

Iresh

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

**SECOND APPEAL NO. 439 OF 2024
WITH
INTERIM APPLICATION NO. 10644 OF 2024
IN
SECOND APPEAL NO. 439 OF 2024**

Sarjerao Janardan Dhaygude and Ors

.....Appellants

Vs.

Janardan Shankar Dhaygude Deceased
through LRs

.....Respondents

IRESH
MASHAL

Mr. R. M. Haridas i/b Mr. Prasad Kulkarni for the appellant
Mr. R. S. Apte Senior Advocate (On VC) i/b Mr. Anand S. Kulkarni for
the respondent

CORAM : GAURI GODSE, J.

DATE : 26th AUGUST 2024

ORDER:

1. Heard learned counsels for the parties. This second appeal is preferred by the original plaintiffs to challenge the concurrent judgments and decrees dismissing the plaintiffs' suit with regard to house property described in plaint paragraph 1A. The suit was filed for a declaration that the compromise decree dated 5th July 1990 passed

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in Special Civil Suit No. 241 of 1990 was not binding upon plaintiffs' $\frac{3}{5}$ th share, and therefore, plaintiffs had prayed for partition and separate possession. The suit was dismissed. Dismissal of the suit was challenged by the plaintiffs in the first appeal. The first appeal is partly allowed, and plaintiffs and defendant nos. 2A, 2B, 2C and 2D are declared to have $\frac{1}{6}$ th share in the agricultural suit property described in plaint paragraph 1B. The first Appellate Court confirmed the dismissal of the suit, rejecting the prayer with respect to the property described in paragraph 1A. Both the Courts have concurrently held that the suit property 1A is self acquired property of defendant no. 1.

2. Appellants, i.e. plaintiffs, are children of defendant no. 1. Defendant no. 2 is their mother. Defendant no. 3 is the purchaser of the suit property 1A by way of a registered sale deed executed by defendant no. 1. The compromise decree dated 5th July 1990 was passed in a suit filed by defendant no. 3 against present defendant nos. 1 and 2 as well as brothers of defendant no. 1. By way of compromise decree in the said suit, present defendant no. 1 had agreed to hand over the possession of the house property, i.e. suit property 1A to present defendant no. 3. Both the Courts have

disbelieved the plaintiffs' contention that they have a share in suit property 1A.

3. Learned counsel for the appellants submitted that the suit property originally belonged to the plaintiffs' grandfather, i.e. Shankar. He submits that since the suit properties are coparcenary properties prior to 1956, the plaintiffs' grandfather could not have sold the property to defendant no. 1. He submits that since the suit property 1A is ancestral property prior to 1956, the plaintiffs' share as coparceners stand protected and the sale deed executed by other coparceners would not be binding upon the plaintiffs' share. He thus submits that the plaintiffs have the right to seek a partition and separate possession, at least to the extent of the grandfather's share. He thus submits that the compromise decree executed in the suit filed by defendant no. 3 would not be binding upon the plaintiffs' right to claim a share in the grandfather's share.

4. Learned counsel for the appellants further submitted that the plaintiffs had examined defendant no. 1's brother in support of their contention that the suit property 1A is an ancestral joint family property prior to 1956, and thus plaintiffs have a right in the same. He submits

that in the evidence of defendant no. 1's brother, he specifically admitted that suit property 1A stood in the name of the plaintiffs' grandfather since 1950–1952. He further admitted that defendant no. 1 had taken a loan on the suit property 1A, and other coparceners were not concerned with the said loan; hence, it was agreed that independent shares of defendant no. 1's brothers and father would be transferred in the name of defendant no. 1. He thus submits that the evidence of defendant no. 1's brother examined on behalf of the plaintiffs would indicate that the suit property 1A was an ancestral property of the grandfather prior to 1956, and thus, the plaintiffs' right in the grandfather's share stands protected.

5. Learned counsel for the appellants further submitted that defendant no. 3 failed to step into the witness box to support the documents in his favour. A vital piece of evidence in the form of defendant no. 1's brother's oral evidence was not rebutted by defendant no. 3. Defendant no. 3 has examined his power of attorney holder, who had no personal knowledge with regard to the documents executed in favour of defendant no. 3. Hence, the evidence led by defendant no. 3 could not have been relied upon. He thus submits that defendant no. 3 failed to rebut the evidence in favour of the plaintiffs

by way of oral evidence of defendant no. 1's brother. Thus, he submits that both Courts ought to have considered the plaintiffs' right to seek partition by way of coparcenary rights in the grandfather's share as the property existed in the name of the grandfather before 1956.

