

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

SECOND APPEAL NO. 220 OF 1998
WITH
CIVIL APPLICATION NO.3115 OF 1998
WITH
CIVIL APPLICATION NO. 4032 OF 1998
WITH
CIVIL APPLICATION NO. 9833 OF 2010
WITH
CIVIL APPLICATION NO. 794 OF 2014

1 Murlidhar Pandharinath Kulkarni
Since deceased through his legal heirs.

A1(a) Smt. Mangala Murlidhar Kulkarni,
Age 74 yrs., occ. Household,

A1(b) Dilip Murlidhar Kulkarni,
Age 49 Yrs. Occ. Service,

Both r/o Karjat Tq. Karjat
Dist. Ahmednagar.

A1(c) Shobha Shridhar Deshpande,
Age, 53 Yrs. Occ. Service,
R/o Pushparaj Apartment, Sangle Galli,
Ahmednagar.

A1(d) Dipali Dattatraya Pethkar,
Age 47 Yrs. Occ. Service,
R/o. Nalegaon, Dist. Ahmednagar.

A1(e) Jayashree Sushilkumar Kamat,
Age 41 Yrs. Occ. Profession.
R/o. Shalimar Chowk, Daund,
Tq. Daund, Dist. Pune.

....Appellants.

Versus

1 Vithal Pandharinath Kulkarni

Since deceased through his legal heirs.

- 1(A) Hemlata Vithal Kulkarni
Age 48 yrs., Occ. Household,
Bhange Galli, Karjat,
Tq. Karjat, Dist. Ahmednagar.
- 1(B) Sau. Pushpalataa Shekhar Kale
Age 25 yrs., Occ. household,
R/o Shakambari Temple, Kacheri Road,
Baramati, Tq. Baramatia, Dist. Pune.
- 1(C) Prasad Vithal Kulkarni
Age 22 yrs., Occ. Agri.,
R/o Bhange Galli, Karjat,
Tq. Karjat, Dist. Ahmednagar.
- 2 Dattatraya Pandharinath Kulkarni,
Since deceased through his legal heirs.
- 2A) Sau. Sunita Nandkumar Tattu
Age 35 years, Occu: Household,
R/o At Post Paras, Tq. Daund.
District Pune.
- 2B) Sau. Sharda Pralhad Pundle
Age 45 years, Occu: Household,
R/o At Dubarwadi, Post Otur,
Tq. Junnar, District Pune.
- 2C) Satish Dattatraya Kulkarni,
Age 38 years, Occu: Service,
R/o Sukhtankarwada, In front
of Patilwada, Daund, District
Pune.
- 3 Digambar Pandharinath Kulkarni,
Age Major, Occu: Service,
R/o Karjat, District: Ahmednagar.
- 4 Laxmibai Anant Kulkarni,
Since deceased through her legal heirs.
- 4-A) Ramchandra Anant Kulkarni
Age 72 years, Occu: Pensioner,

R/o Survey No. 39, Building No.1,
Post Anand Nagar, Pune-51.

4-B) Laxman Anant Kulkarni,
Deceased Through L.Rs.

4B-I) Vinayak Laxman Kulkarni,
Age 28 years, Occu: Service.

4B-ii) Ganesh Laxman Kulkarni,
Age 24 years, Occu: Service.

4B-iii) Shailaja Laxman Kulkarni,
Age 55 years, Occu: Household,

All Res, 4B-i to 4B-iii are
R/o 205, Somwar Peth, Pune-11.

4B-iv) Sau. Uma Mahesh Subhedar,
Age 30 years, Occu: Household,
R/o Near Savata Mali Bhavan,
Near Jijamata Guardan, Budhwar
Peth, Pune-2.

4-C) Bharat Anant Kulkarni,
Age 63 years, Occu: Pensioner,
R/o 27/C, Budhwar Peth, Near
Jogeshwari Tempale, Behind Vedh
Pathsala, Pune.

4-D) Balkrushna Anant Kulkarni,
Age 58 years, Occu: Service,
R/o Sai Sidharth Building
Near Garaml at Post Wadgaon (BK)
Tq. Haveli, District Pune.

4-E) Sau. Malathi Madhav Daithankar,
Age 65 years, Occu: Household,
R/o Behind Belapur Market Yard,
At Post, Belapur, Tq. Shrirampur,
District Ahmednagar.

