

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
BENCH AT AURANGABAD

SECOND APPEAL NO.130 OF 2021

Gorakshnath s/o Anandrao Tarte = APPELLANT  
(Orig.Plaintiff)

VERSUS

1. Jagannath s/o Anandrao Tarte = RESPONDENTS  
and Ors. (Orig.Defendants)

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Mr.Sushant B.Choudhary,Advocate for Appellant;

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CORAM : SMT.VIBHA KANKANWADI,J.  
DATE : 5<sup>th</sup> July, 2021.

PER COURT :-

1. Heard learned Advocate appearing for the appellant. He submitted that both the Courts below have not appreciated the evidence properly. Both the Courts have failed to consider that the property in dispute was ancestral property. Though mutation entry discloses name of the plaintiff as well as defendant No.1; yet when the defendant No.1 had come with a case that there was previous partition then he ought to have proved it. There was no specific document regarding the said partition as well as relinquishment of the rights of their sister. In view of the amendment to Section 6 of the Hindu Succession Act, 1956, when a

(2)

daughter having been even equal right in the property then she ought to have received it. The alleged admissions have not been properly considered. In appeal also, the First Appellate Court, though bound by the law to re-appreciate the evidence, has not re-appreciated it properly and, therefore, substantial questions of law are arising in this appeal, requiring admission of the Second Appeal.

2. At the outset, it is to be noted that the present appellant is the original plaintiff, who had filed Regular Civil Suit No.400/2011 before the Joint Civil Judge, Junior Division, Ashti, District Beed for partition and separate possession. The suit properties, situated at village Doithan Tq. Ashti District Beed, more particularly described in para 1 of the Plaint, were thus, -

| Sr.No. | Survey Number | Area<br>H-R. |
|--------|---------------|--------------|
| 1)     | 154/A/1       | 5-63         |
| 2)     | 157/AA/3      | 7-68         |
| 3)     | 164           | 0-77         |
| 4)     | 165           | 0-83         |
| 5)     | 184/A/5       | 0-43         |
| 6)     | 184/AA/3      | 2-47         |

3. The properties were left by their Father Anandrao was survived by the plaintiff and

(3)

defendant No.1 as well as their sister – Hirabai. Later on, Hirabai expired in 2010. According to the plaintiff, there is no partition by metes and bounds. It was an admitted position that the Government had acquired certain portion from Survey No.154/1 and 157/AA for Doithan Storage Tank and the plaintiff and defendant No.1 had received the compensation. The plaintiff, therefore, prayed for partition and separate possession.

. The defendant No.1 had resisted the claim by saying that already there was partition between the plaintiff and defendant No.1 during the life time of their father. Their father had partitioned the land in 1985 in equal shares. At that time itself, Hirabai had relinquished her right from the suit properties. Defendant No.1, therefore, contended that the plaintiff cannot re-open the partition. He also contended that the compensation that was given for the acquisition of their land by the Government, has been received by the plaintiff and defendant No.1 in equal shares. Further, the plaintiff himself had sold 70 Ares land out of Survey No.131/AA/3 to one Chandrabhagabai

(4)

Fakkadrkao Tarte, by a registered sale-deed on 29.6.1992. Defendant No.1 contended that he has spent huge amount for the development of the land, which he is cultivating after the partition.

4. After the Issues were framed, the parties have led oral as well as documentary evidence. The learned Trial Judge has held that the suit properties are not joint Hindu Family properties of the plaintiff and the defendants. It was held that the joint-family properties were already partitioned and, therefore, the plaintiff is not entitled to get the decree. The suit came to be dismissed. The plaintiff thereafter preferred an appeal being Regular Civil Appeal No.29/2016 before the District Court at Beed on 29.6.2018. The decree passed by the Trial court was confirmed and the appeal came to be dismissed. Hence, this Second Appeal.

5. In Ashok Rangnath Magar Vs. Shrikant Govindrao Sangvikar - (2015) 16 SCC 763, the Hon'ble Apex Court held that Second Appeal can be dismissed even without formulating the substantial questions of law. It has been held thus, -

"18. In the light of the provision contained in Section 100 Civil Procedure

Code and the ratio decided by this Court, we come to the following conclusion:-

(i) On the day when the second appeal is listed for hearing on admission if the High Court is satisfied that no substantial question of law is involved, it shall dismiss the second appeal without even formulating the substantial question of law;

(ii) In cases where the High Court after hearing the appeal is satisfied that the substantial question of law is involved, it shall formulate that question and then the appeal shall be heard on those substantial question of law, after giving notice and opportunity of hearing to the respondent;

(iii) In no circumstances the High Court can reverse the judgment of the trial court and the first appellate court without formulating the substantial question of law and complying with the mandatory requirements of Section 100 Civil Procedure Code."

