



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.624 OF 2018
WITH
CIVIL APPLICATION NO. 1053 OF 2018

Mr.Popatlal Krishnachand

Shaha (Deceased Thru Lrs)

1.Shri.Jeetendrakumar Popatlal Shaha & Ors.

...Appellants/
Applicants

Versus

Sou.Nanda Kantilal Shah & Ors

...Respondents

Adv. Y. S. Jahagirdar, Senior Advocate a/w Adv. B. K. Raje i/b Adv. Santosh M. Suryavanshi for the Appellant.

Adv. Prafulla Shah a/w Adv. Gunjan Shah for Respondent Nos. 1 & 2.

Coram : Sharmila U. Deshmukh, J.

Date : March 18, 2024.

P. C. :

1. Being dissatisfied by the order dated 31st March, 2018 passed in Regular Civil Appeal No. 340 of 2010 dismissing the Appeal confirming the judgment and decree dated 30th October, 2007 passed in Regular Civil Suit No. 205 of 1981, the original Defendants are before this Court. For sake of convenience the parties are referred to by their status before the Trial Court.

2. Regular Civil Suit No. 205 of 1981 was filed by the Plaintiff seeking partition of the suit properties described in paragraph 1 therein situated at Village Yetgaon and Village Chitali claiming to be joint family properties of the Plaintiffs and the Defendants.

3. The contention of the Defendants was that there was a prior partition in the year 1950/51 pursuant to which mutation entry No. 5526 and 6274 were effected as recorded at the instance of the predecessor in title of the Plaintiffs which showed partition between the parties. It was contended that during the partition, the properties at Village Yetgaon with gold etc. was allotted to the share of the Plaintiff's predecessor whereas the properties at Village Chitali were allotted to the share of the Defendant's pre-decessor and accordingly they were in possession of their respective properties.

4. The Trial Court after consideration of the evidence on record held that the Defendants have failed to prove prior partition and decreed the suit determining the shares of the parties. As against this the Appeal came to be filed by the original Defendants. The Appellate Court re-appreciated the evidence on record and confirmed the judgment and decree of the Trial Court.

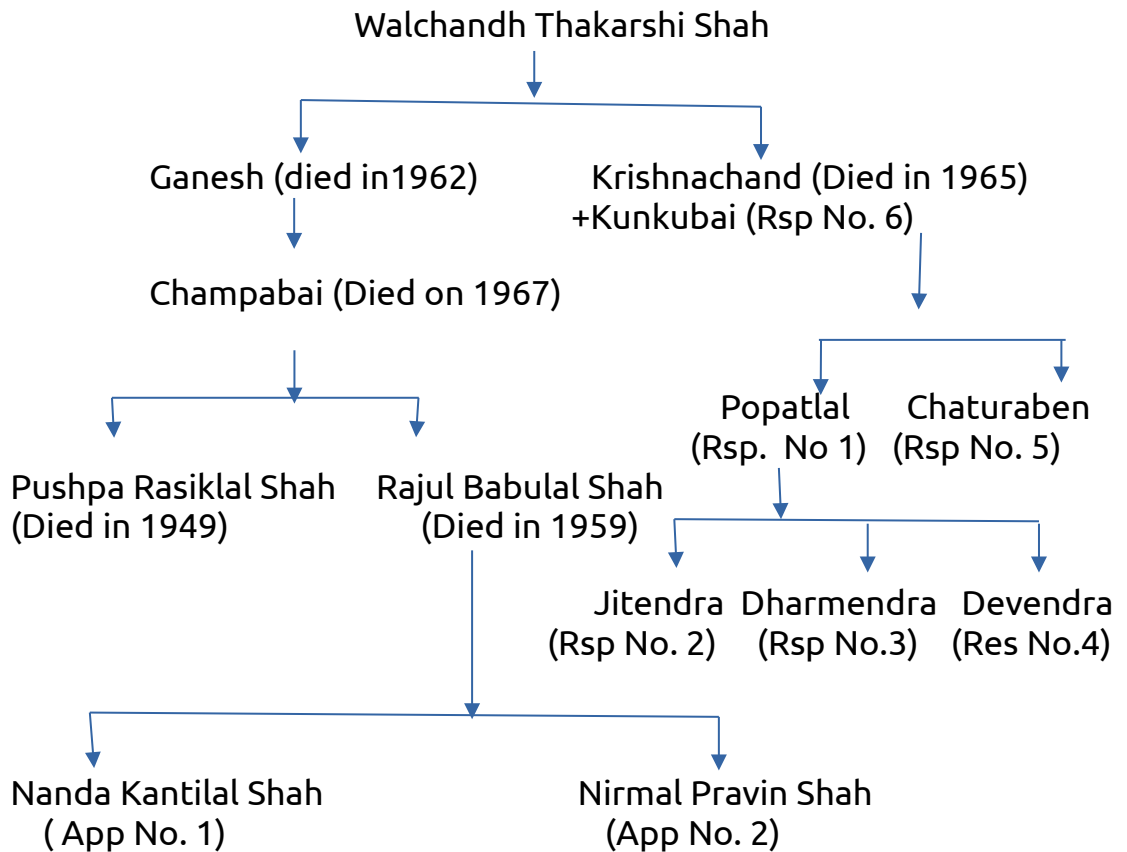
5. Heard Mr. Jahagirdar, learned Senior Advocate for the Appellant

and Mr. Shah, learned counsel for the Respondent.

