

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.600 OF 2022

1. Latabai w/o Ashok Ghaiwat
age 45 years, occ. Agril.
2. Jyoti d/o Ashok Gahiwat
age 30 years, occ. Household
3. Swati d/o Ashok Gahiwat
age 28 years, occ. Household
4. Krishna s/o Ashok Gahiwat
age 24 years, occ. Agril
5. Gokul s/o Ashok Gahiwat
age 23 years, occ. Education
R/o Village Bhingi, Tq. Vaijapur
Dist. Aurangabad.

Appellants

Versus

1. Ushabai w/o Bhanudas Navale
age 52 years, occ. Agril
r/o Bhaggaon, Tq. Vaijapur
Dist. Aurangabad.
2. Subhadrabai w/o Gorakhnath Ghaiwat
age 84 years, occ. Agril
r/o Bhingi, Tq. Vaijapur
Dist. Aurangabad.
3. Raosaheb s/o Gajanan Navale
age 71 years, occ. Agril,
r/o Bhaggaon, Tq. Vaijapur
Dist. Aurangabad.

Respondents

Ms. M. S. Mhase, Advocate for the appellants.
Mr. P. S. Shinde, Advocate for respondent No. 1.

St. Kalpana Mutatkar, Advocate holding for Mr. R. V. Patil, Advocate for respondent No. 2.

Mr. V. M. Kulkarni, Advocate holding for Mr. S. R. Awad, Advocate for respondent No. 3.

CORAM : R. M. JOSHI, J.

RESERVED ON : 13th April, 2023.

PRONOUNCED ON : 12th May, 2023.

JUDGMENT :

1. Against the concurrent findings recorded by both the Courts below, present appeal is filed under Section 100 of the Code of Civil Procedure taking exception to the judgment and decree passed on 3rd February, 2022 in Regular Civil Appeal No. 26/2015 whereby the judgment of the Trial Court in Regular Civil Suit No. 98/2007 decreeing the suit is confirmed.

2. For the sake of convenience, parties are referred to by their names i.e. Ushabai (plaintiff), Subhadrabai (Defendant No. 1) and Latabai (Defendant No. 2).

3. Ushabai filed suit bearing Regular Civil Suit No. 98/2007 seeking partition and separate possession of her share in the suit properties. The suit properties belonged to Gorakhnath, father of Ushabai and husband of Subhadarabai. Latabai is widow of Ashok,

who is real brother of Ushabai. The suit properties originally belonged to Dau Bapu Ghaiwat who was succeeded by his two sons Gorakhnath and Sahebrao. Both of them separated and the suit properties bearing Gat No. 14, 17/2, 18 and 19 situated at village Bhingi, Tq. Vaijapur, came to the share of Gorakhnath. It is the case of Ushabai that she was married in the year 1989. According to her, there was no partition between Gorakhnath, Subhadrabai and Ashok during the lifetime of Gorakhnath who died on 8th August, 1997. Ashok was murdered on 26th June, 1999. Ushabai claimed that Subhadrabai and Ushabai filed a collusive suit bearing Special Civil Suit No. 122/2001 and a decree was obtained. However, since she was not party to the said suit, decree is not binding upon her. It is further pointed out that in the said suit, Latabai has taken a candid stand that there was no previous partition of suit properties. Since Ushabai was denied her share in the suit properties, suit came to be filed.

4. Latabai and her children filed written statement raising objection about the tenability of the suit on the ground that it is barred by limitation. Ushabai's contentions were denied except relationship between the parties. According to these defendants, they

are owners of Gat No. 18 and 19 as per the decree passed in Special Civil Suit No. 122/2001 on 1st February, 2001. Latabai stated that during the lifetime of Gorakhnath, partition took place and accordingly, the entire properties were partitioned between Gorakhnath, Subhadrabai and Ashok and that Ushabai had relinquished her share in their favour. It is further contended that the said partition was acted upon by taking entries in the revenue record and there is no challenge made to those entries by Ushabai at any point of time. It is also claimed that Ushabai had knowledge of the partition.

5. Subhadrabai though did not oppose the suit however has stated that there was a partition during the lifetime of Gorakhnath and mutation entry No. 340 was taken accordingly. It is further averred that the said partition was more in the nature of family arrangement.

6. With these averments, parties went on with the trial. Latabai examined herself at Exhibit 36 and deposed consistently in accordance with her written statement. On the other hand, Usahbai adduced her evidence reiterating her contentions in the plaint. Both

these witnesses were subjected to thorough cross-examination. Learned Trial Court by passing judgment had decreed the suit and held that Ushabai is entitled to 1/3rd share in the suit property along with Subhadrabai and Latabai. When the said judgment was challenged, the First Appellate Court concurred to the decree passed by the Trial Court.