5 Saraswatibai Dhondopant Kulkarni,
(Deceased through L.Rs.)

- 5A Pandurang Dhondopant Kulkarni
(Deceased through L.Rs.)
- 5AI Pradnya Prashant Deshpande,
Age 35 Years, Occu: Hosusehold,
R/o: Shani Galli, At Post Sangola,
District Solapur.
- 5AII Rohini Sarvottam Deshpande,
Age 32 Years, Occu: Household.
R/o: Acharya Galli, Jinturkar Wada,
Osmanabad, District Osmanabad.
- 5AIII Vrushali Shripad Deshpande,
Age 29 Years, Occu: Household,
R/o: Satyakamal Colony, Chandrakant Rekhi Agency,
Block No. B/3, Opposite Manohar Nagar,
Talegaon Dabhade, Chakan Road,
Taluka Mawal, District Pune.
- 5B) Shri. Arun Dhondopant Kulkarni,
Age Major, Occ. Post Master,
R/o. Jeur, Tq. Karmala,
Dist. Solapur.
- 5C) Sow. Vijaya Balasaheb Kimbhune,
Age Major, R/o. Near Krant Nagar,
At post Tq. Patoda, Dist. Beed.
- 5D) Sow. Manda Sadashiv Walwadkar,
Age Major, Occu. Household,
R/o. Alipur Road, Shivaji Nagar,
At post Tq. Barshi, Dist. Solapur.
- ..Respondents.**

Miss. M.S. Mhase h/f. M. Y. Deshmukh, Advocate for appellants.

Mr. S.L. Bhapkar, Advocate for Respondent No. 1 to 3

Mr. B.G. Deshmukh, Advocate for Respondent No. 4A, 4B/i to iv,
4C & 4D .

Mr. Rajendrra Deshmukkh, Advocate for Respondent No. 4E.

CORAM : T.V. NALAWADE, J.

DATED : 17th March, 2016.

JUDGMENT :

1) The appeal is filed against judgment and decree of Regular Civil Appeal No. 364/1990, which was pending in the Court of IInd Additional District Judge, Ahmednagar. The appeal was filed by original defendant Nos. 1 to 3 against judgment and decree of Regular Civil Suit No. 132/1978, which was pending in the Court Court of Civil Judge, Junior Division, Karjat, District Ahmednagar. The suit filed by present appellant - Murlidhar for relief of partition and separate possession in respect of agricultural lands and house properties, was decreed in his favour. The First Appellate Court has set aside the decree of partition and possession given in respect of agricultural lands, though the decision given in respect of house properties in favour of plaintiff is confirmed. Both the sides are heard.

2) Plaintiff and defendant Nos. 1 to 3 were real brothers inter-se. Defendant No. 4 was mother of plaintiff. Their father had died prior to year 1956.

3) The suit was filed in respect of three agricultural lands and six house properties, which included open spaces situated at Karjat, within the limits of Village Panchayat.

4) it is the case of plaintiff - Murlidhar that all the suit properties were ancestral properties of his father, Pandharinath. He contended that father died in the year 1940 and after the death of father, the plaintiff and defendants continued to live in Joint Hindu Family. it is contended that the suit lands were in the possession of tenants and so, to protect the lands from the provisions of the Bombay Tenancy and Agricultural Lands Act, 1948 (hereinafter referred to as 'the Tenancy Act' for short) and for getting back the lands, family arrangement was made and properties were shown in the names of plaintiff and defendants. It is contended that the properties were never partitioned, though such partition was shown on the record. It is contended that for family necessity, the land which was shown in the name of plaintiff, was sold and similarly, one land shown in the name of mother, was sold.

5) It is the case of plaintiff that he has equal share with the three brothers as the lands were ancestral properties of their father and he died in the year 1940. He had claimed 1/4th share and relief of partition to get that share.

6) The defendant Nos. 1 to 4 filed joint written

statement and they denied the contentions of plaintiff that partition in respect of agricultural lands had not taken place. It is contended that the partition took place amongst plaintiff and defendant Nos. 1 to 4 in the year 1956 and accordingly, mutation was made in revenue record at mutation No. 3345. It is contended that property bearing Survey No. 142/4 was accepted by plaintiff, though area of this land was much less as this land was yielding more income and the family was maintaining itself on the income of this land. It is contended that the severance of status and partition took place in the year 1956 itself and so, there is no question of making partition and giving relief of possession to the plaintiff. It is contended that plaintiff sold land allotted to his share viz. Survey No. 142/4 for valuable consideration to one Shri. Katariya in the year 1977 and this circumstance also shows that there was the partition.

7) On the basis of aforesaid pleadings, issues were framed. The First Appellate Court has considered the revenue record which includes the mutation, the conduct of the plaintiff that he sold Survey No. 142/4, the circumstance that mother sold one property which had come to her share like Survey No. 277 in the year 1977 and the circumstance that before Tenancy Court, plaintiff had given statement that he had accepted Survey

No. 142/4 though it was having less area as it was irrigated land.

