

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

SECOND APPEAL NO.235 OF 2014

1. Bhanudas s/o Ananda Adsure,
Age Major, Occu. Agril.,
R/o Varandi, Taluka Rahuri,
District Ahmednagar
2. Maturabai Bhanudas Adsure,
Age Major, Occu. Agril.,
R/o As above
3. Raosaheb s/o Bhanudas Adsure,
Age Major, Occu. Agri.,
R/o As above

..Appellants
(Orig.Appellants No.2
to 4)

Versus

1. Swapnil Bhanudas Adsure,
Age 3 years, Occu. Nil.,
Minor u/g of Sou.Saita
Bhausahab Adsure
2. Sou. Sarita Bhausahab Adsure,
Age 23 years, Occu. Nil.,
R/o Tambaswadi, Taluka Newasa,
District Ahmednagar
3. Hirabai Gangadhar More,
Age 45 years, Occu. Household
R/o Vambhori, Taluka Rahuri,
District Ahmednagar
4. Bhausahab Bhanudas Adsure,
Age Major, Occu. Agril.,
R/o Varvandi, Taluka Rahuri,
District Ahmednagar

..Respondents
(Orig.Resp.No.1 to 4)

Mr V.R. Dhorde, Advocate for appellants
Mr V.D. Hon, Senior Counsel for respondents No.1 and 2
Mr P.S. Dighe, Advocte for respondents No.3 and 4

CORAM : N.W. SAMBRE, J.

DATE : 23rd June 2015

ORAL ORDER

1. This appeal is by original defendants.
2. The respondents No.1 and 2 herein claiming to be a daughter and wife of respondent No.3 - Bhausahab preferred Regular Civil Suit No.211/2000 for partition, possession and perpetual injunction before the Court of Civil Judge, Junior Division, Rahuri.
3. It is further claimed in the suit that the respondent No.3 since had neglected to maintain the respondents No.1 and 2 and had also driven them out, same had prompted filing of maintenance petition No.183 of 1996 and the suit in question for partition.
4. It is further alleged that respondent No.3 has married for the second time which also has prompted the respondents No.1 and 2 to file the suit.
5. The appellants herein resisted the suit claim for partition by filing written statement at Exh.13 and denied all the contentions of the plaintiffs. The appellants and the respondent No.3 herein have come out with a specific case about solemnising marriage of plaintiff No.2 with defendant No.1, however, as plaintiff No.2 was unable to conceive because of medical problem, the defendant No.1 has avoided to continue physical relation with her. According to defendants, the plaintiff No.2 voluntarily left matrimonial home and as

such, they denied the entire claim for partition and separate possession.

6. There was also criminal complaint under Section 498A of the Indian Penal Code against the defendant No.1 at the behest of plaintiffs and proceedings for recovery of maintenance.

7. In addition to above defence, the appellants claimed that already partition was effected prior to about 18 years, however, mutation entries were effected subsequently in 1992-93. It is claimed that partition, if any, to which the plaintiffs No.1 and 2 are entitled to could only be from the property of the respondent No.3 i.e. defendant No.1.

8. The learned trial Court, after considering the rival pleadings framed issues at Exh.15 and decreed the suit granting 1/12th share to each of the plaintiffs by its judgment and order dated 3rd October 2009 which was affirmed in Regular Civil Appeal No.298 of 2009 by the learned Principal Judge, Ahmednagar on 12th November 2013, as such the present second appeal.

9. Learned Counsel for the appellants - original defendants while questioning the legality of both the orders has sought to rely upon the grounds No.VI, VII and VIII to be the questions of law which read thus :

“VI. Whether the courts below erred in holding that on perusal of 8-A account extracts it appears that there is no equal distribution of suit properties to the members of joint families therefore, there is no partition by metes and bounds ?

VII. Whether the courts below erred in holding that as all the joint family members must possess equal properties at their hands, however, that does not seem so by considering the account extracts in view of plea of prior partition raised by the appellants/original defendants ?

VIII. Whether the courts below erred in holding that revenue entries do not disclose the true intention of members of joint family to effect partition of suit properties by metes and bounds ?

10. In support of his contention, learned Counsel for the appellants would urge that both the Courts below have committed an error in giving finding that in view of the fact that the parties to the partition are not holding equal share in the property, the partition as is claimed is not proved. He submits that the adjustment of properties after the partition need not be on equal basis as it depends upon the circumstances, such as the location, valuation, accessories etc. In support of his contention, he has relied upon the judgment of Apex Court in the matter of **M.L. Subbaraya Setty and others Vs. M.L. Nagappa Setty and others**, reported in **AIR 2002 SUPREME COURT 2066** so as to draw support to the above referred issue of misinterpretation and misconstruction, the defence of the present appellants to the suit. In addition to above, the learned Counsel for the appellants submits that the issue of partition could have been easily inferred from the revenue entries and conduct of the parties. He would further urge that both the Courts below have not looked into

the aspect of non-joinder of necessary parties and partition, if any could have been granted to the extent of share of defendant No.1 and not from the share of all the appellants.

11. Learned Senior Counsel for the respondents No.1 and 2 would urge that both the Courts below have taken into account the admitted relationship between the parties. In addition to above, he would urge that the partition, as was claimed some 18 years back while defending the suit was not at all established and sought dismissal of appeal which is against concurrent findings.

