

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

Second Appeal No.276/2018

Bharat Morarji Popat & others.

Vs.

Iccha wd/o Ritesh Popat & others.

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

Court's or Judge's Orders

Shri M.P.Kariya, Advocate for appellants.
Shri R.K.Borkar, Advocate for R.Nos.1 to 3.
Shri M.R.Johrapurkar, Advocate for R.Nos. 4 to 11.

CORAM : A.S.CHANDURKAR, J.

DATED : 27.08.2018

The learned counsel for the parties have been heard on the following substantial questions of law :

- (1) Whether the suit for partition and separate possession filed by the son of defendant no.14 during the lifetime of said defendant no.14 was maintainable ?
- (2) What is the effect of the documents at Exhibits 99 and 100 vis-a-vis defendant no.14 ?

The appellants are the original defendant nos. 2 to 8, who are aggrieved by the decree for partition and separate possession that has been passed by the trial Court and which has been confirmed by the first appellate Court.

The facts in brief are that, one Morarajibhai is the common ancestor who had initially married to one Yashodaben. The said Yashodaben expired in the year 1960. From that marriage, the defendant no.14-Shantilal and a daughter - Ranjanaben were born. After the death of Yashodaben, Morarajibhai performed his second marriage with the defendant no.1. The defendant nos. 2 to 5, 17 to 19 and one Brijlal were children from the second

marriage. According to the original plaintiff, who is the son of defendant no.14, the defendant no.1 started treating defendant no.14 with cruelty. Hence, the defendant no.14 was compelled to stay at different places. Morarajibhai expired in the year 1978 and left behind him his self acquired property. According to the plaintiff, he had got 1/11th share in the suit property and therefore, he had demanded his share from the defendant nos. 1 to 5. As that share was not given, he filed a suit for partition and separate possession.

The suit was contested by the defendant nos. 1 to 5 and defendant nos. 17 to 19. According to them, during the lifetime of Morarajibhai, the defendant no.14 had executed deed of relinquishment on 03.05.1976 which document was duly registered. The defendant no.14 had received an amount of Rs.5,000/- and 10 tolas gold while executing that deed. The defendant no.14 had accordingly executed separate receipt for the same on 03.05.1976. The plaintiff being the son of defendant no.14 was estopped from claiming any share in the suit property.

The trial Court after considering evidence on record held that on the death of Morarajibhai, the suit property became coparcenary properties between the plaintiff, Brijlal and the defendant no.14. Though the relinquishment deed was executed by the defendant no.14, same would not deprive the plaintiff of 1/11th share in the suit properties. Accordingly, the suit came to be decreed. The first appellate Court by the impugned judgment, dismissed the appeal filed by the defendant nos. 1 to 9 and 17 to 19. Being aggrieved, the defendant nos. 1 to 8 have challenged the said judgment before this Court.

It is submitted by Shri M.P.Kariya, the learned counsel for the appellants that both the Court committed an error by not considering the provisions of Sections 4 and 8 of the Hindu Succession Act, 1956 (for short, the Act of 1956). The suit as filed during the lifetime of the father - Shantilal was not maintainable. The grandsons of Morarajibhai had no right to claim

share in the suit property especially when their father - Shantilal had given up all his rights in terms of the documents at Exhibits 99 and 100. The said share was given up on 03.05.1976 by accepting the amount of Rs.5,000/- in cash and 10 tolas gold. The plaintiffs were born after execution of those documents and therefore, it was not permissible for them to seek partition of the properties in question. It was also submitted that the plaintiffs were estopped from claiming share in the property in view of relinquishment of such shares. In support of his submissions, the learned counsel for the appellants placed reliance on the decisions in *Sheela Devi V. Lal Chand* 2007 (2) Mh L J 1, in *Uttam v. Saubhag Singh* 2017(1) Mh L.J.294, in *Commissioner of Wealth Tax, Kanpur Vs. Chander Sen & Ors.*, 2013 ALL SCR 162, in *Jayamati Narendra Shah Vs. Narendra Amritlal Shah* 2014(4) All MR 616 and in *Mookammal v. Subramanian(Madras)* 2010(2) MLJ 576. It was thus submitted that both the Courts erred in decreeing the suit.

