

FARAD CONTINUATION SHEET NO.
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD.

Office Memoranda of appearance, directions and orders.	Notes, of Court's orders and Registrar's	Office Coram, orders or Registrar's	Court's or Judge's orders.
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SECOND APPEAL NO. 600 OF 2015
WITH CA/14260/2015 IN SA/600/2015 WITH
CA/14259/2015 IN SA/600/2015

NARAYAN KHEMA PATIL AND ANOTHER
VERSUS
DINKAR KHEMA PATIL AND ANOTHER

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Advocate for Appellants : Mr. Deshmukh Ravindra M.

CORAM: T. V. NALAWADE,J.
DATED: 27th OCTOBER, 2015.

PER COURT:

1. The appeal is filed to challenge judgment and decree of Regular Civil Suit No.184 of 2004 which was pending in the Court of Civil Judge, Junior Division, Bhusawal, District Jalgaon and also to challenge the judgment and order of Regular Civil Appeal No.308 of 2014. Heard learned counsel for the Appellant.
2. The suit was filed by Respondent Dinkar Khema Patil for relief of partition and separate possession in respect of one house property, situated at village Susari, bearing House No.398 and having size 312 sq.ft. Plaintiff

and defendant No.2 Narayan are real brothers interse. Defendant No.3 is son of defendant No.2 and defendant No.1 is a son of deceased sister of plaintiff.

3. It is the case of plaintiff that, Khema was their common ancestor and after his death the agricultural lands were partitioned amongst the successors of Khama but the suit house was not partitioned. It is contended that as successors of Khama, plaintiff and defendants are entitled to equal share in the suit house. It is contended that behind his back some false record was produced in village Panchayat office and it was submitted by defendant Nos.2 and 3 that deceased has left behind a will and this house is bequeathed to the defendants. It is his case that as the house property was not partitioned, that now needs to be partitioned and equal share needs to be given to him.

4. Defendant Nos.2 and 3 filed joint written statement. They contended that Khema was having separate income and he was giving bullock cart on charges and from that he was making separate income. It is contended that the ancestral and joint Family properties were already partitioned and no such property

was left which could have been partitioned. It is contended that after the partition, plaintiff and defendants started living separate from each other.

5. It is the case of defendants that defendant No.2 had taken care of Khema during his last days and so Khema bequeathed the house to these defendants and it is the defendant No.3 who has been using the house since last 10 to 11 years. The other defendant did not file written statement.

6. Issues were framed on the basis of aforesaid pleading. There was issue about the will also and the Courts below have held that as the suit house was joint Hindu family property there was no question of giving of this property by will by Khema to anybody. $\frac{4}{9}$ th share is given to plaintiff and similar share is given to defendant No.2. $\frac{1}{9}$ th share is given to defendant No.1, a son of daughter of Khema. This decision was not challenged by defendant No.1.

7. The learned counsel for Appellants submitted that the Appellants now want to prove the will executed in favour of defendants and for that permission can be given and matter can be remanded back. He submitted

that for giving such opportunity, appeal needs to be admitted.

8. the learned counsel for Appellants supplied paper book prepared by District Court. This Court has carefully gone through the evidence given in the trial Court. Khema was common ancestor of plaintiff and defendant No.2 and he was also Karta of joint Hindu family. It is not disputed that there were many ancestral and joint Hindu family properties, agricultural lands and they were partitioned between these two sons of Khema. In view of this admitted position, it was necessary for the defendant No.2 to prove that the house property was purchased by Khema out of his separate income. The Defendant No.2 examined himself to prove the said case. His evidence shows that he was not in possession of the will and so will was not produced and no other witness was examined. In the present proceeding the learned counsel for Appellants submitted that there is a copy of will with the Appellants and original will was handed over to the counsel appointed in the trial Court but that document is missing.

9. The decision given by the first Appellate Court

shows that argument was advanced to make out a case that it was self acquired property of Khema and submission was made that Khema had bequeathed the property to defendant No.2. Finding is given by Courts below that it was not self acquired property of Khema and further the existence of will is also not proved. The findings on both points are findings of facts. The suit was filed in the year 2004 and after 12 years the defendant wants order of remand by admitting appeal. As there is a finding that the property was not self acquired property of Khema nothing can be achieved by giving an opportunity to the Appellants, defendants to prove the will. Further, the case about the will is very vague in the written statement and original will is not available.

10. In the result, the appeal stands dismissed.

11. In view of final disposal of the appeal itself, nothing further survives in the pending civil applications and the same stands disposed of.

[T. V. NALAWADE, J.]

Dt.27/10/2015
ans/600