



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

SECOND APPEAL NO. 797 OF 2001

Saibai Dhulappa Bodake & Ors.
v/s.

..Appellants

Kalaba Pasoji Bodake (deceased)
by LRs and Ors.

..Respondents

Mr. Surel Shah a/w. Adv. Chetan Alai a/w. Ms. Rama Somani i/b. Adv. Chetan Alai for the Appellant.

Adv. Rekha Musale i/b Adv. Varsha Palave for the Respondent Nos.1(a), 1(b), 1(c), 1(d), 1(f), 2 and 5.

CORAM : ANUJA PRABHUDESSAI, J.

DATED : 16th OCTOBER, 2023 &

17th OCTOBER, 2023.

ORAL JUDGMENT :-

1. By this appeal under Section 100 of CPC the appellant has raised challenge to judgment and order dated 4.7.2001 in Regular Civil Appeal No.149 of 1998. By the impugned judgment, the Appellate Court allowed the appeal and set aside the judgment and decree dated 27.02.1998 in Regular Civil Suit No. 32 of 1995 for recovery of possession of southern portion of the suit property.

2. The dispute is in respect of an agricultural land, consolidated block No.72 admeasuring 8 Hectares 43.8 Ares with house bearing No.56, situated at village Kolik, Taluka Panhala, District Kolhapur. The said property shall be hereinafter referred to as the suit property.

3. The appellants were the plaintiffs and the respondents were the defendants in the suit and shall be hereinafter referred to as the plaintiffs and defendants respectively.

4. The plaintiffs are the successors of Dhulappa Bodake whereas the defendants are the successors of his brothers - Kalaba, Bhagoji and Siddhoba. The plaintiffs, claimed that the suit property was purchased by Dhulappa in an auction from Raobahadur, Chief Secretary. The plaintiffs asserted that the suit property is a self acquired property of Dhulappa and that they are in exclusive possession of the same. The plaintiffs contended that the predecessors of the defendants obtained the thumb impression of Dhulappa on a document dated 07.03.1977 by misrepresentation and fraud and on the basis of the said document, got their names recorded in the survey records under Mutation Entry No. 25.

5. The plaintiffs raised a grievance that the defendants are interfering with their possession and hence filed a suit for perpetual injunction seeking to restrain the defendants from interfering and /or obstructing their possession in respect of the suit property. The plaintiffs claimed that the defendants have no right, title or interest in the suit property, and sought recovery of possession of southern portion of the suit property, equivalent to 10 annas 6 pai, in the event it is held that the defendants are in possession of the southern

portion of the suit property.

6. The defendants resisted the suit mainly on the ground that the suit property was a joint family property, purchased by Dhulappa and his brothers, who had also contributed money for purchase of the property. The house in the suit property was also constructed by all the brothers. The defendants claimed that the sale deed was executed in the name of Dhulappa, being the eldest brother. In the year 1975 Potoji, the father of Dhulaji and others expired and later in the year 1977 said Dhulappa and his brothers mutually decided to cultivate the property separately. Accordingly, by oral partition Dhulappa was allotted northern 5 anna 6 pai share, and southern portion equivalent to 10 anna 6 pai was allotted to Kalaba, Bhagoji and Siddhoba to the extent of 3 anna 6 pai share each.

7. The terms of oral partition were incorporated in the document dated 7.3.1977, which was signed by Dhulappa and pursuant to the said agreement, an application was submitted to the Revenue Authorities to mutate their names in the survey records as per the shares mentioned therein. The Circle Inspector after conducting due inquiry certified Mutation Entry No. 695 on 6.2.1980. Accordingly, the names of Dhulappa and his brothers were entered in the 7 x 12 extract as per their respective shares. During his lifetime Dhulappa never raised any dispute about their title and possession. The defendants claimed that they are cultivating sugarcane, paddy, nachani etc in

the portion of the land which is in their exclusive possession.

8. The trial Court while considering the question whether the property was a self acquired property of Dhulappa or whether it was a joint family property, held that the burden was on the defendants to prove the existence of joint family and that there was a nucleus with which the joint family property could be acquired. Upon considering the evidence adduced by the respective parties, the learned Judge held that the Resolution No.333 dated 10.12.1938 at exhibit 162 proves that the property was purchased by Dhulappa. The said resolution does not indicate that he had purchased the property as a HUF. The learned Judge further held that Dhulappa, who was serving as a peon, had independent source of income to purchase the property. The learned Judge also observed that the defendants had not produced evidence to prove that they or their father had contributed money to purchase the said property, and hence held that the suit property is a self acquired property.

