

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

SECOND APPEAL NO. 354 OF 2002
WITH
CA 6368/2002 IN 354/2002 WITH CA 4588/2003 IN SA 354/2002
WITH CA 1188/2015 IN SA 354/2002

- 1] Rambhau S/o Shankar Badgujar
Since deceased through his L.Rs
- 1-A] Pramod S/o Rambhau Badgujar
Age: 52 Years, Occu: Retired Service
& Agriculture, R/o Sarvodaya Colony,
Plot No 9, Varkhede Road
Subhash Nagar, Old Dhule, Dhule
Tq & Dist Dhule.
- 1-B] Sau. Vijaya W/o Madhukar Badgujar
Age: 63 Years, Occu: Household
R/o Laxminarayan Nagar, Opposite
Gajanan Maharaj Temple, Bhusaval,
Tq Bhusaval, Dist Jalgaon.
- 1-C] Sau. Usha W/o Shantaram Badgujar
Age: 65 Years, Occu: Household
R/o Plot No 30, Gat No 94/1, Jaihind Colony
Khote Nagar, Jalgaon Tq & Dist Jalgaon.
- 1-D] Sau. Shakuntala W/o Mukund Badgujar
Age: 60 Years, Occu: Household
R/o B-202, Laxmi Nagar, Saphale
Tq. Palghar Dist Thane.
- 1-E] Sau. Shaila W/o Diwakar Badgujar
Age: 58 Years, Occu: household
R/o Pimpalgaon Hareshwar, Manumata Nagar,
Pachora, Tq Pachora Dist Jalgaon.
- 1-F] Sau. Pramila @ Saraswati W/o Subhash Badjugar
Age: 56 Years, Occu: Household
R/o Plot No 60, Gat No 138, Shiv Colony
Near Ganpati Temple, Jalgaon
Dist Jalgaon.

- 1-G] Sau. Mangala W/o Subhash Badgujar
Age: 54 Years, Occu: Household
R/o G-Wing, Om Datta Appartment
Parnaka Dahanu Tq Dahanu Dist Thane**Appellants**

Versus

- 1] Shri. Laxman Shankar Badgujar,
Age: 58 Years, Occu: Retired,
Resident of Salve, Tq. Sindkheda,
Dist. Dhule.
- 2] Shri. Pundlik Shankar Badgujar,
Age: 56 Years, Occu: Agril,
R/o Salve, Tq. Sinkdheda,
Dist. Dhule (Since deceased
through his L.Rs.)
- 2] 1] Smt. Dagubai W/o Pundlik Badgujar
Age: 60 years, Occu: Household,
- 2] Shri. Lotan Pundlik Badgujar,
Age: 32 Years, Occu: Agri,
- 3] Shri Chhagan Pundalik Badgujar
Age: 30 Years, Occu: Agril,
- 4] Shri. Ishwar Pundali Badgujar,
Age: 28 Years, Occu: Agril,
- 5] Shri. Ramkrishna Pundali Badgujar,
Age: 26 Years, Occu: Agril,
- 6] Shri. Ashok Pundali Badgujar,
Age: 24 Years, Occu: Agril,
- 7] Shri. Sanjay Pundali Badgujar,
Age: 28 Years, Occu: Agril,
- 1 to 7 resident of Salve
Tq. Sindkheda, Dist. Dhule.
- 3] Shri. Vithal Shankar Badgujar,

Age: 53 Years, Occu: Agril,
Resident of Salve, Tq. Sindkheda,
Dist. Dhule (deceased through L.Rs.)

- 3] A] Smt. Leelabai W/o Vithal Badgujar,
Age: 52 years, Occu: Household,
- B] Shri. Vinod Vithal Badgujar,
Age: 30 Years, Occu: Agril,
- C] Shri. Kishor Vithal Badgujar,
Age: 26 Years, Occu: Agril,
- 3 (A) to (C) resident of Salve,
Tq. Sindkheda, Dist. Dhule.
- D] Sau. Ratan Bhagwan Badgujar,
Age: 32 Years, Occu: Household,
Resident of Sakali Tq. Yawal
Dist. Jalgaon.
- E] Sau. Vandana W/o Arun Badgujar
Age: 24 years, Occu: Household,
Resident of Palanpur Tq. Renapur,
Dist. Ahemadabad (Gujart)
(Dismissed vide Registrar
Order dtd. 28-11-2007)
- 4] Smt. Dwarkabai W/o Jankiram Badgujar
Age: 63 Years, Occu: Household,
Resident of Dhule Road, Old Police
Line, Amalner, Dist. Jalgaon.
- 5] Smt. Lallubai W/o Murlidhar Bagujar,
Age: 46 Years, Occu: Household,
C/o Murlidhar Vedu Badgujar
Police Jamadar Police Line,
Mahasana, Dist. Mehsana (Gujrat)
- 6] Smt. Jadabai W/o Hiralal Badgujar
Age: 54 years, Occu: Household
R/o Warkhedi Road, Subhash Nagar
Dhule.
- 7] Smt. Vimalbai W/o Baliram Badgujar,

