

***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 572 OF 2015
WITH
CIVIL APPLICATION 1274 OF 2015***

Padmini Vishwanath Deshmukhe & Ors. ... Appellants

Vs

Madhukar Bhika Deshmukhe
Since deceased through legal heirs
Sunil Madhukar Deshmukhe & Ors. ... Respondents

Adv. Mahindra B. Deshmukh, Advocate for the Appellants.
Mr. Vivek Vijay Salunke, Advocate for Respondents No. 1-A,
1-C, 1-D, 1-E, 2-A to 2-D, 3 to 9.

CORAM : SANDEEP K. SHINDE J.
DATE : JUNE 4th, 2019

ORDER :

1. Heard Learned Counsel for the parties.
2. One Jagannath Pandurang Deshmukhe had filed Regular Civil Suit No. 303 of 1997 in the Court of Civil Judge, Junior Division and sought decree in terms of following reliefs :-
 - (i) that the defendants no. 1 to 9 be directed to pay plaintiffs' share in the rent, which they are collecting from defendants no. 8 and 9;

(ii) defendants be restrained from dispossessing from the suit property;

(iii) defendants no. 8 and 9 be evicted from the shops, which they are occupying and constructed in the suit property.

The suit was filed in August, 1997.

3. Pending the suit, Jagannath Pandurang Deshmukhe died and his heirs, legal representatives were brought on record.

4. The suit properties are :-

a) Grampanchayat Property No. 139, known as “Vitthal Mandir” and two rooms therein;

(b) Grampanchayat Property No. 56, open plot known as “Tulshi Vrundavan”.

5. Plaintiffs' case is that the suit properties are not partible. The plaintiffs and the respondents are representing the branch of Pandurang and Prabhu @ Parsu, respectively, two sons of Sakharam (common ancestor). The suit was filed by the son of Pandurang Jagannath. The defendants are from the branch of Prabhu @ Parsu. Plaintiffs would claim that since the suit properties were not divisible, as part of it houses a temple, plaintiffs and father of defendants constructed two shops in the suit property described in

Plaint para No. 1-A and these shops were let out on monthly rent to the defendants no. 8 and 9. It is plaintiffs' case that Rs. 500/- was monthly rent for each of the shops, and that till the death of defendants' father, he was receiving his share, therein regularly, but since after death of Bhiku (father of defendants no. 1 to 6), defendant refused to share the rent to the plaintiffs. The plaintiffs would plead the cause of action arose in June, 1997, when the defendants refused to acknowledge his share in the suit property and in the rent. Plaintiff under the circumstances, was also apprehending his possession and enjoyment in the suit property and therefore brought the subject suit for the reliefs as stated herein above.

6. The defendants no. 1 to 5 denied the suit claim and would assert that since 1940 Prabhu @ Parsu and Pandurang (Predecessor-in-title of the plaintiffs and defendants) were living separately for all purposes, upon partition of the joint family properties. That in the partition, the suit properties were given to the share of Prabhu (their predecessor-in-title) and after the demise of Prabhu, the suit properties were succeeded by his son Appa and after Appa's death, were succeeded by Bhiku and after Bhiku's death, were succeeded by the defendants. The defendants would also contend the suit shops, which were allegedly let out to the defendants no. 8 and 9 and were constructed by them and they also denied the shops were let out to the tenants, who are impleaded as defendants no. 8 and 9. It is

defendants' case that oral partition was given effect to since 1940 and since then the members of the joint family are in enjoyment of the properties, which were given to their share.

7. Learned Trial Judge decreed the suit; however the decree was reversed by First Appellate Court in Regular Civil Appeal No. 120 of 2006. It is against the decree passed in Regular Civil Appeal No. 120 of 2006, this second appeal is preferred.

8. I have gone through the pleadings and evidence. Before advertng to the evidence, it may be stated that the plaintiffs did not ask for share in the suit property but only sought decree for share in the rent and of perpetual injunction. As against this, the defendants have set up the case that properties were partitioned way back in 1940 and the suit properties were given to the share in their predecessor-in-title.

9. Learned counsel would contend that the Appellate Court has misread the evidence and findings recorded are perverse. To test this argument, with the assistance of the counsel for the parties, I have gone through the evidence.

10. After the death of original plaintiff Jagannath Pandurang Deshmukhe, his estate was represented by eight legal

representatives. However, they have chosen to examine the daughter-in-law of original plaintiff, Jagannath Pandurang Deshmukhe. Her evidence discloses that her father-in-law was throughout living at Mumbai, as he was employed in the police force and only after the retirement, he settled in his village. She deposed as Power of Attorney of her husband Vishwanath Deshmukhe, since he had suffered a stroke. In evidence, she was suggested that joint family properties were partitioned in 1940 and the suit properties were given in the share of predecessor-in-title of the defendant. Obviously, she denied this suggestion and also denied other suggestion that Grampanchayat Milkat property no. 50 and 41 were given in the share to her father-in-law. However, this witness admitted that in the revenue record name of the defendants' predecessor-in-title has been recorded on the basis of the partition. This witness however, could not produce on evidence that the two shops, which were allegedly given on rent were constructed jointly by the original plaintiffs and the defendants.

On the other hand, revenue record reflects factum of partition and that too since 1940, on the basis of which name of defendants' predecessor-in-title was recorded. This fact has been admitted by the plaintiffs' witness in cross examination.

11. Thus, after going through the evidence on record, in my view the defendants have proved that the suit properties were partitioned

in way back in 1940 and for all purposes, the parties to the suit were living separately and were enjoying the properties, which fell to their share. In the given set of facts, in my view, the findings recorded by the Appellate Court is consistent with the evidence on record and nothing has been pointed out to hold that said findings are perverse.

12. Appeal therefore does not give rise to any substantial question of law. Appeal is therefore dismissed.

13. Civil Application No. 1274 of 2015 is disposed of accordingly.

(SANDEEP K. SHINDE, J.)