

bdp

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL (ST.) NO. 2210 OF 2019
ALONG WITH
CIVIL APPLICATION NO. 314 of 2019**

Mrs. Varsha Ashok Khopade
age – major, occupation – household,
r/o. Plot No.41, Sushrushanagar,
Deokar Panand, Shivaji Peth,
Kolhapur – 416 012.

**... Appellant/
Applicant**

Versus

- 1) Pramilabai Dattatraya Lingras,**
since deceased through heirs and legal
representatives 2 to 11 herein
below and the Applicant hereinabove
- 2) Jayprakash Dattatraya Lingra,**
age 72 years, occupation retired,
r/o. 1748 k/1 Rajarampuri 5th lane
“E” ward Kolhapur.
- 3) Suryaprakash Dattatraya Lingras,**
age 70 years, occupation nil,
r/o. 1748 k/1 Rajarampuri 5th lane
“E” ward Kolhapur.
- 4) Gurunath Dattatraya Lingras,**
age 64 years, occupation retired,
r/o. 1748 k/1 Rajarampuri 5th lane
“E” ward Kolhapur.
- 5) Jayashri Mahadeo Vhosamani,**
age 76 years, occupation household,
r/o. Dasharath Apartment, Mali Colony,
Flat No.9, Takala “E” Ward Kolhapur.
- 6) Ratnaprabha Ramesh Bhosale,**
age 66 years, occupation household,
r/o. c/o. Vijay Patil, House No. 1868,
Shani Mandir, Rajarampuri, 7th lane,

Kolhapur. c/o. Deepak Wadkar
Plot No.3, Kamagar Housing Society,
Rajarampuri 8th lane, Kolhapur.

- 7) **Rajashri Dilip Kesarkar,**
age 58 years, occupation household,
r/o. Near Shankaracharya Math,
Shukrawar Peth, Kolhapur.
- 8) **Vinod Vilas Karajagi,**
age 46 years, occupation service,
r/o. R.h. 73, Sai Iccha Near Model
College, B wing room no. 10, MIDC,
Dombivali (East), Dist. Thane.
- 9) **Sou. Anita Rahul Balsar,**
age 42 years, occupation household,
r/o. R-53, Swamiprasad, Near Tilak College,
MIDC, Dombivali (East),
Dist. Thane.
- 10) **Archana Vilas Karajagi,**
age 38 years, occupation household,
r/o. R.h. 73, Sai Iccha Near Model
College, B wing room no. 10, MIDC,
Dombivali (East), Dist. Thane.
- 11) **Kalpana Vilas karajagi,**
age 33 years, occupation household,
r/o. R.h. 73, Sai Iccha Near Model
College, B wing room no. 10, MIDC,
Dombivali (East), Dist. Thane.

... Respondents

.....

Mr. Chetan G. Patil along with Mr. Mandar G. Bagkar, Advocates for the Appellant.

Mr. Yuvraj P. Narvankar along with Mr. Vasant R. Kadam, Advocates for the Respondent Nos.2 to 4.

.....

CORAM : R.D. DHANUKA, J.

RESERVED ON : 26th AUGUST, 2019

PRONOUNCED ON : 4th SEPTEMBER, 2019

:- J U D G M E N T :-

. By this appeal filed under Section 100 of the Code of Civil Procedure, 1908, the Plaintiff (original Petitioner) has impugned the judgment and decree dated 2nd May, 2014 passed by the learned Trial Judge, dismissing the suit filed by the Plaintiff *inter-alia* praying for partition and separate possession of the property bearing City Survey No. 1748 K/1, situated at 'E' Ward, Rajarampuri, 5th Lane in Kolhapur city and also impugning the judgment and decree dated 7th December, 2018 passed by the learned Ad-hoc District Judge-1, Kolhapur, dismissing the appeal filed by the Plaintiff. Some of the relevant facts for the purpose of deciding this appeal, are as under:-

