

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 913 OF 2016

Rajaram Kallapa Pawar and Ors. ... Appellants / Applicants

Versus

Shalan Shivaji Chougule & Ors. ... Respondents

ALONG WITH
CIVIL APPLICATION NO. 1631 OF 2016

Mr. S.M. Shettigar for the Appellants / Applicants.

Mr. P.D. Dalvi a/w. Mr. Kalpesh Patil for Respondent No. 1.

CORAM : S.J. KATHAWALLA, J.
DATED : 4TH JULY, 2017

P.C.:

1. Special Civil Suit No. 51 of 2004 was filed by Respondent No. 1 (the Original Plaintiff) before the Court of Civil Judge, Senior Division, Karad (the ‘Trial Court’) for partition and possession of joint family / ancestral properties. The said Suit filed by Respondent No. 1 (the Original Plaintiff) was decreed with costs by the Trial Court by Judgment dated 12th February, 2008. Being aggrieved, the Appellants (Original Defendant Nos. 1 and 2) impugned the Judgment of the Trial Court dated 12th February, 2008 by filing an Appeal, being Regular Civil Appeal No. 150 of 2009 before the Ad-hoc District Judge-1, Karad (the ‘First Appellate Court’). Respondent No. 1 (the Original Plaintiff) also filed cross objections asserting that upon partition she is entitled to 1/4th share in the joint family / ancestral properties and not 5/40th

share in the Suit Properties as declared by the Trial Court. The First Appellate Court by Judgment dated 5th May, 2012 dismissed the Appeal filed by the Appellants (i.e. the Original Defendant Nos. 1 and 2) and allowed the cross objection filed by Respondent No. 1 (the Original Plaintiff) and declared that Respondent No. 1 (the Original Plaintiff) is entitled to 1/4th share in the said joint family / ancestral properties. The Appellants (Original Defendant Nos. 1 and 2) once again being aggrieved therefrom, have preferred the above Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC). After filing of the Second Appeal, Appellant No. 1 has passed away and his heirs are brought on record.

3. Before the commencement of the hearing on Admission of the above Second Appeal, the learned Advocate appearing for Respondent No. 1 (the Original Plaintiff) on instructions stated that Respondent No. 1 (the Original Plaintiff) is not pressing her claim qua the dwelling houses on the Suit Land and is also accepting the decision of the Trial Court qua her share in the joint family / ancestral land and is not insisting that she is entitled to 1/4th share upon partition of the Suit Land, which statements are accepted.

4. For the sake of convenience, the Appellants and the Respondent No. 1 and the Respondent No. 2 are referred to hereinafter as per their original status i.e. Plaintiff and Defendant Nos. 1, 2, and Defendant No. 3 respectively.

5. The Plaintiff – Shalan Shivaji Chougale, as set out hereinabove filed Special Civil Suit No. 51 of 2004 against her brothers (Defendant Nos. 1 and 2) and her sister

(Defendant No. 3) for partition of the joint family / ancestral properties.

6. The Plaintiff in her Suit contended that the subject matter of the Suit is land bearing Gat No. 517 ad-measuring 1 Hectrare 18 Ares along with Well of village Chachegaon, Tal. Karad, Dist. Satara described in Paragraph No. 1A of the Plaint (the 'Suit Land') and House Nos. 505 and 332, situated within the limits of Grampanchayat, Chachegaon, Tal. Karad, Dist. Satara, more particularly described in Paragraph Nos. 1B and 1C respectively of the Plaint (the 'House Properties'); the Suit Land and the House Properties are the ancestral properties of Kallappa, the father of the Plaintiff and the Defendants; the Plaintiff and the Defendants are the legal heirs of the deceased Kallappa; there is no partition of the Suit Properties between the Plaintiff and the Defendants by metes and bounds. The Defendants got their names entered in the Record of Rights by making false entry and they are about to alienate the Suit Properties ; the Plaintiff was therefore constrained to file the Suit for partition and separate possession of her 1/4th share.

