

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

SECOND APPEAL NO.359 OF 2014
WITH
CIVIL APPLICATION NO.5689 OF 2014

Kachrusing Zipru Charwande,
Age 80 years, Occu. Agril.,
R/o Dhawada, Taluka Sillod,
District Aurangabad

..Appellant
(Orig.Deft.No.1)

Versus

1. Fulamabai Bansilal Maher,
Age 39 years, Occu. Household
R/o Tilaknagar, Taluka Sillod,
District Aurangabad
2. Ramkorbai w/o Kachru Charwande,
(since dead)
3. Nirmalabai Premsing Charwande,
Age 41 years, Occu. Household
R/o Dhawada, Taluka Sillod,
District Aurangabad
4. Dipak Premsingh Charwande,
Age 10 years, Occu. Nil
5. Puja Premsingh Charwande,
Age 13 years, Occu. Education
(Res.Nos.4 and 5 being minors
under guardianship of
respondent No.3-mother)
6. Pushpabai w/o Jadusingh Charwande,
Age 37 years, Occu. Agri.,
R/o as above
7. Sagar Jadusingh Charwande,
Age 11 years, Occu. Education,
Under guardianship of
respondent No.6 - mother
8. Kokilabai Govindsingh Khode,
Age 36 years, Occu. Agri.,
R/o Khodawadi, Taluka Badnapur
District Jalna

..Respondents
(Resp.No.1 - orig. plaintiff
and Resp.Nos.2 to 8 orig.
defendants)

Mr S.Y. Patil, Advocate h/f Mr S.B. Bhosale, Advocate for appellant
Mr B.R. Loya, Advocate for respondent No.1
Mr V.V. Ingale, Advocate for respondents No.3 to 6

CORAM : N.W. SAMBRE, J.

DATE : 3rd July 2015

PER COURT

1. Heard learned Counsel Mr Patil holding for Mr Bhosale and Mr B.R.Loya, learned Counsel for respondent No.1.
2. The present second appeal is by original defendant No.1.
3. The respondent No.1 Fulmabai claiming to be daughter of defendant No.1 filed Regular Civil Suit No.76/2008 in the Court of Civil Judge, Junior Division, Sillod, for partition and separate possession in relation to agricultural and house property. The parties hereto are referred to as per their status in the suit.
4. The plaintiff in the said suit claimed that being daughter of defendant No.1 born out of his wedlock with Godhabai, was entitled to the equal share in the suit property which was received in partition by defendant No.1 in the year 1988. The plaintiff further claimed that having demanded the share in the property and denial to that effect by the defendant, the suit was brought before the Court.
5. The defendants filed their written statement at Exh.21 and disputed the claim of the plaintiff. According to defendants the plaintiff was never born to defendant No.1 and was born to one Godhabai who was married to somebody else. Apart from above, it

was claimed by them that having regard to the fact that there was no blood relation in between the plaintiff and defendant No.1, the claim for partition is baseless. It was further claimed by the defendants that the defendant No.1 had married to defendant No.2 and out of said wedlock defendants Jadusingh father of defendants No.6 and 7 and Kokilabai - defendant No.8 were born.

6. Based on the pleadings of the parties, the learned trial Court framed issues and answered the same accordingly.

<u>ISSUES</u>	<u>FINDINGS</u>
1. Whether suit property is available for partition being ancestral ?	In the affirmative
2. Whether plaintiff is entitled for partition in the suit property ?	In the affirmative
3. Whether defendants prove that the plaintiff is not entitled for partition being she is not having blood relation with defendant No.1?	In the negative
4. Whether suit is properly valued and proper Court fees is paid upon it ?	In the affirmative
5. whether plaintiff is entitled for partition as prayed for ?	In the affirmative
6. What order and decree ?	As per order below

7. Based on the evidence, the suit came to be decreed, thereby the trial Court granted 1/5th share in favour of the plaintiff in the suit property.

8. An appeal by the present appellant vide Regular Civil Suit No.160/2010 in the Court of learned Principal District Judge at Aurangabad suffered fate of dismissal, as the decree for partition delivered by the learned trial Court was endorsed, as such the present second appeal.

9. Mr Patil, learned Counsel for the appellant would urge that the Court below committed error of law apparent on the face of record ignoring in the testimony of P.W.2 Madansing Charawande, who has deposed in support of defendant though was a witness of plaintiff. According to him, in the testimony of the said witness, he has in clear terms admitted the birth of plaintiff to one Gadhabai. As such, according to him, the perversity of the evidence is required to be appreciated by this Court in the present second appeal. In addition to above, learned Counsel for the appellant would urge that having regard to the admission given in paragraph 5 of the plaint that the partition was effected in 1988, the suit is not within the limitation and sought to agitate the question of law based on the same. Apart from above, learned Counsel for the appellant further urged that vide issue No.3, the burden as regards the relationship of the plaintiff with that of

defendant No.1 was illegally shifted on the defendants. According to him, the said issue is required to be addressed.

