

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

SECOND APPEAL NO.211 OF 2015

1. Madhav s/o Rama Katkamwad,
Age: 53 years, Occ: Agri.,
 2. Udhav s/o Rama Katkamwad,
Age: 51 years, Occ: Agril.,
 3. Muktabai d/o Rama Katkamwad,
Age: 76 years, Occ: Agri.,
(deleted vide order below Exh. 21
dated 21.11.2011)
 4. Kalawatibai d/o Rama Katkamwad,
Age: 56 years, Occ: Agri.,
Resp. Nos. 1 to 4 r/o Choti Galli,
Kandhar, Tq. Kandhar, Dist. Nanded.
 5. Neelabai @ Babi w/o Balaji Pendlewad,
Age: 40 years, Occ: Agri.,
R/o. Jay Shrinagar, Kandhar,
Tq. Kandhar, Dist. Nanded.
 6. Shilabai w/o Ganpati Bije,
Age: 41 years, Occ: Agri.,
R/o. Shinagarwadi, Tq. Bhokar,
Dist. Nanded.
- ...Appellants

versus

1. Meerabai w/o Nagnath Balkenwad,
Age: 29 years, Occ: Household,
R/o. Rui, Tq. Ahmedpur,
Dist. Latur.
 2. Indubai w/o Mahdav Katkamwad,
Age: 51 years, Occ: Household,
R/o. Imamwadi, Tq. Kandhar,
Dist. Nanded.
- ...Respondents

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Mr. Hamzakhan I. Pathan, Advocate for appellants
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CORAM : N.W. SAMBRE, J.

DATE : 9TH JUNE, 2015

ORAL ORDER :

This appeal is by original defendants to a suit for partition and separate possession.

2. The respondents herein filed Regular Civil Suit No. 6 of 2003 in the Court of Civil Judge, Junior Division, Kandhar praying decree for partition and separate possession in the agricultural land of village Manaspuri, Taluka Kandhar, which is the suit property.

3. Appellant No.1-original defendant No.1 is the father of plaintiff No.1 and husband of plaintiff No.2. As such, the suit was brought into action.

4. The suit summons was served on the present appellants, the appellants resisted the said claim on two counts; (1) that plaintiff No.1 who is daughter of defendant No.1 is not entitled to the property by virtue of provisions of sub section (5) of Section 6 of Hindu Succession Act, as according to him, the said daughter though was born prior to 1994, was not entitled to the share in the property. (2) Second contention that was raised in the defence was

that the appellants inter-se filed Regular Civil Suit No. 9 of 1998 for partition of the ancestral property and the said suit was compromised by parting consideration of Rs. 75,000/- in favour of appellant No.1. Based on above, the claim was made before the Court that the plaintiffs have no legal right of partition.

5. Learned trial Court decreed the suit to the extent of grant of 1/3rd share from the share of defendant No.1 in favour of plaintiff No.1, whereas dismissed the claim of plaintiff No. 2 wife.

6. Plaintiff No. 2 feeling aggrieved thereby preferred appeal before the Court of District Judge-1, Kandhar in Regular Civil Appeal No. 43 of 2006, which appeal came to be allowed thereby ordering the share to wife-plaintiff No.2 equal to that of share of daughter. As such, present second appeal.

7. Mr. Pathan, learned Counsel for the appellants-defendants while questioning the findings recorded by the Court below would urge that both the Courts below have committed an error apparent on the face of record in ignoring the provisions of sub section (5) of Section 6 of Hindu Succession Act. He would urge that findings of fact recorded that the compromise decree executed in 1998 was never acted is contrary to the evidence and as such,

sought to invite attention of this Court on the question of law to that effect.

8. With the assistance of Mr. Pathan, learned Counsel for the appellants, I have gone through the observations made by learned trial Court and lower appellate Court while passing the decree in favour of plaintiffs against the present appellants.

9. While doing so, learned trial Court considered the defence raised by present appellants at Exhibit-20 and accordingly framed issues which are answered as under.

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| (1) Do plaintiffs prove that suit property is ancestral property? | In affirmative. |
| (2) Do plaintiffs prove that they are entitled for partition and separate possession? If yes, then to what extent? | In affirmative to the extent of Plaintiff No.1 and In the negative to the extent of Plaintiff No.2. |
| (3) Do defendants prove that suit property already partitioned prior to this suit? | In the negative. |
| (4) Do defendants prove that plaintiff No. 1 relinquished his right over suit property accepting Rs.75,000/- from defendants? | In the negative. |
| (5) Do defendants prove that suit is hit by principles of res judicata? | In the negative. |

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| (6) Are plaintiffs entitled for relief Claimed? | In the affirmative to the extent of plaintiff No.1. |
| (7) What order and decree? | As per final order. |

10. In support of contentions raised by the parties, the plaintiffs have placed on record their affidavits at Exhibits-23 and 26, supporting evidence of other witnesses at Exhibits-24 and 30 in addition to documentary evidence, such as 7/12 extracts. Defendant No.1 who contested the suit has filed his affidavit at Exhibit-39 and defendant No.2 at Exhibit-41, supporting witness was examined at Exhibit-44.

11. Learned trial Court, while dealing with the issue sought to be canvassed by present appellants in their defence, has made observations upon analyzing the evidence of respective parties as regards the amendment to Section 29-A of the Hindu Succession Act. The trial Court noticed that original plaintiff No.1-daughter by virtue of legal heir is entitled to sue for partition by virtue of her birth in the said family.

12. It is not in dispute in the present case that originally the suit property was an ancestral property and subsequent thereto, after filing of the suit for partition in 1998 was claimed to have been

partitioned. Learned trial Court, while dealing with the said aspect i.e. compromise decree in R.C.S. No. 9 of 1998, has noticed that present appellant No.1 has parted with the share by accepting amount of Rs. 75,000/-. Acceptance of the said amount of Rs.75,000/- for giving up his claim in the ancestral property was required to be established by present appellants, as burden shifts on the appellants having claimed partitioned by virtue of suit of 1998. While discharging such burden, the appellants herein have neither established payment of Rs. 75,000/- nor the revenue entries were changed based on the compromise decree. In my opinion, learned Courts below have rightly inferred that even if the compromise decree was passed in 1998 in R.C.S. No. 9 of 1998, the same was never acted upon and plaintiff No.1 was entitled to partition and as such, rightly ordered her share in the property from the share of appellant No.1.

13. Learned lower appellate Court, while dealing with the claim of plaintiff No.1-wife, has noticed that though plaintiff No.2 and defendant No.1 have strained relations are still staying under same roof. Learned lower appellate Court, while dealing with the claim of plaintiff No.2-wife, has noticed the entitlement to that effect, in view of the right conferred in favour of wife, by relying upon the judgment of this Court in the matter of **Jayamati Narendra Shah vs. Narendra**

Amritlal Shah reported in **2014(4) ALL MR 616**. In my opinion, learned lower appellate Court has rightly taken into account the entitlement of the wife to the share in the property of the husband in absence of partition effected at the behest of son in such property.

14. The claim of appellants that compromise decree was already given effect was rightly disbelieved from the set of evidence that was brought on record.

15. In my opinion, the view taken by the Courts below is just, proper and in accordance with the provisions of Hindu Succession Act.

16. The present second appeal against the concurrent findings, in my opinion, is devoid of merit, stands dismissed.

[N.W. SAMBRE, J.]