

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION No. 4562 OF 2015

Shakuntala Damodar Katake ... Petitioner
Vs.
Rahul Madhukarrao Kalbhor & Ors. ... Respondents

Mr. P.R. Arjunwadkar, Advocate for the petitioner.
Mr. R.M. Haridas, Advocate for respondent nos. 1 to 3 and 13.
Mr. Sumit V. Khaire, Advocate for respondent nos. 4 to 12, 14 to 21.

CORAM: MRS.MRIDULA BHATKAR, J.
DATE: 7th April, 2017.

P.C.:

Rule. Rule made returnable forthwith. By consent, the Petition is heard finally and disposed of at the stage of admission.

2. This Petition is directed against the order dated 18th February, 2015 passed by the 5th Additional Judge, Small Causes Court and Civil Judge Senior Division, Pune in Special Civil Suit No. 1869 of 2012 below Exhibits 217 and 219 which were preferred under Order 1 Rule 10(a) of the Code of Civil Procedure for transposing the petitioner/defendant no. 10 as plaintiff.

3. In the present petition, Respondent nos. 1 to 3 are the plaintiffs in Special Civil Suit No. 1869 of 2010. The plaintiffs are the children

of one Jayshree, who is the sister of present petitioner/original defendant no. 10 Shakuntala Damodar Katake, original defendant no. 11 Yamunabai Dadasaheb Yadav and original defendant no. 1 Babanrao Mukataji Ghule. They all inherited the suit property originally from Muktaji Krishnaji Ghule.

4. It is the case of the original plaintiffs/respondent nos. 1 to 3 that defendant no. 1/respondent no. 4 Babanrao Mukataji Ghule was the eldest son of Mukataji Ghule and was looking after his father. Babanrao assured his sisters that he would manage the suit property as Karta of the Joint Family. The sisters, therefore, believed in him and on 5th September, 1997 respondent no. 4/defendant no. 1 Babanrao called upon the plaintiffs/respondent nos. 1 to 3 so also the petitioner and respondent no. 13/defendant no.11 Yamunabai to sign the documents which were in respect of management of the properties and in good favour, they signed those documents which were treated by the plaintiffs as Deed of Partition. The said document dated 5th September, 1997 was a Release Deed executed in favour of defendant no. 1 by the petitioner and defendant no. 11. He also executed Deed of Partition on 15th February, 2006. Defendant no. 1 also further entered into Development Agreements

dated 7th June, 2006 and 28th December, 2016 and transferred the suit lands in favour of original defendant nos. 12 and 15 and its partners. Therefore, the plaintiffs filed a Civil Suit for declaration that the Release Deed and Development Agreements are illegal, null and void and not binding upon 1/4th share in the suit property and plaintiffs claim 1/4th undivided share in the suit property and asked for preliminary decree for effecting partition of the suit property by metes and bonds. Defendant no.1 subsequently settled the matters with the plaintiffs and defendant no.11 Yamunabai. As the plaintiffs were satisfied of the settlement with defendant no. 1, they sought permission of the Court for withdrawal of the suit. At that time, the present petitioner/defendant no. 10 moved the Applications Exhibits 217 and 219 under Order 1 Rule 10 of C.P.C. The applications were resisted on behalf of defendant no. 3, who is son of defendant no. 1, mainly on the ground that defendant no. 10 has executed the Release Deed and have relinquished the right in the ancestral property. It was further submitted that the petitioner on 2nd March, 2009 had confirmed the Release Deed. It is further submitted that defendant no. 1 had executed Gift deeds dated 17th April, 1998 and 24th January, 2002 in favour of the petitioner in respect of 4R land and 1R plot from the ancestral property to petitioner/defendant no.10

and in the said Gift Deeds, there is specific mention of the Release Deed dated 9th September, 1997 and thereafter the petitioner/defendant no. 10 had executed Indemnity Bond dated 20th April, 1998. Thus, the petitioner/defendant no. 10 has no right in the said property and therefore, she cannot be now transposed as plaintiff in the said suit and the suit cannot be further continued by her. The 5th Additional Judge, Small Causes Court and Civil Judge Senior Division, Pune by order dated 18th February, 2015 has dismissed the Applications Exhibits 217 and 219.

5. The learned counsel for the petitioner has submitted that the learned Judge ought to have taken certain facts which are in favour of the present petitioner. He submitted that the present suit is filed for partition and other reliefs, so the defendant, who is a sister being co-sharer has right to sue against other co-sharers. Though the petitioner did not deny the Release Deed in her written statement and has adopted the plaint, defendant no. 11, i.e., sister Yamunabai has specifically pleaded that she and the petitioner were called by defendant no. 1 on 9th September, 1997 and asked to sign and accordingly they signed on it but then she released that the documents which she signed was a Release Deed. She had denied

