

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 377 OF 2018
ALONGWITH
CIVIL APPLICATION NO. 894 OF 2018

Balaso Krishna Ghadge,
(wrongly named in the suit as
Lalaso Krishna Ghadge) and Ors.

....Appellants

: V E R S U S :

1. Maruti Joti Pawar,
(since deceased through his heirs
and legal representatives) and Ors.

....Respondents

* * * * *

Mr. Dilip Bodake, Advocate for the appellants

CORAM : SANDEEP K. SHINDE, J.

Order Resd on : 18th January, 2019.

Order Pron on : 13th February, 2019.

ORAL ORDER :

1. Appellants, were the defendants no.15, 17, 18, 19, 20 and 21 in the Regular Civil Suit No. 332 of 1981 filed by the respondents no.1 and 2 who were the plaintiffs in the suit for partition, which was filed on 9th December, 1981.

2. Pending partition suit;

(a)appellant no.1 (defendant no.15) purchased part of the suit land from defendant no.3 vide sale-deed dated 19th April, 1987,

(b)appellant no.2 (defendant no.17) purchased part of the suit land from defendant no.8 vide sale-deed dated 20th February, 1989.

(c)appellant no.3 (defendant no.18) purchased part of the suit land from defendant no.8 vide sale-deed dated 20th February, 1989;

(d)appellant no.4 (defendant no.19) purchased part of the suit land from defendant no.8 vide sale-deed dated 20th February, 1989;

(e)appellant no.5 (defendant no.20) purchased part of the suit land from defendant no.7 vide sale-deed dated 20th February, 1990.

(f)appellant no.6 (defendant no.21) purchased part of the suit land from defendant no.11 vide sale-deed 25th February, 1990.

3. It may be stated that appellant no.7 herein was not party to the suit. She had applied to the learned District

Judge in Regular Civil Appeal No. 142 of 2010 to implead herself as a party respondent therein vide application No.3 of 2007. This appellant has purchased part of the suit property vide registered sale-deed dated 26th July, 2001 from defendant no.2 i.e. pending suit.

4. It may also be stated that, appellants no.1 to 6 were not party defendants when the suit was instituted, but impleaded and summons were issued on 14th July, 1993. Rojnama shows, appellants avoided the service of summons. Be that as it may, in April, 1994, appellants no.1, 2 and 3 appeared in the suit and sought time to file the written statement. The rojnama further shows that, written statement was filed only by the appellant no.2 (defendant no.17). The rojnama shows that, though appellants no.3, 4 and 6 were served, the suit proceeded ex-parte against them. It may also be stated that, appellants no.1 to 6 did not lead evidence. Except appellants no.2 and 5, others did not even file the written statement. Admittedly, all the appellants had purchased part of the suit land when suit for partition was pending.

5. I have gone through the judgment of the trial Court wherein there is a reference to the written statement of defendant no.17 (appellant no.2 herein) wherefrom it appears that defendant no.17 contended that he had purchased the suit land after due enquiry and prayed for the cost of Rs.2,000/- for incorrectly impleading him in the suit. Defendant no.20 (appellant no.5 herein) had filed a written statement and submitted that his name was also mutated in the record of rights, on the basis of the sale-deed dated 20th February, 1990 and asked for the compensatory cost of Rs.3,000/- for impleading him as party defendant unnecessarily.

6. Regular Civil Suit No. 332 of 1981 was decreed by the trial court after twenty three years on 25th June, 2004 whereby the plaintiff no.1 was held entitled to 1/4th share, defendants no.1 to 4 were held entitled to 1/24th share each and defendants no.5 and 6 for 1/6th share each in the suit lands. The decree passed by the trial Court was challenged by the plaintiffs in Regular Civil Appeal No. 142 of 2010 ("First Appeal" for short). The appellants herein did not prefer appeal though defendant no.7, defendant no.8 and

defendant no.11 were not allotted any share in the decree for partition, who had sold the part of the suit property to appellants no.2, 3, 4, 5 and 6. Neither these defendants nor the appellants had preferred Appeal against the judgment and decree passed by the trial Court. It is to be stated that, appellants no.2, 3, 4, 5 and 6 were infact 'aggrieved', by the judgment of the trial Court for the simple reason that in the decree of partition, no land was allotted to those defendants from whom appellants had purchased the part of the suit land during the pendency of the suit. In so far as, appellant no.1 is concerned, he had purchased part of the suit land from defendant no.3. In the decree passed by the trial Court, 1/24th share was allotted to defendant no.3. Even this appellant did not prefer appeal against the decree passed by the Appellate Court. The rojnama clearly indicates, the appellants tried their level best to prolong the litigation by keeping themselves away from the suit proceedings, as they were served in Appeal, by paper publication in February, 2009. It is on the backdrop of the aforesaid facts, the grounds raised in the present appeal are required to be appreciated.