12. Having considered rival contentions of the parties, it is required to be noted that the suit in question was for partition, possession and perpetual injunction in relation to the immovable properties which are agricultural lands so also the house property. It is admitted fact that defendant No.2 is father of defendant No.1 and 4 and the defendant No.3 is the wife of defendant No.2 - Bhanudas. It is also not in dispute that plaintiff No.1 is daughter of plaintiff No.2 and the plaintiff No.2 is the wife of defendant No.1. In support of claim put forth by the plaintiffs, they have examined plaintiff No.2 Sarita at Exh.45, plaintiffs' witness No.2 - Rangnath at Exh.59, plaintiffs' witness No.3 Arjun at Exh.60. In addition to above testimonies, the plaintiffs have relied upon the 7/12 extracts of suit properties at Exhs. 17, 21, property extract of property No.63 and 2010 at Exhs.22 and 23, the property extract at Exh.24 of property No.264, at Exh.25 of property No.90/1, the judgment in Criminal M.A.No.583/1998 at Exh.49, certified copy of

Criminal M.A.No.183/1996 at Exh.51 and certified copy of the judgment in Hindu Marriage Petition No.29/1998 at Exh.53.

The defendant No.2 has entered into witness box on behalf of the defendants at Exh.64 and relied upon the record vide list at Ex.66, 8-A extract of property No.209 at Exh.67, extract of property No.217 at Exh.68, extract of property No.232 at Exh.69, extract of property No.282 at Exh.70 and mutation entry No.3091 at Exh.71.

13. It is required to be noted that in a suit for partition and possession preferred by the plaintiffs, the appellant-defendants have come out with a defence of partition effected sometime about 18 years back and as such, the burden was rightly shifted by the Court below on the present appellants. It is not in dispute that the suit properties are the ancestral joint family properties. There is presumption qua jointness of Hindu undivided family and unless there is partition by metes and bounds, it is really difficult to believe the partition effected. While discharging burden of partition the defendant No.2 – Bhanudas in his evidence while denying the share of the plaintiffs given admission about the ancestral status of the properties and also admitted the relationship of the plaintiffs with defendant No.1. It is settled position of law that the sons or daughter of co-parcener shall by birth become co-parcener in the joint family property and as such, plaintiff No.1 was rightly held to be co-parcener in respect of the said property. The defendants' witness having admitted that the plaintiff No.1 was born from defendant No.1, the

same entitles the plaintiffs for claiming partition as per the provisions of Hindu Law.

14. So far as denial of right to partition based on allegedly effected partition about 18 years back is concerned, it is required to be noted that the defendant so as to discharge the said burden has relied upon certain account extracts at Exhs.67 to 70 and 8-A account extract. The Court below while appreciating the same has noticed that there was no equal distribution of the said properties to the members of joint family and as such, gave adverse finding on the aspect of partition of the suit is by metes and bounds. The Court also noticed that merely because the members of joint family are holding different shares that does not take the Court to the conclusion that there was a partition unless same is established by cogent evidence by the defendants-appellants. Though the defendants-appellants relied upon the judgment cited supra in the matter of **M.L. Subbaraya Setty and others Vs. M.L. Nagappa Setty and others**, so as to canvass that the unequal holding of each of the share should not be taken as a basis for forming an opinion that the property was not subjected to partition, it is required to be noted that the partition as is claimed to have been effected some 18 years ago should have been independently proved. Even if the said reasoning, without admitting is accepted, it is required to be noted from the record that the appellants herein have failed to discharge their burden of establishing their case of partition having been taken place some 18 years back. The mutation entries on which the reliance was placed by the

appellant was also taken into account by the Court below and it has rightly been inferred that the property was not subjected to partition. The agricultural properties though have been entered in the name of members of the joint family, the house property stood in the name of defendant No.2 – Bhanudas and it is not his case that the same is his self-acquired property. Neither the defendant No.2 was able to disclose the exact holding of each of the members of joint family nor he has brought on record any documentary and cogent evidence to that effect. Apart from above, he has given an admission that the plaintiffs are having share in the property of defendant No.1.

15. Learned trial Court, in my opinion, has rightly decreed the suit of the respondents No.1 and 2. The learned lower appellate Court, while dealing with the claims having regard to the background of the property that is to say the ancestral nature analysed the discharge of the burden which was on the defendant to prove the partition, the admitted relationship between the parties i.e. plaintiffs and defendant and the inability of defendant No.2 who had entered into witness box on behalf of defendants to prove the partition by metes and bounds, has endorsed the findings of the trial Court.

16. Learned lower appellate Court has appreciated the testimony of Bhanudas Ananda at Exh.64 and also of plaintiffs' witnesses viz. Rangnath at Exh.59, Arjun at Exh.60 and also plaintiff No.2. As stated herein above, the ancestral nature of the property, the so called partition in 1990, the absence of mutation entries and specific demarcation of shares of each of the members of joint family has

prompted the learned lower appellate Court to rightly endorse the view of the learned trial Court.

17. In view above, in my opinion, the present second appeal against the concurrent findings is devoid of merit and as such, stands dismissed.

(N.W. SAMBRE, J.)

At this stage, Mr Dhorde, learned Counsel for appellants makes motion for withdrawal of an amount of Rs.80,000/- deposited in this Court pursuant to the order dated 9th April 2014 which prayer is not objected.

The motion stands allowed. The appellants are permitted to withdraw Rs.80,000/- along with interest accrued thereon.

(N.W. SAMBRE, J.)

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