



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

SECOND APPEAL NO. 236/2014

1. Chandrabhaga Kolhe (Deceased)
through L.R's
- 1a. Ramesh S/o Kashinath Kolhe
Aged about 58 Yrs., Occ.- Labourer,
R/o Wadali, Amrawati
- 1b. Dilip S/o S/o Kashinath Kolhe
Aged about 45 Yrs., Occ.- Labourer,
R/o Anand Wadi, Tah.- Ashti,
Dist.- Wardha
- 1c. Sau Radha W/o Sunilrao Zunurkar
Aged about- 35 Yrs., Occ.-Housewife
R/o Gajanan Nagar, Wardha

... **APPELLANTS**

...**VERSUS**...

1. Suryabhan S/o Champatra Shende
(Deceased) Through Lrs
 - 1a. Smt. Kamlabai W/o Suryabhan Shende,
Aged about 65 years,
Occupation : Agriculturist
 - 1b. Bhaiyya S/o Suryabhan Shende
Aged about 38 years,
Occupation : Agriculturist
- Both Respondents R/o Anandwadi,
Tah. Ashthi, Dist. Wardha
- 1c. Archana W/o Rajendra Suryawanshi,

Aged about 38 years,
Occupation : Household
R/o Wadibhasme House, Near
Chandrakant Jewellers, Beside Hanuman
Temple, Rajendra Nagar, Nandanwan
Zopadpatti, Nagpur
(Amendment carried out as per Court's
Order dated 21/08/2018)

- 1d. Jagdish S/o Suryabhan Shende,
Aged about 34 years,
Occupation : Agriculturist
R/o Anandwadi, Tahsil Ashthi
District Wardha
- 1e. Smt. Alka W/o Digambar Kamble,
Aged 32 years, Occupation : Household
R/o. Plot No. 17, Pratham Gali,
Sheshnagar, Kharbi Road, Hasanbag,
Near Buddha Vihar, Nagpur
(Amendment carried out as per Court's
Order dated 21/08/2018)
- 1f. Smt. Jayashree W/o Anil Sonone,
Aged about 30 years,
Occupation : Household
R/o Bhattipura, Shiraspath, Nagpur

... **RESPONDENTS**

Shri P.D. Meghe, Advocate a/w Ms Aarti Singh, Advocate for appellants

CORAM : SMT. M.S. JAWALKAR, J.
DATE OF RESERVING THE JUDGMENT : 01/03/2023
DATE OF PRONOUNCING THE JUDGMENT : 06/03/2023

JUDGMENT

Heard learned Counsel for the appellants.

2. In spite of service respondent failed to appear in present second appeal.

3. Being aggrieved by the Judgment and Decree passed by the Learned Adhoc District Judge, Wardha, in Regular Civil Appeal No.2 of 1998 dated 30/01/2014, thereby confirming judgment and decree passed by the learned Civil Judge, Junior Division, Ashti in regular Civil Suit No. 242/1992 (Old No. 37/1991) dated 07/10/1997, the appellant prefers this appeal.

4. The appeal is admitted vide order dated 05/10/2015 by framing following substantial questions of law:

(i) When the appellant by way of abandoned precaution stated in her plaint that some signatures were obtained by her brother in the year 1990 under the pretext of execution of Partition-Deed, then it is proper for the learned Lower Courts to record finding that the present appellant failed to prove that the relinquishment deed was fraudulently obtained by the defendant particularly when the defendant himself failed to produce the relinquishment-deed on the record?

(ii) Merely because one sale-deed came to be executed in favour of the present appellant after the death of her father, would that circumstance lead to conclude that brother of the appellant i.e. defendant helped her for

purchase of the property and can said circumstance deprive the appellant for claiming decree of partition?

(iii) Whether the subordinate Courts are right in denying the decree for partition and separate possession in favour of the appellant without recording finding on the point that the appellant is not entitled or is not having share in the suit property?"

5. The case of the Plaintiff is as under:

The appellant and respondent are brother and sister. Father of the appellant and respondent owned and possessed the field property situated at mouza Sayyadpur and Abadalpur, Tahsil Ashti, District Wardha. The description of the property field (A) Mouza Sayyadpur, mouza no. 446, Tahsil Ashti, District Wardha, Survey No. 41, area 1.08, land assessment 4:35 Class I. (B) Mouza Abdalpur, mouzaNo. 19, Tahsil Ashti, District Wardha, Survey No.7, area 2.12 HR, Jama 10.50, Class II and (C) Mouza Ajitpur, mouza No.19, Tahsil Ashti, District Wardha, Survey No. 27/1, area 1.15, Jama 5.25 Class I. Father of the appellant and the respondent died on 03/03/1977 leaving behind him, the appellant and respondent as his legal heirs. The appellant and the respondent have equal share i.e. 1/2 share in the field property A to C after the death of their father. Still property is joint property of the appellant and the

