

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.274 OF 2020
WITH
CIVIL APPLICATION NO.267 OF 2020
IN
SECOND APPEAL NO.274 OF 2020

Shri. Atul Bapusaheb Jadhav & Ors.

...Appellants

vs.

Sharadrao Daulatrao Jadhav,

Since deceased, through LRs & Ors.

...Respondents

....

Mr. Sanjay Kshirsagar, for the Appellants.

Mr. Yuvraj Narvankar, i/b. Mr. Bhooshan R. Mandlik, for the Respondents.

....

CORAM : S.M. MODAK, J.

DATE : 4 AUGUST 2022

Oral Judgment :

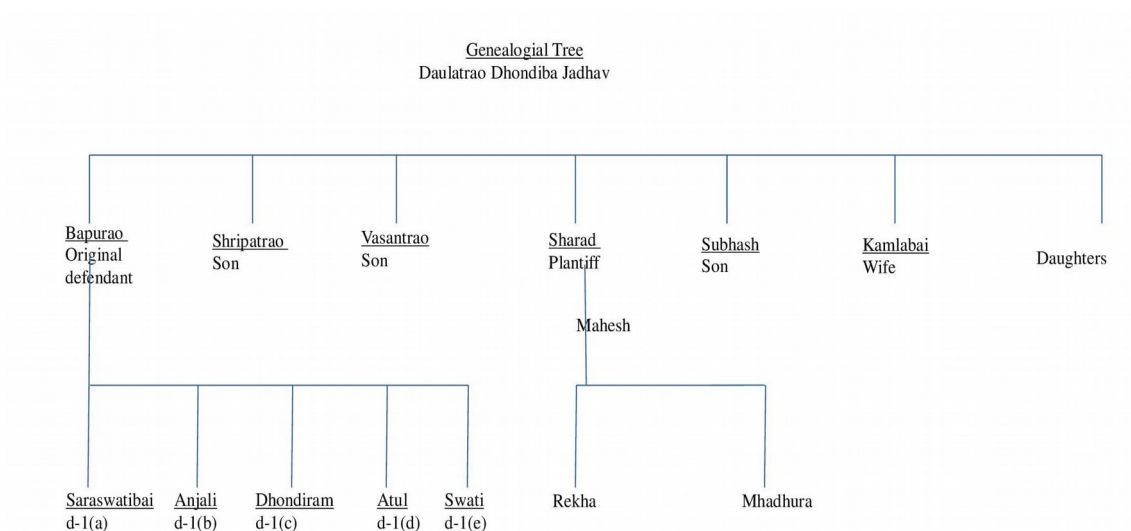
Heard learned Advocate Mr. Kshirsagar for the Appellants and learned Advocate Mr. Narvankar for all the Respondents.

2. This is a second appeal filed by LRs of original defendant Bapusaheb Jadhav. When the suit was filed by his brother Sharad, said Bapusaheb was alive. He expired during pendency of the suit and hence

his LRs, who are present Appellants, were brought on record. The suit was filed for possession predominantly on the background that plaintiff Sharad permitted said Bapusaheb to occupy the suit premises even after the partition is executed in the year 1961. As per the said partition, the suit premises were allotted to the share of plaintiff-Sharad.

3. The suit premises is a part of a structure standing on City Survey No.2024 situated at E-Ward Rajarampuri, District Kolhapur. The said suit was decreed and the defendants were directed to handover possession. When the first appeal was filed on behalf of the defendants, they have failed to convince the first appellate court and, that is how, the present second appeal is filed.

4. The relationship in between the parties is admitted. Though the plaintiff relied upon a registered deed of partition dated 18 December 1961, the defendants have challenged the said partition. The genealogical tree is as follows:



The sons and daughters of Daulatrao Jadhav were described as parties to that partition deed. Said Daulatrao is described as a party, who has executed the partition deed, whereas the present plaintiff and predecessor-in-title of these defendants, Bapusaheb and other sons, were described as the parties, who got it executed. However, on the said partition deed, only Daulatrao Jadhav has signed. These Appellants by way of written statement have challenged the said document and pleaded that it is not a partition deed but will be executed by said Daulatrao. They have also taken a plea that they have become owners by adverse possession because, admittedly, they were in possession of the suit premises even earlier to the 1961 deed of partition. Additionally, they have denied the theory of granting gratuitous licence by the plaintiff Sharad to his brother Bapusaheb (their predecessor-in-title).

