

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 340 OF 1992

1] Ramesh Ramrao Mokashe

2] Suresh Ramrao Mokashe
died LRs.

I) Smt. Shalini W/o Suresh Mokashe
Age : 47 years,

II) Sandhya W/o Nareshrao More
Age – 20 years

III) Rani D/o Sureshrao More
Age – 15 years

IV) Santosh S/o Sureshrao Mokashe
Age – 13 years

The applicant no. 2(III) & (IV) are under
Guardianship of their mother namely
Shalini W/o Suresh Mokashe

All R/o Deshmukh Galli, Taluka
Bhokardan, Dist. Jalna

3] Mandabai w/o Ramrao Mukeshe

4] Shardabai W/o Lakshman Pawar

5] Mandabai W/o Ajabrao Pimpale

6] Sheelabai w/o Shrimant Zalte
(Original Defendant)

.. Appellants

Versus

1] Bhimrao Gambhirao Mokashe died
Legal Representatives

i] Gajanan Bhimrao Mokashe died LRs.

1-a) Shobhabai W/o Gajanan Mokashe,
Age 55 years, Occu. Household,
R/o. Paradh, Tq. Bhokardan,
District Jalna

- 1-b) Krashna S/o Gajanan Mokashe,
Age 30 years, Occu. Agril.,
R/o. Paradh, Tq. Bhokardan,
District Jalna
- 1-c) Mehga Ambadas Deshmukh (Jadhav)
Age 35 years, Occu. Household,
R/o. At Post Wadod Tanda,
Tq. Bhokardan, District Jalna
- 1-d) Sushama Pankaj Wagh
Age 27 years, Occu. Household,
R/o. Mehavanbara, Tq. Chalisgaon,
District Jalgaon
- ii] Bhausahab S/o Bhimrao Mokashe
- iii] Bhagirthibai w/o Bhimrao Mokashe
- 2] Kamalabai w/o Bapurao Deshmukh
- 3] Nirmalabai w/o Pandit Deshmukh
- 4] Pinti d/o Prakash Mokashe Deshmukh
Age 9 years, minor, under the guardianship of
maternal uncle Kailash S/o Shenkarrao Deshmukh,
Age Major, Occupation Agricultural,
Residence of village Gunli Post Pophili,
Taluka Malkapur, District Buldhana
- 5] Shamrao Gambhirrao Mokashe, died
Legal Representatives
- i] Julalrao Shamrao Mokashe Deshmukh
died LRs.
- i-a) Smt. Shobhabai Julalrao Mokashe
Age 60 years, Occu. Household,
R/o. Village Paradh Bk.,
Tq. Bhokardan, Dist. Jalna
- i-b) Dnyaneshwar Julalrao Mokashe
Age 31 years, Occu. Household,
R/o. Village Paradh Bk.,
Tq. Bhokardan, Dist. Jalna

ii] Shantabai w/o Shamrao Mokashe Deshmukh

iii] Pushpabai w/o Ramesh Chavan – Deshmukh

All residents of village Parad B.K. Taluka
Bhokardan, District – Jalna (Original Defendants) .. Respondents

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Mr. V.D. Patnurkar, Advocate for the appellants

Mrs. C.S. Deshmukh, Advocate for respondent no. 5(i-a)

Mrs. C.S. Deshmukh, Advocate h/f. Mr. V.S. Badakh, Advocate for
the respondent no. 5(ii) and 5(iii)

None present for respondents no. 1(i-a) to 1(i-d) though served

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CORAM : MANGESH S. PATIL, J.

DATE : 8 MARCH 2022

ORDER :

This is a second appeal by the original plaintiffs who are heirs of one Ramrao. The respondents are the LR's of the original defendants no. 1 and 2. The appellants' predecessor - Ramrao and the predecessor of the respondents - Bhimrao and Shamrao were the real brothers.

2. Averring that Ramrao died on 19-04-1977 and that because of the quarrels among the womenfolk the ancestral house properties were partitioned amongst the three branches and further averring that the suit property described as survey no. 129/1 was an ancestral property which continued to be joint amongst the three brothers, the appellants prayed for partition and separate possession of their 1/3rd share.

3. The respondents who are the LR's of the original defendant no. 1 - Bhimrao and Shamrao contested the suit by their separate written statements. They admitted relation between the parties. They also admitted that the suit property was the ancestral property. Bhimrao contended that the entire joint family property, including the house properties as well as the suit property was divided by metes and bounds in a partition in the year 1984 whereas Shamrao contended that the partition had taken place on 04-06-1950 in which the suit property was allotted to the share of these two defendants - Bhimrao and Shamrao whereas another land survey no. 128/3 which was in-fact a mortgaged property was allotted to Ramrao who subsequently sold it for a consideration of Rs.3000/- by a registered sale deed dated 30-04-1968.

4. With such pleadings, the trial court concluded the hearing and refuted the claims of previous partition and decreed the suit holding the appellants to be entitled to $\frac{1}{3}^{\text{rd}}$ share in the suit property.

5. By the judgment and order of the lower appellate court under challenge, the appeal was allowed. Judgment of the trial court was reversed and the suit was dismissed upholding the stand of the defendant – Shamrao of there being a previous partition.

6. The second appeal has been admitted on following substantial question :

“Whether a mortgaged land survey no. 128/3 is a partible estate ?”

7. I have heard the learned advocate Mr. Patnurkar for the appellants and learned advocate Mrs. Deshmukh for respondents who are Shamrao's heirs.

8. As can be gathered, there is no dispute about the relation between the parties. There is also no dispute about the fact that the suit property i.e. land survey no. 129 is an ancestral property. There is also no dispute that the family also owned few house properties which were the ancestral and joint family properties. The only dispute, therefore, revolves around the fact of the stand of the defendants of there being a previous partition.

