

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

**SECOND APPEAL NO.709 OF 2016
WITH
CIVIL APPLICATION NO.1405 OF 2016
IN
SECOND APPEAL NO.709 OF 2016**

Shri Barku Yashwant Shinde & Anr. ... Appellants
vs.
Vishnu Yashwant Shinde & Ors. ... Respondents

Mr. Sachin Gite for the Appellants.
Mr. Bhushan U. Deshmukh for the Respondent No.1.

Coram : **A.A. Sayed, J.**
Date : 07 November 2017

P.C. :

1 This Second Appeal is filed by the Appellants/original Defendant Nos.2 and 3 impugning the judgment and order dated 05.11.2015 of the District Judge dismissing the Appeal of thereby confirming the judgment and order dated 18.06.2006 of the Trial Court decreeing the suit filed by the Respondent No.1/original Plaintiff. The Trial Court held that the Respondent No.1/Original Plaintiff is entitled for partition and separate possession of his 1/3rd share of the suit properties. The counter claim of the original Defendants was dismissed. The parties are hereinafter referred to as per their status in the suit.

2. The subject matter of the suit properties consists land bearing Gut Nos.128/A, 128/B, 130 and 451 and house and open space bearing Grampanchayat No.80 at Village Ganur, Tal. Chandwad, Dist. Nashik. The suit was filed by the Plaintiff for partition and 1/3rd in the suit property. The Plaintiff and the Defendant No.2 are the sons of the Defendant No.1. The father-Defendant No.1 was the Karta of the joint family. His wife had predeceased him. Defendant No.3 was a 3rd party claiming interest in Gat No.451. According to the Plaintiff, Gat Nos.128/A and 128/B were transferred in the name of Defendant No.2 and the Mutation Entry No.746 has been wrongly effected in his name in the record of rights. It is also alleged by the Plaintiff that in respect of Gat No.451, Mutation Entry No.883 has been wrongly effected in the record of rights in the name of Defendant No.3-Vimalbai (3rd party). It was further contended by the Plaintiff that he was employed as Lab Assistant in Janata Vidyalaya, Pandhurle, Taluka: Sinnar, District: Nashik and on 05-07-1989 he had purchased Gat No.116/2/2 admeasuring 40R for consideration of Rs.6,500/- out of his own earnings and that was his separate and self-acquired property.

3. In the Written Statement and Counter-claim filed by the Defendant Nos.1 and 2, it was contended that the land bearing Gut Nos.128/A, 128/B were allotted to the Defendant No.2 as a family arrangement and not as share in the partition. So far as Gut No.130 is

concerned, it was contended that the same was purchased in the name of Defendant Nos.1 and 2 for the joint family after selling the land bearing Gut No.451 to the Defendant No.3 Vimalbai (3rd party). According to Defendants Nos. 1 & 2, there was a loan of Rs.90,000/- on the joint family and the Plaintiff was bound to repay 1/3rd of the amount of the loan. Defendant Nos.1 and 2 contended that the land bearing Gut No.116/2/2 was also a joint family property and was not separate and self-acquired property of the Plaintiff.

4. The Trial Court after appreciating the evidence on record concluded that Gut Nos.128/A, 128/B, 130 and 451 and house was a joint family property and that the Defendant Nos.1 and 2 had practically admitted the case of the Plaintiff. The Trial Court found that so far as Gut No.451 is concerned, the same has not been sold or transferred to the Defendant No.3 Vimalbai (3rd party) by a registered instrument and therefore, the Defendant No.3 Vimalbai did not derive any title over Gut No.451. So far as land Gut No.116/2/2 is concerned, the Trial Court concluded that the same was self acquired property of the Plaintiff and it was not proved by the Defendants Nos.1 and 2 that it was joint family property. The Trial Court held that the Defendant Nos.1 and 2 have failed to prove that there was a loan on the joint family in a sum of Rs.90,000/- and that the Plaintiff was liable to pay his 1/3rd share. The suit was accordingly decreed and it was held that the Plaintiff was

entitled for partition and separate possession of his 1/3rd share in the suit properties.

5. In Appeal before the District Judge, it was conceded by the learned Counsel for the Defendants that the Plaintiff and Defendants Nos. 1 & 2 had settled their dispute amicably and the Appeal was being contested only on behalf Defendant No.3-Vimalbai in respect of Gat No.451. The District Judge adverted to the admissions of the Defendant No.3-Vimalbai during her cross-examination, wherein she had categorically admitted that Gat No.451 is the ancestral joint family property of the Plaintiff and Defendants Nos.1 & 2 and that no partition had taken place between them. The District Judge rightly concluded that Defendant No.3-Vimalbai had not produced on record any document to show that Gat No.451 was transferred by Defendant No.1 in favour of Defendant No.3-Vimalbai and that the Defendant No.3-Vimalbai could not get any right, title and interest in Gat No.451 on the basis of Mutation Entry No.883.

6. Learned Counsel for the Appellants/original Defendant Nos.2 & 3 submitted that a substantial question of law arises in this Second Appeal inasmuch as the sister of the Plaintiff namely, Punjabai was not made a party to the suit and hence suit would be bad for non-joinder of parties. I do not find any merit in the contention. It is seen that the Defendants including Defendant No.3 had not raised any objection

before the Trial Court as regards non-joinder of the said Punjabai. Moreover, it is seen that the said Punjabai had made an Application before the District Judge in Appeal to implead her as a party, which Application was allowed and she was made party Respondent to the Appeal, however, thereafter she had filed a pursis stating that she had relinquished her right, title and interest in the suit properties in favour of the Plaintiff and the Defendants Nos.1 & 2 equally. It would be opposite to reproduce the relevant portion at para 25 of the judgment of the District Judge. It reads as under:

“25] ... The defendants have also not raised the objection before the trial Court that plaintiff has not made Punjabai party to the suit, and therefore, suit is hit by non joinder of necessary parties. It is pertinent to note that during pendency of the appeal Punjabai/Bijalabai Vishnu Bhavar i.e. daughter of defendant No.1 filed application to implead her as a party in the proceeding being a necessary party. Her application was allowed and accordingly her name has been incorporated as respondent No.2 in the appeal. So also, respondent No.2 filed pursis Exh.51 before the Court stating that she is relinquishing her right, title and interest in the suit properties in favour of plaintiff and defendant Nos.1 and 2 equally.”

7. Considering the facts and circumstances of the case, in my view no substantial question of law arises for determination in the Second Appeal. The Second Appeal is dismissed. There shall be no order as to costs.

8. The Civil Application does not survive and stands disposed of.

(A.A. Sayed, J.)

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