

NON-REPORTABLE**IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION****CIVIL APPEAL NO(S). 5398/2017****SHIVASHARANAPPA****APPELLANT(S)****VERSUS****SHANTAPPA(DEAD) BY LRS. & ANR.****RESPONDENT(S)****JUDGMENT****ABHAY S. OKA, J**

Heard the learned senior counsel appearing for the appellant and the learned counsel for the first respondent. The appellant is the original second defendant. The first respondent in the Appeal is the original plaintiff and the second respondent is the original first defendant.

The first respondent filed a suit against the appellant and the second respondent claiming declaration of ownership and possession in respect of the suit land bearing Survey No.115/4 measuring 2 acres 30 guntas situated at Village Bhopal Tegnoor, District Gulbarga. The case made out by the first respondent was that the second respondent relinquished his share in the suit land. Under a memorandum of partition, the relinquishment was recorded, and therefore, the appellant became the exclusive owner of the suit land. The Trial Court dismissed the suit. The Trial Court held that the first respondent failed to establish the plea of partition, and as a result, the first respondent has not proved his exclusive ownership and possession over the suit land.

The first respondent preferred an appeal before the District Court. Curiously, the District Court, while partly allowing the appeal proceeded to pass a preliminary decree for partition holding that the parties to the suit were entitled to one-third share each.

In the second appeal preferred by the present appellant, a question of law was framed by the High Court which reads thus:

"7. This Court has raised the following substantial question of law for consideration on 1.3.2008:-

"Whether in the facts and circumstances of the case, the appellate Court was justified in reversing the Judgment and Decree passed by the trial Court and granting 1/3rd share in the suit schedule property when the suit itself was for declaration and permanent injunction?"

By the impugned judgment, the High Court proceeded to dismiss the second appeal.

The submission of the learned senior counsel appearing for the appellant is firstly that the partition was never prayed for in the suit filed by the first respondent. On the contrary, the suit proceeded on the footing that there was an earlier partition under which the first respondent had become the owner of the suit land. Secondly, she submitted that there was no occasion for the First Appellate Court to pass a decree for partition in a suit simpliciter for declaration of ownership and exclusive possession.

She further submitted that recourse taken to Rule 7 of Order VII of the Code of Civil Procedure, 1908 (for short, "CPC") is completely misconceived. She also submitted that the High Court has not at all considered the aspect of illegality committed by the First Appellate Court.

We have perused the judgments of the three Courts. We have also perused the plaint. In the plaint, specific reliance was placed by the first respondent on the memorandum dated 8th June, 1984 by claiming that the said memorandum recorded the partition. Based on this document that the first respondent claims exclusive ownership. Thus, the claim of the first respondent in the plaint is founded on the fact that in the partition effected, the suit land has been allotted to him and, therefore, he has exclusive ownership over the suit land, which is in his possession. The Trial Court held that the first respondent failed to prove the existence of partition as pleaded by him and that is how the Trial Court came to the conclusion that the first respondent cannot claim exclusive ownership and possession over the suit land.

A perusal of the judgment of the First Appellate Court shows that it proceeded on the footing that the finding of the Trial Court regarding the failure of the first respondent to prove partition was correct. However, the First Appellate Court held that it could exercise plenary jurisdiction. It was observed that the discretionary jurisdiction of the Court need not be conferred by a statute and with a view to avoid multiplicity of proceedings, the Court should give some reliefs to the parties. That is how the First Appellate Court observed that the first respondent is entitled to a declaration of one-third share in the suit land. However, the First Appellate Court did not stop at that. It passed a decree declaring that the first respondent was entitled to one-third share in the suit land and the appellant and the second

respondent were entitled to one-third share each.

It is possible to construe the decree passed by the First Appellate Court as a preliminary decree of partition. Even otherwise, the First Appellate Court could not have gone into the question of entitlement of the undivided shares of the parties to the suit. The entire suit is founded on the exclusive ownership claimed by the first respondent and consequently, exclusive possession. Once the First Appellate Court agreed with the Trial Court that the first respondent had not proved exclusive ownership, the suit ought to have been dismissed.

