



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 99 OF 2024

Tanhabai Eknath Mirpagar

VERSUS

Daulat Sahadu Landge Deceased
Through Lrs Deubai And Others

- Mr. A. N. Nagargoje h/f Ms. S. P. Chate, Advocate for the Appellant
- Mr. M. S. Taur, Advocate for the Respondent No. 1
- Mr. A. R. Tapse h/f Ms. N. R. Suryawanshi, Advocate for Respondent No. 2

CORAM : R. M. JOSHI, J
DATE : JANUARY 29, 2025

PER COURT :

1. This Appeal under Section 100 of the Code of Civil Procedure takes exception to the concurrent findings recorded by the Trial Court as well as First Appellate Court in RCS No. 107/2004 and RCA No. 70/2014.

2. Parties are referred to as Plaintiffs and Defendants for the sake of convenience.

3. Plaintiffs have filed suit for partition with specific averments that suit properties are ancestral joint family properties initially owned by Shahadu

Landge and two sons i.e., Plaintiff and Damu. Damu is deceased. Shahadu died in 1956 whereas Damu died in 1985. It was the case of the Plaintiffs before the Trial Court that the suit properties are ancestral joint family properties of Plaintiffs and Defendant Nos. 1 to 5. It is also claimed that there is no partition of suit properties and since partition is denied, suit for partition came to be filed. Plaintiffs also sought declaration of sale deeds executed by Defendant Nos. 1 to 5 in favour of Defendant Nos. 6 to 7 dated 25.10.1990 and 07.01.2004. respectively, not binding to the extent of their share.

4. Defendant Nos. 1, 2, 6 & 7 contested the suit by filing written statement. Though Respondent Nos. 3 to 5 were served with summons before Trial Court, they failed to appear and contest the suit. It is the case of contesting Defendants that there was a previous partition in which the suit properties were allotted to the share of their father Damu. It is claimed in the written statement that there are other properties i.e., Gut Nos. 102, 103 and 255 which are also ancestral joint family properties but the same are not included

in the suit.

5. Considering the case sought to be made out by Plaintiffs and Defendants, initial burden was on the Plaintiffs to substantiate their case. Plaintiff stepped into witness box and claimed that there was no previous partition. The onus, therefore, shifted on Defendant Nos. 1 to 5 to prove the theory of previous partition. Admittedly, Defendant Nos. 1 and 2 who filed written statement, did not lead any evidence. The Trial Court decreed the suit. Plaintiffs were granted half share in the suit properties. It is however declared that the sale deed executed in favour of Defendant Nos. 6 and 7 are not binding on the plaintiffs. Learned First Appellate Court confirmed the said judgment and decree.

6. Learned Counsel for Original Defendant Nos. 6/Appellant herein submitted that the Courts below committed error in not considering the fact that the Plaintiff laid evidence in respect of Block Nos. 102, 103 and 255 without pleadings. It is his contention that the evidence sans pleadings ought to have been ignored by the Trial Court. He further argues that the

issue of limitation was also not considered at all by the Trial Court and was not properly considered by the First Appellate court too. It is his submission that relief of cancellation of sale deed could not have been obtained in view of the fact that sale deeds were executed in the year 1990 in favour of these Defendants. He has pointed out that Defendant No. 7 led evidence for himself and also on behalf of Defendant Nos. 1 and 2 and in view of the same, suit ought to have been dismissed.

In so far as said argument is concerned, perusal of the record indicates that the declaration was sought by the Plaintiff that the sale deed is not binding on him. This is not the case wherein a decree is sought for the cancellation of the sale deed. This Court, therefore, finds no reason to accept the argument advanced by the Appellant that suit is barred by limitation.

7. As far as evidence of Defendant No. 7 is concerned, admittedly, he is not coparcenor but is the purchaser of the portion of the suit property in the year 2000. He, therefore, was not a relevant

witness to prove factum of partition as claimed by Defendant Nos. 1 and 2.

8. It is further argued on behalf of Defendant No. 6/Appellant that the evidence of the Plaintiff i.e., testimony of Plaintiff's constituted attorney could not have been considered by the Trial Court. This submission is opposed by the learned Counsel for Plaintiffs by pointing out that the Plaintiff himself had stepped into witness box and thereafter, his son was also examined. Apart from this, perusal of the evidence of the constituted attorney does not indicate that his personal knowledge about the facts deposed was challenged by the Defendants during the cross-examination. As such, this issue sought to be raised also does not have any bearing on the outcome of this Appeal.

9. Finally, it is sought to be contended by the Appellant that Defendant No. 6 has purchased the part of the suit property in the year 1990 and that while allotting, half share portion in his possession be excluded. In this regard, it is material to note that the second appeal is restricted to the challenge to the

judgment and decree passed by the Trial Court. At the most issue sought to be raised could be agitated before the Execution Court, if permissible in law.

10. Herein this case, Plaintiff has entered witness box and led evidence to discharge initial burden to prove case. There is dispute about the fact that Plaintiff and Defendant Nos. 1 to 5 form joint Hindu family. Defendants also do not challenge that the suit properties are ancestral joint family properties but claim that partition has already been effected between coparceners. Though there is presumption of jointness of Hindu joint family but no such presumption is available for a property being joint family property. Hence, when Defendants claim that other properties mentioned in the written statement are ancestral joint family properties, the burden would be on Defendants to prove the same. It is only after such initial burden is discharged and onus would shift on other side. Thus, there was burden on Defendant Nos. 1 to 5 to prove the same. In absence of any evidence led by them, the onus has not shifted again on Plaintiff to prove otherwise.

11. Having regard to the aforestated facts, this Court finds that the judgment and decree passed by the Trial Court is in consonance with the pleadings and evidence on record and consistent with position of law on the subject. Thus, for want of perversity and as no substantial question of law is involved in this Appeal, Appeal stands dismissed. Pending civil application stands disposed of.

(R. M. JOSHI, J.)