



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

SECOND APPEAL NO. 741 OF 2018

Usha Sahebrao Surwase

VERSUS

Dnyanoba Narayan Lomate And Others

Mr. D. V. Tele, Advocate for appellant

Ms. R. M. Mohale-Choudhari h/f Mr. S. S. Choudhari, Advocate for
respondent.

CORAM : R. M. JOSHI, J.

DATE : 09th January, 2025

PER COURT :-

1. This appeal takes exception to the judgment and decree dated 03.04.2018 passed by First Appellate Court in Regular Civil Appeal No. 80/2017 whereby the judgment and decree passed in Regular Civil Suit No. 91/2011 is set aside and suit stood dismissed.

2. Parties are referred to as plaintiff and defendants for the sake of convenience.

3. Defendant No. 1 is father and defendant No. 2 and 3 are brothers of plaintiff. Plaintiff claimed that suit property is ancestral property of plaintiff and defendants. Suit properties are Gut No. 138, Gut No. 135 and Gut No. 155 situated at village Malkaranja, Tq. Kallam, Dist. Osmanabad. It is the case of the plaintiff that there is no partition

of the suit property and when she asked for the partition, the defendants refused to give her share therein. Hence, suit is filed.

4. Defendants contested the suit by defining the allegations made by the plaintiff except the relationship between the parties. It is a claim of defendants that the suit properties though are ancestral properties, the said properties were already partitioned in the year 1998. Pursuant to the said partition, mutations are effected in the revenue record.

5. Parties led evidence before the trial Court. Learned trial Court decreed the suit granting 1/4th share in the suit property to the plaintiff. Defendants, being aggrieved by the said judgment and decree, preferred RCA No. 80/2017 successfully. Hence this appeal by plaintiff.

6. This Court by order dated 22.04.2022 has framed following substantial question of law:

Whether the appellant is entitled to claim a share in the suit properties in view of decision in Vineeta Sharma Vs. Rakesh Sharma ?

7. Learned counsel for the plaintiff submits that the trial Court had rightly appreciated the evidence on record and decreed the suit

whereas the First Appellate Court committed error in reappreciation of the evidence led before the trial Court. It is his submission that in view of the admitted relationship between the parties, so also the nature of the properties being ancestral properties, it was not open for the First Appellate Court to reverse the findings recorded by the trial Court. In this regard, he drew attention of the Court to pleadings in the written statement and the evidence on record. It is his contention that in the cross examination of defendant, he has accepted that there was written document of partition however the same is not produced before the Court. It is his submission that there is no specific stand taken by the defendants about the nature of partition as to oral or by way of written document. It is his submission that in view of the amendment to Section 6 of the Hindu Succession Act, and since there was no partition affected of the ancestral properties being coparcener, plaintiff is entitled for the share therein. He drew attention of the Court to the findings recorded by the First Appellate Court stating that in the cross examination plaintiff has accepted about the oral partition amongst defendants in 1981.

8. Learned counsel for the defendants supported the impugned judgment and decree passed by the First Appellate Court with the contention that there is in fact no dispute made by the plaintiff about the factum of partition prior to 2005. It is her submission that irrespective of

the fact that the partition is oral or otherwise, the said theory of the partition gets support from the revenue record which is not in dispute.

9. At the first blush, there appears is some substance in the contention of learned counsel for the plaintiff that the findings are found to be recorded by the First Appellate Court on the basis of cross examination plaintiff admitting oral partition amongst defendants in 1987. As it is not so appearing from the evidence on record. However, the cross examination of defendant No. 1 conducted on behalf of plaintiff leaves no room for the doubt that the plaintiff accepts the factum of partition. In this regard, it would be material to take note of the relevant portion of the cross examination though not for purpose of reappraisal but to see whether the Appellate court findings are perverse or otherwise. The said portion is reproduced below :-