The aforesaid position of law has been reiterated by Three-Judges Bench decision of the Hon'ble Apex Court in the case of Kirpa Ram (Deceased) Through L.Rs. And Ors. Vs. Surendra Deo Gaur and Ors. - (2021) 3 Mah.L.J. 250, wherein it has been held thus, -

"23. Sub-section (1) of Section 100 of the Code contemplates that an appeal shall lie to the High Court if it is satisfied that the case involves a substantial question of law. The substantial question of law is required

to be precisely stated in the memorandum of appeal. If the High Court is satisfied that such substantial question of law is involved, it is required to formulate that question. The appeal has to be heard on the question so formulated. However, the Court has the power to hear appeal on any other substantial question of law on satisfaction of the conditions laid down in the proviso of Section 100 of the Code. Therefore, if the substantial question of law framed by the appellants are found to be arising in the case, only then the High Court is required to formulate the same for consideration. If no such question arises, it is not necessary for the High Court to frame any substantial question of law. The formulation of substantial question of law or reformulation of the same in terms of the proviso arises only if there are some questions of law and not in the absence of any substantial question of law. The High Court is not obliged to frame substantial question of law, in case, it finds no error in the findings recorded by the First Appellate Court."

6. In view of the aforesaid legal position for issuing notice to the respondents, it would be mandatory for this Court to formulate substantial questions of law, if the appellant successfully proves that there are substantial questions of law, which are required to be formulated in this case.

7. The first and foremost fact is that there are concurrent findings of facts by both the Courts

below. The findings are based on oral as well as documentary evidence. Though the plaintiff appears to have come with a case that there is no partition at all till date of the suit by metes and bounds; yet perusal of the judgments of both the Courts below would show that they have appreciated the cross-examination of the plaintiff, wherein he has admitted that Anandrao partitioned all his properties in the year 1985. The plaintiff categorically admitted that in the said partition, half of the shares in all the properties, showing specific four boundaries, were allotted to him as well as separately to defendant No.1. Further, it appears that their sister — Hirabai had relinquished her rights over the suit properties. The important point to be noted is that there appears to be no written document regarding relinquishment of the share by Hirabai. However, to this partition suit, defendant Nos.2 to 4 were the legal heirs of Hirabai. In spite of due service to defendant No.2, he failed to appear and, therefore, the suit had proceeded *ex-parte* against him. Further, the plaintiff had not taken effective steps for serving defendant Nos.3 and 4

and, therefore, the suit came to be dismissed against them for want of taking steps. In fact, the decree, that can be passed in any suit for partition, would be joint and several. If the plaintiff is coming with a case that defendant Nos. 3 and 4 were the co-sharers then when his suit came to be dismissed, because of inaction on the part of the plaintiff, then it ought not to have been proceeded further against the other defendants also. It ought to have been dismissed in toto when the order of dismissing the suit as against defendant Nos.3 and 4 came to be passed. This fact is properly considered in para No.35 of the Judgment by the First Appellate court. This also leads to dismissal of the Second Appeal also as it is not tenable when the plaintiff intends to challenge the said decree passed by the Trial Court.

8. Both the Courts below have properly appreciated the actions by the plaintiff himself so also the actions of defendant No.1 in treating the land, which had come to their share. If there was no partition by metes and bounds, then how the plaintiff could have sold 70 Ares land, is a

(9)

question, which has not been answered by him. Further, defendant No.1 appears to have constructed a tenement of 22 tin-sheets in Survey No.152/A/3 and had taken loan from the Society. Another action of receiving equal compensation amount in respect of acquisition of the land from the Government by the plaintiff and defendant No.1 independently, is also the act suggesting the partition. Though there appears to be no written document regarding the partition; yet the parties had proceeded and were acting in pursuant to the oral partition. Such partition cannot be re-opened and, therefore, the suit was rightly dismissed by the Trial Court. The appeal was also rightly dismissed by the First Appellate Court. No substantial questions of law are arising in this appeal. There is no necessity to formulate substantial questions of law. The Second Appeal thus stands dismissed at the stage of admission itself.

**(SMT. VIBHA KANKANWADI)**  
**JUDGE**

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