7. Defendant Nos. 1 and 2 resisted the Suit by filing the Written Statement (Exhibit-12) and Additional Written Statement (Exhibit-37). Defendant Nos. 1 and 2 denied the contentions made in the Plaint. Defendant Nos. 1 and 2 submitted that Kallappa partitioned the Suit Properties during his lifetime between Defendant Nos. 1 and 2 ; the said partition took place about 15 years back and since then Defendant Nos. 1 and 2 are enjoying the properties separately; that initially Kallappa kept 04 'anna' share out of Gat No. 517 for himself and gave 6 'anna' share to each Defendant

Nos. 1 and 2 and also gave actual possession of the land to Defendant Nos. 1 and 2 ; thereafter, Kallappa was unable to cultivate the land and therefore he divided Gat No. 517 between Defendant Nos. 1 and 2 in equal shares and accordingly the entries are made in the Record of Rights ; the House Properties of which the Plaintiff has claimed partition are neither the joint family properties nor the ancestral properties. Kallappa under the Sale Deed gave five gunthas of land to Defendant No. 3. The Defendants submitted that the Plaintiff is therefore not entitled to claim any partition and / or any share in the Suit Properties.

8. The Trial Court has framed the following issues:

Whether the Plaintiff proves that the Suit properties are joint family and ancestral properties of their family ?

Whether the Plaintiff proves that she has a share, title and interest in the Suit properties ? If yes, what would be the share ?

Whether the Defendants prove that partition took place between them 15 years back ?

Whether the Defendants prove that the deceased Kallappa sold five gunthas of land from Gat No. 517 to Defendant No. 3 ? and

Whether Defendant Nos. 1 and 2 prove that the House Properties belong to them ?

9. The Trial Court has after appreciating the evidence, recorded that admittedly Defendant Nos. 1 and 2 are the brothers of the Plaintiff and Defendant No.3. Their father Kallappa died on 25th September, 1993. The agricultural land described in Paragraph No. 1A of the Plaint i.e. Gat No. 517 was admittedly owned by

Kallappa. However, it is case of the Defendants that the property (Gat No. 517) was partitioned during the lifetime of Kallappa. The Trial Court has recorded that the Defendants have relied on a decision of the Hon'ble Apex Court in case of *Digambar Adhar Patil Vs. Devram Girdhar Patil (AIR 1995 SUPREME COURT 1728)* and have submitted that the father has a right to effect partition during his lifetime between his sons under the Hindu Law. The Trial Court has recorded that the Defendants have relied on mutation entry bearing No. 5199 (Exhibit-52). From the said mutation entry, it appears that an Application was given by Kallappa on 25th September, 1988 stating that he is unable to cultivate the land and therefore names of Defendant Nos. 1 and 2 to the extent of 06 'anna' share each as per the actual possession, were recorded in the Record of Rights of Gat No. 517. From the mutation entry no. 5367 (Exhibit-53) relied upon by Defendant Nos. 1 and 2, it appears that on 5th April, 1991 an Application was made by Defendant No. 1 (i.e. the son of Kallappa and not by Kallappa) stating that the name of Defendant Nos. 1 and 2 (the sons of Kallappa) be recorded to the extent of 08 'anna' share each as per the actual possession. The Trial Court held that though the mutation entries are certified by the Circle Officer, both mutation entries do not indicate that Kallappa – the father was intending to effect the partition between him and his two sons. The Trial Court further held that only because Kallappa was unable to cultivate the land, he gave a 06 'anna' share to each Defendant Nos. 1 and 2 in his lifetime for cultivation and therefore mutation entry bearing no. 5199 was taken on record. So far as mutation

entry bearing no. 5367 is concerned, no information was given by the father (Kallappa) to record the name of Defendant Nos. 1 and 2. Both the mutation entries therefore do not support the partition.

