

IN THE HIGH COURT OF JUDICATURE AT BOMBAY:**NAGPUR BENCH : NAGPUR****Second Appeal No.387 of 2016****[Smt. Radhabai Raghunathsingh Badratiye & two others Vs. Sau. Hirabai Virendrasingh Thakur & two others]****AND****Second Appeal No.554 of 2017****[Smt. Radhabai Raghunathsingh Badratiye & two others Vs. Sau. Hirabai Virendrasingh Thakur & two others]**

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

Mr. S. M. Vaishnav, Adv., for the appellants in both appeals.

Mr. M. M. Sudame, Adv., for respondent nos. 1 to 3 in both appeals.

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CORAM : A. S. CHANDURKAR, J.**DATE : 31st January, 2018**

Both these appeals can be conveniently decided together as they arise from the common judgment of the first appellate Court.

For sake of convenience, the parties are being referred to as they were referred to in the first appellate Court. One set of parties are those who are beneficiaries under the Will dated 25th March, 2004 and the others are those who have been excluded from benefits under that Will.

The brief facts giving rise to the appeals can be

stated as under:-

One Raghunathsingh was first married with one Rajwantibai and from that marriage he had one son - Vijay and three daughters. From his second marriage with one Radhabai, he had two sons. On 25th March, 2004, said Raghunathsingh executed a Will in favour of his three daughters who were born from first marriage. Field Gat No. 104 admeasuring 1 hectare 72 Are was bequeathed in equal shares to them. Said Raghunathsingh expired on 27th September, 2004. The second wife, her two sons as well as the son from the first marriage who were all excluded from receiving benefits under the said Will filed a suit for declaration that they had title in the suit property as it was the ancestral property of Raghunathsingh. In defence, the aforesaid Will dated 25th March, 2004 was put forth by the beneficiaries under the Will and it was pleaded that they had accordingly become owners of the suit field. The trial Court after considering the evidence on record found that the suit property was the exclusive property of Raghunathsingh and that he was competent to execute the Will in favour of the beneficiaries. On that basis, Regular Civil Suit No. 105 of 2004 filed by the parties excluded from the benefits under the Will came to be dismissed.

The beneficiaries under the Will filed Regular Civil Suit No. 121 of 2004 seeking a declaration that they had

become owners of the suit field by virtue of the Will dated 25th March, 2004 and they sought further injunction seeking to protect their possession. The defendants therein took the same plea that the suit property was the ancestral property of Raghunathsingh and that they had also filed a suit for declaration of their rights which was pending. This suit, being Regular Civil Suit No. 121 of 2004, came to be decreed and it was held that the plaintiffs had a right to the suit property by virtue of the aforesaid Will.

The parties excluded from the Will filed two appeals before the District Court. These appeals were heard together and by the impugned judgment the first appellate Court confirmed the finding recorded by the trial Court as to validity of the Will and the fact that the suit property was the separate property of Raghuunathsingh. On that count, both the appeals came to be dismissed. Being aggrieved, these Second Appeals have been filed by the parties who have been excluded from any benefit under the Will.

Shri S. M. Vaishnav, learned counsel for the appellants, submitted that both the Courts committed an error in proceeding on the basis that there was a partition of the properties in which Raghunathsingh had received the suit property. The document at Exh.87 titled as "Partition-Deed" dated 16th December, 1993 was erroneously exhibited by the appellate Court

without granting due opportunity to the excluded parties to put forth their case. There were no pleadings in the plaint in that regard that there was a partition between the parties earlier. In absence of such pleadings, this stand of the beneficiaries could not have been taken into consideration. It was exhibited without its contents being duly proved. It was further submitted that the document at Exh.87 which was the Memorandum of Partition was not duly registered and, therefore, same could not have been taken into consideration. As legal rights were created for the first time by virtue of that Memorandum of Partition, the same required registration. For said purpose, the learned counsel placed reliance on the judgments in **Yellapu Uma Maheswari & another Vs. Buddha Jagadheeswararrao & others** [(2015) 16 SCC 787] and **Sunil Tukaram Bharadkar Vs. Santosh Gopichand Rane** [2006 (3) Mh.L.J. 811]. As regards absence of appropriate pleadings in that regard, he placed reliance on the decisions in **Bhagwati Prasad Vs. Chandramaul** [AIR 1966 SC 735] and **Union of India Vs. Ibrahim Uddin & another** [(2012) 8 SCC 148]. Moreover, additional evidence could not have been permitted by the appellate Court de hors the provisions of Order-XLI, Rule 27 of the Code. It was, thus, submitted that on these counts, the first appellate Court committed an error by not considering the case of the parties who were excluded from benefits under the Will.