We have carefully perused the impugned judgment of the High Court. The High Court has correctly framed the substantial question of law on the jurisdiction of the First Appellate Court to pass the decree that it has passed. The first part of the judgment discusses the scope of interference in the second appeal under Section 100 of the CPC. Thereafter, it appears from Paragraph 9 that the High Court was impressed by the fact that though the appellant and the second respondent had jointly filed a written statement, appeal was preferred only by the appellant who is the original second defendant. In the same Paragraph, the High Court noted that on the document of partition pleaded by the first respondent, signature of the second respondent was appearing. However, the document was not registered in accordance with the Indian Registration Act, 1908. Thereafter, the High Court observed that an alternative plea of adverse possession was pleaded and therefore, the title of the first respondent was admitted. There

was no discussion by the High Court on the question of whether the First Appellate Court could have passed the decree considering the frame of the suit.

The First Appellate Court and the High Court relied upon Rule 7 of Order VII of the CPC. At highest, it can be said that by virtue of Rule 7 of Order VII, the Court can take notice of the subsequent events which occurred during the pendency of the suit. But in this case, as we have observed earlier, there was no option for the First Appellate Court but to confirm the correctness of the findings of the Trial Court that the first respondent has not proved partition and therefore, he has not proved exclusive ownership and possession. According to us, complete illegality has been committed by the First Appellate Court. The frame of a partition suit is different. The Court fee payable is different. In such a suit, all co-sharers ought to be made parties.

Therefore, the Appeal must succeed. As noted earlier, the relief granted in favour of the first respondent proceeds on the footing that there was no earlier partition. The first respondent did not dispute the correctness of the finding recorded on this aspect by the High Court as well as the First Appellate Court. Therefore, the suit framed on the premise that he is the absolute owner of the suit land must fail.

Accordingly, we set aside the impugned judgment dated 7th July, 2010 of the High Court and the impugned judgment dated 4th January, 2006 of the District Court and restore the judgment dated 19th June, 1997 passed by the II Additional Munsif at Gulbarga in O.S. No.76

of 1986. This will not preclude the first respondent from filing a suit for general partition.

The Appeal is allowed on the above terms.

.....J.
(ABHAY S.OKA)

.....J.
(PANKAJ MITHAL)

NEW DELHI;
October 05, 2023.

ITEM NO.106

COURT NO.11

SECTION IV-A

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S

Civil Appeal No(s). 5398/2017

SHIVASHARANAPPA

APPELLANT(S)

VERSUS

SHANTAPPA (DEAD) BY LRS. & ANR.

RESPONDENT(S)

Date : 05-10-2023 This appeal was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE ABHAY S. OKA
HON'BLE MR. JUSTICE PANKAJ MITHAL

For Appellant(s) Ms. Sonia Mathur, Sr. Adv.
Mr. Raja V. Naik, Adv.
Ms. Rupakshi Soni, Adv.
Mata Prasad Singh, Adv.
Ms. Pratiksha Mishra, Adv.
Ms. Ronika Tater, Adv.
Ms. Shubhangi Arora, Adv.
Mr. Nikhil Chandra Jaiswal, Adv.
Mr. Divik Mathur, Adv.
Ms. Manju Jetley, AOR

For Respondent(s) Mr. Preetam Shah, Adv.
Rajni Srivastava, Adv.
Mr. K. Krishna Kumar, AOR

UPON hearing the counsel the Court made the following
O R D E R

The Appeal is allowed in terms of the signed Non-Reportable judgment.

Pending application, if any, shall stand disposed of.

(ASHISH KONDLE)
COURT MASTER (SH)

(AVGV RAMU)
COURT MASTER (NSH)

[THE SIGNED NON-REPORTABLE JUDGMENT IS PLACED ON THE FILE]