5. The contention of plaintiff Sharad was that as per the deed of partition, the suit property is allotted to his share and his brother, i.e. Bapusaheb, was staying in that structure earlier to partition and plaintiff Sharad permitted him to remain in possession. The plaintiff has considered the defendant Bapusaheb as a gratuitous licensee. When the plaintiff was in need of the suit premises, he issued a notice of handing over and as it is not complied hence the suit was filed.

6. Learned Advocate Mr. Kshirsagar made following submissions:

- (a) In the plaint, so far as theory of gratuitous licensee is concerned, no sufficient details are given when the licence was granted and in what circumstances.
- (b) He submitted that the burden will shift on the defendants only when plaintiff will prove his case of granting gratuitous licence and unfortunately the plaintiff has not discharged the burden.
- (c) He submitted that the trial court as well as first appellate court has overlooked these aspects and they have laid emphasis more on the shortcomings and lacunas in the case pleaded by subsequently added defendants/present Appellants.
- (d) According to him, even though the deed of partition is accepted for the moment for the sake of argument, admittedly, there was severance of joint Hindu family but there was no severance of possession and as such, the defendants will continue to occupy the suit premises as tenants in common.
- (e) In support of his submissions, he has laid more emphasis on paras. 10 and 11 of the judgment by Hon'ble Supreme Court in a case *Kalyani (dead) by LRs. vs. Narayanan and Others*¹.
- (f) He also read over some of the observations reproduced in said judgment on the basis of commentary Mulla's Hindu Law.

¹ AIR 1980 SC 1173

7. According to them, the facts and circumstances warrant framing of substantial questions of law mentioned on page no.5 of the memo of appeal.

8. As against this, learned Advocate Mr. Narvankar submitted that there is no case made out for framing of any substantial question of law and in view of the concurrent findings of facts by both the courts below it does not require interference. He made submissions on following points:

- (a) Both the courts below have negated the grievance of the defendants that the registered deed is not a partition deed but a will.
- (b) He invited my attention to the observations of both the courts below on the point of plea of adverse possession taken by these Appellants.
- (c) He submitted that in fact deed of partition was acted upon by the persons described in the deed of partition and in fact they have been put into possession of the properties allotted to their share and even the records have been changed to that effect.
- (d) He also submitted that in fact the plea raised now about the status

of the original defendant as tenants in common was not taken before the courts below and now it cannot be taken.

- (e) He also read over the observations by Hon'ble Apex Court in case of *Kalyani*, as referred above.

9. In view of the above submissions, this Court has to decide whether case is made out for framing of any substantial question of law.

In all there are six suggested substantial questions of law. Learned Advocate Mr. Kshirsagar focused more on question nos. (i) and (ii).

“(i) *That as to whether it is correct to say that the appellant is staying in the suit premises as gratuitous licensee inducted by the respondent/plaintiff?*

(ii) *That when the predecessor of the appellant was admittedly staying in the suit premises even before the partition then as to whether the case of plaintiff regarding induction of the original defendant as gratuitous licensee is correct?”*

10. In order to ascertain whether any case is made out, this Court has perused the observations of the trial court and of the first appellate court very minutely. It will be material to refer them.

On the point of the Registered Deed is Partition Deed or Will

11. Before the trial court, both the parties have adduced evidence. On behalf of the defendants, defendant Atul has given oral evidence. He has also examined one Mallapa Kore. Whereas plaintiff Sharad has deposed. Both the parties have relied upon documentary evidence as well. While negating the grievance of the defendants as to the nature of document, the trial court has also referred to the observations in case of *Kalyani* as referred above. It is seen that the trial court was very much aware about the principles of Hindu law about partition.

