

Harish

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.723 OF 2018

WITH

CIVIL APPLICATION NO.1632 OF 2018

IN

SECOND APPEAL NO.723 OF 2018

Babasheb Jalindar Metkari & Ors.

...Appellants/
Applicants

Versus

Sou.Mangal Babasaheb Metkari & Ors.

...Respondents

Mr. V. S. Talkute for the Appellants/Applicants.

Mr. Ajay A. Joshi for the Respondents.

CORAM : SHARMILA U. DESHMUKH, J.

DATE : JANUARY 22, 2024

P. C. :

1. Being dissatisfied that the Judgment of the First Appellate Court dated 5th May, 2017, dismissing the Appeal the present Appeal has been filed.

2. The Appellants are the original Defendant Nos. 1 to 3 in Regular Civil Suit No. 39 of 2011 filed by the Respondent No.1 seeking a declaration that the Plaintiff has half share in the property and for partition of the property and for a directions to the Appellants to hand over possession. For the sake of convenience, the parties are referred by their status before the Trial Court.

3. Regular Civil Suit No. 39 of 2011 was filed by the Plaintiff claiming half share in the suit property which was admittedly the ancestral property of the Plaintiff. It was contended that one Sida Khatal was the owner of the suit land who expired leaving behind him surviving his legal heirs his wife Malan and three daughters namely Mangal, Sakhubai and Tarabai. Mangal is the Plaintiff in the present case. Tarabai died issueless and Sakhubai has one daughter and three sons. The case of the Plaintiff is that, the Plaintiff is the wife of Defendant No. 1 and the Defendant No. 2 is the brother of the Defendant no. 1 and Defendant No. 3 is the wife of Defendant No. 2. The Defendant No. 3 is daughter of the Plaintiff's sister Sakhubai. It was pleaded that the suit property is the ancestral property and the Defendant Nos. 1 and 2 had no right in the suit property. However by virtue of a document styled as a partition deed dated 30th December, 1984, a partition is shown to have been effected between Malan i.e. the mother of the Plaintiff and the Defendant Nos. 1 and 2. It was pleaded that pursuant there to, a mutation entry has been effected, however, the Plaintiff's right in the suit property has not being extinguished. It was further pleaded that subsequently, the Defendant No. 1 has thrown the Plaintiff out of the matrimonial house and necessary proceedings are pending against the Defendant Nos. 1 and 2. It was further pleaded that the Defendant Nos. 1 to 3 have illegally mutated the

name of the Defendant No. 3 in the mutation record.

4. The suit came to be resisted by the Defendant Nos. 1 to 3. The case of the Defendant Nos. 1 and 2 is that Mangal, Sakhubai and Tarabai had made an Application before the Revenue Authority that their names deleted from the revenue records and has thereby relinquished their right in the suit property. It was contended that Malan, i.e. the mother of the Plaintiff had love and affection for the Defendant No. 1 and 2 and had made an Application for permission to execute the partition of the suit land and as such, the same was partitioned between the mother of the Plaintiff and Defendant Nos. 1 and 2.

5. The parties went to trial, and the Trial Court held that the Plaintiff is entitled to the suit land to extent of half share and no right accrued to the Defendant Nos. 1 and 2 on the basis of the partition effected by Malan. The Trial Court further held that the Plaintiff did not relinquish her share in the suit land and decreed the suit. The Appellate Court concurred with the findings with the Trial Court and dismissed the Appeal.

6. Heard Mr. Talkute, learned counsel for the Appellant and Mr. Joshi, learned counsel for the Respondents.

7. Mr. Talkute, learned counsel for the Appellant would submit that admittedly the suit lands are in possession of the Defendant Nos. 1 to 3

and the Trial Court had declared the right of the Plaintiff to the extent of half share and for partition to be effected. He submits that there was no decree for possession passed. He would further submit that the First Appellate Court has mechanically reproduced the findings of the Trial Court without considering the fact that the evidence on record points to the relinquishment of the rights by the sisters in favour of their mother subsequent to which the partition was effected.

8. Considered the submissions and perused the record.

9. It is not disputed that the property is ancestral property belonging to the father of the Plaintiff. From the Judgment of the First Appellate Court, it appears that the contention of the Defendants was that after the death of the father of the Plaintiff-Sida, the suit property was entered into the name of legal heirs i.e. his wife Malan and three daughters and thereafter an Application was made by the sisters to delete their from the revenue records. It is well settled that there cannot be any oral relinquishment deed and the release deed if any, is required to be in writing. In the present case, indisputedly there is no relinquishment deed produced on record by the Defendants, to conclude that there was a release in favour of the mother of the Plaintiff by the daughters including the Plaintiff.

10. As regards the submission that there was a partition which was

effected between the mother of the Plaintiff and the Defendant Nos.1 and 2, admittedly the Defendant Nos. 1 and 2 are not co-parceners and as such, there is no question of any partition being effected between a co-parcener and stranger to the property. As far as decree for possession is concerned, the Trial Court had framed the issue whether the Plaintiff is entitled for partition and separate possession and answered the same in affirmative. There is no challenge by the Plaintiff, at least demonstrated to this Court, as regards non grant of decree for possession despite answering issue in the affirmative. The absence of decree for possession does not raise substantial question of law. Perusal of the judgment of the Trial Court would indicate that there has been a declaration of half of the share of the Plaintiff in the suit property and for partition to be effected. The evidence on record does not indicate any perversity in the finding and is in according to the well settled position in law most of the facts being undisputed. In that view of the matter, no substantial question of law arises.

11. Appeal stands dismissed.

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

(SHARMILA U. DESHMUKH, J.)