

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
CIVIL APPLICATION (ST) NO.7231 OF 2018
IN
SECOND APPEAL (ST) NO.24218 OF 2016
WITH
CIVIL APPLICATION NO.549 OF 2017

Prakash Jaysingh Raorane] Applicant

Vs.

Ajit Pratapsingh Raorane and others.] Respondents

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Mr. Rahul P. Walvekar, for Applicant in Civil Application (ST) No.7231 of 2018.

Mr. Amit Kapse, for Respondent No.1, 15A to 15C.

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CORAM : R.G. KETKAR, J.

DATE : 15TH MARCH, 2018.

P.C.

Heard Mr. Walvekar, learned Counsel for the applicant and Mr. Kapse, learned Counsel for respondents No.1, 15 A to 15C.

2. As the regular Court is not available today, Mr. Walvekar has moved this Court as per the administrative order passed by the Hon'ble Acting Chief Justice as defendant No.2 received notice from Tahasildar for handing over possession of the suit property on 16th March, 2018.

3. This is an application for condonation of delay of two years and 182 days in filing the appeal. Office remark shows that Civil Application is

dismissed against respondent No.6,7,11,16A to 16E, 17 and 18. Learned Counsel for the parties submit that respondents No.1 and 2 being only plaintiffs are contesting respondents. In view thereof, notice to these respondents is dispensed with. Though the applicant has not satisfactorily explained the delay, in the interest of justice, I am inclined to condone the delay. Delay of 2 years and 182 days caused in filing the appeal is condoned. Civil Application is allowed in terms of prayer clause (b) with no order as to costs.

4. At the joint request of the learned Counsel for the parties, Second Appeal is taken up for admission. By this appeal u/s 100 of the Code of Civil Procedure, 1908 (for short 'C.P.C') the appellant, hereinafter referred to as 'defendant No.2' has challenged the judgment and decree dated 31st October, 2007 passed by the learned Joint Civil Judge, Junior Division at Kankavali in Regular Civil Suit No.31 of 2001 as also the judgment and decree dated 25th November, 2013 passed by the learned District Judge Sindhudurg at Oros in Civil Appeal No.175 of 2007. By these orders, the Courts below decreed the suit instituted by respondents No.1 and 2, hereinafter referred to as 'plaintiffs' for partition and declared that plaintiffs No.1 and 2 and defendants No.17 and 18 have 1/5 share in common; defendant No.1 to 5 have 1/5 share in common; defendants No.6 to 9 have 1/5 share in common, defendant No.10 is having 1/5 share and defendant No.12 to 16 are having 1/5 share in the properties described in Schedule A & B among other direction.

5. In support of this appeal, Mr. Walvekar submitted that this Appeal involves following substantial questions of law;

- [1] Whether the cancellation of Mutation Entry No.1389 recording the names of all four brothers, is not sufficient evidence to prove the theory of previous partition?

- [2] Whether personal cultivation of Jahagir/Watan Land can be considered as relevant factor to prove the theory of self acquisition of Watan land?
- [3] Whether the contents of power of attorney [Exhibit 109] executed by Jaysing, father of the Appellant in favour of Pratapsingh, father of plaintiffs, in respect of share in joint family property can be construed as a solemn admission, in the light of the fact that, at the time of institution of suit, Jaysingh was not alive?

Mr. Walvekar submitted that Mutation Entry No. 1389 Exhibit 178 was made sometime in the year 1968 wherein names of four brothers of Jaysingh were entered in the record of rights as co-sharer, 1/5 share each in the suit property. He submitted that Jaysing challenged that Mutation Entry. The mutation entry was set aside by the Sub-Divisional Officer. The plaintiff has challenged that order by filing appeal before the Collector who dismissed the appeal. He submitted that this is one of the relevant circumstances which indicates that the suit properties are not joint family properties.

