

Nikita

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

SECOND APPEAL NO. 300 OF 2021

Ashok Ganajan Gujar ... Appellant

V/s.

Ashadevi Shripatrao Gujar Thr. Power of
Attorney Nandkishor Shripatrao Gujar
and Ors. ... Respondents

WITH

INTERIM APPLICATION NO.2101 OF 2021

Ashok Gajanan Gujar ... Applicant

V/s.

Ashadevi Shripatrao Gujar Thr. Power of
Attorney Nandkishor Shripatrao Gujar ... Respondent

Mr. Ashok B. Tajane, i/b Balaji P. Shinde for the
Appellant-Applicant.

Mr. Sandeep S. Koregave a/w Pallavi Karanjkar for
Respondent Nos. 2B & 5.

Ms. Rekha Musale for Respondent Nos. 4 and 4.

CORAM : AMIT BORKAR, J.

DATED : DECEMBER 7, 2023

P.C.:

1. The appellant is original defendant against whom, the respondent Nos. 1 and 3 had filed suit for declaration, possession and permanent injunction. According to the plaintiffs, suit properties were allotted in partition to father-in-law of plaintiff No.1 in 1937. Accordingly name of her father-in-law Mahadev was entered in revenue records. However, after the death of Mahadev

and Gajanan, defendants entered their name in city survey record. According to plaintiffs, Gajanan fabricated Will of Mahadev in relation to suit properties.

2. Defendants contested the suit by contending that Mahadev executed Will in their favour bequeathing half share in the suit property to their father and they have become owner of half share of the suit property. Objection regarding valuation of the suit was also raised.

3. The Trial Court based on pleadings of the parties framed necessary issue including title of Mahadev Gujar, validity of Will of Mahadev and issue of injunction.

4. The Trial Court decreed the suit. The Appellate Court dismissed the appeal.

5. The learned advocate for the appellant submitted that the Courts below recorded a finding that Mahadev received suit properties in partition is perverse in as much as there is no evidence in support of such finding. However, on perusal of judgment of Court's below, it appears that Courts below recorded a finding of allotment of suit property in partition in favour of Mahadev based on entries recorded in enquiry registered on 13th April 1939 and copy of "Malmatta Patrak" which demonstrates allotment of suit properties based on partition. Therefore, findings of facts recorded by the Courts below holding that the suit properties were allotted in favour of Mahadev is based on admissible evidence.

6. The learned advocate for the appellant, thereafter, contended

that Mahadev executed a Will in favour of father of defendants which the Courts below failed to consider in its proper perspective. However on perusal of the judgments, it appears that the defendants failed to prove Will as required under Section 68 of the Evidence Act, 1872 by examining attesting witnesses. In the absence of proof of document, which is required to be compulsorily attested, findings recorded by the Courts below that Will is not proved does not suffer from legal infirmity.

7. Learned advocate for the appellant next contended that the suit filed by the plaintiff is barred by limitation. On perusal of judgments of the Courts below, it appears that the Courts below rightly referred to Article 65 of the Limitation Act, 1963. As per article 65 limitation for suit for possession would start from the date when possession becomes adverse. However, the defendants have not proved as to when defendant's possession became adverse which can be said to be event of starting period of limitation.

8. The learned advocate for the appellant lastly contended that Clause 3 of the operative part of Appellate Court's judgment amounts to modification of decree which is impermissible. However, on perusal of paragraph No. 40 of the Appellate Court's judgment, it appears that pursis below Exhibit-64 was filed by the parties after referring the compromise. Based on such compromise, the right conferred on Respondent No.5 has been recognized by the Appellate Court shall have no effect of modifying decree for partition or injunction as granted by the Trial Court. Only intervention made by the Appellate Court is to confer right on

respondent No.2 and 5, to execute decree in respect of their respective share in the respective parties. Based on compromise Below Exhibit-64. Such conferment of right is permissible under order 22 Rule 10 of Code of Civil Procedure, 1908, wherein, persons in whose favour, rights in immovable properties are devolved are entitled to be substituted. It is well settled that assignment of rights during pendency of appeal creates right in favour of assignees to apply to implead this as part to the proceedings as if they are legal representatives of dead person or beneficiaries of Will.

9. For the aforesaid reasons, no substantial question of law is involved.

10. The second appeal is dismissed. No costs.

11. In view of dismissal of second appeal, interim application does not survive. And the same stand disposed of as infructuous.

(AMIT BORKAR, J.)