10. Referring to the oral evidence led by the parties, the Trial Court has recorded that though Defendant No. 2 has deposed in his evidence that the partition was effected in the year 1988, during the cross-examination he admitted that the Suit Properties are cultivated jointly. Mr. Atmaram Pawar, the independent witness has stated in his cross-examination that he cannot say when Kallappa effected partition. Mr. Hindurao Pawar – the son of Defendant No. 1 stated that there is a document of partition and the document is at his house. The Trial Court therefore held that there is no consistency in the oral evidence of Defendant Nos. 1 and 2 and their independent witnesses. Their evidence is not sufficient to prove that Kallappa effected partition during his lifetime between himself and his two sons. The mutation entries also do not indicate that the partition was effected equally and an equal share was given to himself and his sons. Therefore, the evidence is not sufficient to prove that Kallappa effected partition in his lifetime, between himself and his two sons. The Trial Court held that as the mutation entries are not in respect of partition, the ratio of the Apex Court relied upon by the Defendants does not corroborate to the oral evidence of partition and therefore the ratio is not helpful to the Defendants.

11. As far as the case of Defendant No. 3 is concerned, it was contended that she was given 05 gunthas land by Kallappa vide a registered Sale Deed. The Trial

Court has recorded that, Defendant No. 3 failed to appear during the trial ; no documentary evidence of the Sale Deed is produced on record ; from the 7/12 Extract (Exhibit-5), it appears that the name of Defendant No. 3 is recorded in the Record of Rights by mutation entry bearing no. 5122 ; however, the mutation entry no. 5122 is not produced on record ; in the absence of any evidence, the Trial Court was constrained to hold that the Defendants have not proved that the deceased Kallappa sold 05 gunthas of land from Gat No. 517 to Defendant No. 3.

12. The Trial Court also held that the dwelling houses are the properties belonging to the joint family.

13. As regards the share of the Plaintiff in the Suit Land, upon partition, the Trial Court held as under :

“34. So far share of plaintiff is concerned, plaintiff's advocate submitted that, in view of Hindu Succession (Amendment) Act of 2005, plaintiff – the daughter become the coparcener in her own right in the same manner as the son by birth and therefore she is entitled to claim equal share as that of sons i.e. defendant Nos. 1 and 2. From the plain reading of Section 6 as amended by the Hindu Succession (Amendment) Act, 2005 it appears that on and from the commencement of the said Amendment Act, the daughter of a Hindu coparcener shall by birth become a coparcener in her own right in a same manner as a son. However, in this case the facts are different. Admittedly, Kallappa – the father of plaintiff and defendants died on 25-9-1993. He had two sons i.e. defendant Nos. 1 and 2 and two daughters plaintiff and defendant No. 3 and a widow of Sakhubai – the heirs. On the date of death of Kallappa, the succession opens. At the time of death of

Kallappa, the provisions of Amendment Act of 2005 were not in force. The Amendment Act 2005 does not indicate that it has any retrospective effect. Even it is not the case of plaintiff that her marriage was performed after 1994. Therefore the theory of notional partition will apply. The succession will open immediately before the death of Kallappa. Sakhubai- the widow of Kallappa was not entitled to claim partition but in partition effected between Kallappa and his sons she was entitled to get equal share as that of sons. Therefore immediately before the death of Kallappa when the succession opens, the sons defendant Nos. 1 and 2, Kallappa & Sakhubai - the widow were entitled to get share i.e. $1/4^{\text{th}}$ share equally. The daughters would be entitled to get share in the share of Kallappa. However, $1/4^{\text{th}}$ share of Kallappa will devolve upon the sons, daughters & widow. Therefore from $1/4^{\text{th}}$ share of Kallappa the plaintiff & defendant No. 3 - daughters would be entitled to get $1/5^{\text{th}}$ share out of $1/4^{\text{th}}$ share and the sons also would be entitled to get same share out of $1/4^{\text{th}}$ share of Kallappa. Sakhubai died on 23-2-2002 and it is fortified from the death certificate (Exh-51). Therefore $6/20^{\text{th}}$ share of Sakhubai will devolve upon two sons & two daughters. Therefore the daughters would get $3/40^{\text{th}}$ share of Sakhubai. So also, sons will get $3/40^{\text{th}}$ share. Therefore, the share of plaintiff would be $5/40^{\text{th}}$ and the share of defendant No. 3 would be $5/40^{\text{th}}$ and the share of defendant Nos. 1 & 2 would be $15/40^{\text{th}}$ each. Hence I record my finding on issue No. 2 accordingly.”

