Supreme Court of India
Shankarrao Dejisaheb Shinde ... vs Vithalrao Ganpatrao Shinde And ... on 22 February, 1989
Equivalent citations: AIR 1989 SC 879, JT 1989 (1) SC 375, 1989 (1) SCALE 477, 1989 Supp (2) SCC 162, 1989 (1) UJ 576 SC
Author: Sharma
Bench: K Singh, L Sharma
JUDGMENT Sharma, J.

1. This appeal, directed against the decision of the Bombay High Court in a first appeal, arises out of a suit filed by the appellant Shankarrao for partition of the properties set out in the plaint. The suit was decreed by the trial court. On appeal, the High Court has reversed the decision and dismissed the suit.

2. For properly following the cases of the parties it may be necessary to appreciate their relationship. The plaintiff-appellant Shankarrao had a brother Ganpatrao, now deceased, whose wives are defendants Nos. 4 and 5 and whose sons are defendants No. 1, 2 and 3. The plaintiff claimed that the family was joint till 1946 and out of the income of the joint family Ganpatrao, who was the 'Karta', had purchased certain lands in which also he the plaintiff) has got half share. He also challenged certain alienations effected by Ganpatrao and claimed share in the transferred properties. Some properties mentioned in the body of the plaint are alleged to be self-acquired properties of the plaintiff.

3. The main defence in the suit has been based on an alleged partition in the family in the year 1914. Admittedly a suit was filed in 1947 by the present defendants No. 1 to 4 against the present plaintiff, wherein title to certain lands was in dispute. The suit was numbered as Special Suit No. 36 of 1947 and the case of the plaintiffs in that suit (that is, the present defendants No. 1 to 4) is set out in the decree, Ext. 86 (at page 289 of the paper book). It was placated that Shankarrao had been given in adoption to a stranger in 1907 and he, therefore, resided at Gwalior to manage the properties of his adoptive father since then. Soon before the filing of the suit in 1947, it is further stated, Shankarrao came and duped Ganpatrao, his elder brother, in signing certain documents on the basis of which he had been claiming the lands which were the subject-matter of that suit. In the alternative there was a prayer for partition and possession of 2/3 share in the properties. Shankarrao, who was the first defendant in that suit, filed his written statement, Ext. 106, denying the alleged adoption and further stating that there was a partition in the family in 1914 when he was allotted the suit lands with a dilapidated house and he has been in possession thereof as owner since then. The trial court decreed the suit holding that Shankarrao had in fact been adopted by a stranger and had thus gone out of the family. An appeal was filed before the High Court which was registered as F.A. No. 370 of 1948 and was allowed by the judgment Ext. 74. The finding on the question of adoption was reversed but the suit was dismissed on the ground that it did not embrace all the joint family properties as also on the further ground that Ganpatrao's consent to his sons for partition was lacking. It was Stated by the learned counsel for the parties before us that by a custom which was binding, a members of the joint family whose father was alive could not maintain a suit for partition without the father's consent. In the result, the trial court's decree was reversed and the suit was dismissed.

4. In the present suit defendant No. 1 heavily relied on the written statement filed by Shankarrao in Special Suit No. 36 of 1947 pleading partition in the family in the year 1914. It was contended on behalf of the plaintiff Shankarrao that the High Court in the earlier suit had recorded a finding that the aforesaid 1914 partition had not been proved and in view of this finding, which is binding on the parties, he (the plaintiff) is entitled to a decree. The trial court agreed with him. On appeal, the High Court has held that there was no finding recorded in the earlier litigation on the question of earlier partition in the family which could bind the parties in the present case. Relying upon the admission of the plaintiff Shankarrao in the earlier suit the High Court has proceeded to hold that the defence case of a partition in the family in the year 1914 was eorrect. The decree of the trial court has thus been reversed and the suit has been dismissed.

