

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

**SECOND APPEAL NO.485 OF 2016
WITH
CIVIL APPLICATION NO.1677 OF 2015**

Dattatraya Kerappa Shinde And Others ... Appellants/Applicants
Versus
Smt. Phulabai Kerappa Shinde And Others ... Respondents

.....

Mr. R.S. Alange for the Appellants/Applicants.
Mr. Surel S. Shah for Respondent Nos.3 And 4.

.....

CORAM : S.C. GUPTE, J.

DATE : 23 MARCH 2017

P.C. :

. Heard learned Counsel for the parties.

2 This Second Appeal is from a decree of partition passed by the Trial Court and confirmed by the lower Appellate Court with a modification. The Trial Court declared 1/4th share of Respondent No.1 (original Plaintiff, since deceased during the pendency of the Second Appeal) and 1/4th share each of Appellant Nos.1, 3 and 4 (original Defendant Nos.1, 3 and 4). The Court also declared 1/4th share each of the Plaintiff and Defendant Nos.1, 3 and 4 in all wells, electric motor/meter situated in the suit property. The suit property consists of two plots of land, bearing Gat Nos. 137 and 190. (There is a well in Gat No.135 to which the parties admittedly have rights) The lower Appellate Court noted that the Plaintiff had during her lifetime

transferred 69R out of Gat No.137 to Defendant Nos.6 and 7 (Respondent Nos.3 and 4 in the present Second Appeal). The lower Appellate Court noted that after considering the disposition of the properties, only 2H and 75R land remained with the family out of Gat No.137 and accordingly, the Plaintiff's share worked out about 69R, which she had already divested in favour of Defendant Nos.6 and 7 and accordingly, she was not entitled to any share in Gat No.137. This was on the footing that this share now belonged to Defendant Nos.6 and 7. As far as Gat No.190 is concerned, after taking into account the share of Defendant Nos.8 in the property, the balance land out of Gat No.190 comes to about 1H 60R and the Plaintiff's 1/4th share, accordingly, worked out to 40R in Gat No.190. The lower Appellate Court accordingly modified the decree passed by the Trial Court.

3 As far as the present Second Appeal is concerned, various grounds are urged on the alienation of 69R by the Plaintiff in favour of Defendant Nos.7 and 8. The questions before the Courts below were two fold, firstly, whether the property was an ancestral property and accordingly, the Plaintiff had a share in it and could transfer the same to the third party and secondly, whether, assuming that the property was joint family property, there being a customary divorce between the Plaintiff and her husband Kerappa, the Plaintiff had no share in the suit property. Both these questions, which essentially are questions of fact, are answered by Courts below by concurrent findings. No substantial question of law arising from these findings for the determination of this Court.

4 It is, however, urged by learned Counsel for the Appellants that in the execution application filed by the Plaintiff and Defendant Nos.6 and 7,

they have sought to include the entire property as partible property and that there is no warrant for the Plaintiff and Defendant Nos.6 and 7 bringing the same to partition. It is clear from the final decree application, that in accordance with the impugned judgment and decree passed by the Courts below, the Plaintiff claims 1/4th share quantified at 40R in accordance with the impugned judgment and order in Gat No.190, whereas Defendant Nos.6 and 7 claim 69R from out of Gat No.137/2 as well as a share in the well. The application, accordingly, is proper and in accordance with the impugned judgment and decree. Anyway, this aspect of the matter does not form part of the subject matter of the Second Appeal, since that is a matter for the executing Court to decide. Learned Counsel for the Appellants, however, submits that he has obtained a protective order in a separate proceeding in respect of 69R of land from Gat No.137/2, which is claimed by Defendant Nos.6 and 7. Anyway, even this dispute is for the executing Court to determine.

5 With these clarifications, the Second Appeal is dismissed. No order as to costs.

6 In view of the dismissal of the Second Appeal, the Civil Application does not survive and the same is also disposed of.

(S.C. GUPTE, J.)