9. (a) In order to substantiate the stand regarding previous partition, the defendant – Shamrao heavily relied upon a deed of partition which was produced on the record and was treated as duly proved and exhibited as Exhibit – 107. It is apparent that this was a deed purportedly effecting partition of not only the ancestral lands including the suit property i.e. land survey no. 129 as also the land survey no. 128/3 which was admittedly a property in possession of the joint family under a mortgage executed by one Supdu Warka described in this deed as ‘Supdu Warkache Pabal’. It appears that it was an unstamped and unregistered document of the year 1950.

(b) As far as insufficiency of stamp duty is concerned, as can be seen, by following necessary procedure under the Maharashtra Stamp Act, the document was initially impounded and thereafter deficit stamp duty and penalty was recovered and apparently the defect was cured as can be seen from the statutory endorsement put on the reverse of it of the concerned officer of the trial court.

(c) There can be no dispute about the fact that since this document effects partition as distinguished from a memorandum, it was compulsorily registrable in view of the provisions of section 17 of the Registration Act. There could also be no dispute about the fact that in view of the provisions of section 49 of that Act, there was a bar to read such a document which is compulsorily registrable but has not been registered to read it in evidence. There is an exception permitting the document which is compulsorily registrable but has not been registered to enable it to be read in evidence for collateral purposes. But then the defendant - Shamrao was seeking to establish a previous partition based on such unregistered deed. It cannot be termed as a collateral purpose since effecting the partition sought to be established was the main purpose for which the document was brought into existence. Therefore, though the document has been treated as duly proved and exhibited and even referred to by the courts below, for want of registration, no amount of evidence can be permitted to be lead and read to draw any conclusion relying upon this document.

10. But then, since it is a civil dispute and when there is no law requiring a partition to be effected by a deed or a registered document, the effect of previous partition could have certainly been permitted to be established by leading necessary oral evidence and establishing all the attending circumstances. A party relying upon the previous partition based on an unregistered instrument cannot be precluded from independently substantiating the stand by leading necessary evidence *aliunde*.

11. One can, therefore, legally undertake scrutiny of the evidence to ascertain if there were such circumstances indicating existence of such previous partition on the preponderance of probability. Apart from the oral evidence, it was sufficiently brought on record that land survey no. 128/3 belonging to one Supdu who had mortgaged it to the family was being treated as a property of the joint family, as can be seen from a document i.e. a revenue record (Exhibit – 104).

12. Though the question has been formulated while admitting the second appeal as to if a mortgaged property is partible, the question here travels beyond that. Even if it is assumed that the mortgaged property is not available for partition, the subsequent events which are peculiar to the matter in hand and regarding which there is absolutely no dispute as to their veracity, clearly indicate that in spite of the land survey no. 128/3 being a property which was with the joint family as a mortgaged property, in all probability, it was consciously

allotted to the share of Ramrao and, the other two brothers defendant Bhimrao and Shamrao were allotted two different portions from the suit property survey no. 129.

13. Admittedly, Ramrao alone subsequently sold the land survey no. 128/3 by a registered sale deed dated 28-04-1967 for a consideration of Rs.3000/- (Exhibit – 98). Conspicuously, in the recitals of this sale deed, Ramrao specifically asserted that the property was owned by him and was his ancestral property. This conduct of Ramrao certainly corroborates the stand of the respondents about there being a previous partition. This seems to have weighed with the lower appellate court as can be seen from the paragraph no. 18 of the judgment. As has been rightly pointed, the learned judge of the trial court failed to appreciate this material circumstance which has the tendency of corroborating the respondents' version of there being an antecedent partition.

14. Apart from the afore-mentioned vital piece of circumstance, as has been rightly pointed out by the lower appellate court, since after 1950, mutations were effected and the revenue record in respect of the suit property stood in the name of the defendants - Bhimrao and Shamrao.

15. True it is that in the year 1969, Bhimrao seems to have, by mutation entry no. 330 allotted some portion of the suit property to Shamrao. But as can be seen from the mutation entry no. 330 (Exhibit – 81), this circumstance seems to have weighed with the trial court in

concluding that had there been really any partition, there was no reason for Bhimrao to once again allot some share from the suit property to Shamrao. However, as has been rightly pointed out by the lower appellate court, merely on the basis of such a circumstance, one cannot brush aside the evidence in respect of the previous partition demonstrated by the subsequent conduct of Ramrao in selling land survey no. 128/3 allotted to his share. The appellants have neither pleaded anything about this transaction nor have they made any attempt to explain it during recording of testimonies.

16. The trial court had drawn some adverse inference against the defendant - Shamrao for not calling defendant - Bhimrao as his witness. Taking into account the fact that Bhimrao was in a way supporting appellants and was even ready to receive 1/3rd share in the suit property, therefore, he was an adversary of the defendant - Shamrao and it would not have been legally permissible for the latter to call the former as his witness. In-fact, a similar argument and a similar reasoning could have been resorted to draw an adverse inference against the appellants also. If defendant Bhimrao was supporting them, his conspicuous absence from the witness box should have been looked upon as an adverse circumstance which the trial court failed to do. Be that as it may, non-examination of defendant - Bhimrao could not have been taken as an adverse circumstance to refute the stand of defendant - Shamrao regarding there being an antecedent partition.

17. All in all, the trial court had indeed committed an error in appreciating the evidence that was available to be looked into in respect of previous partition and which error was corrected by the lower appellate court.

18. No substantial question, as is formulated earlier, in-fact arises for determination in this appeal. The appeal is dismissed with costs.

[MANGESH S. PATIL]
JUDGE

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