

Arjun

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

**SECOND APPEAL NO.670 OF 2017
WITH
CIVIL APPLICATION NO.1277 OF 2017
IN
SECOND APPEAL NO.670 OF 2017**

Shri. Ramchandra Nanabhau Dhokale ...Appellants/
& Ors. Applicants

V/s.

Smt. Laxmibai Nanabhau Dhokale ...Respondents
(Deceased through her legal heirs)
1-a) Kailash Ramchandra Galande & Ors.

Mr. Akshay Petkar a/w Ketki Gadkari, for the
Appellants/Applicants.

Mr. Nitin P. Deshpande a/w Kanchan Phatak, for
Respondent Nos.1A & 1B.

**CORAM : MADHAV J. JAMDAR, J.
DATE : 14th MARCH, 2023**

P.C.:

1. Heard Mr. Petkar, learned counsel appearing for the
Appellants and Mr. Deshpande, learned counsel appearing
for the Respondent Nos.1A & 1B.

2. The Appellants who are the original Defendants, are
challenging the legality and validity of the judgment and
decree dated 13th December, 2007 passed by the learned Civil

Judge, Junior Division, Ghodnadi, Shirur in Regular Civil Suit No.144 of 2005 as well as the judgment and decree dated 5th August 2017 passed by the learned District Judge-1, Pune in Civil Appeal No.97 of 2008.

3. Mr. Petkar, learned counsel appearing for the Appellants submitted that following substantial questions of law arise in this Second Appeal :

- 1) Whether the Ld. Judges of Districts Courts were justified in granting a Decree in favour of Plaintiff by declaring that Deed of Partition dated 26.11.2002 was obtained by fraud, in the absence of particulars with dates and details as required by the provision contained in Order VI Rule 4 of Code of Civil Procedure, 1908?
- 2) Whether Regular Civil Suit No.144 of 2005 as filed by the Plaintiff was maintainable, in the light of the provisions contained in Section 34 of Specific Relief Act, 1963, in the absence of substantive relief of possession, when the Plaintiff is not at all in possession of Suit Properties?
- 3) Whether the Ld. Judge of the first Appellate Court failed to consider that if a Plaintiff desires to press a relief against a Defendant upon the ground of fraud, fraud must be adequately pleaded and the particulars of the fraud alleged must specifically be set out and proved?

4) Whether the Ld. Judge of first Appellate Court disregarded the settled principle of law that, documents being registered documents, carry a presumption of proper execution as also the contents thereof, and that the burden of proof was on the Respondents to prove that they were vitiated by fraud?

5) Whether the Ld. Judge of the first Appellate Court has failed to consider that as per the provisions of Section 16 and 17 of the Indian Contract Act, 1872 a written document/contract/Agreement is to be presumed as legal and valid unless and until it is proved beyond doubt that it is an outcome of any undue misrepresentation, influence, coercion or fraud?

4. Before considering the rival submissions and substantial questions of law raised by learned counsel appearing for the Appellants, it is important to note that, the Respondent/Plaintiff-Laxmibai Nanabhau Dhokale was the second wife of Nanabhau Dhokale, Nanabhau Dhokale passed away on 12th November, 2001. Revubai was the first wife of Nanabhau. Ramchandra i.e. Defendant No.1 is the son of Nanabhau and Revubai. The Defendant Nos.2 & 3 i.e. Mukund and Balu are the sons of Ramchandra. Nanabhau Dhokale married Laxmibai who is the original Plaintiff, after

the death of his first wife Revubai. Laxmibai has two daughters who are married.

5. It is admitted position that, the suit properties are the ancestral properties and Nanabhau R. Dhokale i.e. husband of Plaintiff and father of Defendant No.1 transferred the properties by Mutation Entry No.992 in the year 1978. Accordingly, the names of Plaintiff and Defendant No.1 were recorded in the Revenue Record to all the ancestral properties.

