

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.1041 OF 2006

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| 1. Ramchandra Raou Bhosale, |] |
| Age - 49 Yrs., Occ.: Agriculture. |] |
| 2. Dadaso Raou Bhosale, |] |
| Age - 47 Yrs., Occ.: Service. |] |
| 3. Rukmini Rau Bhosale, |] |
| Age - 54 Yrs., Occ.: Household. |] |
| 4. Radhabai Tukaram Mohite, |] |
| Age - 45 Yrs., Occ.: Household. |] |
| 5. Sushila Raou Bhosale, |] |
| Age - 42 Yrs., Occ.: Household. |] |
| 6. Janardhan Shamrao Bhosale, |] |
| Age - 46 Yrs., Occ.: Agriculture & Business. |] |
| 7. Sundar Shamrao Bhosale, |] |
| Age - 44 Yrs., Occ.: Service. |] |
| 8. Bhupal Shamrao Bhosale, |] |
| Age - 40 Yrs., Occ.: Business. |] |
| 9. Jaipal Shamrao Bhosale, |] |
| Age - 38 Yrs., Occ.: Agriculture |] |
| <i>All are the residents of Inam Dhamani,</i> |] |
| <i>Taluka Miraj, District Sangli.</i> |] |
| 10. Housabai Bhagwan Lokhande, |] |
| Age - 39 Yrs., Occ.: Household. |] |
| <i>R/of Soni, Tal. Miraj, Dist. Sangli.</i> |] Appellants |

Versus

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| 1. Dattatraya Devappa Bhosale (<i>Since Deceased</i>), |] |
| Through Legal Heirs :- |] |

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| 1A. Sugandha Dattatraya Bhosale, |] |
| Age : 62 Yrs., Occ.: Nil. |] |
| 1B. Vijay @ Dhananjaykumar D. Bhosale, |] |
| Age - 42 Yrs., Occ.: Nil. |] |
| 1C. Pushpa Rajendra Londhe, |] |
| Age - 43 Yrs., Occ.: Nil. |] |
| 1D. Nanda Satyawar Sadamate, |] |
| Age - 38 Yrs., Occ.: Nil. |] |
| 1E. Sangita @ Deepa Rajendra Gode, |] |
| Age - 36 Yrs., Occ.: Nil. |] |
| 1F. Raharam @ Raju D. Bhosale, |] |
| Age - 33 Yrs., Occ.: Nil. |] |
| <i>All residents of 1-A, 1-B and 1-F,</i> |] |
| <i>Sugandha Niwas, Kore Campus,</i> |] |
| <i>365/3, Nagaraj Colony, South Area,</i> |] |
| <i>Vishrambag, Sangli.</i> |] |
| 2. Bapuso Devappa Bhosale, |] |
| Age - 62 Yrs., Occ.: Agriculture. |] |
| 3. Vitthal Devappa Bhosale, |] |
| Age - 44 Yrs., Occ.: Agriculture. |] |
| 4. Annaso Devappa Bhosale, |] |
| Age - 52 Yrs., Occ.: Agriculture. |] |
| 5. Babaso Devappa Bhosale, |] |
| Age - 48 Yrs., Occ.: Agriculture. |] |
| 6. Sharada Sudam Bhosale, |] |
| Age - 44 Yrs., Occ.: Household. |] |
| <i>Nos.1, 3 and 4 are residents of</i> |] |
| <i>Nagraj Colony, Vishrambag, Sangli.</i> |] |
| <i>Nos.2 and 5 are residents of</i> |] |
| <i>Inam Dhamani, Tal. Miraj, Dist. Sangli.</i> |] |
| | Respondents |

Mr. Umesh Mankapure for the Appellants.

Mr. A.M. Kulkarni for the Respondents.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 17TH JULY 2018.

ORAL JUDGMENT :

1. Heard Mr. Mankapure, learned counsel for the Appellants, and Mr. Kulkarni, learned counsel for the Respondents.

2. This Second Appeal is directed against the 'Judgment and Decree' dated 13th September 2006 passed by the IIIrd Ad-Hoc Additional District Judge, Sangli, in Regular Civil Appeal No.140 of 2006, which was preferred against the 'Judgment and Decree' dated 25th April 2006 passed by the Joint Civil Judge, Junior Division, Sangli, in Regular Civil Suit No.117 of 2002.

3. The said Suit was filed by the Respondents, who are the Original Plaintiffs, for partition and separate possession of their 1/3rd share in the suit property, which Suit came to be dismissed by the Trial Court and the Appellate Court, by reversing the 'Judgment and Decree' of the Trial Court, decreed the Suit.