5. Mr. Lalit, the learned counsel for the appellant, has contended that the conclusion of the High Court in the impugned judgment is entirely incorrect. It has been argued that the interpretation put by the trial court is a correct one and, in any event, the High Court failed to correctly read and construe Shankarrao's written statement in the earlier suit. The learned counsel also urged that the evidence led by the parties in the present case establishes the plaintiff's case.

6. We have been taken through the judgment Ext. 74 and we are in complete agreement with the High Court that no finding on the question of alleged partition was recorded therein so as to be binding on the parties in the present case. The relevant portion from the judgment Ext. 74 has been quoted in paragraph 8 of the impugned judgment, and it is clear therefrom that the conclusion of the High Court is correct. The High Court in Ext. 74 had observed that, ...it is impossible merely on the strength of the yadi standing as it is, to come to any conclusion in regard to a partition having taken place between these two branches of the family.

The High Court had thereafter proceeded to point out the other infirmities in the case of the plaintiffs in that suit (present defendants) leading to the dismissal of the suit. As has been rightly pointed out in the impugned judgment, the earlier suit had been filed for certain items of property which were the subject-matter of a deed executed by Ganpatrao in favour of Shankarrao, and the suit was not concerned with other properties. The claim of 2/3 share in the alternative was made in that suit not on the basis of Shankarrao being a co-parcener or co-sharer but on the assumption that he had acquired title from Ganpatrao under the impugned deed. The observation in Ext. 74 relied upon by the trial court in the present case has therefore been rightly rejected by the High Court as not recording a finding supporting a plea of res judicata.

7. The question as to whether there was an earlier partition in the family or not has, in the circumstances, to be decided on the basis of the evidence led by the parties. Mr. Lalit has contended that the High Court instead of considering all the material on the record erred in relying only on Shankarrao's written statement in the earlier litigation as if it were a piece of conclusive evidence. The criticism is justified inasmuch as the High Court did not care to analyse and appraise other evidence on the record. We have, however, examined the evidence led by the parties with the help of the learned advocates.

8. The plaintiff Shankarrao's plea in his written statement dated 20. 12. 1947, Ext. 106 in the earlier suit has been the subject-matter of discussion in the two courts below as also during the hearing of the appeal in this Court. According to his case in paragraph 4 of he Ext. 106, a partition took place between him and his brother Ganpatrao who was impleaded as the 7th defendant in that suit in the year 1914 and in lieu of his half share Shankarrao got the lands which were the subject-matter of that suit and a dilapidated house, and he remained in possession thereof as full owner from 1914 onwards He explained certain circumstances which linked Ganpatrao with suit lands by stating that he (Shankarrao) had leased the lands to his brother and other tenants from 1924 to 1938 when he was serving the then Gwalior State. On his return to the village in 1938, he got direct Possession of the lands and personally cultivated the same. This statement has been strongly relied upon by the High Court in the present case. Mr. Lalit contended that Shankarrao's aforementioned statement should not be read in isolation; and if the same is considered along with paragraph 11 of the written statement, which is quoted below, it will not be legitimate to infer an admission :-

11. The joint Hindu family of plaintiff and defendants own lands worth about 10 to 15 thousand rupees and assessed at Rs. 50/- at village Lonikand, Taluka Haveli District Poona and a house, which is still joint and undivided. The proceedings of suit should not be continued, till this property is included in suit for purpose of partition. That defendant No. 1 will produce extracts of record of rights of this property at the next date of hearing.

We are unable to agree with the learned counsel. The unambiguous and express statement in paragraph 4 of Ext. 106 about a partition having taken place in the family in 1914 is not Contradicted by the statement in paragraph 11. In paragraph 11 Shankarrao was merely trying to say that some lands belonging to the family were not partitioned by metes and bonds in 1914 and this plea was consistent with his unequivocal assertion about 1914 partition we cannot, score.