7. Learned counsel for Latabai states that both the Courts below have committed error in wrongly appreciating the pleadings in Special Civil Suit No. 122/2001 to hold that there was admission of Latabai in respect of there being no partition of the suit properties. According to her, in the previous suit partition was sought between Latabai and Subhadrabai on account of their reunion after previous partition after death of Gorakhnath and Ashok. It is submitted that in this context, the Trial Court and the First Appellate Court ought to have appreciated the case of Latabai and evidence led by the parties and could not have decreed the suit. By referring to the evidence on record it is sought to be argued that mutation entries No. 340 and 434 clearly show that partition effected between Gorakhnath, Subhadrabai and Ashok was duly acted upon and for want of challenge to the said mutation entry, Ushabai has conceded to the

said fact. For establishing the relinquishment, knowledge of Ushabai about mutation entries and fact of no challenge to the same is relied upon.

8. It is further argued that though the First Appellate Court has allowed the application Under Order 41 Rule 27 of the Code of Civil Procedure for leading additional evidence, in fact opportunity of evidence was not given to Latabai which has caused prejudice. Emphasis is laid on the judgment of the Hon'ble Apex Court in the case of Vineeta Sharma Vs. Rakesh Sharma and others, **(2020) 9 SCC 1**, to state that irrespective of explanation to Section 6(5) of Hindu Succession Act, even plea of oral partition cannot be rejected outrightly. It is submitted that in the case where the plea of oral partition is supported by public document and the partition is finally evinced in the same manner as if it had been effected by a decree of Court, it may be accepted. In this context, evidence on record is relied upon particularly mutation entries No. 340 and 434 respectively. Thus, according to learned counsel for Latabai, on these amongst other grounds specifically raised in appeal memo, this is a fit case wherein interference is required in the impugned judgment and decree.

9. Per contra, learned counsel for Ushabai supported the decree in question with a submission that both the Courts have rightly appreciated the pleadings of the parties and the evidence led by them. Amongst other submissions as regards previous suit between Latabai and Subhadrabai is concerned, it is contended that in the said suit when specific plea was raised by Latabai that there was no previous partition, now it is not open for her to claim that there was partition in the year 1985. As regards submission about additional evidence is concerned, attention of the Court is drawn to the order passed by the First Appellate Court wherein the documents sought to be placed on record were allowed and are duly considered while passing the impugned judgment. Thus, according to him, no case is made out showing any prejudice being caused to Latabai.

10. At the outset it needs to be recorded that there is no dispute about the fact that the suit properties i.e. Gat No. 14, 17/2, 18 and 19 are ancestral properties. It is the case of Ushabai that there was no partition of the suit properties and hence she is entitled to get 1/3rd share therein. On the other hand, Latabai claims that there was partition of the suit properties in the year 1985 during the

lifetime of Gorakhnath and that Ushabai had relinquished her right in the suit properties in favour of other co-sharers. Thus, the initial burden is on Latabai to show that infact there was partition in the year 1985 and that Ushabai had relinquished her right in favour of her parents and brother, Ashok.

11. Latabai admitted about the suit properties being joint family properties and also accepted that there is no document of relinquishment of the right by Ushabai in respect of the suit properties in any one's favour. It is claimed that it was an oral relinquishment. Latabai though has claimed that there was a partition between Gorakhnath, Subhadrabai and Ashok, husband of Latabai, but there was no specific averment as to the nature of the said partition i.e. oral or by deed of partition. In the light of these pleadings, the evidence on record needs to be appreciated.

12. Mutation entries No. 340 and 434 were not placed on record before the Trial Court and on the basis of an application under Order 41 Rule 27 of the Code of Civil Procedure, both the mutation entries were allowed to be brought on record and were read in evidence. The judgment of the First Appellate Court clearly

indicates that as requested by Latabai both entries were not only taken on record but also duly considered for the purpose of decision of the appeal. This Court, therefore, finds that no prejudice is caused by not calling upon parties to lead oral evidence. Mutation entry no. 340 dated 4th November, 1985 does not state about oral partition. It only records that on the basis of partition, the suit properties are mutated in the name of respective persons. It needs to be noted that though Subhadrabai has also claimed that in the year 1985 there was partition however, she has explained that it was not real partition but it was in the nature of family arrangement. As stated earlier, initial burden is on Latabai to prove that there was partition in the year 1985. Except for mutation entry No. 340 itself, there is absolutely no evidence on record to hold that any partition really had taken place in the year 1985. The factum of partition may be proved by document if there is deed of partition or leading evidence showing oral partition. The said case as sought to be made out by Latabai also gets falsified in view of the fact that there was another partition in the year 1993 between Subhadrabai and Latabai and pursuant to the said partition, mutation entry No. 434 was recorded on 31st January, 1993. If it is a case of Latabai that there was partition of the suit properties in the year 1985, there was no

question of any further partition between them in the year 1993. Pertinently, mutation entry No. 434 indicates that it was made on the basis of partition deed. No such deed is however placed on record in order to ascertain as to the nature of said partition and also to see as to whether it was a partition in the circumstances of reunion of the joint family of Subhadrabai and Latabai as claimed by learned counsel for Latabai before this Court. In this regard it is relevant to note that, in Special Civil Suit No. 122/2001, Latabai had not taken any specific plea of previous partition and reunion nor in the written statement herein plea to that effect finds place in record. In considered view of this Court, this theory of reunion of Latabai and Subhadrabai after death of Gorakhnath and Ashok, cannot be entertained in absence of pleadings and proof thereof.

