

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.636 OF 2017

Dagdu Kashiba @ Bhau Walunj

...Appellant

Versus

Vimal Dagdu Walunj And Ors.

...Respondents.

Adv. T. D. Deshmukh for the Appellant.

Coram : Sharmila U. Deshmukh, J.

Date : April 30, 2024.

P. C. :

1. Being dissatisfied by the judgment dated 9th September, 2015 passed by the Appellate Court dismissing the Appeal thereby confirming the judgment of the Trial Court passed in Regular Civil Suit No. 100 of 2003, the original Defendant No. 1 is before this Court. For the sake of convenience the, parties are referred to their status before the Trial Court.

2. The facts of the case are that the Plaintiff No.1 is the wife of Defendant No. 1 and Plaintiff No. 2 is the son of Plaintiff No. 1 and Defendant No. 1. Criminal Application under Section 125 of Cr.P.C. came to be filed by the Plaintiff No. 1 for maintenance which was allowed. Subsequently, a lump-sum amount was accepted by the

Plaintiffs from the Defendant No. 1 as maintenance. By way of the instant suit, partition was accepted, of the suit properties on the premise that the suit properties are ancestral properties. In the proceedings apart from the Defendant No. 1, other family members of the Defendant No. 1 were impleaded as parties.

3. Suit came to be resisted by the Defendant No. 1 claiming that in lieu of the lump-sum maintenance which was accepted, the Plaintiff have relinquished their shares in favour of the Defendant No. 1. As such they have no right to seek partition. The Trial Court after considering the evidence, decreed the suit on 15th October, 2007. As against this, the Defendant No. 1 filed a Civil Appeal No. 73 of 2014 which came to be dismissed.

4. Heard Mr. Deshmukh, learned counsel for the Appellant.

5. Learned counsel for the Appellant would submit that the substantial question of law which would arise is that once there is a relinquishment by the Plaintiffs of their right in the suit property in lieu of maintenance, no suit for partition would lie. He submits that the relationship between the parties is not disputed. He submits that once it is accepted by the Plaintiffs that the lump-sum amount was accepted from Defendant No. 1, there is a relinquishment which is

evident the Consent Terms which were filed in the Criminal Misc. Application No. 242 of 1994.

6. Considered the submissions and perused the Record.

7. The relationship inter-se between the parties is not disputed neither is the nature of the suit properties that the same constitutes ancestral properties. The Appellate Court has considered the Consent Terms which were filed by the Plaintiffs and the Defendant No. 1 in the Criminal Misc. Application No. 242 of 1994 and noted, noted that the Plaintiff No. 1 is an illiterate lady and the Plaintiff No. 2 was a minor at the time of execution of the Consent Terms.

8. Considering the position, firstly, the Consent Terms was not binding on the Plaintiff No. 2 and secondly, the burden is upon the Defendant No. 1 to show that the Consent terms was executed by the Plaintiff No. 1 relinquishing her rights was by executed her free and informed consent. The Appellate Court on the basis of the evidence has held that the evidence does not conclusively establish that the Plaintiffs have relinquished their share in the suit properties in favour of the Defendant no. 1. It is also an admitted position that there is no deed of relinquishment which has been executed *qua* the suit properties and the only evidence which has been adduced by the

Defendant no. 1 is a thumb impression which is affixed on the compromise deed.

9. Considering the evidence of the Defendant No. 1's witnesses, the Appellate Court has noted that he was called by the Defendant No. 1 with cash as Defendant No. 1 was intending to take divorce from Plaintiff No. 1 by giving cash to her. The Appellate Court noted that the witness has further admitted that neither any talk of compromise taken place in his presence nor any deed of compromise was executed in his presence. Considering the evidence which is come on record, the Appellate Court disbelieved the case of the Defendant No. 1 that there was relinquishment of the Plaintiffs share in the suit properties.

10. Admittedly, there is no partition of the joint family property and thus, the Plaintiff No. 2 would have a right to seek partition of the property. The Plaintiff No. 1 being the wife could not have demanded the partition, however, if the partition takes place between her son and her husband, she is entitled to receive a share in the said partition. In view of the settled position in law, the Trial Court has decreed the suit and determined the shares of the Plaintiffs in the suit property. The Appellate Court on re-appreciation of evidence has confirmed the findings of the Trial Court. In exercise of power under Section 100 of

the CPC, it is not permissible for this Court to re-appreciate the evidence and substitute its own view unless it is shown from the evidence on record that there is perversity in the findings of the Court. No such perversity is demonstrated in the present case. The Appellate Court has rightly drawn the correct inference by applying the law properly. In view thereof, no substantial question of law arises. Appeal stands dismissed.

11. In view of dismissal of Second Appeal, Civil/Interim Applications if any, taken out therein does not survive for consideration and stand disposed of.

[Sharmila U. Deshmukh, J.]