

IN THE HIGH COURT OF JUDICATURE AT BOMBAY:
NAGPUR BENCH : NAGPUR
Civil Application No. 595 of 2016
IN
Second Appeal No.26 of 2016
[Smt. Kamlabai Namdeo Borikar & others Vs. Sau. Mangala
Parmanand Dube & another]

Office Notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.

Court's or Judge's orders

Mr. S. S. Ghatge, Adv., for the applicants.
Mr. S.D. Malke, Adv., for respondent nos. 1 and 2.

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CORAM : A. S. CHANDURKAR, J.

DATE : 13th June, 2017

This appeal has been preferred by the original defendants who are aggrieved by the decree for partition and separate possession that was passed by the first appellate Court.

The respondent nos. 1 and 2 are the original plaintiffs and are daughters of one Namdeo Borikar. It is their case that their father expired in the year 1992 and the present appellants who were in possession of the joint family property intended to alienate the same. On that basis, suit for partition and separate possession came to be filed. The defendants took the plea that Ramchandra, the father of Namdeo, had executed a Gift-Deed dated 4th July, 1966 in favour of Namdeo and his wife in respect of an agricultural field. Thereafter, by

virtue of registered Will dated 20th April, 1992 executed by Namdeo, they had become owners of the remaining suit property and, therefore, the plaintiffs had no right therein.

The trial Court after considering the evidence on record dismissed the suit. The appellate Court came to the conclusion that on 4th July, 1966, Ramchandra had executed a Gift-Deed in favour of Namdeo and Kamlabai in respect of an agricultural field at Wadgaon which was, therefore, not ancestral property. It further held that Will dated 20th April, 1992 was not proved by the present appellants and, thus, directed partition of the residential house.

Shri Ghate, learned counsel for the appellants, by moving Civil Application No. 595 of 2016 under provisions of Order-XLI, Rule 27 of the Civil Procedure Code, sought permission to place on record aforesaid Will dated 20th April, 1992 and submitted that though in the Written Statement reference was made to the aforesaid Will and its copy was handed over to the counsel representing the appellants, same could not be brought on record. Further, as the suit was dismissed, the appellants were arrayed as respondents before the first appellate Court and had, therefore, no occasion to place the said Will on record. According to him, under provisions of Order-XLI, Rule 27 (aa) of the Civil Procedure Code, such permission deserves to be

granted. In that regard, he placed reliance on the following decisions:-

- [a] **Union of India Vs. Ibrahim Uddin & another** [(2012) 8 SCC 148],
- [b] **A. Andisamy Chettiar Vs. Subburaj Chettiar** [Civil Appeal No. 14055 of 2015; decided on 8th December, 2015 by Honourable Supreme Court (Coram : Dipak Misra & Prafulla C. Pant, JJ.),
- [c] **Rafiq & another Vs. Munshilal & another** [AIR 1981 SC 1400],
- [d] **Ashok Ravji Vadodriya, Wagri Shiva Magan and Ramnik Ravji Vadodriya Vs. Municipal Corporation of Greater Bombay** [(2003) (3) Mh.L.J. 1003], and
- [e] **Prakash & others Vs. Phulavati & others** [Civil Appeal No. 7217 of 2013; decided on 16th October, 2015 by Honourable Supreme Court (Coram : Anil R. Dave & Adarsh Kumar Goel, JJ.).

It is, therefore, submitted that if the registered Will is taken into consideration, the stand of the appellants of having title to the suit property would be proved. According to him, the plaintiffs did not have any right, whatsoever, in the residential house.

Shri Malke, learned counsel for the original plaintiffs, opposed the aforesaid application and submitted that due diligence was not exercised by the appellants for bringing on record said Will-Deed dated 20th April, 1992. He referred to para 13 of the judgment

of the trial Court to indicate that appellants had not led oral evidence in support of the aforesaid stand. According to him, grant of such permission at this stage would amount of filling up lacuna.

Having perused the application as well as judgments of the trial Court and the appellate Court, I find that the appellants have not exercised due diligence in bringing on record their stand on the basis of Will dated 20th April, 1992. Mere statement that its copy was handed over to the counsel would not be sufficient to hold exercise of due diligence. Though the trial Court dismissed the suit, it answered Issue No.5 against the original defendants. Before the first appellate Court even as respondents, the present appellants could have challenged the finding against Issue No.5. Considering observations in para 48 of the judgment of the Honourable Supreme Court in *Union of India Vs. Ibrahim Uddin & another* [supra], I find that grant of permission to lead additional evidence in absence of due diligence would amount to filling up of lacuna. The ratio of the decision in *Rafiq & another* [supra] is clearly distinguishable as in that case the proceedings itself were dismissed on account of absence of the appellant's lawyer. Hence, for aforesaid reasons, the application does not deserve to be granted. The same is accordingly rejected.

In so far as challenge to the judgment of the

appellate Court is concerned, the same is with regard to the decree for partition in respect of the residential house. The appellants failed to substantiate their defence on the basis of Will dated 20th April, 1992. Except said Will, there is no other basis for the appellants to contend that the residential house was not joint family property. In absence of said Will being brought on record, the judgment of the appellate Court directing partition of the residential house being joint family property cannot be faulted. The Second Appeal, therefore, does not give rise to any substantial question of law at the instance of the original defendants. The same is accordingly dismissed. No costs.

Judge

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