7. The decree passed by the trial Court was challenged in the First Appeal by respondents no.1 and 2 (original plaintiffs) wherein the present appellants were respondents, except appellant no.7. It is contended that, the First Appeal was withdrawn in the Lok-Nyayalay on 13th December, 2014 and only after receiving the notice from the T.I.L.R. on 24th July, 2016, the appellants learnt that First Appeal No. 142 of 2010 was withdrawn and the decree passed by the trial Court was put to execution.

8. It is in the facts aforesaid, the appellants had preferred Regular Civil Appeal in November, 2016 alongwith an application seeking condonation of 13 years of delay.

9. The learned District Judge refused to condone the delay vide order dated 23rd April, 2018. It is against this order, the Second Appeal is preferred.

10. Before I advert to the contention raised by the appellant, it may be stated that the suit for partition was filed in the year 1981. The appellants herein had appeared in the suit in April, 1994. During the pendency of the suit,

the appellants purchased part of the suit lands. None of the appellants led evidence. Except appellants no.2 and 5, other appellants had not even filed written statement. The proceedings show that in the Regular Civil Appeal preferred by respondents no.1 and 2 (original plaintiffs), the appellants herein were served by paper publication in February, 2009. It all indicates that appellants were avoiding and keeping themselves away from the suit proceedings. On the backdrop of these facts, I will deal with the contentions raised by the learned Counsel for the appellant.

11. It is submitted that, the appellants are the purchasers of the undivided share in the suit property from their respective vendors-co-sharers. It is contended that, Regular Civil Appeal was withdrawn unilaterally by the appellants without notice. It is contended that, the Appellate Court ought, not to have, granted leave to withdraw the Appeal without the consent of the parties to the Appeal. It is submitted that in the suit for partition, all defendants are the plaintiffs and vice-a-versa. It is therefore submitted that the order granting leave to withdraw Appeal

caused prejudice to their interest. It is submitted that, in the proceedings for condonation of delay, the Court below ought to have taken this fact into consideration. It is submitted that sufficient cause was shown for condoning the delay of 13 years.

12. At the outset, it may be stated that merely because undivided share is purchased from the member of the joint family, the purchaser does not step in shoes of member of the family for all purposes. He has right to file a separate suit for partition against the members of the family. In the suit for partition, all defendants are plaintiffs because each of them, receive share in the partition. However, this privilege or advantage cannot be extended to third party purchaser in so far as their right to file suit for partition and possession of their share is concerned. Third Party Purchasers (appellants herein) cannot claim that because co-owner has filed an appeal, they were not required to pursue their remedy. It is for this reason, the appellant cannot contend that, they had not preferred Regular Civil Appeal against the decree of the trial Court because in the suit for partition, all defendants are the plaintiffs. In my

view, taking into consideration the conduct of the appellants to keep themselves away from the suit and appeal proceedings, it cannot be said that, they were unaware of withdrawal of the Appeal filed by respondents no.1 and 2 herein. That even otherwise, the purchasers of the undivided share in the joint family property have a right to file the suit for partition. Infact, the appellants herein had purchased part of the suit land during the pendency of the suit. They did not lead any evidence. They are all living in the same Taluka where the land is situate. It is not their case that, they were living in some other State or District. A fact cannot be ignored that, though these appellants are living in the same Taluka, they were served by paper publication in the appeal proceedings. All these facts, if taken together, leads me to draw the inference that the appellants are interested in prolonging the litigation. That even otherwise, the cause shown by them is not sufficient on the backdrop of the facts aforesaid to condone the delay. In view of the facts aforesaid, the Appeal does not give rise to any substantial question of law. The Appeal is accordingly dismissed.

13. In view of dismissal of the Appeal, Civil Application No. 894 of 2018 does not survive. The same is accordingly disposed of.

(SANDEEP K. SHINDE, J)