2. The parties in this judgment are described as per their original status before the Trial Court. The Defendant no.1 is widow of the Mr. Dattatraya Lingras and mother of Defendant nos. 2 to 4, who are her sons and the Plaintiff, Defendant nos. 5, 6 and 7 are the daughters of the Defendant no.1. Defendant Nos. 8 to 11 are the legal heirs of the said Savita, who was one of the daughter of the said Mr. Dattatraya Lingras. It was the case of the Plaintiff that the suit property was an ancestral property coming to the share of the said Mr. Dattatraya Lingras. The said Mr. Dattatraya Lingras died on 10th May, 1971. The Plaintiff was married on 4th July, 1984. Defendant No. 2 to 4, 6 and 7 were married after the death of the father.

3. It was the case of the Plaintiff that the Plaintiff and all the Defendants were using the suit property being joint family property. Till the marriage of the daughters of the said Mr. Dattatraya Lingras, all daughters were residing in the suit property. There was no partition of the suit property. It was the case of the Plaintiff that after the death of the father Mr. Dattatraya Lingras, the Plaintiff and Defendant no.1 to 8 and Defendant no.9 to 11 collectively, each have $1/9^{\text{th}}$ share in the suit property.

4. On 26th May, 2009, the Plaintiff filed a suit for partition and separate possession against the Defendants being Spl. Civil Suit No. 193 of 2009. The Defendant nos. 1, 3 and 4 filed written statement and admitted the relationship of the said deceased Mr. Dattatraya Lingras with the Plaintiff. It was denied that the suit property was the joint family property or that all the Defendants and the said Mr. Dattatraya Lingras were residing jointly. It was the case of the Defendant nos. 1, 3 and 4 that the suit property was self-acquired property of the said Mr. Dattatraya Lingras. The ancestral property of Mr. Dattatraya Lingras was partitioned with his brothers. In the said partition, City Survey No. 1088, gold ornaments and some cash amount were received by Mr. Dattatraya Lingras.

5. It was the case of the Defendant nos. 1, 3 and 4 that the said Mr. Dattatraya Lingras was in habit of playing *Matka* (gambling) and was spending more amount in the said gambling. The said Mr. Dattatraya Lingras and the Defendant nos. 1, 3 and 4 accordingly appointed an

arbitrator, who made an arbitral award on 22nd June, 1956, thereby partitioning the suit property. In so far as property bearing City Survey No. 1086 is concerned, the said property came to the share of Defendant nos. 1 to 4. The said award was duly registered. Based on the award rendered by the learned arbitrator, the name of the said Mr. Dattatraya Lingras and the Defendant nos. 1 and 2 came to be recorded in the mutation entries in the year 1956 itself. Defendant No.2 filed a separate written statement adopting the contentions raised by the Defendant nos. 1, 3 and 4. Defendant Nos. 5, 7 to 11 did not appear and thus the suit proceeded *ex-parte* against them. Defendant No.6 filed a written statement admitting relationship with the Plaintiff and the other Defendants. The mother of Defendant nos. 8 to 11 died in the year 1981. The Defendant nos. 2 to 4, 6 and 7 were married after the death of said Mr. Dattatraya Lingras.

6. The learned Trial Judge formulated six issues for determination. The Plaintiff examined a witness, Defendant no.6 examined a witness and Defendant nos. 1 to 4 examined witnesses. The learned Trial Judge dismissed the suit filed by the Plaintiff. Being aggrieved by the said judgment and decree dated 2nd May, 2014, the Plaintiff filed Regular Civil Appeal bearing No.282 of 2016 before the learned Ad-hoc District Judge-1, Kolhapur. The learned Ad-hoc District Judge-1 dismissed the said Regular Civil Appeal filed by the Plaintiff. The Plaintiff filed this Second Appeal being aggrieved by the judgments and decrees passed by the two Courts below.

