



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.407 OF 2024

Deepak Bhalchandra Kodre

...Appellant

Versus

Minabai W/o. Pradip Nahlave (Nalave) & Ors.

...Respondents

WITH
CIVIL APPLICATION NO.12923 OF 2024
IN
SECOND APPEAL NO.407 OF 2024

Deepak Bhalchandra Kodre

...Applicant

Versus

Minabai W/o. Pradip Nahlave (Nalave) & Ors.

...Respondents

Adv. S. P. Tiwari h/f. Adv. Shantilal J. Gaike for Appellant.

CORAM : S. G. CHAPALGAONKAR, J.

DATED : 10th DECEMBER 2024.

P.C.:-

1. The Appellant/Original Defendant No.2 impugns judgment and decree dated 19th June 2023 passed by learned District Judge-5, Latur in Regular Civil Appeal No.31 of 2018 as well as judgment and decree dated 19th January 2018 passed by learned Civil Judge, Junior Division, Ausa in Regular Civil Suit No.356 of 2011. [Hereinafter parties are referred as per original status in the suit for brevity and convenience].

2. The Respondent Nos.1 to 5 (Original Plaintiffs) instituted suit for partition and separate possession in respect of lands Survey Nos.9/A, 9/B and 67 along with House Property Nos.1605 and 2076, situated at AUSA, contending that Plaintiff Nos.1 to 4 are daughters and Defendant Nos 1 and 2 are the Sons of Plaintiff No.5 and Late Bhalchandra Kodre, who died in the year 1997. The Plaintiffs and Defendants are members of joint family and governed by Mitakshara law.

3. The suit properties are ancestral properties. The Defendants are in possession of aforesaid properties as tenants in common. There were some other properties belonging to joint family, however, those have been alienated long back, therefore, Plaintiffs are not claiming any relief in respect of earlier sale deeds, being barred by limitation. The Defendants have prepared false documents pretending relinquishment of share by plaintiffs in their favour, accordingly, mutated their names into revenue record. Plaintiffs contend that mutation would not prejudice their right in suit property. On 4th April 2011, Plaintiffs claimed for partition but Defendants refused, hence filed present suit. Defendants refuted Plaintiffs' claim contending that there was previous partition during life time of Bhalchandra. The Defendant Nos.1 and 2 were allotted the shares from Survey No.9/B. After demise of Bhalchandra on 14th December 1997, the land to the

extent of 4 Hec. 85 R from Survey No.9/A was mutated in the name of Plaintiff No.5. The Plaintiff Nos.1 to 4 relinquished their right in suit property. They executed consent deed dated 7th December 1998 for transfer of lands. As such Plaintiffs have no more claim in suit properties left by deceased Bhalchandra. The Defendants further contends that Plaintiff No.5 orally partitioned land out of Survey No.9/A and allotted share to Defendant Nos.2. The Plaintiff No.5 has relinquished her right in property by accepting cash of Rs.25,000/-. The memorandum of the partition between Defendant Nos.2 and Plaintiff No.5 is prepared on 19th July 2008. Consequently, mutation entry is sanctioned. According to Defendants, suit is barred by limitation. Neither necessary parties nor entire joint family property has been included in suit.

4. The Trial Court framed issues, recorded evidence of the parties and finally concluded that properties described in paragraph 2 of the plaint are joint properties of Hindu Undivided Family and Plaintiffs are entitle for partition. The other contentions of Defendants are rejected. Eventually, Plaintiff Nos.1 to 4 were held entitled for 1/28th share each and Plaintiff No.5 was held entitled for 2/7th share in the suit properties.

5. The Plaintiffs as well as Defendants challenged judgment and decree passed by the Trial Court by filing appeal and cross-objection

respectively. The Appellate Court modified the decree of Trial Court and concluded that Plaintiff Nos.1 to 5 and Defendant Nos.1 and 2 are entitled for 1/7th share each in the suit property. Consequently, dismissed the appeal and allowed the cross-objection.

6. Mr. S. P. Tiwari, learned Advocate appearing for the Appellant (Original Defendant No.2) submits that both the Courts have failed to consider Defendants' contention as to previous partition of the properties by Bhalchandra during his lifetime. On 14th December 1997 Bhalchandra expired thereafter lands from Survey No.9/A stood mutated in the name of Plaintiff No.5. The Plaintiff Nos.1 to 4 had executed consent dated 7th December 1998 in favour of Plaintiff No.5 to alienate the suit properties. On 19th July 2018, Plaintiff No.5 relinquished her share in favour of Defendant Nos.1 and 2. As such, there was nothing left for the partition of the ancestral property. He would further submit that since Bhalchandra died on 14th December 1997, Plaintiffs could have filed suit for partition within 3 years from his death, hence, suit filed after lapse of 12 years is barred by limitation. Mr. Tiwari points out that there were many previous transfers of the land. The document dated 20th March 1999 placed at Exhibit-87 is a registered partition deed executed by Plaintiff No.5 in favour of Defendant Nos. 2. He would, therefore, submit that Courts

below have committed serious error of law and casually recorded findings without framing material issues.