6. Nanabhau passed away on 12th November, 2001. However, in the meanwhile by registered Will dated 27th July, 1999 executed by Laxmibai, all the properties were bequeathed in favour of the Defendant Nos.2 & 3. Thereafter, registered partition deed dated 26th November, 2002 was executed, by which, the properties of both Laxmibai and Ramchandra have shown to have been allotted to the share of Mukund and Balu. Although, the document is apparently a partition deed, however, in fact, by the said document, Laxmibai had transferred the properties or her share completely in favour of the Defendant Nos.2 and 3. It is admitted position that, by the said partition deed, no shares

were allotted to Laxmibai. It is also further significant to note that, although, the properties of Ramchandra are not the subject matter of the partition deed, yet he has been impleaded as a party to the partition deed and these properties are also partitioned in favour of the Defendant Nos.2 and 3. However, both the learned Trial Court as well as the learned First Appellate Court have recorded that while giving effect to the said partition deed, only name of Laxmibai was deleted from the record of rights.

7. Thereafter, Mutation Entry No.3900 dated 6th February, 2004 was entered into on the basis of the partition deed and, the effect of the same is given only to the share of Laxmibai. It is significant to note that, in the said Mutation Entry No.3900, it is mentioned that, particular area of the property out of particular Gat number has been allotted in favour of Defendant Nos.2 and 3. Therefore, it is clear that, only effect of the said registered partition deed is given with respect to the share of Laxmibai's property. The same is also clear as in the Plaint while describing the suit properties of Ramchandra is shown as situated on the boundary. It is the contention of Laxmibai that, Ramchandra and his sons i.e.

Mukund and Balu by playing fraud on her, have got executed said Will dated 27th July, 1999 and registered partition deed dated 26th November, 2002 from her. She filed the suit on 10th August, 2005 bearing R.C.S. No.144 of 2005 *inter alia* seeking that, the said partition deed be declared as not binding on her and her property and also for injunction. It is further prayed that, as Laxmibai has not obtained any share in the said partition deed dated 26th November, 2002, the said partition deed be declared as illegal.

8. Both the learned Trial Court as well as the learned First Appellate Court have come to the conclusion that, the said partition deed dated 26th November, 2002 has been obtained by playing fraud on her by the Defendants and, that, the Plaintiff is entitled for the reliefs claimed therein. Therefore, the learned Trial Court held that, the Plaintiff is entitled for cancellation of the partition deed dated 26th November, 2002 and the Appeal filed challenging the same has been dismissed.

9. The first substantial question of law raised by Mr. Petkar, learned counsel appearing for the Appellants that, the Plaint filed contending that the said partition deed was

got executed from the Plaintiff by playing fraud is not maintainable and the suit cannot be decreed in absence of particulars with dates and items as required by the relevant provision contained in Order VI Rule 4 of the Civil Procedure Code, 1908. The said Order VI Rule 4 of the Civil Procedure Code, 1908 reads as under :

“ORDER VI : PLEADINGS GENERALLY

1.....

2.....

3.....

4. Particulars to be given where necessary.— In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading.”

10. Perusal of the Plaint shows that, the details of said fraud are set out in paragraph Nos.3 to 8. The English Translation of the said paragraphs furnished by the learned Advocate of the Respondents reads as under :

“3. Thereafter, in the year 2000, Nana Rangu Dhokale partitioned the aforementioned joint Hindu family properties in presence of two

panchas. This was an oral partition. As per this partition, the boundaries were ascertained and fixed. As per this oral partition, the Plaintiff became exclusive owner of the suit properties described above. Plaintiff's husband Nana expired on 22.11.2001. The Plaintiff is illiterate. She had nobody to fallback upon in his life. Defendant No.1 used to be the obedient son. Therefore, the Plaintiff had full faith in the said Defendant No.1. She had love and affection towards her grand-son, viz. Mukund and Balu.

4. Defendant Nos.1 to 3 represented to the Plaintiff that despite oral partition executed two years ago, the revenue record still shows joint possession. Therefore, let us go and separate the revenue record, thereby reflecting the factum of partition. For this purpose, we will have to go to government office. Stating this reason, the Defendant Nos.1 to 3 carried the Plaintiff to Shirur. There, the Defendant Nos.1 to 3 had some discussions with 5 to 6 persons, which the Plaintiff could not hear. None of the persons present there was known to the Plaintiff. Thereafter, all the persons prepared certain documents without taking the Plaintiff in confidence. By representing that 7/12 extracts will have to be separated, they all procured thumb impression of her left hand at the required place. All the persons told the Plaintiff that now, the 7/12 extracts will be

separated. Thereafter, till today, the Plaintiff is exclusively cultivating the suit property.