9. On behalf of the appellant it was next urged that while Shankarrao has changed his stand in the present case from that which he took in 1947 suit, the present respondents who were plaintiffs in that suit are also guilty of a similar change in their stand, and the admission of the appellant must be considered to have been neutralised by the admission of the other side. This argument also does not appear to have any merit inasmuch as the present respondents did not plead in the earlier suit a case of jointness between them and Shankarrao. As has been rightly pointed out in the impugned judgment, the respondents (plaintiffs in the earlier suit) did not alternatively claim 2/3 share on the basis that Shankarrao was a co-parcener or a co-sharer. Their case was that if Ganpatrao who was a party to that suit continued to support Shankarrao's claim on the basis of the deed executed by him, the members of his branch, that is, his sons and wife, were at least entitled to their shares in the demised lands. It is, therefore, not right to suggest that the respondents bad admitted in the earlier suit the present case of Shankarrao.

10. It is true that an admission by a party cannot be treated as conclusive and it is permissible for him to meet it by acceptable explanation, but at the same time it must be recognised that an admission is an important piece of evidence carrying considerable weight. The High Court, therefore, was right in drawing a presumption against Shankarrao's case, but the further question is as to whether the other evidence on the records of the case is sufficient to rebut that presumption.

11. Mr. Lalit is right in pointing out that there is presumption of jointness in a family governed by Hindu Mitakshara law and the initial burden lies on the party claiming disruption in the joint status. So far as the present case is concerned, however, we are of the view that this presumption stands rebutted by the aforementioned statement of Shankarrao in his written statement filed in 1947 suit. Of course, the other evidence led by the parties in the case will have to be examined in this context. Reliance was placed on behalf of the appellant on the money order receipts Exts. 113 to 119 and the letters Exts. 123 to 127 included in the paper book at pages 407 to 419. The argument is that these documents are consistent with Shankarrao remaining joint with his brother and the deposition of Shankrrao (P.W.I) corroborated by these papers ought to be accepted. The plaintiff stated that he was taken to Gwalior in his childhood where he joined the service in the Gwalior Army at the age of 17/18 years and in that capacity he stayed in Indore till 1983 when he went back to his original home. He further claimed that he used to send money from time to time to Ganpatrao by postal money order and sometimes he also paid in cash and the amounts were utilised by Ganpatrao for the joint family. Thus certain lands purchased by Ganpatrao in the names of his relations actually belong to joint family and are liable to be partitioned. Sometimes Ganpatrao utilised the amounts sent by the plaintiff in purchasing fodder for the cattle and in constructing or repairing the family house. The money order receipts do show that money was sent by Shankarrao to his brother. Ext. 119 is dated 10.7.1912, Ext. 118 4.3.1915, Ext. 117 17.12.1915, Ext. 116 26.12.1919, Ext. 115 14.4.1921, Ext. 114 30.3.1921 and Ext. 113 22.3.1922. So far as the post cards are concerned, Exts. 123, 124 and 125 all bear the date 12.10.1923, and letters Ext. 126 and 127 are respectively of 29.11.1923 and 20.2.1921. They purport to have been written by Ganpatrao to the plaintiff and carried the news in regard to the prospects of harvest and the condition of the cattle. It has been contended before us that Ganpatrao could not have been writing to plaintiff these letters if there had been already a partition between the two brothers. The difficulty in accepting these letters is that the plaintiff in his examination-in-chief itself stated thus :-

I do not know who had written them. Ganpatrao know? Simply to sign his name. I could not read or write.