9. The learned Judge did not rely upon the document dated 7.3.1977 (Exhibit 219) for the reason that it was not registered and further recorded a finding that the said document was forged and fabricated. The learned Judge held that the plaintiffs are the absolute owners and in exclusive possession of the suit property and hence restrained the defendants from interfering with the plaintiff's possession in respect of the northern portion of the property and further directed the defendants to hand over possession of the southern part of

the property equivalent to 10 anna and 6 paise. The learned Judge also directed inquiry under Order XX Rule 12(1)(c) of CPC for mesne profit.

10. Being aggrieved by the said judgment, the defendants filed an appeal under Section 96 of the Civil Procedure Code being Regular Civil Appeal No. 149 of 1998. The learned District Judge reversed the findings of the trial court that the document dated 7.3.1977 at Exhibit 219 is a forged and fabricated document. The Appellate Court held that the said document, which was signed by Dhulappa clearly indicates that the suit property is a joint family property. The said document at Exhibit 219 merely recites the terms of the oral partition and hence does not require registration. The learned Judge observed that acting on the said document at Exhibit 219, Dhulappa and his brothers gave an application to the Revenue Authority to effect mutation entry as per the shares mentioned in the said agreement. Accordingly, the names of Dhulappa and his brothers came to be recorded in the survey records. The learned District Judge therefore reversed the finding that the suit property was a self acquired property and held that the said property was in fact a joint family property.

11. The Appellate Court observed that the plaintiffs are in possession of the northern portion of the suit property equivalent to 5 anna 6 pai share, whereas the defendants are in possession of southern portion equivalent to 10 anna 6 pai share. The Appellate Court therefore held that the plaintiffs are not

entitled for any relief in respect of the southern portion of the suit property. Based on these findings the Appellate Court allowed the appeal and set aside the decree for recovery of possession of southern portion of the suit property, as well as the inquiry under Order XX Rule 12 (1)(c) of the Code of Civil Procedure, 1908. Being aggrieved by this judgment, the plaintiffs have filed this appeal under Section 100 of the CPC.

12. By order dated 18.04.2007 this Court admitted the appeal on the following substantial question of law.

“ Whether the Lower Appellate Court was right in setting aside the decree of the trial Court without recording a finding regarding the ownership of defendants on the southern side 10 Ana 6 pai share and whether there was documentary evidence in support of the case of the defendants that they were the rightful owners of the said share?”

13. It is not in dispute that the suit property was purchased in the name of Dhulappa. The defendants relied upon an agreement at Exhibit-219 to contend that the suit property was a joint family property. The trial court recorded a finding that the document at Exhibit-219 is forged and fabricated and further held that the document is inadmissible in evidence for want of registration. The Trial Court therefore did not rely upon the document at Exhibit 219 and recorded a finding that the suit property is a self acquired property of Dhulappa. The Appellate Court has reversed the finding that the document

was forged and fabricated. The Appellate Court held that the document at Exhibit - 219 is only an agreement of partition and did not require registration. Relying upon the said document, the Appellate Court has held that the suit property is a joint family property and hence set aside the decree for recovery of possession.

14. There is no challenge to the findings recorded by the Appellate Court that the plaintiffs have failed to prove that the document at Exhibit – 219 is a forged and fabricated document. The thrust of challenge, as can be seen from the grounds raised in the appeal memo, is that the document dated 7.3.1977 at Exhibit 219 which purportedly created right in favour of the defendants was required to be registered and since the document was not registered, the same was not admissible in evidence. In such circumstances, apart from the substantial question of law which was framed on 18.04.2017, the following substantial question of law is formulated after hearing the learned Counsel for the appellant-plaintiffs.

(2) Whether the document dated 7.3.1977 at Exhibit 219 required registration and whether the Appellate Court has erred in relying upon the said unregistered document in holding that the suit property is a joint family property?

15. Learned Counsel for the plaintiffs was given an opportunity to meet the aforesaid substantial question of law, which has now been formulated. Mr.

Surel Shah, learned Counsel for the plaintiffs has consented to advance arguments on the aforestated substantial question of law without further time.

16. Mr. Surel Shah submits that the Appellate Court has grossly erred in holding that the suit property is a joint family property. He submits that the Trial Court analyzed the documentary as well as the oral evidence on record and held that the suit property is a self acquired property of Dhulappa and that it is not a joint family property. He submits that the Appellate Court has reversed the findings solely on the basis of the document at Exhibit 219. He submits that the Appellate Court has failed to appreciate that there was no pre existing title in favour of the defendants, and that the document at Exhibit 219, which allegedly created right in favour of the defendants for the first time, was not registered and was not admissible in evidence. He submits that the Appellate Court could not have relied upon an unregistered document (Exhibit 219) and that the impugned judgment is contrary to the settled law. He has relied upon the decisions of the Supreme Court in ***K. Arumuga Velaiah vs. P.R.Ramasamy & Anr. (2022) 3 SCC 757*** and ***Ravinder Kaur Grewal & Ors. vs. Manji Kaur & Ors. (2020) 9 SCC 706***.

