

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

17 SECOND APPEAL NO. 59 OF 2018
WITH CA/898/2018 IN SA/59/2018

JATASHANKAR BHISHANLAL VYAS
VERSUS
GAURISHANKAR BHISHANLAL VYAS DIED LRS KAMALBAI AND
OTHERS

.....

Advocate for Appellant : Mr. Rathi Swapnil S.
Advocate for Respondents : Mr. Milind Patil Beedkar

.....

CORAM : V. K. JADHAV, J.
DATED : 9th APRIL, 2018

PER COURT:-

1. The learned counsel for the appellant/original defendant submits that the trial court as well as the first appellate court recorded finding to the effect that the respondents/original plaintiffs failed to prove their ownership over the suit shop on the basis of the partition alleged to have been effected in the year 1976. The learned counsel submits that in absence of the factum of partition, the relinquishment deed alleged to have been executed by the appellant/original defendant carries no meaning. Further, the appellant/defendant has specifically denied the relinquishment deed dated 04.06.1977 Exhibit-61.

However, the courts below have considered the averments made in the written statement and interpreted in the manner that the appellant/defendant has not denied the execution of relinquishment deed Exhibit-61.

2. The learned counsel for respondents/plaintiffs submits that three real brothers of the appellant/defendant have instituted the civil suit for a decree of perpetual injunction and in the alternate, a decree of recovery of possession of the suit shop. The learned counsel submits that the appellant/defendant has not denied execution of the relinquishment deed and as such, the further exercise of sending the signature over the relinquishment deed to the hand-writing expert and obtaining his opinion on the same would be unwanted and uncalled for. The learned counsel submits that the appellant/defendant has specifically averred in the written statement that his elder brother Gaurishankar, who was the *karta* of the family, got executed the relinquishment deed exhibit 61 fraudulently and as such, accepted the execution thereof. It is, thus, on the appellant/defendant to prove the factum of fraud played on him while executing the relinquishment deed. The learned counsel submits that in

absence of any evidence to that effect, the courts below have rightly considered the deed of relinquishment exhibit 61.

3. On perusal of the judgment and decree passed by the courts below, it appears that the respondents/plaintiffs have approached the civil court with a specific pleading that some months prior to the death of their father Bhishanlal in the year 1976, the property of deceased Bhishanlal was partitioned amongst the plaintiffs and the defendant and even after division of the property by partition, they remained joint and plaintiff no.1 Gaurishankar was the *karta* of the joint family. It is also their specific pleading that the suit house bearing no. 583 fell in the share of the plaintiffs and some movables and cash were given to the defendant in partition. It is also the pleading of the respondents/plaintiffs that as per the terms of partition, the defendant had relinquished his right over the property on 04.06.1977 by executing relinquishment deed in favour of the plaintiffs. It appears that both the courts below have recorded a finding in the negative and held that the plaintiffs failed to prove their ownership over the suit shop on the basis of partition effected in the year 1976. It is the case of the respondents/

plaintiffs that as per the partition deed, the relinquishment deed exhibit-61 came to be executed. In this backdrop, I find that a case is made out for consideration in the Second Appeal that in absence of evidence of partition, whether only on the basis of the relinquishment deed, the suit instituted for a decree of perpetual injunction or in the alternate, for recovery of possession could have been decreed by the courts below.

4. Thus, the following substantial question of law is involved in this Appeal:

Whether decree of possession can be passed relying upon the sole document that is the relinquishment deed exhibit 61, more particularly when partition between the brothers was not proved and when there is no evidence as to what has been allotted to the share of the appellant/defendant in lieu of execution of alleged relinquishment deed?

5. The Second Appeal is **admitted** on the above substantial question of law. Mr. Milind Patil, learned counsel waives service on behalf of the respondents.

6. There shall be interim relief in terms of prayer clause (B) on condition that the appellant/original defendant shall deposit Rs.2,000/- per month, quarterly, before this Court till the disposal of the Appeal. Civil Application No. 898 of 2018 is accordingly disposed of.

(V. K. JADHAV, J.)

vre/