4. Without prejudice to the above contention, the Plaintiff further submits that **the partition deed of the joint family property, so executed, is no partition in the eyes of law. It is an illegal document. This is because the Plaintiff has not been given any share in the joint family property.** Normally, the Deed of Partition is executed in order to appropriate share to all the persons. **Nothing is given to the Plaintiff, the document of the partition is *void ab initio* and the same deserves to be set aside.**

5. The Plaintiff has no other source of income except the said agricultural land. She wanted to make certain improvement in her land. For that purpose, she decided to raise loan. For this purpose, 7/12 extracts, 8A Form, mutation entries are required. Accordingly, she procured these documents, viz. 7/12 extracts, 8A and the mutation on 27.6.2005. She made the others explained to her these documents. **Thereafter,** with the help of knowledgeable persons, she also procured the copy of the so called document dated 26.11.2002 on 30.6.2005. At that time, she came to know that by misrepresentating that 7/12 extracts are to be separated, Defendant Nos.1 to 3 misused the Plaintiff's thumb impression as per the ill-advice given to them and have grabbed the

Plaintiff's property. The Plaintiff came to know about this on 30.6.2005.

6. **The Defendant Nos.1 to 3 took undue advantage of the Plaintiff's illiteracy and faith in them and with an intention to achieve their selfish motive, played fraud on the Plaintiff and have brought into effect the said document. Basically, this document is illegal and false. The Plaintiff cannot read and write. She had never executed the said document with the Defendant Nos.1 to 3. It was never binding and it is not binding on the Plaintiff as per the law. No rights are created in favour of the Defendant Nos.1 to 3 by this document. Though the Defendant Nos.1 to 3 have executed the document in question by keeping the Plaintiff in dark, the Plaintiff has been cultivating the suit property as owner and she has been in possession of the same. If the document in question remains in force, then the said Defendants are likely to adopt illegal means to dispossess the Plaintiff. If this happens then an irreparable injury, which cannot be compensated, will be caused to the Plaintiff.**

7. **Looking at the mutation entry No.3900, though it records that notice of this mutation was received by the Plaintiff, no such notice was even issued. This mutation entry has been brought into effect by the Defendant in collusion with the revenue officers. The Defendant Nos.1 to 3 appear**

to have ill-intention of playing fraud on the Plaintiff. Since the oral partition of the 2000, the Defendants are in no way concerned with the suit property. The Plaintiff has two married daughters; residing separately from the Defendant Nos.1 to 3 since the year 2000. The Plaintiff had never executed the document dated 26.11.2002 with the Defendant Nos.1 to 3. The said document is not legal and genuine.

8. On 1st of July 2005, the Plaintiff questioned the Defendant Nos.1 to 3 about the so called Partition Deed dated 26.11.2002 prepared by misrepresenting that we are separating the 7/12 extracts. Thereupon, the Defendants replied that they have somehow kept quiet but threatened her that with the help of the said document, they will dispossess the Plaintiff. For this reason, the Plaintiff is compelled to file this Suit for declaration and permanent injunction.”

(Emphasis supplied)

11. Thus, it is clear that, particulars of said fraud are set out in detail. Both the Courts have concurrently held that, the Plaintiff has averred all the necessary contentions regarding the fraud. Therefore, there is no substance in the first substantial question of law raised by Mr. Petkar, learned counsel appearing for the Appellants.

12. As far as the second substantial question of law that, the suit itself is not maintainable as the relief of possession is not sought is concerned, it is significant to note that, it is the case of the Plaintiff that, by playing fraud on her, the said registered Will dated 27th July, 1999 and registered partition deed dated 26th November, 2002 were got executed from the Plaintiff, however, she is in possession of the suit property. It is also significant to note that, both the Courts have held that, original Plaintiff is in possession of the suit property. Therefore, there is no substance in the second substantial question of law raised by Mr. Petkar, learned counsel appearing for the Appellants.