Age: 25 years, Occu: Household,
Resident of Piloda (Gandhali),
Tq. Amalner, Dist. Jalgaon.

....**Respondents**

Mr. C. R. Deshpande, Advocate for appellants

Mr. S. P. Brahme, Advocate for respondents Nos. 2(1) to 2(7), 4, 5
& 6, 7.

CORAM : T.V. NALAWADE, J.

DATED : 15th July, 2016.

JUDGMENT :

1) The appeal is filed against judgment and decree of Regular Civil Appeal No. 38/1994, which was pending in the Court of Additional District Judge, Dhule. The appeal was filed by plaintiff of Regular Civil Suit No. 56/1992, which was pending in the Court of Civil Judge, Junior Division, Shindkheda. The suit filed for relief of partition was dismissed by the Trial Court and the First Appellate Court has set aside that decision and decree is given in favour of plaintiff. Both the sides are heard.

2) In short, the facts leading to the institution of the appeal can be stated as follows :-

The suit was filed in respect of four agricultural lands bearing Gat Nos. 176, 105 and 181 situated at Salve and Gat No. 171 situated at Hatnur and house properties bearing house Nos. 22, 23, 271, 272, 273, 274 and 256 situated at village Salve,

Tahsil Shindkheda.

3) Plaintiff is real brother of defendant Nos. 1 to 3. Defendant Nos. 4 to 7 are sisters of plaintiff and defendant Nos. 1 to 3. It is the case of plaintiff that suit properties were ancestral properties of their father Shankar and partition has not taken place amongst the co-parceners of the suit properties. It is contended that plaintiff was staying out of station due to his service and so, the defendants were enjoying the fruits of the properties, but their possession was for plaintiff also as he was co-parcener.

4) It is the case of plaintiff that on 1.4.1992 he gave notice to defendant Nos. 1 to 3 and asked them to partition the suit properties. It is contended that defendant Nos. 1 to 3 did not reply the notice and they are avoiding to partition the suit properties. It is the case of plaintiff that he has 9/40th share in the properties and he prayed for partition and for separation of his share. His sisters admitted the claim.

5) Defendant No. 1 filed written statement and contested the matter. Defendant admitted that the properties were with their father as ancestral properties. Defendant No. 1

contended that the father had partitioned the properties amongst his sons and so, at the time of death of his father, there was no joint family in existence.

6) Defendant No. 1 contended that defendant Nos. 4, 5 and 6, sisters are not entitled to get any share and so, the suit is bad for mis-joinder of parties. Defendant has also contended that there are heirs of three deceased sisters of plaintiff and defendant Nos. 1 to 3 and they are necessary parties to the suit. He contended that Shankar had four sons and seven daughters.

7) It is the case of defendant No. 1 that prior to 1966 partition had taken place and the parties have been enjoying their shares separately since then. It is contended that the house properties are also partitioned as per the oral partition and as per the partition, the sharers are in separate possession.

8) It is the case of defendant No. 1 that in the year 1961 the joint family, plaintiff, defendants and their father had taken loan and this loan was to be repaid by all the successors of Shankar. It is contended that plaintiff avoided to share his responsibility and defendant Nos. 1 to 3 repaid this loan. It is contended that the amount of Rs. 15,000/- was repaid by

defendant Nos. 1 to 3. It is contended that as plaintiff did not give amount of his share, the properties were not entered in his name. He also contended that in the year 1966, the will deed was prepared by Shankar and as per the will document, defendant No. 1 has partitioned even the share of Shankar amongst the successors of Shankar.