Shri R.K.Borkar, learned counsel for the respondent nos. 1 to 3 on the other hand supported the impugned judgment. According to him, in the light of provisions of Section 6 of the Transfer of Property Act, 1882, the plaintiffs had right to claim partition. The properties were self acquired property of Morarajibhai and by way of succession, the plaintiffs could claim partition. By virtue of documents at exhibits 99 and 100, the defendant no.14 had given up his rights and he had no authority to relinquish the rights of the plaintiffs. On the death of Morarajibhai the coparcenery was constituted and rights were created in favour of the plaintiffs. In that regard, the learned counsel placed reliance on the decision in *C.N.Arunachala Mudliar Vs. C.A.Muruganatha Mudaliar and another* AIR 1953 Supreme Court 495 as well as the provisions of Chapter XII of Hindu Law by Mulla.

Shri M.R.Johrapurkar, the learned counsel for the respondent nos. 4 to 11 also supported the impugned judgment. It was submitted that in the light of law laid down in *Narayan Ramchandra Katkar and others V. Arjun Bhimrao Gore and others* AIR 1986 Bombay 122, the suit as filed was maintainable. He submitted that adverse findings recorded by the trial Court

had been challenged by filing cross objections and the same were rightly allowed by the appellate Court. The learned counsel also placed reliance on the decision in *Aryan Kamal Wadhwa V. Biharilal Wadha(HUF) and Ors. AIR 2009 Bombay 80* in support of his submissions. The defendant no.14 despite opportunity did not depose in the suit with regard to the documents at exhibits 99 and 100. It was thus submitted that there was no reason to interfere with the impugned judgment.

I have heard learned counsel for the parties and I have also perused the impugned judgments. The Courts have recorded a finding of fact that the suit property was the self acquired property of Morarajibhai. By executing documents at exhibits 99 and 100, the defendant no.14 relinquished his own rights in that property. It was not permissible for the defendant no.14 to relinquish the rights of the plaintiffs, who were born subsequent to the execution of those documents. The future rights of the parties could not be governed by execution of the relinquishment deed executed prior to their birth. As per the provisions of Chapter XII of Mulla Hindu Law and especially Clause 221 thereof, it becomes clear that after the death of Morarajibhai, the coparcenery was created and the plaintiffs got right in the estate of Morarajibhai. The decision in C.N.Arunachala Mudliar(supra) especially para 12 thereof, clearly indicates that the plaintiffs had a right in the suit property for claiming the relief of partition. That the suit for partition is maintainable during the lifetime of the father has been held in Narayan Ramchandra Katkar and others (supra) which decision has been subsequently followed in Aryan Kamal Wadhwa (supra). This legal position has been considered and applied by the Courts while holding the suit to be maintainable and granting relief of partition.

The decisions relied upon by the learned counsel for the appellants do not support his contention considering the facts of the present case. In Sheela Devi (supra), it was found that insofar as ancestral property is concerned, alienations cannot be objected to by the son with regard to such alienations that were made prior to his birth. As noted above, it has been

found that the suit properties were self acquired properties of Morarajibhai. Similar is the situation in Uttam (supra) which also considers the nature of right of grandson in ancestral property. The fact that the suit property was the self acquired property of Morarajibhai is a finding of fact which cannot be interfered.

Thus, on considering the judgment of the appellate Court it is found that after considering all the legal aspects, the decree for partition has been maintained. The substantial questions of law as framed are answered by holding that the suit for partition and separate possession that was filed by the son of defendant no.14 during his lifetime was maintainable. The documents at Exhibits 99 and 100 would not affect the legal rights of the plaintiffs.

As a result of aforesaid discussion, there is no reason to interfere with the judgment of the appellate Court. The second appeal stands dismissed with no orders as to costs.

The decree in question shall not be executed for a period of **six weeks** from today.

JUDGE

Andurkar