

Sequeira

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

***SECOND APPEAL NO.58 OF 2014
Along with
CIVIL APPLICATION NO. 138 OF 2014***

Laxman Gangaram Meher .. Appellant
Vs
Ramdas Gangaram Meher & others. .. Respondents

Mr.Vaibhav Patankar, for the Appellant & Applicant.

Mr.T.D.Deshmukh, for Respondent No.1.

***Coram : N.M.Jamdar, J.
Date : 12 April 2017.***

Oral Order :

Heard learned counsel for the parties.

2. The Appellant is the original Defendant No.1 in Regular Civil Suit No.142 of 2005 filed by the Respondents-Plaintiff in the Court of Civil Judge, Junior Division, Junnar for partition of the suit property.

3. The learned Civil Judge had decreed the suit holding that the properties were joint family properties and that parties have shares in them as specified. The suit was accordingly decreed by judgment and order dated 5 January 2009. The Appeal No.153 of 2009 filed by

the Defendant No.1 in the Court of District Judge, Pune was partly allowed and the learned District Judge corrected the shares in the suit property.

4. The learned counsel for the Appellant submitted that there was an earlier oral partition in which the Plaintiff had relinquished his share in favour of the Appellant. It was submitted that the share was relinquished since the other expenses of the Plaintiff were taken care. This submission cannot be accepted. Firstly, whether there was the oral partition and whether there was a relinquishment of shares are questions of fact. The learned counsel for the Appellant laid emphasis on the evidence of witness Dilip Baban Tajane to contend that his evidence clearly shows that there was oral partition. Both the Courts have considered the evidence of this witness. The case of the Appellant is not only there was oral partition but relinquishment of shares. For this purpose something more than mere examination of persons stated to be present was necessary. Both the Courts found that for lack of any corroborative evidence such as to the amount of expenses spent, the evidence of this sole witness, was not sufficient. Both the Courts as fact finding courts were entitled to take view regarding sufficiency of the material and the evidentiary value of the material placed on record by the Appellant. Both the Courts therefore, rightly disbelieved the theory of oral partition and relinquishment shares for lack of cogent evidence.

5. The learned counsel for the Appellant then submitted that Gat No.354 is a fragment and cannot be partitioned in view of Section 8 and 9 of Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947. The learned counsel for the Respondents on the other hand has drawn my attention to Section 8AA of the said Act, which reads thus :

'(8AA.) Restriction on partition of land.-

(1) Where, by transfer, decree, succession or otherwise, two or more persons are entitled to shares in an undivided agricultural land in any local area for which standard areas have been fixed, and the land has to be partitioned among them, such partition shall be effected so as not to create a fragment.

(2) Where such partition is made by the Court or the Collector, the following procedure shall be adopted:—

(a) If, in effecting a partition among several co-sharers, it is found that a co-sharer is entitled to a specific share in the land and cannot be given that share without creating a fragment, he shall be compensated in money for that share. The amount of compensation shall be determined so far as practicable in accordance with the provisions of section 23 of the Land Acquisition Act, 1894.

(b) If, in effecting a partition, it is found that there is not enough land to provide for the shares of all the co-sharers in accordance with the provisions of sub-section (1), the cosharers may agree among themselves as to the particular co-slarer or co-sharers who should get the share of land and which of them should be compensated in money. In the absence of any such agreement, the co-sharers to whom a share of land can be provided and those to whom money compensation should be given shall be chosen by lot in the manner prescribed.

(c) The compensation shall be payable by each co-sharer

in proportion to the excess value of land he gets over the share of land legally due to him, and such co-sharer shall deposit the proportionate amount of compensation in the manner prescribed before taking possession of the share allotted to him. On his failure to do so, his share shall be allotted to any other co-sharer to whom land has not been previously allotted and who is chosen in the manner provided in clause (b) subject to the payment of similar compensation to the co-sharers not getting shares of and.

(d) If none of the co-sharers to whom land has been allotted under clause (c) pays the compensation and takes the share, the share shall be sold in auction to the highest bidder, and the purchase money shall be paid to the co-sharers not getting land in proportion to their respective shares.

(e) Where the parties agree upon any other method of partition which will not result in the creation of a fragment, that method shall be followed in effecting partition.

(3) Where a partition is effected in execution of a decree all questions relating to the partition of the land and appointment of compensation shall be decided by the Court executing the decree or by the Collector effecting the partition, as the case may be, in accordance with the provisions of sub-section (2)'

Thus the Act of 1947 itself provides a methodology as to how fragmentation of lands is to be adjusted or taken care while executing a partition decree. Once such methodology is provided, which the Collector for executing the decree is under obligation to follow, merely because one of the properties is a fragment, the partition of the joint family properties cannot be withheld. This issue will have to

be anyway considered at the time of actual determining and allocation of shares. The learned District Judge has also accepted this position of law.

6. In the circumstances, no question of law arises for consideration. Second Appeal is dismissed. Civil Application is also disposed of accordingly.

(N.M.Jamdar, J.)