

(2013) 02 MP CK 0130
In the Madhya Pradesh High Court
Case No : S.A. No. 546 of 2012

Smt. Nalini Kalyankar

APPELLANT

Vs

Sangeeta Baghmare

RESPONDENT

Date of Decision : 22-02-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100, 96
Registration Act, 1908 — Section 17, 49
Stamp Act, 1899 — Section 35

Citation : (2013) 02 MP CK 0130

Hon'ble Judges : U.C. Maheshwari, J

Bench : Single Bench

Advocate : Rajendra Sagoria, for the Appellant; Ankur Maheshwari, Learned Counsel, for the Respondent

Final Decision : Dismissed

Judgement

U.C. Maheshwari, J.—The appellants/defendants have filed this appeal u/s 100 of CPC being aggrieved by the judgment and decree dated 31.8.2012 passed by Ist Additional District Judge Gwalior in Civil Regular Appeal No. 40-A/2012, affirming the judgment and decree dated 5.7.2012 passed by Ist Civil Judge Class-I Gwalior, in Civil Original Suit No. 3-A/12, whereby the suit of the respondent filed for declaring her 1/3rd share in the disputed house described in the plaint with a further prayer of perpetual injunction restraining the appellants to dispossess her from such house so also to restrain the appellants from any transfer by way of sale or otherwise so also for appropriate direction to maintain the status-quo, was decreed. The facts giving rise to this appeal in short are that, the appellant no. 1 being wife of late Harimartand Kalyankar, is the mother of appellant no. 2 and respondent and Harimartand Kalyankar, passed away in the year 1970. Respondent herein filed the impugned suit contending that the disputed house no. 29/822 new no. 979 described in the plaint being self acquired property of her father Harimartand Kalyankar, was remained his ownership and possession. Subsequent to death of her father, the appellants herein without her knowledge

and consent got mutated the disputed house in their names. It is further stated that the respondent being in possession of some portion of such house i.e. two rooms, kitchen, latrine and bathroom is residing in the same as daughter of said Harimartand Kalyankar. The appellant no. 2 is working in the Health Department Morena, where he is residing in a Government Quarter and in such premises, he is not in possession of the disputed house. In such premises, the prayer to declare her 1/3rd share in the aforesaid house is made and consequently, the prayer for perpetual injunction to protect her right and possession is also made.

2. In the written statement of the appellants/defendants by denying the material averments of the plaint and the ownership of the respondent over the house, in addition it is stated that such house is under the ownership of the defendants and they are in possession. It is also stated that subsequent to death of said Harimartand Kalyankar, the respondent as well as the appellants are the natural heirs and the legal representative of him. But Harimartand Kalyankar, in his life time made a family arrangement of the property with the consent of the respondent and in such arrangement the respondent was satisfied by giving the cash amount and ornaments in her share and the disputed house was given to the appellants, in such premises, subsequent to death of said Harimartand Kalyankar, the name of the appellants was mutated in the record of local authorities. In this regard no objection was not taken by the respondent. Since then they being owner are in possession of the property. In addition to it, it is also stated that before some months from the date of filing the suit, the appellant no. 2 had applied to some Bank to provide the loan facility, in that connection to keep this house under mortgage, the consent of all the owners/co-owners was required. In this connection the respondent herein sworn the affidavit contending that in the life time of her father, she had taken her share in the property in cash amount and ornaments and relinquished her right in the disputed house and such affidavit was handed over to the appellant no. 2 to submit in the Bank for the purpose of aforesaid loan transaction. So accordingly in the affidavit the respondent has admitted the ownership and possession of the appellants on such property saying that she has already relinquished her right long before in the life time of her father. In such premises, the prayer for dismissal of the suit was made.

3. After framing the issues and recording the evidence on appreciation of the same, the suit of the respondent was decreed and she has been declared to be owner of 1/3rd portion in the disputed house and pursuant to that, the decree for perpetual injunction has also been passed by the trial Court. On filing the appeal u/s 96 of CPC by the present appellants on consideration, by affirming the judgment and decree of the trial Court the same was dismissed on which the appellants have come to this Court with this appeal.

