

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

1 SECOND APPEAL NO. 14 OF 2012
WITH CA/110/2012 IN SA/14/2012 WITH CA/3444/2016 IN
SA/14/2012

VITHOBA BABAJI HINGE DECEASED TH LRS THAKUBAI
VITHOBAHINGE AND ORS
VERSUS
ANUSAYA @ LAXMIBAI BABURAO NAVLE DECEASED TH LRS
ANANDRAO BABURAO NAVLE AND ORS

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Advocate for Appellants : V.S. Bedre h/f. P. S. Pawar
Advocate for Respondents 1A, 1B : A.B. Dhongade
Advocate for Respondents 2B, 2C, 2D, 2E, 3, 5A, 5B, 5C & 5D :
Pawan B. Pawar
...

CORAM : T.V. NALAWADE, J.
DATED : 2nd May, 2016.

ORDER :

1. The appeal is filed to challenge the judgment and decree of Regular Civil Appeal No. 347/2001, which was pending in the Court of Principal District Judge, Ahmednagar. The Principal District Judge has set aside the judgment and decree of the Civil Judge, Junior Division, Parner given in Regular Civil Suit No. 249/1988 and the suit which was dismissed by the Trial Court is decreed by the learned Principal District Judge and decree of partition and separate possession is given. Both the sides are heard.

2. The suit was filed by one Smt. Anusayabai, who is

daughter of one Tukaram. Genaji was father of Tukaram and Genaji had one more son by name Babaji. It is the case of plaintiff that the suit properties like Gat Nos. 133, 132, 130 and 264/1 situated at village Mhase-Khurda, Tahsil Parner and house property situated in Gat No. 130 are Joint Hindu Family properties and they are ancestral properties of plaintiff and defendants. Genaji, Tukaram and Babaji are dead. The defendants are successors of Babai. 1/ 2 share was claimed in the suit properties.

3. Defendant No. 9 filed written statement and it was adopted by defendant No. 2, 6 to 8. Other defendants admitted the claim of the plaintiff by filing purnis.

4. As per the case of defendants, who contested the suit, plaintiff Anusayabai is not daughter of Tukaram. They contended that after the death of Genaji, partition was effected between Tukaram and Genaji and in the partition, Survey No. 37/3 (new Gat No. 130) was allotted to the share of Tukaram. It is contended that Tukaram had mortgaged his property to one Lalchand and he had got redeemed the property on 30.5.1955. It is contended that Tukaram then agreed to sell the property to Vithoba Babaji, defendant No. 2, who is successor of Babaji,

for consideration of Rs. 1,000/-. It is contended that on the date of transaction, amount of Rs. 600/- was paid as earnest money by Vithoba. It is contended that Vithoba was already in possession of land as tenant of Tukaram and he continued his possession under agreement of sale. It is contended that due to illness, Tukaram could not execute sale deed, but by adverse possession Vithoba has become owner of Survey No. 37/3 (Gat No. 130). Alternatively, the defendants contended that Tukaram and his wife Tanabai died prior to 1956 and as the property went to other co-parceners due to survivorship, daughter of Tukaram does not get any right.

5. Issues were framed on the basis of aforesaid pleadings. Both the sides gave evidence. In view of the circumstances like some transactions made by Tukaram in respect of land Survey No. 37/3 and some transactions made by branch of Babaji, the Trial Court held that there was the partition and property bearing Survey Nos. 37/3 was allotted to the share of Tukaram. The Trial Court further held that Vithoba came in possession of Survey No. 37/3 under agreement of sale dated 30.5.1955 and he became owner by adverse possession of this property.

6. The First Appellate Court has held that there was no partition and Vithoba has not become owner due to adverse possession. As Tukaram was entitled to 1/2 share in the suit properties, that share is given to the plaintiff. The Appellate Court has held that both Tukaram and his widow Tanabai died after coming into force of Hindu Succession Act, 1956.