respondent. The appellant demanded the partition of the said property so many times to the respondent but in vain. The appellant issued registered notice on 03/06/1986 through the Counsel for partition. The respondent received it but he did not take any cognizance of it nor did he replied. On the contrary, the respondent played the foul game with this appellant and he had obtained signature of the appellant on one stamp by saying that it was relating to partition deed between them. The appellant came to know that the respondent had taken disadvantage of the faith of the appellant and created one false document as deed of relinquishment. When the respondent applied for mutation on the basis of the said alleged relinquishment deed, 23/07/1990, on receipt of notice from Talathi she came to know about this document, hence she filed suit for partition and separate possession. In fact the appellant never executed any relinquishment deed in favour of the respondent.

6. The defendant filed written statement and stated that the suit property was the self acquired property of the Champatrao and therefore, he is the exclusive owner and possessor of the suit

land. The lower Court after considering the evidence on record dismissed the suit of the appellant/plaintiff. Being aggrieved by the same appellant filed Regular Civil Appeal No. 02/1998 before District Court –Wardha. Learned Appellate Court dismissed the same with costs. The abovesaid judgment and decree is the subject matter in the present appeal.

7. It is the contention of the appellant that the learned Lower Courts totally failed to address issue of partition and recorded perverse finding that because she did not file suit for partition for more than 14 years after the death of her father, despite the fact that her name along with her brother were recorded in record of rights including 7/12 extract and thus her silence would amount to waiving of right of partition by her.

8. The learned lower Courts totally in erroneous manner recorded finding that because she took plea in her plaint that some signatures were obtained by her brother on relinquishment deed and since relinquishment deed was not produced, thus she failed to prove that the fraud was played by her brother and further

recorded the finding that she is not entitled for decree of partition. It is obvious that when the relinquishment deed was not produced by defendant then any finding recorded by learned Lower Courts regarding relinquishment deed needs to be set aside.

9. The learned Lower Courts totally erred in concluding that sale deed in favour of husband of plaintiff came to be registered after the death of father then brother of the appellant might have helped her in purchasing said agricultural field and therefore further erroneously concluded that for that reason appellant did not file suit for partition and further recorded the finding that the circumstances are sufficient to deny her decree of partition. Thus such perverse finding cannot sustain in the eyes of law and are liable to be set aside. Without any evidence on record, only on the basis of assumption and presumption the findings are arrived at by learned lower court.

10. It is the contention of the respondent in suit that during the lifetime of their father, father had given land bearing Survey No.3, admeasureing 1.06 HR situated at village Tembha to plaintiff

however sale deed could not be executed during the lifetime of the father. Respondent himself get executed the said sale deed on 31/03/1977 in favour of the appellant. Deceased Champatrao has executed the will deed in the presence of plaintiff. As per the said will-deed respondent is the exclusive owner of the said land.

11. It is the case of plaintiff that in the year 1990, under the pretext of execution of partition deed, her brother obtained her signature however, no partition is effected. Her father expired on 03/03/1977. She is entitled to get the suit property partitioned being legal heirs along with her brother. She issued legal notice Exhibit 36 dated 03/06/1986 to the defendant which was duly received. The defendant replied the same. After receipt of the notice, the defendant had informed plaintiff that he will give property by getting it partitioned. The defendant obtained signature of plaintiff and told that he has given share of property at Achalpur. However, possession was not handed over to the plaintiff. The said document on which signature of plaintiff was obtained was produced before the Tahsildar by the defendant for getting his name mutated, she received notice from Tahsildar. When she

enquired in the office of Tahsildar, she came to know about ill intentions of the defendant and therefore she filed her written objections for mutating the name of defendant. After raising objections before the Tahsildar, she issued another legal notice dated 23/07/1990 claiming therein that the relinquishment deed is not admissible for want of registration and otherwise illegal and inoperative. The defendant came with the written statement that property was self acquired property of their father. He denied the share of the plaintiff. It is contended that the land bearing Survey No.3 admeasuring 1 H 06 R situated at village Tembha has given by their father to the plaintiff during his lifetime. However, the sale-deed could not be executed and it was executed on 31/03/1977 in favour of the plaintiff. It is further claim of the defendant that deceased Champtrao (father of plaintiff and defendant) has executed the will deed in the presence of plaintiff and as per the said will deed, the defendant is the exclusive owner of the said land. The learned Trial Court dismissed the suit.

