

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

Second Appeal No. 578 of 2015

- 1) Kachru S/o Murlidhar Chakke,
Age 55 years,
Occupation : Agriculture,
R/o Tilawani, Taluka Kopargaon,
District Ahmednagar.
- 2) Dwarkabai w/o Kachru Chakke,
Age 50 years,
Occupation : Agriculture,
R/o Tilawani, Taluka Kopargaon,
District Ahmednagar.
- 3) Sonyabai w/o Murlidhar Chakke,
Since deceased through her
surviving legal representatives
appellant Nos.1 and 2.
- 4) Hirabai w/o Pandurang Cholke,
Age Major,
Occupation: Household,
R/o Cholkewadi, Taluka Kopargaon,
District Ahmednagar. **.. Appellants.**

Versus

- * Parighabai W/o Pandurang Devkate,
Age 48 years,
Occupation : Agri. & Household,
R/o B Wing, 3rd Floor, Room No.302,
Gautam Housing Society,
Andheri (East), Mumbai. **.. Respondent.**

Shri. Sachin S. Deshmukh, Advocate, for appellants.

Shri. K.M. Nagarkar, Advocate, for respondent.

CORAM: T.V. NALAWADE, J.

DATE : 28 JULY 2016

JUDGMENT:

1) The appeal is admitted. Notice after admission made returnable forthwith. Heard both the sides for final disposal of the appeal on following substantial questions of law :-

(I) *Whether the Courts below have committed error in not considering the material available for drawing inference that partition was effected by father of the parties prior to the date of the suit ?*

(II) *Whether the Courts below have committed error in calculating the share of the plaintiff in view of the provisions of Hindu Law ?*

The facts in short, leading to the institution of the appeal can be stated as under :-

2) Plaintiff - Parighabai is real sister of defendant No.1 and one Murlidhar was their father. Defendant No.4 Hirabai is another daughter of Murlidhar and defendant No.3 was widow of Murlidhar. She died during pendency of the appeal. Murlidhar died prior to 1998. Plaintiff was given in marriage prior to 1994.

3) The suit was filed for relief of partition in respect of Survey No.156/1, 156/2 and 162 situated at village Tilwani, Tahsil Kopargaon, District Ahmednagar. It is contended that these properties were ancestral properties of Murlidhar and after the death of Murlidhar the names of defendant Nos.1 to 4 were entered in the revenue record only as heirs but there was never partition of the suit property amongst the plaintiff and defendants. Contentions regarding cause of action were made and relief of partition and separate possession of share of plaintiff was claimed.

4) Defendant Nos.1 to 3 filed joint written statement. They admitted that the properties were

ancestral properties of Murlidhar. They contended that in the year 1981 Murlidhar had effected partition of the properties and he had given lands Survey Nos.156/1, 156/2 to Kachru, defendant No.1 and then he had entered the third property Survey No.162 in the name of wife Sonyabai. It is contended that defendant No.1 had also entered name of his wife Dwarkabai in the revenue record.

5) It is the case of the defendants that plaintiff was allotted Gat No.37 of village Tilawani which was admeasuring 74 R and in the past this land was bearing Survey No.156/3. It is contended that this property is sold by the plaintiff to one Popat Gaike and so she is not entitled to claim partition and get share in the properties allotted to defendants. It is contended that names of plaintiff and defendants were continued in land Gat No.162 in revenue record and the plaintiff is trying to use that continuation to contend that partition has not taken place.

6) Issues were framed on the basis of aforesaid pleadings. Both sides gave evidence.

7) The trial Court held that there was no partition and plaintiff has 1/3rd share in all the suit properties. It appears that in view of the amendment introduced in Hindu Succession Act in the year 2005, equal share was given to plaintiff. This finding is confirmed by the First Appellate Court.