7. Having considered submissions advanced, it cannot be disputed that the suit properties were originally owned by Bhalchandra i.e. father of Plaintiff Nos.1 to 4 and Defendant Nos.1 and 2. The Plaintiffs instituted suit in the year 2011 seeking partition and separate possession in respect of suit properties. The Defendants have contested suit mainly on the ground of previous partition. The first document relied upon by the Defendants is Mutation Entry No.3078 sanctioned on 5th October 1986, which shows that Plaintiff No.5 and deceased Bhalchandra had purchased the landed property. The second document relied upon by Defendants is consent deed dated 7th December 1998 placed at Exhibit-86. The Defendants have pleaded that Plaintiff Nos.1 to 4 relinquished their right in suit property. The third document relied upon by Defendants is partition deed executed by Plaintiff No.5 dated 20th March 1999 placed at Exhibit-87. The fourth document relied upon by Defendants is the partition deed dated 19th July 2008 placed at Exhibit-85.

8. Insofar as the previous partition of 1985 is concerned, there is no supporting document, on other hand, the pleading in the written statement filed by legal representatives of Defendant No.1 shows that

till death of Bhalchandra, suit lands were jointly owned and after his death, the Defendants and Plaintiffs inherited same.

9. The Defendants have pleaded that they were allotted the share in the suit properties vide partition deed dated 20th March 1999 (Exhibit-87). However, said document depict that it was the partition by Defendant Nos.1 and 2 among themselves after death of Bhalchandra. No share was allotted to Plaintiffs under that document. Therefore, said document would not create right in favour of Defendant Nos.1 and 2 to exclusion of right of Plaintiffs. The Defendants have further relied upon document at Exhibit-86 stating it to be document of relinquishment of rights by Plaintiffs in favour of Defendants. However, stipulations in said document simply suggest that Plaintiffs have given no objection for alienation of lands and asserted not to have any right or concern in the property. Pertinently, the document of relinquishment of existing right in immovable property is compulsorily registerable as per Section 17 of the Registration Act, otherwise, such document would not be admissible in the evidence. Apparently, such document cannot be accepted as evidence of relinquishment of the right by the Plaintiffs. Further it can be observed that Plaintiff No.2 is not party to the said document. She was not present at the time of execution of the document. However, her signature is affixed. The evidence of scribe-DW-2 suggest that the

Plaintiff No.2 was not present at the time of writing of deed. The Appellate Court observed that even signature of Plaintiff No.2 is in different ink than others. The Courts below have, therefore, rightly refused to rely upon such documents.

10. Next document relied upon by the Defendants is dated 19th July 2008 placed at Exhibit-85 in form of Memorandum of Oral Partition by which the land Survey No.9/A is shown to have been allotted to Defendant Nos.1 and 2. Whereas, Defendant No.5 accepted Rs.25,000/- towards her share. Pertinently, Plaintiff No.5 not entered in the witness box. The Defendants have also not examined her as their own witness. Nothing is brought on record to prove oral partition dated 19th July 2008. In case of memorandum of partition, fact of partition ought to have independently proved. The memorandum itself do not create any right unless factum of the partition is independently proved. Eventually defendants can not draw advantage from it to advance their case.

11. Pertinently, as per amendment in Hindu Succession Act, (HSA) the daughters have been conferred with co-parcenary right in the ancestral properties. The Supreme Court of India in case of *Vineeta Sharma Vs. Rakesh Sharma & Ors.*¹ interpreted Section 6 of HSA as amended in 2005. In the absence of proof of previous

1 (2020) 9 SCC 1

partition, after death of Bhalchandra, Plaintiff Nos.1 to 5 are definitely entitle to claim equal share in property along with brothers and mother. Pertinently in State of Maharashtra right in coparcenary property has been recognized to daughters as per Hindu Succession (Maharashtra Amendment)Act, 1994.

12. In that view of the matter, no substantial question of law arises for consideration in this appeal. Second Appeal stands dismissed.

13. In view of dismissal of second appeal, civil application does not survive and also disposed of.

(S. G. CHAPALGAONKAR, J.)