12. The learned Lower Court on the first place, failed to appreciate this fact that the relinquishment deed relied on by the

defendant is not produced on record and the same is disputed by the plaintiff. It is the contention of defendant that his father executed a will and it must be prior to 1977. If there is any will in existence, there was no reason to get executed any relinquishment deed from the plaintiff in the year 1990. The conduct on the part of defendant clearly goes to show that he wanted to deceive plaintiff. The learned Trial Court as well as Appellate Court failed to appreciate this fact in its proper perspective and recorded perverse finding. The relinquishment deed ought to be registered one in view of Section 17 (1)(b) of the Registration Act. The defendant's case is based on "will deed". It is contention of the defendant that the will deed, which is written by plaintiff's father, it is mentioned that he paid the amount for purchase of field in the name of plaintiff. However, will deed is not produced on record nor proved. Only on the basis of some admission that financial position of husband of plaintiff was not sound that is not sufficient to lead to any conclusion that it was not possible for her to purchase new land. In fact, it has come on record that husband of plaintiff sold his land in the year 1972 and purchased land at Tembha in 1977 for consideration of Rs.2000/-. From this, the learned Trial Court

concluded that “*It means certainly amount must be paid by the defendant for the purchase of land situated at village Tembha in the name of plaintiff.*” This inference is perverse and based on surmises and conjectures. Unless there is a will deed or relinquishment deed placed on record and duly proved, the Court below ought not to have rejected relief of partition as names of both the plaintiff and defendant appearing in the land records. The learned Appellate Court also has not applied its mind and dismissed the appeal.

13. Learned Counsel for appellants relied on ***Yellapu Uma Maheswari and another Vs. Buddha Jagadheeswararao and others, reported in (2015) 16 SCC 787.***

15. It is well settled that the nomenclature given to the document is not decisive factor but the nature and substance of the transaction has to be determined with reference to the terms of the documents and that the admissibility of a document is entirely dependent upon the recitals contained in that document but not on the basis of the pleadings set up by the party who seeks to introduce the document in question. A thorough reading of both Exhibits B-21 and B-22 makes it very clear that there is relinquishment of right in respect of immovable property through a document which is compulsorily

registerable document and if the same is not registered, becomes an inadmissible document as envisaged under Section 49 of the Registration Act. Hence, Exhibits B-21 and B-22 are the documents which squarely fall within the ambit of section 17 (i) (b) of the Registration Act and hence are compulsorily registerable documents and the same are inadmissible in evidence for the purpose of proving the factum of partition between the parties. We are of the considered opinion that Exhibits B 21 and B22 are not admissible in evidence for the purpose of proving primary purpose of partition.

16. Then the next question that falls for consideration is whether these can be used for any collateral purpose. The larger Bench of Andhra Pradesh High Court in Chinnappa Reddy Gari Muthyala Reddy Vs. Chinnappa Reddy Gari Vankat Reddy, AIR 1969 A.P. (242) has held that the whole process of partition contemplates three phases i.e. severancy of status, division of joint property by metes and bounds and nature of possession of various shares. In a suit for partition, an unregistered document can be relied upon for collateral purpose i.e. severancy of title, nature of possession of various shares but not for the primary purpose i.e. division of joint properties by metes and bounds. An unstamped instrument is not admissible in evidence even for collateral purpose, until the same is impounded. Hence, if the appellants/defendants want to mark these documents for collateral purpose it is open for them to pay the stamp duty together with penalty and get the document impounded and the Trial Court is at liberty to mark Exhibits B-21 and B- 22 for collateral purpose subject to proof and relevance.”

14. As such, relinquishment deed requires to be registered otherwise it is not admissible in evidence. In the present matter, the relinquishment deed itself is not produced at all nor it is the case of defendant that it was the registered one. As such, appeal is liable to be allowed and accordingly, the substantial question of Law No.1 answered in the negative. The substantial question of Law Nos.2 and 3 also in the negative. Accordingly, I proceed to pass the following order:

ORDER

- i) Second appeal is allowed.
- ii) The judgment and decree passed by learned Adhoc District Judge, Wardha, in Regular Civil Appeal No.2 of 1998 dated 30/01/2014, thereby confirming judgment and decree passed by the learned Civil Judge, Junior Division, Ashti in regular Civil Suit No. 242/1992 (Old No. 37/1991) dated 07/10/1997 both are hereby quashed and set aside.

iii) The suit is decreed. It is hereby declared that the plaintiff is having half share in the property specifically in property described in paragraph No.1 and she be put in separate possession of the same.

iv) Enquiry is hereby directed under Order 20 Rule 12 of the Civil Procedure Code for mesne profit from filing of the suit till delivery of possession.

v) The decree for partition of agricultural land described in paragraph No.1 be sent to the Collector, Wardha under the provisions of Section 54 of the Civil Procedure Code.

vi) Preliminary decree be drawn up accordingly.

vii) Parties to bear their own costs.

(Smt. M.S. Jawalkar, J.)

R.S. Sahare