

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.450 OF 2013

SMT. CHAYABAI WD/O. KASHINATH BHAMBIRE AND ANR
VERSUS
SMT. SUBHADRA BAI RAMCHANDRA BHAMBIRE (DIED) THR. LRS
KAMAL SHANTRAM NIGHUT AND ORS.

...
Mr. A. S. Kale a/w Mr. K. A. Kale, Advocate for the applicants.
Mr. A. R. Rathod, Advocate for respondent Nos.3, 4 and 9 (Absent)
Mr. L. B. Palod, Advocate for respondent Nos.5 to 8.
Mr. N. S. Jaju, Advocate for respondent Nos.1-A, 2.
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CORAM : SMT. VIBHA KANKANWADI, J.

Reserved on : 28.09.2021

Pronounced on : 26.10.2021

ORDER :-

. Present appeal has been filed by original plaintiff Nos.1 and 3 to challenge the concurrent finding and decree in respect of rejection of part of their suit i.e. rejection in respect of partition of agricultural lands by both the Courts below.

2. Present appellants and respondent No.9 had filed Regular Civil Suit No.132 of 2000 before IInd Joint Civil Judge Senior Division, Ahmednagar for partition and separate possession of the agricultural lands described in paragraph No.1 of the plaint as well as partition of house properties described in paragraph No.1(a) of the plaint. The said

suit was partly decreed on 08.02.2007. The suit in respect of partition of agricultural land was dismissed. The plaintiffs were jointly held to have 1/3rd share in the house property described in paragraph No.1(a) of the plaint. Defendant No.1-A and defendant No.2 were also held to be entitled to get 1/3rd share each in the said house property. Suit for declaration of sale-deed in respect of agricultural land was also dismissed.

3. Only plaintiffs preferred Regular Civil Appeal No.103 of 2007 before the learned Principal District Judge, Ahmednagar and the said appeal came to be dismissed on 28.01.2013. Hence, this second appeal by original plaintiff Nos.1 and 3.

4. Heard learned Advocate Mr. A. S. Kale and Mr. K. A. Kale for appellants, learned Advocate Mr. L. B. Palod for respondent Nos.5 to 8 and learned Advocate Mr. N. S. Jaju for respondent Nos.1-A and 2. Learned Advocate Mr. A. R. Rathod for respondent Nos.3, 4 and 9 is absent. In order to cut short, it can be said that all of them have made submissions in support of their respective contentions.

5. At the outset, it has been rightly considered by the learned Principal District Judge that since the original defendants did not file any appeal in respect of the decree granted about partition and separate

possession in respect of house properties, that part of decree has become final and the subject matter in the appeal was restricted to rejection of prayer regarding partition of agricultural land and setting aside sale-deeds. In this second appeal also that is the subject matter. The genealogy or the relationship is not disputed. Ramchandra was the ancestor of appellants and defendant Nos.1 to 4. After the death of Ramchandra, he was survived by widow – Subhadra and sons Kashinath and Bhagwan. Kashinath expired on 09.08.1995. He was survived by plaintiffs i.e. his widow and children and defendant Nos.3 and 4, who are also their daughter and son. Subhadra, who was defendant No.1, expired during the pendency of the suit and her legal heirs were brought on record. Ramchandra's son Bhagwan is defendant No.2 and defendant Nos.5 to 8 are the purchasers of the portion of suit properties.

6. Plaintiffs were claiming 1/3rd share in agricultural land Gut No.240/1 admeasuring 1 H 74 R situated at village Nalegaon, Taluka and District Ahmednagar. Defendant Nos.1 and 2 had sold 99 Gunthas from the eastern side and 38 Gunthas from the western side of the said land to defendant Nos.5 to 8 and, therefore, plaintiffs had claimed declaration that those sale-deeds are illegal and not binding on them.

7. Original defendant Nos.1 and 2 had taken the defence that Ramchandra expired in the year 1968 and, thereafter, there was a

partition in the year 1969, in which the suit property was equally divided amongst all the three i.e. defendant Nos.1, 2 and deceased Kashinath. Kashinath had sold 3 Acres of land in the year 1980 to one Jankiram Raghunath Kale and Leelabai Vithalrao Kale, which was out of his 1/3rd share and, therefore, he was holding only 38 Gunthas. However, defendant No.2 purchased 61 R land from Lilabai Kale and Jankiram in the year 1982. So also, Kashinath purchased 60 R land separately. These purchases were out of their separate income. The holding of Kashinath, therefore, went up to 98 R, which was towards the western side and 37 R towards eastern side, whereas the holding of defendant No.2 was to the extent of 99 R. Thereafter, Kashinath sold 61 R land out of his 98 R land in the year 1988 to Shri. Sairam Vinkar Salesman Co-operative Housing Society, Ahmednagar and again his holding went down to only 37 R. Therefore, plaintiffs have no share in the suit property. Defendant Nos.5 to 8 by their written statement claimed that they are the *bona fide* purchasers for value without notice.

8. At the outset, it is to be noted that both the Courts below have held that the defendants have proved previous partition amongst deceased Kashinath and defendant Nos.1 and 2 in the year 1969. To arrive at this conclusion, both the Courts have taken note of the evidence in the form of the admissions given by P.W.1 – Chayabai,

supporting mutation entries and the sale-deeds as well as testimony of defendant No.2. In other words, the defence taken by defendant No.2 is well supported by the documentary evidence in the form of sale-deeds and mutation entries as well as the admissions given by P.W.1 – Chayabai in the cross. Admittedly, Chayabai was not member of the joint family in the year 1969. Therefore, she has no personal knowledge about the same. D.W. - Bhagwan has relied on the mutation entry No.3048 to show that the partition had taken place. It is to be noted that all the three heirs of Ramchandra got equal share. Thereafter, it has come on record by way of oral as well as documentary evidence that 40 R land each was sold out of share of Ramchandra to Leelabai Kale and Jankiram Kale at the time of marriage of Kamal i.e. daughter of Ramchandra. Therefore, the holdings of three heirs of Ramchandra reduced to 38 R each. Thereafter, Bhagwan and Kashinath repurchased land admeasuring 1 H 21 R which was sold to Lilabai and Jankiram and, therefore, Bhagwan's share increased to 99 R and Kashinath's share went to 98 R. However, at that time, defendant No.1, who was their mother, had not contributed and, therefore, her share remained to 38 R only. Thereafter, Kashinath sold 61 R land to Sairam Vinkar Salesman Co-operative Society and Bhagwan has not received any share from the consideration. Only Kashinath was the executant of that document.

This fact is admitted by PW.1 – Chayabai. All these documents and as aforesaid the oral evidence has been taken to be the pieces of evidence supporting the contention of defendant Nos.1 and 2 that there was already a partition in the year 1969. There is no perversity of the Courts below in arriving at this conclusion. When the evidence on record shows that there was already a partition and Kashinath had received his share, there is no question of opening partition again and, therefore, no substantial question of law as contemplated under Section 100 of the Code of Civil Procedure is arising in this case requiring admission of the second appeal. Hence, second appeal stands dismissed.

[SMT. VIBHA KANKANWADI, J.]

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