4. Shri Rajendra Sagoria, learned appearing counsel of the appellants after taking me through the records of Courts below along with the impugned judgments and proposed substantial questions of law mentioned in para 7 of the

appeal memo argued that under the Hindu law, the oral partition or family arrangement is permissible and when the Harimartand Kalyankar, the principle owner of the disputed property himself made family arrangement with the consent of the family members or made partition between them and according to which, the disputed house was given to the appellants and some ornaments and cash amount was given to the respondent as her share, so, subsequent to such arrangement or the partition, the respondent did not have any authority to claim her share in the house. In continuation he said that, in this connection on arising the occasion when the appellant no. 2 was taking some loan from the Bank, then voluntarily the respondent had sworn the aforesaid affidavit contending that in the life time of the father she was given her share in the family property in the shape of cash amount and ornaments and she has relinquished her share in the house and accordingly, she admitted the ownership, title and possession of the appellants. So, there was no occasion before any of the Courts below to discard the version stated in the affidavit so also the admission of the respondent but contrary to that, the suit of the respondent has been decreed. Even the theory of relinquishment has not been properly considered only by saying that in the lack of registration of the document, the alleged affidavit could not be deemed to be the document of valid relinquishment deed. In this premises, he prayed for admission of this appeal on the basis of admission of the respondent made by her in the affidavit [Ex. D. 3] so also on the question of aforesaid oral relinquishment of the property by the respondent in favour of the appellants.

5. Having heard the counsel at length, keeping in view his arguments I have carefully gone through the pleadings of the parties along with the evidence adduced by them so also the exhibited documents available on record including the Ex. D. 3, the aforesaid affidavit.

6. It is apparent fact between the parties that the principle owner of the property had neither executed any document in writing with respect of family partition nor testamentary document the Will. It is also undisputed fact that the said property was self acquired property of Harimartand Kalyankar and in his life time, he was the only owner of the property and he could have disposed of the same in accordance with his choice. So, in his life time the relinquishment of the share by the respondent was not the relevant factor. Such thing could be happened if there was any documentation like gift deed etc, by the deceased. As argued today, that subsequent to death of Harimartand Kalyankar, no any proceedings for relinquishment takes place between the parties. So, in such premises, in the life time of Harimartand Kalyankar, the relinquishment was not required and subsequent to that if there is no act or documentation between the parties regarding relinquishment, then the theory of relinquishment could not have been considered by the Courts below. Apart this, in view of the provision of Sections 17 and 49 of the Registration Act as well as of Section 35 of the Stamp Act, in the lack of proper stamp duty and the registration of the document of relinquishment of the property, mere on the basis of the affidavit Ex. D.-3, which was sworn by the respondent only in the year 2011 near about after 41 years

from the date of death of their father, could not be deemed or assumed that the respondent had left or given her share in the property to the appellants either by relinquishment or in alleged partition of the family. So, in such premises, on examining the case at hand, I have not found any error in concurrent approach of the Courts below based on appreciation of evidence in decreeing the suit of the respondent for her 1/3rd share with the appellants in the disputed house and in such premises, the decree of perpetual injunction and could not be said to be faulty at this stage.

7. It is settled proposition of law that concurrent findings with respect of admissibility or inadmissibility of any document being finding of fact could not be interfered u/s 100 of CPC at the stage of second appeal and it is apparent fact that the appellants are defending the case since trial Court upto this Court only on the basis of version of the respondent stated in her affidavit Ex. D.3, and such defence has been concurrently discarded by both the Courts below by supplying the sufficient reasons on facts as well as on the law. So, such question is not open for interference at the stage of second appeal u/s 100 of CPC.

8. Although learned counsel for the appellants" Shri Rajendra Sagoria, by referring the decision of the apex Court in the matter of Digambar Adhar Patil Vs. Devram Girdhar Patil (died) and another, holding that under the Hindu law the oral partition is permissible and the partition by way of family arrangement in the joint Hindu family does not require any registration in writing under the provision of Registration Act argued that in the light of this decision the oral partition is permissible under the Hindu law and while considering such question the Court is bound to consider and take note of revenue entries made in the record of the local authorities or it's revenue department but the case was not examined by any of the Courts below. So far the principle laid down in the cited case is concerned, this Court did not have any dispute but in the case at hand the same being distinguishable on facts, is not helping to the appellants. In the present case, the date of oral partition is neither pleaded by the appellants in the written statement nor proved by them on recording the evidence. It appears that the appellants" are relying on the theory of relinquishment only on the basis of Ex. D. 3, the alleged affidavit of the respondent and not on the partition. Even otherwise, if it was a self acquired and earned property of Harimartand Kalyankar, then there was no occasion to carry out the of partition of the same. The same could have been given by him in his life time by way of gift deed or after his life time by testamentary document to the appellants, so in such premises also, the theory of partition was rightly discarded by the Courts below. In view of the aforesaid discussions, I have not found any material circumstance giving rise to any question of law rather than the substantial question of law requiring any interference u/s 100 of CPC at the stage of second appeal. Consequently, this appeal being devoid of any merit is hereby dismissed at the stage of motion hearing. There shall be no order as to the costs.