7. Mr. Chetan Patil, learned Counsel for the Plaintiff, invited my attention to some of the documents annexed to the second appeal, the findings rendered by the two Courts below and would submit that the learned Trial Judge has declared the Defendant as the owner of the suit property merely on the basis of arbitral award passed on 22nd June, 1956. The Defendants did not produce arbitration agreement alleged to have been entered into between the parties to the arbitration proceedings. He submits that in absence of any arbitration agreement, the learned arbitrator did not have jurisdiction to make any award. The learned Counsel placed reliance on Sections 14, 17, 30, 31, 32 and 33 of the Arbitration Act, 1940 and would submit that since filing of the arbitral award was mandatory and was not filed in Court, the said alleged arbitral award was not enforceable in law. No decree in terms of the arbitral award was made by the competent Court. No reliefs thus could be claimed by the Defendants based on the said arbitral award in the said Civil Suit filed by the Plaintiff.

8. In support of this submission, learned Counsel placed reliance on the judgment of Andhra Pradesh High Court in case of ***Sait Pamandass Sugnaram v/s. S. Manikyam Pillai and Others, AIR 1960 AP 59 (V 47 V 19)*** and in particular paragraphs 11, 16 and 20 to 22. The learned Counsel invited my attention to the findings rendered by the learned Trial Judge in paragraph 19 of the judgment and decree dated 2nd May, 2014 and would submit that the learned Trial Judge has dismissed the said suit on the

ground that the suit was not filed within 3 years from the date of the Plaintiff attaining the age of majority. The Plaintiff kept quiet for a period of 30 years even after the date of attaining majority.

9. It is submitted by the learned Counsel that the Plaintiff was born on 7th November, 1955 i.e. before the commencement of Hindu Succession Act, 1956 and thus in the context of amended Section 6 thereof on or from the commencement of Hindu Succession (Amendment) Act, 2005 and overriding effect of the said act, the Plaintiff was entitled to share in the property of deceased Mr. Dattatraya Lingras as a married daughter, since the suit property was self-acquired property at the stage of institution of the suit filed by the Plaintiff on 8th September, 2009.

10. It is submitted by the learned Counsel that the First Appellate Court ought to have exercised its jurisdiction under Section 107 read with Order XLI Rule 33 of the Code of Civil Procedure, 1908 and ought to have interfered with the impugned judgment and decree passed by the Trial Court. Learned Counsel placed reliance on the judgment of Supreme Court in case of ***H. Siddiqui (dead) by LRS. v/s. A. Ramalingam (2011) 4 SCC 240*** and in particular paragraphs 21 and 22.

11. Mr. Narvankar, learned Counsel for the Defendants on the other hand submits that on 16th March, 1956, Mr. Dinkar Mane was appointed as the arbitrator for partition of the self-acquired property of Mr. Dattatraya Lingras. The said arbitrator passed an arbitral award on 22nd June, 1956 and

declared the share of the said Mr. Dattatraya Lingras, who was father of the Plaintiff and some of the Defendants and husband of Defendant no.1. The said arbitral award was registered on the same date. The self-acquired properties of the said deceased Mr. Dattatraya Lingras were partitioned between the parties to the said arbitral proceedings. The names of the contesting Defendants were already mutated in the record in pursuance of the said partition deed (arbitral award) on 31st December, 1957.

12. It is submitted by the learned Counsel that though the Plaintiff had attained the age of majority in the year 1958, the Plaintiff did not challenge the said registered deed nor the mutation entry in the name of the contesting Defendants. On 4th July, 1984, the Plaintiff got married. Between the year 1984 and 2005, the Plaintiff did not challenge the partition deed though registered or even the mutation entry in the name of his clients. He submits that only after the provision of Hindu Succession Act were amended in the year 2005, the Plaintiff chose to file the Special Civil Suit *inter-alia* praying for partition and separate possession in respect of the suit properties. He submits that the partition of the properties, which were subject matter of the suit had already taken place much prior to the date of filing of suit. The Civil Suit was only filed on 27th May, 2009. No declaratory relief was sought by the Plaintiff in respect of the earlier partition already effected in the year 1956.