On the other hand, Shri M. M. Sudame, learned counsel for respondents, supported the impugned judgment. According to him, the first appellate Court rightly took into consideration the entire material on record while concluding that though initially the properties were ancestral in nature, by virtue of the subsequent partition, the suit property became the absolute property of Raghunathsingh. He referred to the observations in paragraph 17 of the judgment of the first appellate Court to indicate the consent given by the other side to exhibiting the document at Exh.87. Having so consented, it was not now open to take the stand that contents of that document were not proved. It was then submitted that on the basis of the respective cases as pleaded, both parties were aware about the case of the other side and the pleadings would have to be considered in that backdrop. He relied upon the decisions in **Ram Sarup Gupta Vs. Bishun Narain Inter College & others** [(1987) 2 SCC 555], **Bhagwati Prasad Vs. Chandramaul** [AIR 1966 SC 735] and **Nedunuri Kameswaramma Vs. Sampati Subba Rao** [AIR 1963 SC 884]. As regards execution of the Will dated 25th March, 2004, it was submitted that its due execution and attestation had been proved and the finding in that regard recorded by the trial Court stood affirmed by the first appellate Court. He, therefore, submitted that there was no case made out, whatsoever, to interfere with the judgment of the

appellate Court.

I have heard the learned counsel for the parties at length and I have also gone through the records of the case.

Perusal of the material on record indicates that as recorded in paragraph 17 of the judgment of the first appellate Court, both the parties had agreed that initially the suit field was the ancestral property of the family of Raghunathsingh and by virtue of a Partition-Deed at Article 'A', the same had come to the share of Raghunathsingh. This document was dated 16th December, 1993. With the consent of parties before the appellate Court, the same was marked as Exh.87. The appellate Court then found that on perusal of this Partition-Deed, it was in the form of memorandum as one of the parties - Vijay who was the son of Raghunathsingh from his first wife and who was excluded from any benefit under the Will had been given field Survey No. 37 admeasuring about 5 acres 17 Gunthas. It was, therefore, found that the said document was merely a record of the partition that had already taken place and, therefore, it did not create any right for the first time when it was executed. This document, therefore, did not require any registration. In the light of these observations which are based on the contents of Memorandum of Partition dated 16th December, 1993, this conclusion arrived at by the first

appellate Court is based on appreciation of this document and it does not call for any interference. In that view of the matter, the ratio of the decision in *Yellapu Uma Maheswari* [supra] does not assist the case of the appellants.

By taking into consideration this Memorandum of Partition dated 16th December, 1993 [Exh.87], it cannot be said that the first appellate Court took into consideration additional evidence. It is to be noted that this memorandum was already on record and marked as Art. 'A.' Both parties consented to the same being exhibited as recorded by the first appellate Court in paragraph 17 of its judgment. Similarly, the reason for taking into consideration the revenue entries at Exh.21 has been stated in paragraph 19 of the judgment. It is not a ground raised in the Memorandum of the Second Appeal that without consent of the appellants, the said Memorandum of Partition came to be exhibited. In any event, it was for the appellants to have raised this point before the first appellate Court seeking correction of those observations as held by the Hon'ble Supreme Court in **Ramdas Nayak Vs. State of Maharashtra** [AIR 1982 SC 1249]. Said course not having been followed, the grievance in that regard cannot be urged before this Court.

The pleadings of the parties indicate that the

beneficiaries under the Will had pleaded that the suit property was the exclusive property of Raghunathsingh while the excluded parties had pleaded that it was the ancestral property of Raghunathsingh. In this backdrop, the Partition-Deed at Exh.87 indicates that the suit property had come to the share of Raghuunathsingh. PW 1 - Purushottam - Exh.41 in his cross-examination admitted the factum of partition between his father, Raghunathsingh and his brothers. In that view of the matter, the submission as regards absence of pleadings with regard to partition by relying upon the decisions in *Bhagwati Prasad* and *Ibrahim Uddin* [supra] cannot be accepted.

The finding with regard to due execution and attestation of the Will dated 25th March, 2004 is based on appreciation of evidence. I do not find that appreciation of evidence by both Courts to be perverse giving rise to any substantial question of law in that regard. On perusing the records of the case and after examining the judgments of the trial Court as well as first appellate Court, I am satisfied that the appeals do not give rise to any substantial question of law. The same are, therefore, dismissed with no order as to costs.

Judge

