

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.110 OF 2015

Ranganath Popat Pagar & Ors. .. Appellants
-Versus-
Baban Popat Pagar and Ors. ..Respondents

Mr. Kuldeep Patil for appellants
Mr. Rameshwar Gite for respondents

CORAM : R.D.DHANUKA, J.

DATE : 18th October 2016.

P.C.

1] By this appeal filed under section 100 of the Code of Civil Procedure, 1908, the appellant – original defendant Nos. 1 to 7 have impugned the judgement and decree dated 9th July 2014 passed by the learned Dist. Judge II, Niphad dismissing Civil Appeal No.274 of 2005 filed by the appellants in which the appellants had impugned the judgement and decree dated 8th April 2005 passed by the learned Civil Judge, Senior Division, Niphad, thereby decreeing the suit filed by the plaintiffs, inter alia, praying for a declaration that the mutation entry No.861, 613, 720 and 591 are null and void and not binding on the plaintiffs and for permanent injunction and directions that the defendants should not alienate the suit property till the plaintiffs get the possession of

their share of the suit property and prayed for partition and separate possession of half share in the suit property along with mesne profits.

2] Parties are described in this judgement as per their original status in the trial court proceedings.

3] Respondent No.1 was the original plaintiff. Respondent No.2 was the original defendant No.10. The appellants are original defendant Nos. 1 to 7. It was the case of the plaintiffs that the suit properties were purchased by his father Popat Pagare (deceased) who had two wives Hausabai and Gangubai. Out of the wedlock of Hausabai with Popat Pagare they had two children i.e. plaintiff and defendant No.10. It was the case of the plaintiff that the said Popat had a mistress by name Gangubai, who was defendant No.5 before the trial court. The said Gangubai and Popat had four daughters and four sons. Marriage of Popat with Gangubai is admitted by plaintiff.

4] It was the case of the plaintiff that the defendant Nos. 1 to 7 in collusion with the Tahsildar and Talathi got their names mutated in the suit properties. The plaintiff also challenged the alleged partition between the said Popat and defendant Nos. 1 to 7. The suit was resisted by the defendant Nos. 1 to 7 by filing written statement. The defendant No.10

who is the sister of plaintiff supported the claim of the plaintiff in toto. The learned trial Judge framed the issues. The plaintiff examined himself and one more witness Sarubai Gaikwad and also led documentary evidence. Defendant Nos. 1 to 7 examined defendant No.2 and also examined one Bhaurao Wagh. Defendant Nos. 1 to 7 also examined defendant No.5. Defendant No.10 was also examined as a supporting witness of plaintiff.

5] By a judgement and decree dated 8th April 2005, the learned Trial Judge declared that the mutation entry 613 and 720 are illegal and not binding on the plaintiff and defendant No.10. It was also declared that the plaintiff was entitled to get $1/7^{\text{th}}$ share as his own share plus $1/77^{\text{th}}$ share as share from his father's share and $1/28^{\text{th}}$ share from his mother's share by notional partition out of the suit properties which was allotted to the share of branch of Popat. The learned trial Judge declared that the defendant No.10 will get $1/77^{\text{th}}$ share from her father's share plus $1/28^{\text{th}}$ share from her mother's share. The trial Judge further directed that insofar as properties which are agricultural lands, the matter is sent to Collector for effecting partition by metes and bounds.

6] Aggrieved by this judgement and decree the defendant Nos. 1 to 7 preferred Civil Appeal No.274 of 2005 before the learned Dist. Judge, II, Niphad. Learned Dist. Judge framed four points for determination and

by a judgement and decree dated 9th July 2014 dismissed the said Civil Appeal No.274 of 2005. The first appellate court, however, modified the decree partially. Being aggrieved by the said judgement and decree dated 9th July 2014, the defendant Nos. 1 to 7 have filed this second appeal.

7] Mr. Patil appearing for defendant Nos. 1 to 7 invited my attention to the various portions of evidence of the witnesses examined by the plaintiff and the evidence of defendant No.10. He submits that the witnesses examined by the plaintiff could not produce even a single document or photograph of the said Popat with his wife Hausabai to demonstrate that the said Hausabai was married with Popat. He submits that the said witnesses in cross examination also admitted partition of the suit property by Popat in respect of suit property amongst defendant Nos. 1 to 7. It is submitted by the learned Counsel that plaintiff's witness Sarubai, though in the examination in chief deposed that she was present at the time of marriage of Popat with Hausabai, in her cross examination, she admitted that she had never seen Popat.