12. What is meant by *de jure* partition and *de facto* partition have been considered. When it can be said that the process of partition is started, i.e. to say, when there is an indication of intention to separate by any member is also considered by the trial court. “What is meant by partition in narrow sense, i.e. the declaration of shares as referred and the partition by metes and bounds in broad sense” is also referred. The trial court have also considered the grievance about not signing the partition deed by co-sharers, except the father Daulat. The trial court has also considered the admission given by defendant Atul Jadhav in his cross-examination. It transpires that his father Bapusaheb has not challenged the said document during his life time. It also transpires that that deed was sent to him and it was received by him.

13. Learned Advocate Mr. Narvankar submitted that the trial

court has also considered how plot no.77 is partitioned and in fact defendants' witness Mallapa Kore was examined on that point only. It is referred in para no.17 of the trial court judgment. After detailed discussion, the trial court concluded that the document in question is not a will but it is a partition deed. The trial court observed that the consent of all the co-sharers are not required and father can foist the partition on the co-sharers.

14. There are certain documents produced in respect of CTS No.2024. The defendants have relied upon certain correspondence received on the address of suit premises. It is referred in para no.22 of the trial court judgment. Probably it is for the reason that they want to show that their predecessor-in-title Bapusaheb was in possession of the suit premises prior to 1961.

Theory of gratuitous licensee

15. When this Court has perused the trial court judgment in order to ascertain what are the observations about theory of gratuitous licensee, it reveals that in para no.22 (page no.18 of the judgment) the trial court observed thus:

“The evidence shows that they are in possession of the suit property from 1950. However, possession of Bapusaheb prior to 18.12.61 was that of coparcenary. The partition took place

in the year 1961. It is, therefore, quite natural that Bapusaheb continued to remain in the suit property as brother of plaintiff and that possession was merely a permissive possession.”

16. The trial court has also considered the plea taken about adverse possession. It was also answered in the negative.

Findings by appellate court

17. When this Court has perused the observations by the first appellate court it reveals that there is a detailed discussion about all the pleas taken by the defendants. All have been answered in the negative. Even the first appellate court has referred the evidence of defendant Atul in detail. Defendant Atul tried to submit that CTS No.2024 was earlier purchased by one Bapu Nalawade from one Shripat Babar. He has also referred to a sanad. Earlier it was block nos. 123, lateron changed to CTS No.2024. It is in Para No.18 of the judgment. The first appellate court has also referred to some of the applications filed by Bapusaheb in his lifetime at Exhibit 74 and 76 (para no. 20). In those documents, Bapusaheb has not said that the CTS No.2024 was purchased with joint ones.

18. The first appellate court has also considered all the principles of Hindu law pertaining to manifestation of intention to

separate and meaning of the word partition in narrow sense and in broad sense. Finally, the first appellate court has confirmed the findings of the trial court about non-proof of the theory of adverse possession and disputing the nature of document as deed of partition. About the theory of gratuitous licensee, first appellate court observed in para no.33 that

“defendants continued their possession in suit property and till filing of suit and also till this date then possession of the suit property since 1960.”

Furthermore, it is observed that “their possession in the suit property cannot be treated as adverse possession”. There is also discussion about the plea of limitation in para no.45. Finally, the first appellate court observed :

“Hence it is deemed permissible possession of Bapusaheb in the suit property. In other words his possession in the suit property is in the capacity as a licensee of the true owner.”

19. In para no.46, the first appellate court noted that there was no leave and licence agreement and the plaintiff was minor on the date of execution partition deed. Inference can be drawn that defendants were possessing the property in the capacity of licensee.

20. If we consider above observations, this Court feels that so

far as the findings referred above about the nature of document as a partition deed, cannot be interfered with. This Court also feels that the findings of the court below pertaining to plea of adverse possession, does not require interference. The findings are based on proper appreciation of evidence and application of principles of Hindu law. So now the only question remains whether a case is made out for framing substantial question of law on the point of the theory of gratuitous licence.

21. Learned Advocate Mr. Narvankar submitted that the Appellants have not taken the plea of their status as tenants in common in their written statement and hence now it cannot be taken. I am not inclined to accept that contention. Learned Advocate Mr. Kshirsagar is right in his submission that this plea is based on the principles of law and it is founded on the pleadings and evidence, which is adduced and, hence, such plea can be taken before this Court also.