7. It is not disputed that property Nos. 37/1, 37/3 which were subsequently given Gat numbers were ancestral properties of Tukaram and Babaji. Though during arguments, it was contended that property Survey No. 88 was purchased after the partition, by the branch of Babaji, there was no record whatsoever to substantiate that contention and there was no such specific pleading in the written statement. On the basis of revenue record, it can be said that some transactions like mortgage were made by both Tukaram and branch of Babaji in respect of Survey No. 37/3 and 37/1 separately, but on the basis of this record, it cannot be inferred that there was the partition. The property had returned back to Tukaram and Babaji as the amount was paid by them. In revenue record of even Survey No. 37/1, which is at Exh. 94, the name of Tukaram was mentioned as a person cultivating the land. This circumstance speaks lot against the case of partition. One transaction of sale was also

made in respect of Survey No. 37/1 by Maruti, branch of Babaji, but that land had also returned back to the family.

8. The area of Survey No. 37/1 was around 3 Hectors 90 R. and area of Survey No.37/3 was around 3 Hectors 43 R. If the partition was effected and separate portions were entered in the names of Tukaram and Babaji, that mutation could have been produced, but such record is not produced. When admittedly these properties were ancestral properties, burden was on the defendants to prove that the partition had taken place. Only defendant Vithoba could have said something about the partition, considering his age as other defendants could not have personal knowledge. But Vithoba has given evidence that he was not present at the station when partition took place. He does not know as to whether any document was prepared or it was oral partition and how the partition was effected. Thus, there is virtually no evidence on actual partition. The area of Survey No. 88 is around 9 Hectors 65 R. This property was also standing in the names of members of this family and so, the burden was on defendants to prove that the property was separately purchased by the members of branch of Babaji after the partition. If the branch of Babaji failed to prove the factum of partition, then there is very little scope to show that property Survey No. 88

was their self-acquired property.

9. A strange defence is taken by Vithoba, defendant that he has become owner of survey No. 37/3 due to adverse possession. He has tried to contend that one agreement was executed by Tukaram on 30.5.1955 and under that agreement he is in possession. In that case also his possession would be permissive possession and he cannot become owner due to adverse possession. The admission given by Vithoba in his cross examination shows that Tukaram was cultivating Survey No. 37/3 till his death. It is already observed that the names of members of both the branches were entered in the crop cultivation column though in title column names of other members were entered. Due to these circumstances, it cannot be believed that the persons who were shown to be cultivating the lands were tenants and there was the partition.

10. Tukaram did not leave behind male issue. Finding is given that Tukaram died after coming in to force of Hindu Succession Act and similarly Tanabai died after that. In view of these circumstances, there was no question of giving finding that defendants became owner of the property due to survivorship. The finding on the date of death of Tanabai is the

same by both the Courts below and the finding given by the Trial Court was not challenged by original defendants. It is clear that as Tukaram did not leave behind son, the members of other branch, branch of Babaji did everything to grab the property. Even her relationship with Tukaram was disputed when there were proceedings between two parties about entering of the name of daughter of Tukaram after his death and she succeeded in those proceedings. This circumstance can be found in the cross examination of Vithoba. There is house property in Survey No. 37/3 and it is the claim of plaintiff that this house is also ancestral property. No specific evidence is given whether Tukaram was living, if there was the partition. This circumstance cannot be ignored. In Hindu families, the transactions of aforesaid nature are made to raise the loan, but due to such transactions inference cannot be drawn that partition had taken place and only due to partition names were separately entered in the revenue record and each member was enjoying the property separately. In such cases, the burden is always on defendants and it is heavy. The circumstance that the properties returned back to the family is sufficient to infer that the transactions were made to raise loan for the family and the properties were again acquired back for the joint family. The conduct of the defendants like not admitting the relationship of

plaintiff, daughter of Tukaram with them, is sufficient to show that they want to deprive plaintiff and her share. Even in case of proof of partition plaintiff could have succeeded to get back the possession of Survey No.37/3 as Vithoba could not have proved that he has become owner due to adverse possession. Not much importance can be given to other oral evidence given for defendants. Only witness who could have given particulars of partition etc. was Vithoba and his evidence is of aforesaid nature. No substantial question of law as such is involved in the matter.

11. In the result, the appeal stands dismissed. Both civil applications are disposed of.

[T.V. NALAWADE, J.]

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