8] It is also submitted by the learned Counsel for defendant Nos. 1 to 7 that though the plaintiff could not produce any evidence to prove the marriage between Hausabai and Popat, the learned trial Judge as well as

the first appellate court totally ignored the admissions of the witnesses examined by the plaintiff while passing the judgement and decree. He submits that the plaintiff also could not produce any proof that the defendant No.10 as well as Hausabai were staying with the said Popat before Hausabai's alleged dispossession. He submits that the findings recorded by the courts below are perverse and should be interfered with by this Court.

9] Learned Counsel for the plaintiff has invited my attention to some of the portions of the oral evidence led by the plaintiff and defendant No.10 who was supporting plaintiff. She submits that Gangubai who was wife of the said Popat admittedly did not enter the witness box. He submits that the plaintiff had produced several documents before the trial court, including the school leaving certificate of the plaintiff showing the name of his father as Popat as entered into the school records as far back as in 1955. He also produced on record the election identity card of his mother Hausabai issued in the year 1984, which bears the name of her husband as Popat so also the bank passbook of plaintiff showing name of plaintiff's father as Popat issued in 1982. It is submitted by the learned Counsel for the plaintiff that the photograph of the marriage which took place 60 years back could not have been produced.

10] It is submitted that the two courts below have considered the entire documentary as well as oral evidence led by both the parties and have rendered various findings of fact including the finding that the plaintiff had proved that the said Hausabai was legally wedded wife of the deceased Popat and the findings being concurrent cannot be interfered with in this second appeal. In support of this submission, the learned Counsel has invited my attention to various findings recorded by the courts below.

11] A perusal of the oral evidence led by both the parties indicates that though the plaintiff could not produce any photographs showing marriage of Hausabai with Popat, the plaintiff had produced several other documents of the period much prior to the death of deceased Popat showing the name of Popat as father of the plaintiff. In my view, in the year 1955 when name of the deceased was shown as father in the school records of the plaintiff, nobody could have anticipated any dispute in the year 1999 in respect of the suit property or about the status of their legal heirs claiming through the said Popat. I am not inclined to accept the submission of Defendant Nos. 1 to 7 that no documents were produced by the plaintiff before the learned trial court showing marriage of said Hausabai with the said Popat. Though the photographs were not produced for the reason that the marriage was performed 60 years ago, there were sufficient documents produced by the plaintiff and defendant

No.10 to show that the said Hausabai was legally wedded wife of the said Popat and that the defendant No.10 and the plaintiff were born out of the said wedlock.

12] Learned Trial Judge has considered several documents produced by the plaintiff and defendant No.10 to show that they were born out of the wedlock of Hausabai and Popat. In my view the learned trial Judge has rightly considered the school record, election identity card and several other documents referred to in the judgement and decree while rendering a finding of fact that the plaintiff had proved that the said Hausabai was legally wedded wife of Popat. Defendant Nos. 1 to 9 and 14 and 15 had failed to prove that defendant No.5 viz., Gangubai was the only wife of Popat.

13] A perusal of the record also indicates that the plaintiff had called the said Gangubai as witness who was present in the court. Since, she was handicapped and was not able to see anything, her evidence could not be fully recorded.

14] In my view, the court has to appreciate the entire evidence led in the right perspective and has to consider the entire evidence harmoniously and cannot decide on the basis of few lines of evidence in

isolation. The trial court as well as the first appellate court has considered the entire evidence in right perspective and in entirety and rendered a finding of fact and the same cannot be interfered with. The appeal is devoid of any merits. No substantial questions of law arise in this appeal.. The appeal is accordingly dismissed with no order as to costs.

14] Learned Counsel for the appellant seeks continuation of interim releif for a period of eight weeks. The ad-interim protection granted by this Court to the effect that execution proceedings to continue, possession of the property however shall not be taken, is continued for a period of eight weeks from today.

(R.D.DHANUKA, J)