that she never executed Deed of Relinquishment and therefore, she has 1/4th undivided share in the property. The learned counsel further submitted that defendant no. 11 filed the Application Exhibit 202 transposing her as plaintiff which was contested by the plaintiffs and other defendants when the plaintiff is going to withdraw the suit. It was also argued that there was bar of limitation, however, the learned trial Judge by order dated 7th April, 2014 allowed the said Application and defendant nos. 4, 11 was transposed as plaintiffs. Thereafter, the plaintiffs and defendant no. 1 settled the matter with her by paying her Rs.30,00,000/- and sought permission to withdraw the suit. She filed the pursis on 23rd September, 2014. Thereafter the petitioner Shakuntala on the same lines moved the Application Exhibit 217 seeking permission that she be transposed as plaintiff, however, the said application was rejected erroneously. The learned counsel for the petitioner has further submitted that the petitioner has the same case like defendant no. 11 Yamunabai and the written statement of Yamunabai in fact is to be considered as part of the plaint which is also adopted by the petitioner. He submitted that the learned Judge while deciding the Application of transposition has disclosed the entire case of the petitioner on merit on the issue of her right in the suit property and to get partition, therefore, he submitted

that the order be set aside.

6. The learned counsel for defendant no. 3/respondent no. 6, who is the main contesting party, has supported the order passed by the learned trial Court mainly on the ground that the petitioner cannot claim partition at this stage due to the Release Deed executed by her on 9th September, 1997 so also her share is satisfied by defendant no. 1 by gifting her land. He further submitted that no cause of action survives as on today and therefore, she cannot sue the suit for partition. The learned counsel further submitted that the suit filed by the plaintiff is not only for the partition but it was mainly for declaration and cancellation of the Development Agreement and Release Deed so the prayer of partition is not a principal relief but an ancillary relief. He also pointed out that the petitioner has not challenged the Release Deed in her written statement at any time. Therefore, it is to be considered as her admission to the Release Deed and she was just a formal party to the suit and that was accepted by her by adopting the plaint.

7. The relationship between the petitioner, plaintiffs and other defendants is admitted. Yamunabai who was initially defendant no. 11 was transposed as party-plaintiff and after having satisfied her

share, she filed pursis of allowing her to withdraw the suit is also an admitted fact. The plaintiffs have filed the suit for cancellation of the agreements of defendant no. 1 with the builders, i.e., other defendants and also prayed for cancellation of the Release deed of the plaintiffs in respect of the property. It is not disputed that the petitioner, defendant no. 1, original defendant no. 11 Yamunabai and plaintiffs have 1/4th share in the ancestral suit property which was inherited to them from Mukataji Ghule. There is specific prayer of determination of their 1/4th share and the partition of the said share from the suit property.

8. From the records it is transpired that the petitioner has adopted the plaint and has not specifically denied the execution of Release Deed. However, in the plaint, the plaintiffs have denied the Release Deed in favour of defendant no. 1 and have asserted their 1/4th of share in the suit property despite execution of said Release Deed. In the written statement, defendant no.11 Yamunabai has specifically denied execution of Release Deed dated 9th September, 1997 and at that time, present petitioner and she were called by defendant no. 1 to execute the said deed. The present suit is mainly based on the right of the plaintiffs in 1/4th share in the suit property and on the

basis of that share, the relief of cancellation of the development agreements executed between defendant no. 1 and 3 the developer/other defendants are sought. Thus, the relief of partition is not at all ancillary relief but is a main relief and therefore, it is a suit for partition. A suit, being a suit for partition, right to sue vests with the other defendants having undivided share in the property. In the suit for partition, other defendants hold a character of a plaintiff and further the transposition of the defendant as plaintiff under Order 1 Rule 10(a) is to be allowed.

9. I place reliance on **Veerabhadrappa vs. Gangamma, reported in AIR 2003 (Kar.) 348** wherein it was held that when a defendant is transposed as a plaintiff, then his written statement forms a part of the plaint. Thus, the written statement/reply of Yamunabai/defendant no. 11 which is filed at Exhibit 95 become a part of the plaint and therefore, as defendant Shakuntala has adopted the case of the plaintiff, she could very well rely on the averments made in the written statement/reply of Yamunabai, as the case of both the sisters is identical qua execution of Release Deed and their 1/4th undivided share in the suit property.

10. On this background whether 1/4th share is satisfied due to the Gift Deed executed by defendant no. 1, who is father of defendant no. 3, in favour of Shakuntala is a matter of evidence and appreciation at the time of trial. It is also a matter of apportionment whether the valuation of her bequeath is equivalent to her 1/4th share in the property or not, is a subject matter of appreciation of evidence and the learned trial Court has unnecessarily entered into that area, which was not warranted while deciding the Application under Order 1 Rule 10 of C.P.C. Thus, the order passed by the learned trial Court cannot sustain on merits and hence is quashed and set aside. The petitioner is transposed as a party-plaintiff.

11. Rule is made absolute in terms of prayer clause (b).

12. Other parties are not contesting. The original plaintiffs are also not interested in pursuing the matter, therefore, the trial Court has to give finding on a limited issue. It is to be expedited on or before 31st December, 2017. The Court to proceed with the matter and parties to cooperate.

(MRIDULA BHATKAR, J.)