

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**SECOND APPEAL NO.528 OF 2018
WITH
CIVIL APPLICATION NO.13812 OF 2019
IN SA/528/2018/**

SHYAMSING SAKHARAMSING BUNDELE

VERSUS

RAMSING HIRAMANSING BUNDELE AND OTHERS

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Advocate for Appellant : Mr. G. K. Naik (Thigle)
Advocate for Respondent No.1 : Mr. D. P. Deshpande
Advocate for Respondent No.2 : Mr. V. G. Kodale

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CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 01-10-2021.

ORDER :

1. Present appeal has been filed by original plaintiff No.1 challenging the concurrent decisions. He is challenging the Judgment and decree dated 28-09-2017 passed by learned District Judge-4, Beed in Regular Civil Appeal No.105 of 2010 confirming the final decree dated 09-10-2009 in Special Civil Suit No.123 of 1993 by learned Civil Judge, Senior Division, Beed.

2. Heard learned Advocate Mr. G. K. Naik (Thigle) for appellant, learned Advocate Mr. D. P. Deshpande for respondent No.1 and,

learned Advocate Mr. V. G. Kodale for respondent No.2.

3. It has been vehemently submitted on behalf of the appellant that though the plaintiff had filed suit for partition and separate possession and it was decreed, yet the respondent/defendant Ramsing filed Miscellaneous Civil Application No.227 of 2006 before Civil Judge, Senior Division, Beed under Order XX Rule 18 read with Order XXVI Rule 13 of the Code of Civil Procedure. In fact that applicant was the Judgment Debtor. It was declared in the suit that the plaintiffs together have $1/3^{\text{rd}}$ share in all the properties referred in Clause 'A'. It was then declared that defendant Ramsing has got $2/3^{\text{rd}}$ share in the properties i.e. $1/3^{\text{rd}}$ as a co-parcener and $1/3^{\text{rd}}$ under Will left by one Hiramansing in his favour. Defendant No.1 Ramsing was directed to give accounts in respect of bank balances received by him from Hiramansing. After the said application was filed, Court Commissioner was appointed. Advocate Mr. D. R. Opalkar was appointed to suggest the partition in respect of property described in Schedule 'A'. He submitted the report and the said report has been almost blindly accepted by both the Courts below. The objections those were raised by the Decree Holder i.e. the present appellant, were not considered at all. No proper opportunity

of being heard was given. It could have been seen by both the Courts below that the principle of equitable partition was not adhered to by the Court Commissioner. If we consider the report of the Court Commissioner then it can be seen that the properties which were carrying more value were given to the share of respondent No.1. He has not considered the situation of the property, how much price it will fetch or how much is the market value of that property. He has also not taken into consideration the provisions of Partition Act. At the time of making appointment of a Court Commissioner, the Court ought to have appointed one person from construction line whereby he could have assess the value of the property and would have made more equitable partition. Main problem has been created while distributing/ carving share from House No.3-8-17, when in fact the abutting road was available from the front side, yet the access has been given from the sides from which they will have to incur expenses to create door. When equitable partition has not been made, substantial questions of law are arising in this case requiring admission of the second appeal.

4. Per contra, learned Advocates appearing for respondents No.1 and 2 respectively objected to the admission of the second appeal by

submitting that no substantial questions of law are arising in this case. Whatever has been submitted and shown on behalf of the appellant would at the most infer questions of fact and not of law. Questions of fact cannot be gone into by this Court. Opportunity of putting forward his version or objections was given to the appellant. There is no such division taking into consideration fact that the more valued property has been given to respondent No.1. The division is perfectly made. Advocate Mr. Opalkar has put much efforts to make the partition equitable as far as possible.

5. At the outset, it is to be noted that the suit filed by the present appellant was decreed on 31-12-1996 in Special Civil Suit No.123 of 1993, yet till Miscellaneous Civil Application No.227 of 2006 was filed by the Judgment Debtor himself, no steps were taken by the Decree Holder i.e. the present appellant/original plaintiff. In Miscellaneous Civil Application No.124 of 1997, Advocate Mr. Opelkar was appointed for suggesting partition. He gave his report on or about 30-12-2003 and further it appears that till Miscellaneous Civil Application No.227 of 2006, no final decree was drawn and, therefore, the Judgment Debtor filed the said application i.e. Miscellaneous Civil Application No.227 of 2006 under Order XX Rule

18 read with Order XXVI Rule 13 of the Code of Civil Procedure. In that proceedings, the present appellant filed say and it appears from the record that the present appellant himself had filed that Miscellaneous Civil Application No.124 of 1997. It came to be disposed of for want of prosecution by the present appellant on 10-02-2005 and, therefore, the Judgment Debtor filed Miscellaneous Civil Application No.227 of 2006. In that application he had admitted the proposed partition as suggested by Advocate Mr. Opalkar whereas the present appellant had taken objection only in respect of House No.3-8-17. After hearing both sides, the Court has given a detailed decision in respect of how the division of House No.3-8-17 should be made. Now merely because it is inconvenient to one of the parties, it cannot be said that it is giving rise to a substantial questions of law. In any partition suit when actual partition would be effected, it may be convenient to some person, it may not be some persons to the litigation, that does not mean that such suggestions should be convenient to all. As far as possible the convenience will have to be definitely considered, but when none of the parties agreeable then by judicial order that will have to be made compulsory.

6. When in his say the present appellant has taken objection only in respect of one property and has not given in detail as to how the partition suggested by Advocate Mr. Opalkar is not equitable from the point or angle that the market value of the property is different and it ought to have been taken into consideration, it cannot be said that any legal right is available to the present appellant to agitate the same. It is again at the cost of repetition that as far as convenience of each parties would be seen, however, sometimes some such decisions which are bitter are required to be taken.

7. One more point that was argued that the other part of the decree has not been put to execution, especially the accounts to be taken. In the opinion of this Court, there can be as may as final decrees that can be passed in a preliminary decree and, therefore, for one final decree which can be separately and distinctively passed; we need not wait for action to be taken in respect of those reliefs those have been granted. In fact, plaintiffs i.e. including the present appellant can take up the application for the final decree in respect of the accounts to be taken, provided now there is limitation.

8. Taking into consideration the submissions made, no substantial questions of law are arising in this case. The Courts

below have given proper opportunity to the appellant to put forth his say. Merely because the proposed partition is not convenient to him, it cannot be gone into as it can be certainly said that he has not shown that the proposed partition is not equitable. There is no scope for framing substantial questions of law as contemplated under Section 100 of the Code of Civil Procedure in this case and, therefore, the second appeal stands dismissed. Pending Civil Application stands disposed of.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-