4. The few facts, which are essential for deciding the substantial questions of law raised in this Second Appeal, are to the effect that, one 'Tayappa' was the common ancestor. He has three sons by name, Devappa, Raou and Shamrao. Respondents-Plaintiffs are the legal heirs of 'Devappa'; whereas, Appellants-Defendants are the legal heirs of 'Shamrao' and 'Raou'. Devappa, Raou and Shamrao were initially constituting joint family along with the Tayappa. The joint family was having various ancestral properties at Village 'Inam Dhamani', including the house properties etc. On 29th January 1959, the suit property came to be purchased in the name of Tayappa. According to the Respondents-Plaintiffs, they were not given any share in the said property; whereas, in respect of the other joint family properties, in the partitions that took place from time to time, they were given their 1/3rd share. As regards the suit property, as their share was not given, Respondents-Plaintiffs made an enquiry and they came to know that, one document named as 'Smaran Patra' is alleged to have been executed between 'Devappa', his two other brothers and father Tayappa on 21st January 1959.

5. As per the said 'Smaran Patra', 'Devappa' has accepted severance from the joint family and further stated that, he will have no concern with the subsequent purchases or other transactions to be made by the joint family i.e. his father and two other brothers. According to the Respondents, as 'Devappa' was suffering from mental illness, his two

brothers and father got executed the said document from him, without informing him the contents thereof, and on the basis of the said document, Respondents-Plaintiffs' share in the suit property is being denied. However, they cannot be deprived of their share. Hence, they filed the Suit for partition and separate possession of their 1/3rd share in the suit land.

6. This Suit was resisted by the Appellants-Defendants contending *inter alia* that, 'Devappa' has separated from the remaining joint family in the year 1939 itself and he has also accepted the said fact by executing this 'Smaran Patra', in which 'Devappa' has categorically stated that, he will have no concern with the property or any of the transactions to be done by the other members of the joint family. In view thereof, the mutation entry was also made. The said record was also confirmed in the consolidation proceedings and hence, 'Devappa' had no right in the suit property. Therefore, his legal heirs, i.e. Respondents-Plaintiffs, also cannot claim any share therein. It was denied that, 'Devappa' was in any way suffering from mental illness and taking disadvantage thereof, this document called 'Smaran Patra' was got executed from 'Devappa'.

7. In support of their respective contentions, the parties examined themselves. Plaintiff No.2 examined himself and also led the evidence of

one witness; whereas, on behalf of the Defendants, Defendant No.7- Sundar Shamrao Bhosale has entered into the witness box. He also examined the Stamp Vendor – Bhalchandra Dhondu Kulkarni and the attesting witness to the said document, namely, Ramchandra Mali. Thus, the entire controversy between the parties was surrounding the execution of this document called as 'Smaran Patra'.

8. Both the Trial Court and the first Appellate Court, after appreciating the evidence on record, held that, the Plaintiffs have failed to prove that 'Devappa' was suffering from any mental illness and this document called 'Smaran Patra' was got executed from him without his knowledge. As a result, the Trial Court has dismissed the Suit holding that, in view of this document called 'Smaran Patra', the Plaintiffs cannot have any share in the suit property.

9. The Appellate Court, however, found that the very intention of the parties from this document called as 'Smaran Patra' cannot be to exclude 'Devappa' from his share in the suit property. What was contemplated on the basis of the said document was, his severance from the joint family house, but, as regards the joint family properties, they still continue to remain the joint family properties and that is the reason why even after purchase of the suit property, there were two partitions in the joint family. The Appellate Court also found that, though this document called

'Smaran Patra' is proved to be executed by 'Devappa' in sound state of mind, as after the death of 'Tayappa' also, the name of 'Devappa' was entered into the 'Record of Rights' by mutation entry, it becomes difficult to accept that 'Devappa' has given up all his rights in respect of the subsequent purchases of the joint family properties. The Appellate Court also confirmed that, the findings of the Trial Court that the suit property was, admittedly, purchased from the joint family funds and, therefore, if it is held that, by this 'Smaran Patra, 'Devappa' has not released his share in the joint family property, then his legal heirs are entitled to their $1/3^{\text{rd}}$ share therein. The Appellate Court, therefore, decreed the Suit and granted partition to the Plaintiffs of their $1/3^{\text{rd}}$ share in the suit properties.

10. This Judgment of the first Appellate Court is challenged in the Second Appeal by the Original Defendants. The Second Appeal was admitted on the following substantial questions of law :-

- (i) *Whether the lower Appellate Court is justified in ignoring the vital admissions given by the Respondent admitting the fact that, the severance that the joint family property was effected by metes and bounds by executing a 'Memorandum of Partition' dated 29th January 1959?*
- (ii) *Whether the Appellate Court is justified in ignoring the evidence on record in the nature of application filed by deceased Devappa i.e. predecessor-in-title of the Respondents for changing the mutation entries?*

(iii) *Whether the Appellate Court is justified in ignoring the fact that deceased Devappa (Predecessor-in-title of the Respondents) himself filed an application for changing the mutation entry, which was corrected by an order dated 3rd February 1964 and mutation entry bearing No.3738 was effected?*

11. As rightly submitted by learned counsel for the Appellants and Respondents, the crux of the controversy between the parties is revolving around the document called 'Smaran Patra'; otherwise, on other aspects and factual details, the parties are at *ad-idem*.

