

Santosh

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 74 OF 2014

Sundarabai Santram Kedar & Ors

...Appellants

Versus

Kasabai Ganpat Nakate & Anr

...Respondents

Mr. Ajay A. Joshi, for the Appellants.

Mr. Rahul Shinde, for the Respondents.

CORAM: N. M. JAMDAR, J

DATED: 31 JANUARY, 2018

Oral Order:-

1. By this Appeal, the Appellants – original Defendants have challenged the concurrent judgments and orders passed by the learned Civil Judge, Junior Division, Sangola and the learned District Judge, Pandharpur, decreeing the suit filed by the Respondents – Plaintiffs and dismissing the Appeal.

2. The original person in the family was Namu Raju Kedar. He expired on 27 January, 1971. He was survived by son Shantaram and three daughters Kalawati, Kasabai and Lochanbai. The heirs of Santram are Defendants nos.1 to 3. Though the Suit was filed in respect of the six properties, the Appeal is restricted to gat nos.149/1 and 152. The learned Civil Judge decreed the Suit and held that the Plaintiff and the other

sisters have 1/6 share in the suit property and Defendants nos.1 to 3 have ½ share. The learned District Judge, by dismissing the Appeal confirmed the judgment and decree passed by the learned Civil Judge.

3. The learned Counsel for the Appellants reiterated the contentions raised in both the Courts that the Plaintiff had relinquished her share in the year 1977 and she cannot now ask for partition. It was submitted that the application was made by her and other sisters in the year 1977, pursuant to which the entries made in the revenue record. The learned Counsel submitted that the view taken by both the Courts that the document is not registered, is incorrect, as oral relinquishment is permissible. He relied upon these two decisions: *Ramdas Chimna vs Pralhad Deorao & Ors*¹ and *Hirabi w/o Harji Ingale vs Babu Manika Ingale*².

4. Firstly, the case put up by the Appellants is not of oral relinquishment *per se*. It is a document which is stated in the form of application to the revenue authority. All that is produced on record is a mutation entry. The application stated to be made by the original Plaintiff is not on record. It is also not discernible as to who had filed this application before the revenue authority. It is not the case that the original Plaintiff

¹ AIR 1965 Bombay 74.

² 1980 Mh.L.J 494.

came before the revenue authority and made oral an statement. Though it is correct that oral relinquishment may be permissible as held in the decisions relied upon by the learned Counsel for the Appellant, a conclusion has to be drawn in the facts of each case. In the present case, the primary document, the application itself, is not on record. Once it is the case of a documentary application, then it does not remain a case of oral relinquishment. The decisions relied upon therefore will not be applicable to the facts of the present case.

5. The learned Counsel then submitted that if the relinquishment is not proved then the suit is barred by limitation, as the original Plaintiff was aware that revenue records were changed in the year 1977, yet suit was filed in the year 1994. This was not taken in the courts below. It was submitted that this point, being pure question of law, can be considered even in Second Appeal. As stated above, there is no cogent evidence as to who made an application to the revenue authorities. Unless the starting point of limitation is established and admitted, the issue raised cannot be considered as pure question of law. No such evidence has been led by the Appellants.

6. The learned Counsel then submitted that the finding of both the Courts that in view of Section 40 of the Bombay

Tenancy and Agricultural Lands Act, 1948 (“the Tenancy Act”, for short), the Respondent – Plaintiff has share in the suit property, is incorrect, as Civil Court has no such jurisdiction to decide the claims regarding the tenants. Section 40 reads thus:

“40. (1) Where a tenant (other than a permanent tenant) dies, the landlord shall be deemed to have continued the tenancy on the same terms and conditions on which such tenant was holding it at the time of his death, to such heir or heirs of the deceased tenant as may be willing to continue the tenancy.

(2) Where the tenancy is inherited by heirs other than the widow of the deceased tenant, such widow shall have a charge for maintenance on the profits of such land.”

7. This provision only states that, after the death of the tenant, the tenancy devolve on the heirs, and the landlord is deemed to have continued the tenancy. There is no dispute that the property was originally held as a tenant by Namu Kedar and that the parties to the suit and other sisters, are the heirs of Namu. Therefore, both the Courts were not adjudicating or deciding any rights under the Tenancy Act but only recognising what was made clear by the Tenancy Act. Since there was no adjudication in that sense to take away the jurisdiction of the Civil Court. Therefore, there is no merit in the contentions which are advanced. This Appeal and the arguments advanced is

a classic example of the lengths at which people go to deprive the rightful share of their own family members. No substantial question of law arises. Second Appeal is dismissed.

[N. M. JAMDAR, J.]