13. It is submitted that Plaintiff had complete knowledge of the arbitral

award made by the learned arbitrator on 22nd June, 1956 and about the registration of the said arbitral award and actual partition of the suit property. Suit was thus *ex-facie* barred by limitation. He submits that the contesting Defendants had specifically made a reference to the arbitral award dated 22nd June, 1956 in the written statement filed before the learned Trial Judge. The Plaintiff did not apply for amendment to the plaint and did not challenge the said partition already effected as far back as in the year 1956.

14. Learned Counsel for the Defendant nos. 2 to 4 strongly placed reliance on the judgment of the Hon'ble Supreme Court in case of ***Uttam V/s. Saubhag Singh and Ors., 2016(3) ALL MR 451(S.C.)*** and more particularly in paragraph 8 thereof and would submit that in view of Section 4 of the Hindu Succession Act, 1956 and Section 6 thereof the Plaintiff was not entitled to any share in the suit property.

15. Learned Counsel for the Defendant nos. 2 to 4 invited my attention to various findings of fact rendered by the Trial Court in the judgment and decree dated 2nd May, 2014 and would submit that the learned Trial Judge after considering the oral and documentary evidence rightly rejected the suit filed by the Plaintiff. The learned Trial Judge also has rendered a finding that in the cross-examination of the Plaintiff, she had stated about partition of the suit property already effected as per the earlier arbitral award and since 16th March, 1956, the Defendant nos. 1 to 4 and the

Plaintiff had started residing separately.

16. Learned Counsel for the Defendant nos. 2 to 4 also invited my attention to the judgment and decree passed by the First Appellate Court on 7th December, 2018 and would submit that the First Appellate Court also considered the pleadings, documents, oral evidence and various judgments relied upon by both the parties and has rightly dismissed the said Regular Civil Appeal No. 282 of 2016 filed by the Plaintiff. He submits that the findings of facts being concurrent and not perverse, cannot be interfered with by this Court in this second appeal filed under Section 100 of the Code of Civil Procedure, 1908.

17. In so far as the issue raised by the learned Counsel for the Plaintiff that there was no arbitral agreement produced by the defendant no.1 to 4 or that the arbitral award was not filed in Court as contemplated under Section 17 of the Arbitration Act, 1940 and thus the said arbitral award was not enforceable in law is concerned, it is submitted by the learned Counsel that the said arbitral award rendered by the learned arbitrator was already registered as far back as on 22nd June, 1956. None of the parties to the arbitral agreement had disputed the existence of arbitral agreement. The said arbitral award has been already acted upon more than 60 years ago by the parties to the arbitration agreement and to the arbitral proceedings.

18. Learned Counsel for the Defendant nos. 2 to 4 distinguished the judgment relied upon by the learned Counsel for the Plaintiff. The learned

Counsel invited my attention to some of the portions of the oral evidence led by the Plaintiff and would submit that the Plaintiff was fully aware of the arbitral award and the partition having been effected pursuant to the said arbitral award, which was duly registered.

19. Mr. Chetan Patil, learned Counsel for the Plaintiff in rejoinder would submit that since the defendants have failed to produce the arbitral agreement referred in the arbitral award and since the said arbitral award was not filed in Court, the said arbitral award was not binding on the Plaintiff.

20. The Plaintiff and the Defendants nos. 2 to 7 are real brothers and sisters. Defendant No.1 was their mother. Defendant Nos. 8 to 11 are the legal heirs of the deceased Savita, who was sister of the Plaintiff and Defendant nos. 2 to 7. It is not in dispute that the Plaintiff was married on 4th July, 1984 and the Defendant nos. 2 to 5 and 6 and 7 were married after the death of father Mr. Dattatraya Lingras. The Plaintiff also did not dispute that till her marriage, the Plaintiff was residing in the suit property. The Plaintiff had claimed 1/9 share in the suit property. The Plaintiff has not disputed that the arbitral award dated 22nd June, 1956 was already registered on the same date. The said arbitral award declared the share of the said Mr. Dattatraya Lingras and his wife and sons. A perusal of the record indicates that it is an undisputed position that on 31st December, 1957, the names of the contesting Defendants were already recorded in the

mutation entry based on the said partition of the properties.