6. He also invited my attention to paragraph 17 of the District Court's judgment. He submitted that the Courts below relied on power of attorney dated 12th November, 1981 executed by Jaysingh in favour of Pratapsingh (father of the plaintiffs). However, by notice dated 31st December, 1981 at Exhibit 105 served on the father of the plaintiff, Jaysingh had cancelled the power of attorney. He further submitted that as per section 85 of the Indian Evidence Act, 1872, the Court will presume that every document purporting to be a Power of Attorney, and to have been executed before, and authenticated by, a Notary Public or any Court, Judge, Magistrate etc, was so executed and authenticated. In the present case, no such presumption can be drawn. He

further submitted that in any case admittedly Jaysingh expired in the year 1985. Thus, the Courts below were not justified in relying on power of attorney dated 12th November, 1981 being one of the circumstances for establishing that properties are joint family properties.

7. Mr. Walwekar submitted that basically suit properties are exclusively owned by Jaysingh. He has taken me through paragraphs 7 to 10 of the trial Court's judgment as also the District Court's dealing with this aspect. He submitted that the Courts below misread the evidence which itself involves a substantial question of law. Merely because in the copy of patra book at Exhibit 135 suit properties are shown in the name of Jaysingh and others that by itself does not mean that the suit property is jointly owned by Jaysingh and four brothers. He, therefore, submitted that the Courts below have committed serious error in decreeing the suit. As the appeal raises substantial questions of law, it requires consideration.

8. On the other hand, Mr. Kapse supported the impugned orders. He submitted that the Courts below have considered the evidence on record. After appreciating the evidence on record, they concurrently decreed the suit in favour of the plaintiffs. He further submitted that in fact as per partition decree, division of the suit property by meets and bounds was proposed in terms of partition chart. Defendant No.2 has consented for the same. He, therefore, submitted that no case is made out for interfering with the impugned orders.

9. I have considered the rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. While decreeing the suit, the Courts below have relied on;

- (1) letter dated 20th August, 1975 written by Jaysingh at Exhibit 104. This letter shows that Jaysingh himself had admitted shares of his brothers in the suit properties.
- (2) Power of attorney dated 12th November, 1981 executed by Jaysingh in favour of Pratapsing father of the plaintiffs.

The Courts below have noted that in Power of Attorney Jaysingh admitted in clear words that the properties at Mouje Achirne Ghanekarwadi, Taluka Vaibhavwadi, District Sindhudurg are joint family properties of five brothers, though recorded only in his name. In that Power of Attorney, Exhibit 109, Jaysingh also admitted that he has 1/5 share in the joint family properties. As far as Patra Book Exhibit 135 shows that the suit properties are shown in the name of Jaysingh and others. The Courts below noted that Anandrao, father of Jaysingh and his four brothers died sometime in the year 1933-1934. After the death of Anandrao, Mr. Jaysing being the eldest brother was acting as Karta of the family. It is in this context, the Courts below held that the suit properties were entered in his name on behalf of other family members. Thus, finding recorded by the Courts below are based upon appreciation of evidence on record. It cannot be said that the findings recorded by the Courts below are contrary to evidence on record or that they are based on no evidence. In other words, it cannot be said that the findings recorded by the Courts below are perverse. That apart, as noted earlier, as per the partition decree, the Court Commissioner has suggested division of shares of the properties by meets and bounds and that was accepted by defendant No.2.

10. Mr. Walwekar relied on Section 85 of the Indian Evidence Act, 1872. A perusal of the impugned orders shows that no such contention was advanced before the Courts below. Defendant No.2 cannot raise this contention for the first time in the Second Appeal. Mr. Walvekar submitted

that by notice dated 31st December, 1981, Jaysingh had cancelled the Power of Attorney. As noted earlier, the contents of Power of Attorney clearly show that properties are of joint family.

11. In view thereof, no case is made out for interfering with the impugned orders. Appeal does not involve any question of law much less any substantial question of law. Hence, appeal fails and the same is dismissed.

12. In view of dismissal of main appeal, Civil Application No.549 of 2017 does not survive and as such is disposed of.

[R.G. KETKAR, J.]