When cross-examined by the counsel for the contesting defendant, the plaintiff could not give satisfactory answers in respect of the money orders. Admittedly several pieces of land have been purchased by the plaintiff which he claims his self-acquired property not subject to partition. The defendants are also not making any claim thereto. For a considerable period before 1938 when the plaintiff was serving the Gwalior State Army his self-acquired properties were admittedly managed by Ganpatrao, and it was, therefore, natural for the two brothers to have exchanged information and at times money in this connection. Even according to his own statement (page 80, line 37 of the paper book) the jointness continued only till 1941 when the plaintiff states, that he demanded partition. In his written statement of the earlier suit Shankarrao had stated that in the 1914 partition, so far as homestead properties were concerned he was allotted a dilapidated house. In the present suit he claims the residential house as his exclusive property which he alleges to have been constructed after separation. When asked, he stated in his cross-examination (at page 81, lines 23-24 of the paper book) that he was not willing to permit partition of his residential houses. Assuming that the plaintiff's case about his sending moneys to his brother through the exhibited money order receipts as correct, they are quite consistent with his deposition about the role his

brother Ganpatrao was playing in managing his self-acquired properties. The post cards also are explainable on that basis, but the basic objection in accepting the post cards is the fact that nobody has proved them. As stated earlier, the plaintiff does not claim any of them to be in the hand-writing of Ganpatrao or for that matter in the hand-writing of any person known to him. We have considered the documents relied upon by Mr. Lalit along with the oral evidence and we do not have any doubt that they cannot be accepted as reliable evidence for the purpose of accepting the plaintiff's case of jointness.

12. Apart from the several plots of land and the house, which according to the plaintiff belong to him exclusively, he has also stated that he possessed 5 bullocks, 4 cows, a bullock-cart, and plough etc. in which the defendants do not have any share. The defendants have strongly relied upon the document described as 'pavati' dated 24.7.1941 executed by Ganpatrao and Shankarrao and witnessed by a relation. This document refers to the earlier partition of 1914 and recites that as some properties were then left undivided, dispute in the family with respect to them was being settled under the document. The plaintiff, however, has denied the deed.

13. The defendant No. 1 has been examined as D.W. 1 and has stated about the partition of 1914. He further stated that Shankarrao started making 'vahiwat' of his lands as owner and got a rent note executed in respect of those lands. The plaintiff was staying in Gwalior till 1938 and when he returned to religen in 1938 he stayed in his own house which he had got in partition. All the relevant statements of Shankarrao in support of his case of jointness and purchase of lands by Ganpatrao on behalf of the family but in the names of his branch were denied. He was cross-examined at considerable length but nothing has been elicited to discredit his testimony. The post cards which the plaintiff claimed to have received from Ganpatrao were shown to the defendant No. 1 and were denied to have been so sent. The revenue records with regard to the lands support his case and are inconsistent with the plaintiff's claim. His evidence in regard to 1941 document appears to be satisfactory. He has given the number of cows and bullocks which belonged to him and the other properties claimed exclusively by him.

14. We have in detail gone through the evidence in the case as included in the paper book and find ourselves in agreement with the conclusion of the High Court that there was disruption in the joint status of the family in 1914 and the two branches were separately allotted items of properties belonging to the joint family. The evidence in the case also proves that some properties which were left joint in 1914 were later partitioned in 1941 and the plaintiff on the one hand and the defendants on the other have been in separate exclusive possession. The properties which have been purchased by the two branches belong to them as their self acquired properties and they are not liable to be partitioned. The relief for partition as included in the plaint was in the circumstances rightly refused by the High Court. The challenge by plaintiff to the transfers effected by the defendants consequently fails.

15. Mr. Lalit lastly submitted that in view of the observation in paragraph 11 of the judgment of the High Court that properties which were subsequently purchased by the plaintiff are held to be his self-acquisitions, the suit in any event should not have been dismissed in its entirety. We do not find any merit in this argument either. It has been pointed out in the judgment that the aforesaid claim

of the plaintiff was not disputed by the defendant. If the reliefs claimed in paragraph 21 of the plaint are examined, it will be clear that there was no lis in this regard and the plaintiff therefore did not ask for any relief in regard to the same. It is, therefore, not open to the plaintiff to make a grievance against the dismissal of the entire suit by the High Court. His interest so far as the self-acquired properties are concerned, is fully protected by the observations in the judgment. In the result the appeal fails and is dismissed with costs.