21. In the year 1958, the Plaintiff had already attained the age of majority. The said Mr. Dattatraya Lingras, the father of the Plaintiff and some of the Defendants, expired on 10th May, 1971. There is also no dispute that on 4th July, 1984 the Plaintiff got married. During the period between 1984 till May, 2009, the Plaintiff did not challenge the said partition deed or mutation entry recording the names of the contesting Defendants based on the said partition deed/arbitral award. Admittedly, the Civil Suit came to be filed only on 27th May, 2009. A perusal of the averments made in the plaint indicates that the Plaintiff did not seek any declaration in respect of the partition already effected in the year 1956/1957 as bad and illegal. The contesting Defendants had referred to the arbitral award dated 22nd June, 1956 in the written statement in the said suit filed by the Plaintiff. The Plaintiff further did not apply for amendment of the suit even at that stage for impugning the said partition deed or the factum of partition.

22. In the oral evidence led by the Defendant nos. 1 to 4, those Defendants proved before the learned Trial Judge that the suit property was self-acquired property of the deceased Mr. Dattatraya Lingras. By the said arbitral award, the property bearing CTS No. 1088 was allotted to the share of the deceased Mr. Dattatraya Lingras, whereas the suit property came to be allotted to the share of Defendants nos. 2 to 4. The learned Trial Judge

considered the said arbitral award as 30 years old document and after adverting to Section 90 of the Indian Evidence Act, placed reliance upon the said arbitral award duly registered on 22nd June, 1956. The learned Trial Judge has rendered a finding that till her marriage and marriage of the other sisters of the Plaintiff, the Plaintiff and her sisters were residing along with parents in the suit property. The learned arbitrator was brother in law of Defendant no.1 and was thus a relative of the Plaintiff and the Defendants. The learned Trial Judge recorded a finding that the learned arbitrator was appointed on 16th March, 1956 and was given authority to give decision in the dispute between said Mr. Dattatraya Lingras and his wife Pramilabai. The Plaintiff did not apply for partition in respect of the property bearing CTS No. 1088, which was allotted to the said deceased Mr. Dattatraya Lingras.

23. A perusal of the cross-examination of the Plaintiff indicates that she had stated in the evidence about partition of the suit property. Though, the Plaintiff denied the existence of the arbitral award but admitted that partition had taken place in respect of the properties of the said deceased Mr. Dattatraya Lingras between himself and the Defendant no.1 and that the said document is registered on 22nd June, 1956.

24. After considering the oral and documentary evidence, in my view, the learned Trial Judge has rightly dismissed the said suit filed by the Plaintiff.

25. A perusal of the judgment and decree passed by the First Appellate Court on 7th December, 018 indicates that the Appellate Court also independently considered the pleadings, oral and documentary evidence given by the parties. The Appellate Court rendered a finding that the Plaintiff was not a coparcener in the suit property and had failed to prove that the suit properties were joint family properties and that she had share therein. The Appellate Court also held that the arbitral award rendered by the learned arbitrator was lawful and was already acted upon. Plaintiff had no *locus-standi* to institute the said suit. The Plaintiff failed to prove that the arbitral award was obtained by playing a fraud on Mr. Dattatraya Lingras. The suit filed by the Plaintiff was also not within the period of limitation.

26. A perusal of the evidence further indicates that in her cross-examination the Plaintiff admitted that in the year 1956, the suit properties and the property bearing CTS No. 1088 were standing in the name of her father Mr. Dattatraya Lingras. She further admitted that the said Mr. Dinkar Mane, the learned arbitrator had resolved the manner of the partition of the properties and that the said resolution was registered on 22nd June, 1956. The First Appellate Court thus rightly held that the Plaintiff had not admittedly contributed any amount to purchase the suit property and thus it was clear that the suit property was self-acquired property of the deceased Mr. Dattatraya Lingras.

