel before this court on 14th July, 1997, it is clear that the defendant no.1 has not disputed the grant of 2/5th share to the plaintiff in the suit property but has restricted her grievance only in respect of the specific area of the plot to be allotted to her.

10. A perusal of the order dated 14th July, 1997 indicates that the grievance of the defendant no.1 is only restricted to the specific area/location of the 2/5th share allotted to her.

11. It is not in dispute that the plaintiff and the defendant no.2 have not impugned the judgment and decree passed by the first appellate court. The share of the parties determined by the first appellate court has thus attained finality. The limited issue which remains to be considered is whether any of the parties to the proceedings are entitled to any specific portion of the suit property or not. In my view, the first appellate court was right in holding that 2/5th share has to be determined as far as possible in the property in which the defendant no.1 had grown up mango grafts.

12. In my view the parties can lead evidence before the executing court about the specific portion of the plot to be allotted to them in partition in accordance with the share determined by the first appellate court.

13. The substantial question of law formulated by this court are accordingly answered in the aforesaid terms.

14. I, therefore, pass the following order :-

Second Appeal No.373 of 1997 is disposed off in following terms:-

(a) Order of the first appellate court determining the share of the parties is upheld.

(b) Insofar as allotment of the specific portion of the land in the suit property is concerned, the executing court shall decide the said issue by giving an opportunity to all the parties to the proceedings and in accordance with law.

(c) The executing court shall decide the issue and shall pass an order for partition of the suit properties by metes and bounds within six months from the date of communication of

this order.

(d) All contentions in respect of the allotment of specific partition of the suit property in favour of either party are kept open.

(e) The parties as well as the executing court to act on the authenticated copy of this order.

(f) The parties are directed to appear before the executing court on 10th October, 2016.

(g) The office is directed to remit the records and proceedings transmitted to this court by the trial court before the executing court expeditiously.

(h) No order as to costs.

15. In view of the disposal of the second appeal, the interim protection granted by this court to stand vacated.

[R.D. DHANUKA, J.]