9) The Trial Court had made order of dismissal of the suit for default in respect of defendant Nos. 2 and 3. Exparte order was made as against defendant No. 6, sister. On the basis of aforesaid pleadings, issues were framed. Both the sides gave evidence. The Trial Court held that the suit is bad for non-joinder of necessary party, for not making the legal heirs of three deceased sisters party to the proceeding and for not joining defendant Nos. 2 and 3 in the suit against whom the suit was dismissed. The Trial Court further held that Shankar had effected partition before 1966. The First Appellate Court has held that the suit summons was duly served on defendant Nos. 2 and 3 and one advocate was representing them and so, the order of dismissal of the suit could not have been made by the Court. The First Appellate Court held that defendants failed to prove that partition was effected by their father prior to 1966. The First Appellate Court held that plaintiff is entitled to 9/40th share in all

the suit properties.

10) This Court had admitted the appeal in 2004, but no substantial questions of law were specifically formulated. From the reasoning given, it can be said that following two points are expected to be considered in the present appeal as substantial questions of law.

- (i) Whether there is sufficient material to prove that partition was effected prior to 1966 ?
- (ii) Whether the suit ought to have been dismissed for non-joinder of necessary parties ?

11) It is not disputed that plaintiff was staying out of station due to his service. The oral and documentary evidence show that the name of plaintiff - Laxman is not entered in the revenue record of agricultural lands. The 7/12 extracts at Exhs. 37, 38 show that both the lands were having total area of more than 10 H. and are standing in the name of defendant No. 1 and he is shown in possession of these lands. Similarly, Exh. 40 shows that land admeasuring 2.33 H. is standing in the name of defendant - Pundlik and he is shown in the possession of the property. This record is of the year 1991-92 and so, it can be said that the so called partition was not shown in the revenue record.

There is no mutation of partition.

12) Some assessment lists in respect of house properties are produced. The assessment list at Exh.31 shows that two house properties are shown to be entered in the name of Laxman - plaintiff and remaining house properties are shown to be entered in the name of defendant Nos. 1 to 3. No record is produced to show that plaintiff had taken steps to enter his name in assessment record. Thus, the entry in the assessment record of the name of plaintiff cannot lead to inference that partition had taken place. Admittedly, he was out of station and whatever record was prepared was on the basis of applications given by mainly defendant No.1. Admittedly, notice of partition was given by plaintiff dated 1.4.1992 and receipt is produced at Exh. 54. This notice was not replied by the defendants. Thus, the record is consistent with the case of plaintiff and there is also substantive evidence of plaintiff to the effect that partition had not taken place. All his sisters are supporting him.

13) The burden to prove the partition was on defendants. The oral evidence of defendant No. 1 shows that he is mainly relying on document at Exh. 51, which according to him, is the will executed by his father Shankar. In the evidence given by this

witness, this document was given exhibit, but due to execution will was not proved. Even if this document is treated as document showing that Shankar wanted to partition the properties or partition was effected, this document cannot make any sense. The particular portions of survey numbers allotted to the shares of sons are not mentioned. In any case, this document was not used for any purpose by defendant No. 1. In written statement also defendant No. 1 did not come with specific case that any particular portion was given to plaintiff in the partition. First time in the evidence, he tried to say that in one land, some portion was given to plaintiff, but his name was not entered as plaintiff refused to pay the proportionate amount of loan. Such evidence cannot be used as it has no base of pleading. It was necessary for defendant No. 1 to prove that properties were partitioned by Shankar and particular property was given to defendant No. 1 by Shankar. There is no such evidence on record. On the contrary, the land which was shown to be given to plaintiff as per the oral version of defendant No. 1, still stands in the name of defendant No. 1. His name is appearing in the crop cultivation column. Defendant No. 1 has tried to contend that the house property which was given to the share of plaintiff, was given by him on lease basis, but no evidence is given to prove that contention also. In view of these

circumstances, there was no other alternative before the Courts below than to hold that defendant No. 1 had failed to prove that partition was effected prior to 1966.