8) At the time of admission of appeal, no substantial question of law as such was formulated. In view of the submissions made by the learned counsel for the appellants, this Court holds that following substantial questions of law can be considered in the present matter.

(i) Whether the First Appellate Court has committed error in holding that there was partition on the basis of circumstances like sale deeds made by plaintiff, his mother in respect of portions shown to be allotted to them in partition of 1956, the statement of plaintiff given before the Tenancy Court when there were the other circumstances that house properties were not partitioned ?

(ii) Whether the First Appellate Court has committed error in holding that there was partition when plaintiff did not get equal area as shown to be allotted to the shares of defendants ?

(iii) Whether there was sufficient material to draw inference that the so called partition shown to be effected in the year 1956 was not partition, but it was family arrangement made for protecting the property of

the family from the provisions of Tenancy Act ?

9) The learned counsel for appellants took this Court through oral evidence and evidence of one witness like Bhika Wagh. It was submitted that only one defendant was available in Karjat and other brothers were living at different places, the places of their work and so, it was not possible for them to cultivate the portions shown to be owned by them personally and separately. She submitted that Bhika Wagh has given evidence that he was working as a labour in all the lands and brothers were together giving labour charges to him. He has produced one receipt allegedly issued to Bhika in support of this case. If Bhika was only working as a labour, there was no necessity of creation of such record as labour charges were paid at the relevant time without creating such record. He was not cultivating the lands as tenant and his name was not entered in the revenue record as the person cultivating lands. Similarly, in the crop cultivation column of revenue record of all the lands from the year of surrender of the lands by tenants, the names of plaintiff and defendants were shown in their respective properties.

10) Admittedly, the sale deed executed by plaintiff was

executed by him alone and no consent etc. of defendants was obtained on the sale deed. Same is the case in respect of sale deed executed by the mother of the plaintiff in favour of third party. In view of this record and as these transactions were never challenged, it is not possible to accept the contention of plaintiff that these properties were jointly sold for legal necessity of plaintiff and defendants. One document like Yadi, list, prepared at the time of marriage of defendant No. 1, which was second marriage, is produced. It shows that members of the family of plaintiff and defendants have signed on Yadi, list. Such practice is there in Hindus when the marriage is settled. Even after the partition the relatives come together and they sign on such Yadi and so, not much can be made out from this circumstance in favour of plaintiff.

11) On one hand, there are following circumstances.

- (i) Record like report given to revenue authority by these brothers to show that partition had taken place amongst them and as per the report mutation was made and entries of the names of these brothers were entered in the lands which were allotted to their share.
- (ii) Further, in support of partition, there is the record of transactions of aforesaid two sale deeds made

independently by the persons to whom the lands were allotted.

(iii) The statement given by plaintiff before Tenancy Court that he was accepting Survey No. 142/4, though it was having less area than the area of defendants as his share in the partition as it was good quality land, Bagayat land.

These circumstances can be treated admissions against his own interest by the plaintiff. On this point, the learned counsel for appellants, placed reliance on one case reported as **AIR 1977 SUPREME COURT 1712 [Sita Ram Bhau Patil Vs. Ramchandra Nago Patil & Ors.]**. In this case, the Apex Court has laid down that the admission is relevant, but it needs to be proved before it becomes evidence. It is further laid down that admission is not conclusive proof. There is no dispute over the propositions. There is not only the admission before Tenancy Court, but there is aforesaid record and the admission given before Tenancy Court was clear and unambiguous. The explanation given of aforesaid nature by the plaintiff in respect of the sale deeds does not appear to be probable as he sold this land in the year 1977 and there is no convincing evidence to show that the land was sold by plaintiff and the defendants together and the sale proceeds were used by all of them. It is

not disputed that these brothers were living separate from each other at different places. Even the mother was living in a separate room. On the other hand, against the record there is word against word. This Court holds that the probability which is created by documentary evidence needs to be accepted. It appears that subsequently, the mother executed will in favour of defendant Nos. 2 and 3 in respect of the property which she was leaving behind. Though under the will, nothing is given at present to defendant Nos. 2 and 3, the contents of the will showing that there was the partition and mother had separate property needs to be considered in the matter like present one. It appears that due to this circumstance, defendant No. 1 then changed his stand and he admitted that there was no partition. It is clear that he must have felt that he will be losing more, the share in the property of mother and so, such stand was taken. Such afterthought admission given by defendant No. 1 cannot help the plaintiff in any way. So, the aforesaid questions are answered in negative and following order is made.

ORDER

Appeal stands dismissed. All Civil Applications are disposed of.

[T.V. NALAWADE, J.]

ssc/