

Urmila Ingale

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 425 OF 2019
WITH
CIVIL APPLICATION NO. 957 OF 2019

Prakash Ramchandra Nal .. Appellant
Vs.
Kishor @ Keshav Ramchandra Nal and ors. .. Respondents

Mr.Dilip Bodake, for the Appellant.

CORAM : M.S.KARNIK, J.
DATE : 23rd JULY, 2019

P.C. :

. Heard learned Counsel for the appellant. Learned Counsel for the appellant has assailed the concurrent findings of the Courts below. The appellant is the original defendant No.1. It is the contention of the learned Counsel for the appellant that the Courts below have not appreciated that the house property No. 480 is not included as a suit property. According to learned Counsel for the appellant, the Suit for partition is not maintainable as house property No. 480 is not included and the Suit should have been dismissed.

2. The next contention of Shri Bodke is that defendant No.1 – Prakash Ramchandra Nal was cultivating agricultural land in his individual capacity. According to Shri Bodke defendant No.1 - Prakash has first resided separately from the family since the year 1977. He therefore submits that he had sufficient means of income and he was cultivating land belonging to D.W. 7. From out of those funds, he was able to purchase the suit property. It is further contention of the learned Counsel for the appellant that Ramchandra - father of defendant No.1 Prakash was addicted to liquor and was not doing any work and therefore was not earning any income.

3. I have gone through the findings of the Courts below. The Courts below have concurrently found that on the date when defendant No.1 claims to have started earning independent income, he was hardly of 16 years of age. The Courts below did not believe the evidence of the witnesses - D.W.7 & D.W.8 of handing over to defendant No.1 possession of the suit land for cultivation in the absence of any document.

Moreover, insofar as these witnesses are concerned, the Courts below have taken into consideration that they are on good terms with the defendant No.1 and are on visiting terms. Appellant has therefore not been able to prove independent source of income.

4. Insofar as plea of appellant - defendant No.1 that he was residing separately from 1977 is concerned, the Courts below have relied upon the voters list for the years 1983, 1988 and 1993 which indicates that defendant No.1 - Prakash was residing jointly in house No. 450 along with other family members. He was thus living as a member of the joint family.

5. Even insofar as the contention of appellant that his father - Ramchandra was not earning any income is concerned, the Courts below relied upon the conditional mortgaged deeds dated 05/07/1979 and 08/06/1981 indicating that the appellant's father, since deceased, was cultivating the lands of others by obtaining the same on conditional mortgage and

deriving income therefrom.

6. Even the witnesses denied that defendant No. 1 was residing separately from his family since 1977. As noticed by Appellate Court there is evidence on record to indicate that appellant - original defendant No.1 - Prakash was helping his father in cultivation and fruit business. The evidence on record indicates that defendant No.1 - Prakash was always residing in joint family. The Courts below have come to the conclusion that evidence on record is not sufficient to arrive at a finding that the appellant has purchased the suit property from his own earnings. On the contrary, it is to be noticed that from the loan obtained by appellant - Prakash for different purposes, not only he has paid installments from the joint family income derived from cultivation of the suit fields, but even the plaintiff had paid some of installments.

7. Appellant - Prakash claimed to have paid the house tax of the suit house and even plaintiff Kishor deposited the house tax amount being in occupation of the half portion of the

suit house. All these materials would indicate that appellant was residing in joint family and properties are purchased from the joint family income.

8. Insofar as the contention of the learned Counsel for appellant that house property No. 480 is not included, the same is ancestral property of deceased Ramchandra i.e. father of defendant No.1 and his brother Dashrath. The materials on record indicates that deceased Ramchandra himself transferred Grampanchayat property No. 480 in favour of his brother Dashrath to which nobody objected. The name of Dashrath is recorded in Grampanchayat record. In the light of this evidence, the Courts below have come to the conclusion that the house property is no more a joint family property of the parties to the Suit.

9. I see no reason to interfere with the concurrent findings recorded by the Courts below. The trial Court has held that plaintiff No1, plaintiff No.2 and defendant No.1 are

entitled to 9/32th share each in the suit property.

10. Learned Counsel for the appellant states that plaintiff No.2 has died on 14/07/2015. So far as the share of plaintiff No.2 is concerned, the same will obviously devolve as per law. No substantial questions of law is involved in the Appeal. Second Appeal is dismissed.

11. If the appellant applies for reshuffling the shares of the defendant in view of the death of plaintiff No.2, such application may be considered by the Executing Court on its own merits and in accordance with law if at all such an application is maintainable.

12. In view of dismissal of the Second Appeal, Civil application does not survive and the same shall stand disposed of.

(M.S.KARNIK, J.)