14) Much was argued by the learned counsel for appellant on the circumstance that order of dismissal of the suit was made by the Trial Court in respect of defendant Nos. 2 and 3. The First Appellate Court has considered the relevant record which include the filing of pursis by one advocate who was representing defendant No. 1 also to the effect that he was appearing for defendant Nos. 1 to 3. He has filed address memo in respect of defendant Nos. 1 to 3. Adjournment was sought to file written statement by defendant Nos. 2 and 3 by this advocate and there was one more advocate along with him. It appears that due to this circumstance, no further steps were taken, but the Trial Court dismissed the suit as against defendant Nos. 2 and 3. These defendants were made parties in the appeal also by plaintiff and in the appeal, they were duly served, but they preferred not to appear in the appeal. This circumstance also needs to be considered against defendant Nos. 2 and 3. It can be said that defendant Nos. 1 to 3 are on one side and they want to see that plaintiff does not get any share in the properties. Due to these circumstances, it cannot be said that

the suit was bad for non-joinder of two brothers like defendant Nos. 2 and 3 in the suit.

15) It appears that three sisters of plaintiff had died prior to Shankar and they have left behind some heirs. Shankar died in the year 1975 and so, as per the provisions of Hindu Succession Act, 1956, the successors of three predeceased daughters of Shankar are entitled to get share in the properties of Shankar. If the properties are partitioned amongst Shankar and his four sons, then Shankar would get 1/5th share and in this share, all the successors of Shankar like sons, daughters and daughters of predeceased daughters are entitled to get equal share. Though this circumstance is there, the shares of the said daughters of predeceased daughters are fixed and the decision of the suit is not against them and they will be getting some share. The other sisters have admitted the claim of plaintiff and admittedly, the properties were ancestral properties of Shankar. Due to this circumstance, the suit could not have been dismissed for non-joinder of legal heirs of three predeceased daughters of Shankar.

16) The learned counsel for appellant placed reliance on some reported cases like **2010 AIR SCW 5071 [Budh Ram**

and Ors. Vs. Bansi and ors.], order made by this Court (by other Hon'ble Judge) in Second Appeal No. 1/2010 decided on 26th February, 2010 (between Vishwambhar Swami Vs. Mahadev Swami) and order made in review application No. 77/2010 by this Court (other Hon'ble Judge) on 30.10.2014 (between Vishwambhar Swami Vs. Mahadev Swami). The facts of the aforesaid cases were different. Abatement and the effect of provisions of Order 22 of Civil Procedure Code was under consideration. Such is not the present case. In view of the facts of this case, this Court holds that observations made in aforesaid cases are of no use to the present appellant. The case reported as **2009 (2) Mh.L.J. 547 [Equbalbegum Sk. Ahmed Vs. Abdul Rahim FAteh Mohammad]** was also cited, but the facts of this case were also different. The decree in the present matter will be effective even in absence of legal heirs of predeceased daughters of Shankar and there is no possibility of giving conflicting decisions.

17) The First Appellate Court has held that plaintiff is entitled to 9/40th share. As already observed, the partition needs to be first effected amongst Shankar and his four sons and so, in the first partition plaintiff will get 1/5th share. Similarly, 1/5th share could have been given to Shankar and after his death, this

$1/5^{\text{th}}$ share was required to be distributed equally amongst his four sons and seven daughters. Thus, each son and each daughter will get $1/55^{\text{th}}$ share. Thus, plaintiff will get $12/55^{\text{th}}$ share ($1/5 + 1/55$). Each brother of plaintiff will get similar share. So, the points are answered against the appellant and following order is made.

ORDER

(I) Appeal is partly allowed. Judgment and decree of the First Appellate Court is modified in following terms :-

(i) The First Appeal is allowed. Judgment and decree of the Trial Court of dismissal of the partition suit is set aside.

(ii) The suit is decreed.

(iii) Plaintiff is entitled to $12/55^{\text{th}}$ share in all the suit properties. The brothers of the plaintiff viz. defendant Nos. 1 to 3, each, is entitled to the same share viz. $12/55^{\text{th}}$. Each daughter of deceased Shankar is entitled to $1/55^{\text{th}}$ share and to this share, the daughters of predeceased daughters are also entitled, though they are not made party to the suit. Care is to be taken to see that in execution proceeding, their shares are also carved out.

(iv) The remaining part of the judgment and

decree of the First Appellate Court stands as it is.

(v) Decree is to be prepared accordingly.

(II) The learned counsel for appellants requested for stay to the execution proceeding. The request of stay is refused as suit is very old and apparently, the appellants are in possession of the properties and original plaintiff is deprived of his share.

(III) Civil Applications are disposed of.

[T.V. NALAWADE, J.]

ssc/