6. In support of his submissions regarding defendant no. 3 not entering into the witness box and examining only the power of attorney holder, learned counsel for the appellants relied upon the decision of the Hon'ble Apex court in the case of *Man Kaur (Dead) By LRS Vs. Hartar Singh Sangha*¹. To support the submissions that the suit property 1A was an ancestral property prior to 1956 and since the grandfather acquired rights in the coparcenary property prior to 1956, the grandfather could not have transferred his share to defendant no. 1, learned counsel for appellants relied upon the decision of the Hon'ble Apex court in the case of *Arshnoor Singh Vs. Harpal Kaur and Ors*²

7. Learned counsel for the appellants thus submitted that the second appeal would require consideration on the aforesaid grounds, which raise substantial questions of law.

¹ (2010) 10 Supreme Court Cases 512

² (2020) 14 Supreme Court Cases 436

8. I have considered the submissions made on behalf of the appellants. The pleadings and evidence on record indicate that it is not in dispute that the suit property 1A was a coparcenary property. It is also not in dispute that on 30th March 1968, a compromise decree for partition was passed between defendant no. 1 and his brothers and their father. By way of a compromise decree dated 30th March 1968, defendant no. 1, his brothers and their father were given 1/6th share. Thereafter, on 22nd January 1970 and 28th January 1970, sale deeds were executed by defendant no. 1's father and brothers of defendant no. 1, thereby transferring their respective 1/6th share in the suit property 1A to defendant no. 1. The said compromise decree and the sale deeds executed in favour of defendant no. 1 are not challenged.

9. Thus, based on the said compromise decree and the two sale deeds, defendant no. 1 claims to be the exclusive owner of suit property 1A. Based on the absolute title of defendant no. 1, he executed a sale deed dated 12th October 1987 in favour of defendant no. 3. Based on the said sale deed, defendant no. 3 had filed a separate suit, i.e. Special Civil Suit No. 241 of 1990, against defendants nos. 1 and 2 and the other heirs of the plaintiffs'

grandfather. The said suit was compromised, and defendant no. 1 had agreed to hand over possession of suit property 1A to defendant no. 3.

10. Therefore, the plaintiffs filed the present suit to declare that the compromise decree in defendant no. 3's suit would not be binding upon the plaintiffs' share. The plaintiffs claim a $\frac{3}{5}$ th share in suit property 1A through their grandfather and thus prayed for a declaration that the compromise decree in defendant no. 3's suit would not be binding upon their share. Hence, the plaintiffs also prayed for partition and separate possession.

11. Both the courts have concurrently held that in view of the sale deeds executed in favour of defendant no. 1, the absolute ownership of suit property 1A stood transferred in favour of defendant no. 1. The reasons recorded by both the Courts would indicate that all the documents, i.e. original compromise decree dated 30th March 1968 and the two sale deeds in favour of defendant no. 1 have been considered by the Courts as the documents of absolute title in favour of defendant no. 1. The plaintiffs neither challenged the original compromise decree, nor challenged the sale deeds executed in favour of defendant no. 1. The plaintiffs also did not challenge the sale deed

dated 12th October 1987 in favour of defendant no. 3. The right claimed by the plaintiffs in the suit property 1A is on the ground that they would get a share in the joint Hindu family and defendant no. 1 did not execute sale deed in favour of defendant no. 3 by way of any legal necessity. It is for the first time argued that the plaintiffs would be entitled to claim share as coparceners at least in their grandfather's share, as the coparcenary property existed prior to 1956.

12. The decision of the Hon'ble Apex Court in the case of ***Arshnoor Singh***, which was relied upon by the learned counsel for the appellants, deals with the rights of coparceners in the property in existence prior to 1956. In the present case, it is necessary to note that there was a compromise decree for partition and separate possession executed between the plaintiffs' grandfather, defendant no. 1, i.e. the plaintiffs' father and the other coparceners, i.e. the brothers of defendant no. 1. The compromise decree of partition and separate possession is based on the shares claimed by the respective parties under the provisions of The Hindu Succession Act 1956. Thus, the legal principles settled by the Hon'ble Apex Court in the case of ***Arshnoor Singh***, are of no assistance to the appellants. In the present

case, the grandfather's share is transferred to defendant no. 1, in view of the compromise decree and subsequent sale deeds executed by the grandfather and brothers of defendant no. 1. Thus, the plaintiffs' grandfather's share in the coparcenary property received as per the compromise decree of partition and separate possession on 30th March 1968, was transferred by way of a registered sale deed in favour of defendant no. 1.