8) The defendants had contended that there was partition effected by Murlidhar and so burden was on defendants to prove that such partition was effected by Murlidhar, father of plaintiff and defendant No.1. For proving such case the defendants have relied on copy of mutation No.246. This document Exhibit 41 shows that as per order made by Tahsildar the property was shown to be partitioned and the Circle Officer had signed for sanction on 28-11-1981. In this entry it is shown that land Gat No.162 admeasuring 2.33 hectares was kept with himself by Murlidhar, land Gat No.37 admeasuring 1.22 hectares

was shown to be given to Sonyabai, wife of Murlidhar. Land Survey No.156 admeasuring 1.03 hectares was shown to be given to Kachru and land Survey No.156 to the extent of 1.78 hectares was shown to be given to Dwarkabai, wife of Kachru.

9) The aforesaid record shows that some order was made but no steps were taken by defendants to call record which could have been in the form of so called application given by Murlidhar to show that he had effected partition and as per the partition effected by him he had requested to make entries in the revenue record. In any case this record does not show that any property was given to the share of plaintiff, daughter. It can be said that as the property was ancestral property of Murlidhar, he was not expected to give share to his daughter as law which was prevailing in the year 1981 could have been used. Admittedly, land Gat No.37 was sold by Murlidhar to plaintiff under registered sale deed. Copy of mutation No.596 dated 30-4-1993 is produced to show that plaintiff sold this land (old No.156/3) to Narayan and Thakubai.

Copy of the said sale deed is produced on the record. If the sale deed was executed by Murlidhar in favour of the plaintiff, it cannot be said that he had partitioned the property. Further, the sale deed executed in favour of the plaintiff was never challenged by the defendants and there is record of aforesaid nature. Thus, on the basis of these circumstances inference is not possible that Murlidhar had effected partition. Murlidhar would not have given property to Dwarkabai wife of Kachru as she was not coparcener and she was not entitled to have any share in the ancestral property during life time of her husband Kachru. This circumstance again creates doubt about the partition. It can be said that no title is passed to Dwarkabai in respect of 1.78 hectares from Gat No.156 shown in Mutation No.246. Thus this property was available for partition and further due to death of Sonyabai the property like Gat No.162 was also available for partition. In any case when defendants failed to prove that Murlidhar had effected partition, all the three properties were available for partition. The findings of the Courts below on the defence of the partition are findings

on facts and they are concurrent. Thus it is not possible to interfere in the finding given that properties are of joint Hindu family.

10) Learned counsel for the appellant placed reliance on one case reported as **2016(1) Mh.L.J. 1 (Prakash v. Phulavati)** and submitted that the provisions of section 6(3) of the Hindu Succession Act as amended in the year 2005 cannot be given retrospective effect and so the share given to the plaintiff viz. 1/3 is not correct share and she could have been given share only in the property of her father. This proposition cannot be disputed as the Apex Court has interpreted the aforesaid provision in the case cited supra.

11) In view of the position of Hindu Law which was prevailing prior to amendment of 2005 and due to circumstance that marriage of plaintiff had taken place prior to the year 1994, in the notional partition only Murlidhar, his son Kachru and wife of Murlidhar could have got equal share viz. 1/3rd share. Due to death of

Murlidhar and death of his wife subsequent to the death of Murlidhar, plaintiff can get share in the property which was allotted to the share by Murlidhar and to his wife. 1/3rd share which could have been given to Murlidhar in the notional partition, needs to be divided amongst his two daughters, sons and widow. After such partition in the share of Murlidhar, plaintiff would get 1/12 share. As widow survived Murlidhar her share at the time of death was $1/3 + 1/12 = 5/12$. Due to death of Sonyabai this share needs to be distributed amongst her successors like one son and 2 daughters and from that property plaintiff can get 5/36th share ($5/12 \times 1/3$). Thus the total share of the plaintiff in the property will be 8/36th ($5/36 + 1/12$). The trial Court has given 1/3 share and so the judgment and decree needs to be modified accordingly. In the result, the first point is answered in negative and the second point is answered in affirmative for making the share as 8/36th. In the result, the following order is made.

12) The appeal is partly allowed. The judgments and decrees of the trial Court and the first appellate Court

are modified. The share of the plaintiff will be 8/36th. Other part of the decree is maintained. The amount if any deposited in this Court by way of security by the appellants is to be sent to the executing Court. The amount can be taken into consideration at the time of taking decision on mense profit. Decree is to be prepared accordingly.

Sd/-
(T.V. NALAWADE, J.)

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