22. It is true that earlier to partition deed, the plaintiff Sharad and defendant Bapusaheb, being the sons of Daulatrao, they were the members of joint Hindu family. Status of joint Hindu family can be severed either by filing a suit for partition or by executing a deed of partition amongst the co-sharers. The second contingency has happened in this case. So there is already severance of status. Though the Appellants have disputed nature of document as a deed of partition, it was negated by both the courts below. And this Court has

concluded not to interfere in those findings. So far as the suit property is concerned, the defendant Bapusaheb continued to remain in the suit property. His possession whether can be considered as possession of tenant in common or a gratuitous licensee, as pleaded by the plaintiff, is an issue.

23. In the judgment given by the Hon'ble Supreme Court in case of *Kalyani*, there is a discussion in para no.9 about the factual aspects and para nos. 10 and 11 about the principles of Hindu law. Even if status is severed, always immediately there cannot be partition by metes and bounds immediately. On some occasion, it takes time. In this case, there is evidence on record to suggest that some of the co-sharers have acted upon the deed of partition and they have started enjoying the properties allotted to their shares.

24. Now, we may find the phrase 'tenants in common' in Section 19 of Hindu Succession Act. It applies when there is an intestate succession. The heirs succeeds the property not as joint tenants but as tenants in common. The phrase tenants in common is not defined anywhere. It is not to be understood as used in Rent Control Legislation. Whereas, the phrase "licence" is defined in Section 52 of the Easements Act. When the person grants to another a right to do or continue to do something upon the immovable (which is not movable) it amounts to granting a licence.

25. So the possession of the defendant Bapusaheb, after the partition deed is executed, no doubt is that of tenant in common. It mean to say that after his death, the property will not pass on to other co-sharer but it will pass on to his heirs. But ultimately the heirs will get that much right, which the tenant in common was possessing. The heirs will not get a right in excess of the right possessed by a tenant in common. When we have perused the pleadings from the plaint and the findings given by both the courts below, this Court feels that the pleadings and evidence is sufficient to make out a case that original defendant Bapusaheb can be considered as a licensee. Ultimately, he was a brother of the plaintiff. When the deed of partition was executed, the plaintiff was minor. So earlier there was no demand for handing over a possession. Subsequently, the plaintiff felt it necessary to tell his uncle to handover the possession. Merely because Bapusaheb was possessing the suit structure earlier to 1961, it will not enure to his benefits once there is a partition deed allotting this property to plaintiff and which is accepted by both the courts below. Law on the point of framing of substantial questions of law is well settled. This Court can frame it only when it is made out. There are concurrent findings on the point of theory of gratuitous licensee. On the basis of submission made, this Court does not feel that those findings are perverse that is to say by ignoring particular piece of evidence or by wrong interpretation of principles of law. So this Court feels that there is no case made out for framing of the two substantial questions of law, as referred above.

26. The other substantial questions of law are mainly based upon the first two substantial questions of law. So this Court feels that both the courts below have dealt with the plea of gratuitous licensee correctly and on the basis of evidence on record. So no case for framing of substantial question of law is made out. No interference is warranted in the impugned judgment. Hence, the appeal stands dismissed.

27. In view of the disposal of the second appeal, nothing survives in the civil application and the same is disposed of.

28. At this stage, Mr. Kshirsagar, learned Advocate for the Appellants, prayed for extension of interim relief granted by this Court for a period of eight weeks. There is opposition on behalf of the Respondents. It is contended that in fact the Appellants have given an undertaking before the trial court to vacate the premises and in fact it was not pointed out to this Court when interim relief is granted. Be that as it may, this Court is inclined to extend the period of interim order granted earlier for a period of six weeks from today. It is made clear that the Respondents are at liberty to press for execution once the period of six weeks is over. The Appellants are directed not to create third party interest or part with possession of the suit premises. It is submitted that as on today, the Appellants are only in possession of the suit premises.

(S.M. MODAK, J.)