6. Mr. Jahagirdar, Learned Senior Advocate for the Appellant submits that the mutation entries on record establishes the case of the prior partition. He submits that the intention to separate is evident particularly when the mutation entry has been certified on the basis of the Application which was made by the predecessors of the Plaintiff i.e. the branch of Ganesh. He would further submit that the Trial Court on the basis of the subsequent Mutation Entry No. 8094 mutating the names of heirs of Krishna and by taking into consideration the sale-deed which was shown to have been jointly executed by Ganesh and Krishna has disbelieved the theory of prior partition. He submits that the Trial Court as well as the Appellate Court has mis-appreciated the evidence on record. He would submit that the substantial question which arises is that the intention to sever the status of joint family property has to be inferred from the documentary evidence which has come on record as well as the conduct of the parties. According to him, in the present case, as the branches of Ganesh and Krishna were individually dealing with their separate properties the conduct of the parties would indicate the severance of the joint status.

7. Considered the submissions and perused the record.

8. For the purpose of appreciating the relationship of the parties inter se, the genealogy is reproduced as under:



9. The Plaintiffs are from the branch of Ganesh and the Defendants are from the branch of Krishnachand. The Plaintiffs seek partition whereas the Defendants have put forth case of prior partition. In support, the Defendants rely upon two mutation entries which are marked as Exhibit 103 and 104. Perusal of the mutation entries would indicate that at the instance of Ganesh certain properties are shown to be mutated in the name of Krishnachand. The mutation entry indicates that an application made by Ganesh for the

purpose of mutating certain properties in the name of Krishnachand as the same have been allotted to the share of Krishnachand. However, it is well settled that there must be a definite and unequivocal intention to separate and the conduct of the parties subsequent to the partition will have to be taken into consideration for the purpose of ascertaining whether the parties intended to separate and enjoy the property in defined shares as separate owners. If the documentary evidence on record is perused, the mutation entry No. 8049 discloses that after the death of Ganesh, the properties came to be mutated in the name of the persons from the branch of Krishnachand by way of succession. The other documentary evidence which negates the issue of the prior partition of the year 1951 is that the recovery of the tenanted lands at village Chitali from the possession of the tenants was obtained by Ganesh pursuant to which his name came to be recorded in respect of said properties.

10. If as per the Mutation Entry No. 5526 and 6247, which are relied upon by the Defendants to substantiate the case of prior partition, the lands at Village Chitali were allotted to the branch of Krishna, the possession of the tenanted land at Village Chitali could not have been obtained by Ganesh and subsequently mutated in his name. Further evidence to show that there was no severance of joint family status is

the sale-deed which has been executed on 29th December, 1956 by both Ganesh and Krishnachand in respect of properties at Village Yetgaon. The case of the Defendants is that the properties at Yetgaon were allotted to the share of Ganesh. There is no explanation pleaded or established as to why if the properties at Village Yetgaon were allotted to the share of Ganesh, by way of the sale deed, the properties were jointly sold by Krishnachand as well as the Ganesh. On the basis of the documentary evidence it is clearly established that despite the Mutation entries marked as Exhibit 103 and 104, there was no severance of the joint family properties and parties continued to treat the properties as the joint family properties and have dealt with the said properties accordingly. The case of the Defendants is that the properties at Village Yetgaon came to the share of Ganesh whereas the properties at Village Chitali came to the share of Krishna is disregarded by the Trial Court and the Appellate Court on the basis of the evidence which has discussed above.

11. As the evidence on record does not demonstrate the clear and unequivocal intention to separate and hold the properties allotted to their shares as separate owners, the Trial Court and Appellate Court has rightly decreed the suit for partition. In exercise of powers under Section 100 of CPC it is not open for this Court to re-appreciate the

evidence and substitute its own view in place of the findings of the Trial Court and the Appellate Court unless it is demonstrated that the concurrent findings are based on no evidence or have been arrived at without proper application of law. It is well settled that even an erroneous finding of fact cannot be interfered with by this Court by exercise of power under Section 100 of CPC.

12. Having regard to the discussion above, no substantial question of law arises. Appeal stands dismissed.

13. In view of dismissal of Second Appeal, Civil Application for stay does not survive for consideration and the same stands disposed of.

[Sharmila U. Deshmukh, J.]