14. The Trial Court therefore by its Judgment and Decree dated 12th February, 2008 decreed the Special Civil Suit No. 51 of 2004 with costs.

15. As stated earlier, being aggrieved by the said Judgment and Decree passed by the Trial Court, Defendant Nos. 1 and 2 filed the Regular Civil Appeal No. 150 of

2009 before the Ad-hoc District Judge-1, Karad. The Appellate Court has by its detailed Judgment dated 5th May, 2012, after appreciating the oral and documentary evidence filed by the parties, dealt with the contentions of the parties and has dismissed the Appeal. However, as stated earlier, the Appellate Court allowed the cross objection filed by the Plaintiff and held that the Plaintiff is entitled to 1/4th share in the Suit Property.

16. As stated earlier, the Advocate for Respondent No. 1 has at the very outset submitted on instructions that Respondent No. 1 is not seeking any right over the House Properties and is also not pressing for 1/4th share in the land bearing Gat No. 517. She is willing to accept her share in the land bearing Gat No. 517 as determined by the Trial Court.

17. In view thereof, as can be seen from the above facts, the Trial Court as well as the First Appellate Court have given concurrent findings on facts namely that the land bearing Gat No. 517 which admittedly is the ancestral property of the family, was not partitioned by Kallappa, the father of the Plaintiff and Defendant Nos. 1, 2 and 3 in favour of his two sons during his lifetime. Therefore, in my view no question of law arises in the above Second Appeal.

18. However, the learned Advocate appearing for the Appellant has insisted that the Suit filed by the Plaintiff ought to have been dismissed since the Plaintiff has not entered the witness box and her son on the strength of a Power of Attorney executed in his favour adduced evidence on her behalf, and therefore the substantial question of

law which arises is whether the lower Courts could at all have decreed the Suit in favour of the Plaintiff, who did not step into the witness box to prove her case. The Advocate for the Appellants relied on the decision of the Hon'ble Apex Court in the case of **Janki Vashdeo Bhojwani V. Indusind Bank Limited, 2004 DGLS (SC) 118**, wherein it is held that the Power of Attorney Holder cannot depose for the Principal in respect of the matter, which the Principal can have a personal knowledge and in respect of which the Principal is entitled to be cross examined. In the present case, the Defendants have admitted that land bearing Gat No. 519 is ancestral property. However, since the Defendants have claimed that the said land was partitioned during the lifetime of their father – Kallappa, the burden of proving / establishing the same is completely upon the Defendants and not on the Plaintiff. In any event, the Hon'ble Apex Court has in the case of **Man Kaur (D) by Lrs. V. Hartar Singh Sangha, 2010 DGLS (SC) 780** in paragraph 12, summarized the position as to who should give evidence in regard to the matter involving personal knowledge. In the said decision, the Hon'ble Apex Court has carved out an exception that, “*where all the the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona fide or readiness and willingness. Examples of such attorney holders are a husband / wife exclusively managing the affairs of his / her spouse, a son / daughter exclusively managing the affairs of an old and infirm parent, a father / mother exclusively managing the affairs of a son / daughter living abroad.*” In the present case, the son of

the Plaintiff is the Power of Attorney Holder of the Plaintiff and he has deposed in the matter. He has informed the Court that the Plaintiff has given him complete information qua the Suit Property, namely that the Suit Property is ancestral property belonging to the joint family and that the Plaintiff has filed the Suit seeking partition of the Suit property. In his cross-examination, he has stated that though his mother is not having difficulty in talking / walking, she does not move around much. He has in his cross-examination also refuted the case put to him by the Advocate for the Defendants that the evidence of the Plaintiff herself is not led because she will speak the truth. In view thereof, the exception carved out in the decision of the Hon'ble Apex Court in the case of *Man Kaur (D) by Lrs. V. Hartar Singh Sangha (supra)* is applicable to the present case and no question of law arises in this regard in the present Second Appeal. The Second Appeal is therefore dismissed. Civil Application No.1631 of 2016 also stands disposed off.

(S.J.KATHAWALLA, J.)