17. I have perused the records and considered the submissions advanced by the learned counsel for the respective parties.

18. In *K.Arumuga Velaiah* (supra) the question before the Apex Court was

award/document of partition providing for effectuating a division of properties in future would require registration under Section 17(1)(e) or Section 17(1)(b) of the Registration Act, 1908. The Apex Court held that a document of partition, which provides for effectuating a division of properties in future would be exempt from registration under Section 17(2) (v). The Apex Court has observed that the test in such a case is whether the document itself creates an interest in a specific immovable property or merely creates a right to obtain another document of title. If a document does not by itself create a right or interest in immovable property, but merely creates a right to obtain another document, which will, when executed create a right in the person claiming relief, the formal document does not require registration and is accordingly admissible in evidence.

19. In *Ravinder Kaur Grewal* (supra) the Apex Court while considering the question whether the document (memorandum of family arrangement) was required to be registered in view of transfer of interest in immovable property worth more than Rs.100/-, observed thus:-

“25. ... The settled legal position is that when by virtue of a family settlement or arrangement, members of a family descending from a common ancestor or a near relation seek to sink their differences and disputes, settle and resolve their conflicting claims or disputed titles once and for all in order to buy peace of mind and bring about

complete harmony and goodwill in the family, such arrangement ought to be governed by a special equity peculiar to them and would be enforced if honestly made. The object of such arrangement is to protect the family from long-drawn litigation or perpetual strifes which mar the unity and solidarity of the family and create hatred and bad blood between the various members of the family, as observed in Kale [Kale v. Director of Consolidation, (1976) 3 SCC 119]. In the said reported decision, a three-Judge Bench of this Court had observed thus: (Kale case [Kale v. Director of Consolidation, (1976) 3 SCC 119],

“9. ... A family arrangement by which the property is equitably divided between the various contenders so as to achieve an equal distribution of wealth instead of concentrating the same in the hands of a few is undoubtedly a milestone in the administration of social justice. That is why the term “family” has to be understood in a wider sense so as to include within its fold not only close relations or legal heirs but even those persons who may have some sort of antecedent title, a semblance of a claim or even if they have a spes successionis so that future disputes are sealed for ever and the family instead of fighting claims inter se and wasting time, money and energy on such fruitless or futile litigation is able to devote its attention to more constructive work in the larger interest of the country. The courts have, therefore, leaned in favour of upholding a family arrangement instead of disturbing the same on technical or trivial grounds. Where the courts find that the family arrangement suffers from a legal lacuna or a

formal defect the rule of estoppel is pressed into service and is applied to shut out plea of the person who being a party to family arrangement seeks to unsettle a settled dispute and claims to revoke the family arrangement under which he has himself enjoyed some material benefits.”

26. *In para 10 of the said decision, the Court has delineated the contours of essentials of a family settlement as follows: [Kale v. Director of Consolidation, (1976) 3 SCC 119]*

“10. In other words to put the binding effect and the essentials of a family settlement in a concretised form, the matter may be reduced into the form of the following propositions:

‘(1) The family settlement must be a bona fide one so as to resolve family disputes and rival claims by a fair and equitable division or allotment of properties between the various members of the family;

(2) The said settlement must be voluntary and should not be induced by fraud, coercion or undue influence;

(3) The family arrangement may be even oral in which case no registration is necessary;

(4) It is well settled that registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distinction should be made between a document containing the terms and recitals of a family arrangement made [Ed.: The words between two asterisks have been emphasised in original as well.] under the document [Ed.: The words between two asterisks have been emphasised in original as well.] and a mere memorandum prepared after the family

arrangement had already been made either for the purpose of the record or for information of the court for making necessary mutation. In such a case the memorandum itself does not create or extinguish any rights in immovable properties and therefore does not fall within the mischief of Section 17(2) of the Registration Act and is, therefore, not compulsorily registrable;

(5) The members who may be parties to the family arrangement must have some antecedent title, claim or interest even a possible claim in the property which is acknowledged by the parties to the settlement. Even if one of the parties to the settlement has no title but under the arrangement the other party relinquishes all its claims or titles in favour of such a person and acknowledges him to be the sole owner, then the antecedent title must be assumed and the family arrangement will be upheld and the courts will find no difficulty in giving assent to the same;

(6) Even if bona fide disputes, present or possible, which may not involve legal claims are settled by a bona fide family arrangement which is fair and equitable the family arrangement is final and binding on the parties to the settlement.” (emphasis supplied)

27. ... In para 35, the Court noted as follows: [*Kale v. Director of Consolidation*, (1976) 3 SCC 119]

“35. ... We have already pointed out that this Court has widened the concept of an antecedent title by holding that an antecedent title would be assumed in a person who may not

have any title but who has been allotted a particular property by other party to the family arrangement by relinquishing his claim in favour of such a donee. In such a case the party in whose favour the relinquishment is made would be assumed to have an antecedent title."