10. While countering the above referred contentions, learned Counsel for respondent No.1 would urge that both the Courts below have concurrently held against the present appellant and the demand for partition was upheld by the first appellate Court after re-appreciation of entire evidence. In addition to above, he would urge that the suit was well within limitation, as there was no partition effected in between the defendants *inter se* and the partition effected in the year 1988. referred in paragraph 5 of the plaint is in between the defendant No.1 and his brothers *inter se*. In addition to above, he would urge that the provisions of Section 112 of the Evidence Act were rightly taken into account by both the Courts below while shifting the burden qua proving the issue as regards paternity on the present appellant and as such, supported the judgments of both the Courts below. According to him, the present appeal, which is against concurrent findings deserves to be dismissed.

11. Having considered the rival contentions of the parties, with the assistance of learned Counsel for the appellant, I have gone through the observations recorded by both the Courts below. So far as the point as regards limitation is concerned, bare perusal of paragraphs 4

and 5 of the plaint reflects, that the suit property is described in detail by the plaintiff. The plaintiff in para 4 and 5 of the plaint has pleaded about the source of such property. In clear terms, the plaintiff has stated that the defendant No.1 has received said property in a partition effected in 1988 amongst his brothers *inter se*. It is never stated by the plaintiff that there was partition effected in 1988 *inter se* amongst the defendants to the suit. The claim of the plaintiff is based on her status as a co-parcener.

12. It is required to be noted here that in a formal state, every Hindu joint family is joint and as such there exists a presumption unless a contrary is proved. Such family continues to be joint on the basis of the presumption, however, it is required to be noted that the presumption as regards the jointness is rebuttable.

13. Though as stated herein above that there exists presumption as regards joint family, however, there is no presumption as regards joint possession by joint family and the burden in such cases vests on the plaintiff to prove that the property is a joint family property.

14. While claiming the partition of the joint family property, the one who asserts i.e. plaintiff, asserts a share of the existing co-parcener in the joint property and in a suit for partition the shares of each of the

party to the partition are ascertained and fixed based on the claim put forth and the evidence adduced. In the present case, as stated herein above, the plaintiff based on her status as a co-parcener, has sought partition of the joint family property and has proved the fact that the suit property is a joint family property by adducing evidence to that effect. It is required to be noted here that once a plea of limitation is raised by the respondent before this Court, this Court went on analysing the same, particularly in the light of the claim for partition initiated in 2008 by the plaintiff and noted that till the said suit was brought into action, the property remained as joint family property and as such, the suit was well within limitation.

15. The next contention raised by the present appellant is in regard to the shifting of burden on the defendant No.1 so as to prove that the plaintiff was not born to defendant No.1.

16. Learned Counsel for appellant-defendant No.1 has read over to me the additional pleadings in the written statement wherein the appellant-defendant No.1 has, in clear terms, admitted that in the marriage of the plaintiff he has performed the rituals of *Kanyadan*. Apart from above, it is required to be noted that the defendant No.1, in clear terms has admitted his relationship with Godhabai, who happened to be mother of the plaintiff. Apart from above, appropriate

reference could be made to Exh.40 – school leaving certificate of the plaintiff wherein the name of the present appellant – defendant No.1 is recorded as father of the plaintiff. If the above referred evidence is analysed in the light of Section 112 of the Evidence Act, in my opinion, both the Courts below were right in shifting the burden on the present appellant – defendant No.1 to prove that the plaintiff was not born to the defendant No.1. Section 112 of the Evidence Act reads thus:

112. Birth during marriage, conclusive proof of legitimacy.—The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

17. So far as appreciation of evidence of P.W.2, in my opinion, both the Courts below have concurrently held that the plaintiff was entitled for decree for partition and separate possession. In view thereof, it will not be proper for this Court to re-appreciate the said evidence i.e. the evidence of P.W.2, particularly degree with which the same issue was sought to be canvassed as perverse in the background of the findings recorded by both the Courts below.

18. As such, the present Second Appeal being devoid of merit, stands dismissed.

19. In view of dismissal of Second Appeal, Civil Application does not survive and stands disposed of.

(N.W. SAMBRE, J.)

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