13. In the aforesaid facts and evidence on record, the statement of Latabai in Special Civil Suit No. 122/2001 assumes great relevance. While filing the said suit it was claimed by Latabai that there was no partition in respect of the suit properties and now in the present suit, it is sought to be claimed that there was partition in the year 1985. In view of these contradictory pleadings of Latabai, stricter burden is on her to prove the factum of previous partition. On

appraisal of the evidence on record, this Court does not find any material placed on record to prove previous partition. Even examination of Suryabhan (Exhibit 60) is hardly of any consequence as he does not give any particulars of previous partition.

14. The second limb of Latabai's contention is about relinquishment of right of Ushabai in favour of others in the year 1985 itself. Mutation entry No. 340 does not indicate anything about any relinquishment of right by Ushabai. There is no pleading as to the nature of relinquishment however, in the oral evidence it is sought to be claimed that there was oral relinquishment made by Ushabai. If it is so, then said oral relinquishment must be proved by examining witness in whose presence such relinquishment was done. Though Suryabhan states about decision of relinquishment to be made by Ushabai however, for want of details as to time, place, persons present etc., his evidence is far from satisfaction to hold that Ushabai relinquished her right in the suit properties.

15. Learned counsel for Latabai has sought to take assistance of the judgment of the Hon'ble Apex Court in the case of Vineeta Sharma (supra). In order to appreciate the same, it would be

relevant to reproduce paragraph No. 137.5 of the said judgment which reads thus :-

137.5 In view of the rigour of provisions of the Explanation to Section 6(5) of the 1956 Act, a plea of oral partition cannot be accepted as the statutory recognised mode of partition effected by a deed of partition duly registered under the provisions of the Registration Act, 1908 or effected by a decree of a court. However, in exceptional cases where plea of oral partition is supported by public documents and partition is finally evinced in the same manner as if it had been affected (sic effected) by a decree of a court, it may be accepted. A plea of partition based on oral evidence alone cannot be accepted and to be rejected outrightly.

The aforesaid observations clearly show that what has been held by the Hon'ble Apex Court is that a plea of oral partition cannot be either accepted or rejected outrightly. Meaning thereby, the Court needs to appreciate the material pleadings and evidence on record in order to come to the conclusion as to whether it is an exceptional case where the plea of oral partition is supported by public document and acted upon, in that case it can be accepted.

16. In the instant case, there is no specific plea about oral partition in the written statement. Documentary evidence i.e. mutation entry No. 340 though indicates that the suit properties were mutated in the name of Gorakhnath, Ashok and Subhadrabai however, in the light of the statement of Subhadrabai that it was more a family arrangement than partition, the said mutation entry would not be a sufficient document to hold that there was oral partition and on the basis of which the said mutation entry was carried out. There exists another mutation entry No. 434 of year 1993 recording partition coupled with totally contradictory and inconsistent statement of Latabai about previous partition as stated in the present suit and claim in the earlier suit about there being no such partition. In view of these peculiar circumstances, unless there is candid evidence to hold that there was partition may be oral in 1985, this case cannot be considered as an exceptional case as contemplated by Apex Court in case of Vineeta Sharma (supra).

17. Once it is not proved that the ancestral properties were partitioned previously, application of amendment of 2005 to Section 6

of Hindu Succession Act is inevitable. Ushabai being daughter of Gorakhnath is entitled for 1/3rd share in the suit properties along with Subhadrabai and Latabai with her children.

18. Aforestated discussion leads to conclusion that no perversity is found in findings recorded by both the Courts below. Since no substantial question of law is involved in the appeal, it stands dismissed.

19. Pending civil application, if any, does not survive and stands disposed of.

(R. M. JOSHI)
Judge

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LATER ON :

1. After pronouncement of the judgment, learned counsel for the appellants seeks extension of interim order dated 17th October, 2022 for a further period of 8 weeks. She states that in view of the vacation of the Hon'ble Apex Court, the said time is necessary.

2. This request is opposed by the learned counsel for the respondents on the ground that the time sought is unreasonable.

3. Considering the ensuing vacation of the Hon'ble Apex Court, this Court finds no reason not to accept the request made by the learned counsel for the appellants herein. Hence, interim order dated 17th October, 2022 is extended for further period of eight weeks.

(R. M. JOSHI)
Judge

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