And again, in para 36, the Court noted as follows: [Kale v. Director of Consolidation, (1976) 3 SCC 119],

"36. ... Yet having regard to the near relationship which the brother and the son-in-law bore to the widow the Privy Council held that the family settlement by which the properties were divided between these three parties was a valid one. In the instant case also putting the case of Respondents 4 and 5 at the highest, the position is that Lachman died leaving a grandson and two daughters. Assuming that the grandson had no legal title, so long as the daughters were there, still as the settlement was made to end the disputes and to benefit all the near relations of the family, it would be sustained as a valid and binding family settlement."

28. *While rejecting the argument regarding inapplicability of principle of estoppel, the Court observed as follows: [Kale v. Director of Consolidation, (1976) 3 SCC 119], SCC p. 138, para 38)*

"38. ... Assuming, however, that the said document was compulsorily registrable the courts have generally held that a family arrangement being binding on the parties to it would operate as an estoppel by preventing the parties after having taken advantage under the arrangement to resile from the same or try to revoke it."(emphasis supplied)

20. In the instant case, the suit property was purchased in the name of Dhulappa. It is not in dispute that said Dhulappa had entered into an agreement (Karar patra) dated 7.3.1977 at Exhibit 219 with his brothers Kalaba, Siddhoba and nephew Chandrakant (son of Bhagoji), stating that the property bearing Gat No.72 at Village Kolik with a house existing therein is a joint family property. The agreement at Exhibit-219 states that Dhulappa has 8586 (anna pai) share, whereas his two brothers- Kalaba, Siddhoba and nephew Chandrakant have 8386 (anna pai) share each. The agreement at Exhibit 219 which was admittedly signed by Dhulappa categorically states that though the property was purchased in his name, he along with his brothers and nephew are the joint owners of the suit property and gave no objection to record the names of his brothers and nephew in the survey records as per their respective shares. The said document further records that the agreement is binding on them and their successors.

21. A perusal of the agreement at Exhibit 219 clearly indicates that said Dhulappa had neither relinquished his right in respect of the suit property nor created for the first time any right, title or interest in favour of his brothers and nephew. The agreement at Exhibit-219 merely records a statement of fact that though the suit property is in the name of Dhulappa, it is in fact a joint family property. The said document executed by Dhulappa merely acknowledges that his brothers- Kalba and Sidhoba and nephew -Chandrakant, have pre-

existing right to suit property as per their respective shares and gave no objection to record their names in the survey records. In such circumstances, the document at Exhibit-219, which does not create any right, title or interest in favour of the defendants and which was executed either for the purpose of record or for making necessary mutation entries, does not require compulsory registration and is admissible in evidence.

22. It is also pertinent to note that said Dhulappa, who was a signatory to the said agreement at Exhibit-219, expired on 06.02.1987. He never challenged or disputed the said agreement during his life time. On the contrary, acting on the said document at Exhibit-219, said Dhulappa gave an application to the Revenue Authority on 07/03/1978 for recording the names of his brothers and nephew in 7/12 extract in respect of the suit property, as per the shares specified in the said agreement. Accordingly, mutation entry No.25 (Exhibit-117) came to be effected on 15/01/1979 and the same was certified on 06/02/1980. The names of Dhulappa, his brothers -Kalaba, Sidoba and Nephew-Chandrakant came to be recorded in 7/12 extracts at Exhibits-123 to 126. In these circumstances, even if the document /agreement at Exhibit-219 was not registered, it would operate as complete estoppel as against the plaintiffs, who are claiming right to the suit property through Dhulappa.

23. The agreement at Exhibit-219 clearly indicates that the suit property is a

joint family property and that the defendants have share in the said property, as specified in the said agreement. Hence, as rightly held by the Appellate Court the Plaintiffs are not entitled to claim right to the entire property and /or seek recovery of possession of southern portion of the property equivalent to 10 anna 6 pai share. The Appellate Court has exercised the discretion in a judicial manner. The decision does not suffer from an error either of law or procedure requiring interference in the second appeal.

23. Under the circumstances and in view of discussion supra, the Second Appeal is dismissed.

. Learned Counsel for the Appellant seeks extension of interim relief by a period of six weeks. Interim relief is extended by six weeks.

(ANUJA PRABHUDESSAI, J.)