२. वादी उषाबाई ही माझी बहीण असून प्रतिवादी क्र. १ वडील व प्रतिवादी क्र. २ हे माझे भाऊ आहेत. माझ्या वडिल प्रतिवादी क्र. १ चे वय आता ९० वर्षे आहे. त्यांचा सांभाळ मी एकटाच करतो. हे म्हणणे खरे आहे की, सर्व वादमिळकती या वडिलोपार्जित आहेत. आमच्या वाटण्या सन १९८१ साली झाल्या. सदरील वाटण्या मौजे माळकरंजा येथे बॉण्डवर झाल्या होत्या. सदर वाटण्याच्या वेळी मी, माझे वडील व भाऊ हजर होते. आमच्या व्यतिरिक्त वाटण्याच्या स्टॅम्पवरील साक्षीदार हजर होते. त्यांची नावे आता मला माहिती नाहीत. सदर वाटणीचा स्टॅम्पपेपर प्रकरणात दाखल

केला नाही. तो स्टॅम्पपेपर आम्ही तलाठी यांचेकडे दिला होता.

३. हे म्हणणे खरे आहे की, आमचे वडिलांकडे कोणतेही कर्ज नव्हते. सदर वाटणीत मला गट क्रमांक १५५ पैकी ५ हेक्टर २६ आर व माझ्या भावाला त्याच गटातील ५ हेक्टर २६ आर जमीन वाटून आली होती. सदर वाटणीत माझ्या वडिलांना गट क्रमांक १३५ व गट क्रमांक १३८ हा त्यांनी स्वतःकडे ठेवून घेतला होता. हे म्हणणे खरे आहे की, माझी बहीण वाटणीच्या वेळी हजर नव्हती. माझा मुलगा अभय धर्मराज लोमटे हा शेती करतो. अलका दत्तात्रय लोमटे ही माझी भावजय आहे.

10. It is settled position of law that the suggestions made to the witness by the other side is considered to be the case of the said party. Moreover, this is not the case that any stray suggestion was made, however, consistent question asked brings it on record through the cross examination that there was partition in the year 1981. In fact, it is suggested to the witness to the defendant No. 1 that at the time of said partition, plaintiff was not present. Thus, there is no dispute made by the plaintiff with regard to the factum of partition between defendants.

11. Now question arises as to whether the absence of the plaintiff at the time of the said partition would make her entitled forth share therein. There is no dispute about the fact that prior to

amendment of 2005 to Section 6 of the Act, the daughter was not considered as coparcener if she was married prior to 1994 and as such she was not entitled to get benefit of Maharashtra Amendment of 1994. In such circumstances, since she was not a coparcener, her absence during the partition is immaterial and it does not affect the validity of partition between coparceners.

12. Learned counsel for the plaintiff has placed reliance on the judgment of Hon'ble Supreme Court in case of **Ganduri Koteshwaramma and anr vs. Chakiri Yanadi and anr., 2012(1) Mh.L. J. (SC) 613.** Reference is made to Para No. 12 of the judgment. No doubt, it is observed therein that only on the basis of registered partition or a decree of the Court, the daughter has right as coparcener, unless it is denied. However, now it is settled position of law by the judgment of Hon'ble Supreme Court in case of **Vineeta Sharma vs. Rakesh Sharma and Ors. AIR 2020 SC 3717,** wherein it is held so

In view of the rigor of provisions of Explanation to Section 6(5) of the Act of 1956, 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 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.

13. In this Judgment it was held by Hon'ble Supreme Court that on the basis of the provisions of explanation to Section 6(5) of the Act of 1956, ordinarily a plea of oral partition cannot be accepted. However, such oral partition can be accepted in exceptional cases where the plea of oral partition is supported by public document and the partition is finally evidenced in the same manner as if it has been done, then it may be accepted on the record but here in above case, in fact, the plaintiff herself does not dispute the factum of partition. Moreover the partition claimed by the defendants gets support from the mutation entries. Thus, there is public document to support the case of the defendants. Most importantly plaintiff has accepted factum of partition and claimed it to have been done in her absence. As such, the case of defendants is squarely covered by the judgment in case of **Vineeta Sharma** (cited supra).

14. Having regard to the afore stated facts, substantial question of law framed is answered in negative. Parties to bear their own cost. Hence, appeal stands dismissed.

(R. M. JOSHI, J.)

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