27. First Appellate Court also rendered a finding that the admission of the Plaintiff makes it clear that in the year 1956, the suit property and the property having CTS No. 1088 were standing in the name of Mr. Dattatraya Lingras. The Plaintiff Court has held that the separate property held by the deceased Mr. Dattatraya Lingras was thrown into the common coparceners stock and thereby the suit property became coparcenary property and lost its identity of self-acquisition, joint Hindu family property and had become coparcenary property. In my view, the learned Appellate Court rightly held that in the year 1956, the Plaintiff was not a coparcener. Since the partition of the property had already being effected in the year 1956/1957, the Plaintiff could not claim any share in the said property.

28. The First Appellate Court rightly held that the Plaintiff did not challenge the partition deed or mutation entry for last several years. The registered arbitral award clearly showed intention of the separation by the parties to the said arbitral proceedings. The Plaintiff and her sisters were not the coparceners and thus were not entitled to any share in the said property.

29. In so far as the submission of Mr. Chetan Patil, learned Counsel for the Plaintiff that the Defendants had failed to produce any arbitration agreement or that the alleged arbitral award not having been filed in Court under Section 17 of the Arbitration Act, 1940, the same being not

enforceable is concerned, a perusal of the record clearly indicates that the said arbitral award dated 22nd June, 1956 was registered on the same date. Pursuant to the said arbitral award, all the parties to the said arbitral proceedings had acted upon the said arbitral award and had effected the partition of the properties. The effect of such partition was also reflected in the mutation entries. None of the parties to the arbitral proceedings had challenged the said arbitral award. In these circumstances, since there was no dispute between the parties to the arbitral proceedings and the parties had acted upon the said arbitral award, even if the said arbitral award was not filed in Court, in the facts and circumstances of this case, the Plaintiff cannot be allowed to urge that the said arbitral award was not enforceable in law. The Plaintiff has not disputed the registration of the said arbitral award as far back as on 22nd June, 1956.

30. In my view, there is thus no substance in this submission of the learned Counsel for the Plaintiff. The judgment of Andhra Pradesh High Court in case of **Sait Pamandass Sugnaram** (supra) relied upon by Mr. Narvankar, learned Counsel for the Defendant nos. 2 to 4 would clearly apply to the facts of this case. The said property already having been partitioned prior to the date of amendment to Section 6 of the Hindu Succession Act in the year 2005, the said amendment would not affect the partition of the properties already having been effected prior to the date of such amendment. I am respectfully bound by the judgment of the Supreme Court in case of **Uttam V/s. Saubhag Singh and Ors.** (supra).

31. In so far as the judgment of the Supreme Court in case of **H. Siddiqui (dead) by LRS.** (supra) relied upon by the Mr. Chetan Patil, learned Counsel for the Plaintiff is concerned, there is no dispute about the proposition of law laid down by the Supreme Court in the said judgment. A perusal of the judgment and decree rendered by the First Appellate Court clearly indicates that the First Appellate Court has also considered the pleadings, documents and the oral evidence laid down by both the parties and has independently rendered various findings of facts. The judgment and decree passed by the First Appellate Court is in compliance with the powers of the Appellate Court under Order XLI Rule 31 and are in conformity with the guidelines described under the said provision.

32. The findings rendered by the two Courts below being concurrent and not perverse cannot be interfered with by this Court in this second appeal filed under Section 100 of the Code of Civil Procedure, 1908. No substantial question of law arises in this second appeal. The second appeal is devoid of merit.

33. I therefore pass the following order:-

- a) Second Appeal (St.) No. 2210 of 2019 is dismissed.
- b) In view of the dismissal of the Second Appeal, Civil Application No. 314 of 2019 does not survive and is accordingly dismissed. No order as to costs.

(R.D. DHANUKA, J.)