13. The registered sale deeds executed by the grandfather are not under challenge. Thus, in view of the registered documents executed in favour of defendant no. 1, the grandfather's share also stood transferred in favour of defendant no. 1. Hence, it is concurrently held that the plaintiffs would not be entitled to seek any share in the said property. Thus, defendant no. 1 became the absolute owner of the suit property 1A in view of sale deeds executed in his favour. Thus, defendant no. 1 has transferred his right, title and interest in favour of defendant no. 3 by way of a registered sale deed.

14. In view of the aforesaid undisputed documents executed in favour of defendant no. 1, the compromise decree executed in defendant no. 3's suit is binding upon defendant no. 1 and the

plaintiffs. Thus, the plaintiffs are not entitled to claim any share through their father, i.e. defendant no. 1, or through their grandfather. Hence, the legal principles settled by the Hon'ble Apex Court in the case of ***Arshnoor Singh*** would be of no assistance to the arguments raised on behalf of the appellants. The Hon'ble Apex Court held that when succession opens under old Hindu Law, i.e. prior to the Hindu Succession Act 1956, the nature of the property will remain coparcenary property even after the commencement of the Act of 1956. In the present case, the plaintiffs are not claiming any coparcenary share by challenging the compromise decree for partition and separate possession between defendant no. 1, his brothers and their father. Hence, the ground argued by the learned counsel for the appellants based on the legal principles settled in the case of ***Arshnoor Singh*** cannot be examined for the first time in the second appeal.

15. The decision in the case of ***Man Kaur*** would also be of no assistance to the grounds argued on behalf of the appellants in as much as the main relief sought by the appellants was with regard to the plaintiffs' right to claim a share in the coparcenary property. Thus, defendant no. 3 was not required to step into the witness box

personally to rebut the oral evidence led by defendant no. 1's brother regarding the original existence of coparcenary property or the compromise decree for partition and separate possession.

16. It is argued on behalf of the appellants that they seek share in the suit property 1A through their grandfather. However, the grandfather's share stood transferred to defendant no. 1 in view of the registered sale deed. Defendant no. 3 was not concerned with either the compromise decree executed on 30th March 1968 or the sale deeds executed in favour of defendant no. 1. In any case, the compromise decree of 1968 and the sale deeds in favour of defendant no. 1 were not under challenge. Thus, the evidence relied upon by the learned counsel for the appellants to support the plaintiffs' right to seek share in the grandfather's coparcenary right was not required to be rebutted by defendant no. 3 who is a subsequent purchaser. Hence, all the proposed questions of law argued on behalf of the appellants would require no consideration in the second appeal.

17. Thus, in view of the settled legal principles, this Court is not required to consider the grounds raised on behalf of the appellants.

18. The reasons recorded by both the Courts with regard to

defendant no. 1's title is based on the registered documents executed in his favour and after examining all the documents as well as oral evidence on record. I do not find any illegality or perversity in the reasons recorded by both the Courts on defendant no. 1's title.

19. The second appeal does not raise any other substantial question of law. Hence, the second appeal is dismissed.

20. In view of the dismissal of the second appeal, Interim Application 10644 of 2024 is dismissed as infructuous.

21. At this stage, learned counsel for the appellants submits that defendant no. 3 has filed execution proceedings for execution of the compromise decree in Special Civil Suit No. 241 of 1990. He submits that execution of the said decree was stayed in view of the statement made on behalf of defendant no. 3. He submits that the appellants are in possession of suit property 1A. Hence, he submits that the appellants would be dispossessed if the compromise decree is executed. He therefore requests that the protection which is operating till date be extended for a period of eight weeks from today.

22. Learned counsel for defendant no. 3 opposes the said request

on the ground that the compromise decree was executed more than 30 years ago; hence, protection may not be extended further. He further submits that in the event this Court is inclined to extend the protection, the appellants be directed to file an undertaking stating that they would hand over the possession in the event the Hon'ble Apex Court does not pass favourable orders.

23. I find substance in the submissions made on behalf of defendant no. 3. Hence, protection already granted by this Court, i.e. stay to the execution and operation of the decree passed in Special Civil Suit No. 241 of 1990, shall continue for a period of eight weeks subject to appellants filing an undertaking in this Court stating that they are in possession of the suit property 1A and they shall handover the same to defendant no. 3 in the event favourable orders are not passed by the Apex Court. The undertaking shall also state that they will not create any third-party interest in suit property 1A. Necessary affidavit-cum- undertaking of the appellants shall be filed in this Court within three weeks.

[GAURI GODSE, J.]