13. As far as the third, fourth and fifth substantial questions of law raised by Mr. Petkar are concerned, I have already discussed hereinabove in detail that the Plaintiff has in the plaint given the particulars of fraud. The Plaintiff has examined herself and gave detailed evidence and she has been cross-examined extensively. Mr. Petkar has tried to point out certain admissions in her cross- examination for the purpose of substantiating his contention that, the evidence of Plaintiff is not trustworthy and, therefore, she

has failed to prove that, fraud has been committed on her. However, the evidence affidavit filed by her as well as the detailed cross-examination clearly show that, no admissions which will damage her evidence in the evidence affidavit is brought on record. Mr. Petkar, learned counsel appearing for the Appellants has failed to point out any material contradiction in her evidence. He has failed to point out any material to come to the conclusion that her evidence is not trustworthy. Both the learned Courts after appreciating her evidence have concurrently held that, the Plaintiff has established that fraud has been played on her.

14. As far as the contentions of Mr. Petkar, learned counsel on the basis of certain admissions which according to him damage the case of the Plaintiff, it is important to note that if the evidence of the Plaintiff is entirely taken into consideration that it is clear that, nothing damaging has come on record so that the evidence of the Plaintiff can be treated as untrustworthy. In fact, her entire evidence clearly shows that, fraud has been committed on her. It is significant to note that, the Plaintiff has two biological daughters. The Defendant No.1 is her step son and Defendant Nos.2 and 3

are sons of Defendant No.1. It has also not come on record that, the relationship between the Plaintiff and her two daughters is strained. Therefore, the conduct of execution of Will and execution of registered partition deed, by which, her own daughters are deprived of their property rights, is not natural. Thus, the same also shows that by playing fraud on the Plaintiff the said documents were got executed from her.

15. It is further significant to note that, although, the said document dated 26th November, 2002 is titled as partition deed, however, no share is allotted to the Plaintiff and, therefore, in fact, the said document is either release deed or transfer. Mr. Deshpande, learned counsel appearing for the Respondent Nos.1A and 1B has relied on the decision of the Supreme Court in the matter between *V. N. Sarin Vs. Ajit Kumar Poplai & Anr.*¹ and more particularly, on paragraph No.10 of the said decision. The said paragraph No.10 reads as under:

“Mr. Purshottam, however, contends that when an item of property belonging to the undivided Hindu family is allotted to the share of one of the coparceners on partition, such allotment in substance amounts to the transfer of the said

1 AIR 1966 SC 432

property to the said person and it is, therefore, an acquisition of the Said property by transfer. Prima facie, it is not easy to accept this contention. Community of interest and unity of possession are the essential attributes of coparcenary property; and so, the true effect of partition is that each coparcener gets a specific property in lieu of his undivided right in respect of the totality of the property of the family. In other words, what happens at a partition is that in lieu of the property allotted to individual coparceners they, in substance, renounce their right in respect of the other properties; they get exclusive title to the properties allotted to them and as a consequence, they renounce their undefined right in respect of the rest of the property. The process of partition, therefore, involves the transfer of joint enjoyment of the properties by all the coparceners into an enjoyment in severalty by them of the respective properties allotted to their shares. Having regard to this basic character of joint Hindu family property, it cannot be denied that each coparcener has an antecedent title to the said property, though its extent is not determined until partition takes place. That being so, **partition really means that whereas initially all the coparceners have subsisting title to the totality of the property of the family jointly, that joint title is by partition transformed into separate titles of the individual**

coparceners in respect of several items of properties allotted to them respectively. If that be the true nature of partition, it would not be easy to uphold the broad contention raised by Mr. Purshottam that Partition of an undivided Hindu family property must necessarily mean transfer of the property to the individual coparceners. As was observed by the Privy Council in *Girja Bai v. Sadashiv Dhundiraj*.

"Partition does not give him (a coparcener) a title or create a title in him; it only enables him to obtain what is his own in a definite and specific form for purposes of disposition independent of the wishes of his former co- sharers"."

(Emphasis added)

16. It is clear that, by the partition deed, no share is allotted to the Plaintiff and, therefore, the same cannot be considered as partition deed. Both the Courts have concurrently held that, the said document is created by playing fraud on the Plaintiff. It is significant to note that, when the said registered Will was executed in 1999 and the said partition deed was executed in 2002, the daughters of the original Plaintiff are adults, both are married and staying at their matrimonial house. It is significant to note that, both the daughters are staying in Pune and inspite of that, when

the said registered Will and registered partition deed were executed at Pune, the daughters had not accompanied the mother. In fact, it has come on record that, the major part was taken by the said Ramchandra while executing the said registered Will as well as the said partition deed.