12. This document called 'Smaran Patra' itself is produced on record and also properly proved through the evidence brought on record. The real question for consideration is the interpretation of this document named as 'Smaran Patra', because, the said document itself is also not clear as to what was intended by the parties by execution of such document. At one stage, the document is saying that, there are still the joint family properties, namely, the ancestral landed property at Village 'Inam Dhamani', which is to the extent of 7 Gunthas of land; then house properties, the open land etc. In addition to that, immovable properties like the Jungle estate, utensils etc. But it is saying that, out of these four, i.e. Tayappa and his three sons, 'Devappa' has severance of his status, after taking the immovable property i.e. Jungle Estate, and has separated from the joint family. However, it is not stated since when

'Devappa' was separated. Though the specific case is put up that 'Devappa' has separated from joint family since 20 years prior to execution of this document called 'Smaran Patra', the document does not say so. Further the document says that, since 'Devappa' is separated, he is no more concerned with the joint family transactions and since the date of severance itself, he has no concern with the estate of the other three members of the family. However, in the last paragraph, again it says that, so far as the landed property at 'Inam Dhamani' is concerned, they are still cultivating the said joint family property in common. Thus, the document does not say specifically whether 'Devappa' has separated from the joint family in all the respects by metes and bounds, or, he has merely separated from the joint house and having separate residence and, therefore, no more concerned with the joint family transactions.

13. It is pertinent to note that, on this very day itself, when the 'Smaran Patra' was executed, the 'Sale-Deed' of the suit property also came to be executed. Now it is not clear whether the 'Sale-Deed' is executed prior to execution of this 'Smaran Patra' or thereafter, but the fact remains that, it was executed on the same day, that too in the name of 'Tayappa' alone. If, admittedly, Tayappa or his two other sons, namely, 'Raou' and 'Shamrao', had the intention that 'Devappa' should not claim any share or interest in this property, which was purchased under the 'Sale-Deed', then there was no difficulty for executing the 'Sale-Deed' in

the name of all the three of them. However, the 'Sale-Deed' came to be executed in the name of 'Tayappa' alone and it is pertinent to note that, after the death of 'Tayappa', the name of 'Devappa', along with other two sons, also came to be mutated in the 'Record of Rights'.

14. Therefore, as observed by the first Appellate Court, in the first place, if 'Devappa' was separated long back from the family and if this was a 'Memorandum of Partition' i.e. 'Smaran Patra', then there was no reason at all for the subsequent partitions to take place as regards the ancestral joint family properties or the lands. Therefore, this document called 'Smaran Patra' does not show that there was already the partition by metes and bounds between 'Devappa' and his other two brothers and father and, therefore, 'Devappa' had, by that time, given up his right. This document also nowhere specifies that, on the very day itself, the 'Sale-Deed' was to be executed. It was also not stated or recorded that, 'Devappa' will not claim any interest in the land to be purchased by the said 'Sale-Deed'. A vague statement is made that, 'Devappa' will have no concern with the joint family transactions.

15. Admittedly, the 'Sale-Deed' stands in the name of 'Tayappa' and not in the name of remaining joint family, namely, his two other sons. Admittedly, it is purchased out of the joint family funds and none of the party is coming before the Court with a clear case as to the object and

purpose of executing this 'Smaran Patra', the contents of which are also not consistent. Hence, it becomes difficult to place reliance on such document to deprive the legal heirs of 'Devappa' from their share in the joint family property, which was purchased out of the funds of the joint family. Mere mutation entry of the name of Defendant Nos.2 and 3, subsequently confirmed in the consolidation record, also cannot be sufficient to deny the title, interest or share of the legal heirs of 'Devappa' in the suit property.

16. If the parties wanted to rely upon this document, then, there should have been evidence on record sufficient to that effect. Appellants-Defendants are also not consistent with their case. At one stage, they are saying that 'Devappa' was separated 20 years back; however, the contents in the documents are not supporting the same. It is nowhere stated since when he has separated. Conversely, it is stated that, still there are some joint family properties, which they are still cultivating. Therefore, if the case put up by the Appellants-Defendants that, 'Devappa' has given up all his rights, share, interest in the joint family properties is accepted, then, there should have been a clear case made out to that effect in either the document called 'Smaran Patra' or also in the written statement. Even the evidence of the attesting witness is also not clear on this aspect as to for what purpose such document was executed.

17. Therefore, having regard to all these facts on record, if the Appellate Court has taken a view, which view is supported from proper appreciation of evidence on record, that this document called 'Smaran Patra', cannot deprive the legal heirs of 'Devappa' from their share in the joint family properties, then in the Second Appeal, this Court cannot interfere in the said finding of fact and substitute its own finding, by converting this Court to a third Court of fact finding; especially when the said finding of fact is based on proper appreciation of evidence.

18. As a result, this Second Appeal, being devoid of merits, stands dismissed.

[DR. SHALINI PHANSALKAR-JOSHI, J.]