17. Mr. Deshpande, learned counsel appearing for the Respondents has relied on the decision of the Calcutta High Court in the matter between *Atrabannessa Bibi v. Safatullah Mia*² and the decision of the Madras High Court in the matter between *Picha Mooppanar Vs. Velu Pillai & Anr.*³ to substantiate his contention that, the essence of partition is that the property is transformed into estates in severally and one of such estates is assigned to each of the former occupants for his sole use and as his sole property.

18. The learned Appellate Court while discussing the said partition deed in paragraph No.8 has observed as follows :

“ The document Exhibit 59 is dated 26.11.2002. It is titled as a ‘Registered Vatap Patra’. A general stamp of Rs.200/- is affixed on it. It is purchased in the name of the plaintiff. The properties mentioned in this deed are containing only one-half share of the properties which are standing

2 AIR 1916 CALCUTTA 645

3 AIR (34) 1947 Madras 203

commonly in the name of the plaintiff and defendant No.1. As per this deed, said $\frac{1}{2}$ share of these properties are divided in two share. One is allotted to defendant No.2 and another to defendant No.3. It is further written in this document that the plaintiff is a grandmother of defendant Nos.3 and 4 and as she is aged person, she has transferred concerned property in her grand-son's name by her own will. It is also written in said deed that the defendant No.1 has also transferred concerned properties in the name of defendant Nos.2 and 3 as he has other properties in his name. On bare reading of document No.59, it seems that though the document is titled as partition deed, nothing is allotted in the share of the plaintiff. The deed Exhibit 59 is not titled as a released deed. It is titled only as a partition deed. If the real intention of the defendant was of partition, then it was necessary for them to bring in hotch pot all the properties standing in the name of the plaintiff and defendant No.1. The 7 x 12 extract of the suit properties at Exhibit 67 to 77 shows that name of defendant No.1 and the plaintiff were commonly appearing on each extract. In spite of that, during exhibiting document Exhibit 59, the defendant has mentioned only one-half of the share of the properties which were standing in the name of the plaintiff and defendant No.1 commonly. At the

time of execution of the document, it is no where mentioned in the document that they are dividing only share of the plaintiff. It is only mentioned in the document that the plaintiffs and defendants are going to execute a partition deed of the properties mentioned in it. It is no where written that they are going to partition only share of the plaintiff. It is also mentioned in the document that the concerned parties i.e. Plaintiff and defendants are going to partition $\frac{1}{2}$ share from all the properties which are commonly owned and possessed by both the plaintiff and defendant No.1. But, after executing said document and while effecting its entry in revenue record, only name of the plaintiff is struck off from the record of rights by virtue of the partition deed Exhibit 59. Therefore, it is rather clear intention that the document Exhibit 59 was executed only for the partition of the share of the plaintiff. Under the said circumstances, the document cannot be treated as a partition deed because the real intention of the parties was to transfer the share of the plaintiff only in the name of defendant Nos.2 and 3. No where intention of partition reveals from the documents. Therefore, it is nothing but, release of the right of the plaintiff over the suit property. I the only intention of the parties to transfer the share of the plaintiff only in the name of defendant, then it was sufficient for the plaintiff

and defendant to execute a document of release deed by the plaintiff in favour of the defendant Nos.2 and 3. But, instead of this, a document of partition has been executed which creates a clog on the real intention behind the execution of the document Exhibit 59. On bare reading of document Exhibit 59, it reveals that **though the document Exhibit 59 is titled as a partition deed. It is nothing but a release deed of the right of the plaintiff over the suit property in favour of defendant Nos.2 and 3.**"

(Emphasis added)

19. It is clear that, by the partition deed, no share is allotted to the Plaintiff and, therefore, in the eyes of law, the said deed is not a partition deed. Apart from that, the evidence on record clearly shows that, fraud has been played on the Plaintiff and both the Courts by appreciating the evidence have held that, fraud has been played on the Plaintiff and, therefore, decreed the suit. Nothing has been shown to substantiate the contention of the Appellants that the said findings are not on the basis of evidence and, therefore, there is no substance in the substantial questions of law raised by the learned counsel appearing for the Appellants.

20. Therefore, the Second Appeal is dismissed, however, with no order as to costs.

21. In view of dismissal of the Second Appeal, nothing survives in the Civil Application and the same is also dismissed.

[MADHAV J. JAMDAR, J.]