

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 2057 OF 2015**

Smt. Sharada Dasharath Kamble Petitioner
Vs
1. Shri Nivritti Sitaram Kokade,
since deceased, through LRs .. Respondents
1A. Smt. Indubai Nivritti Rokade
and Ors.

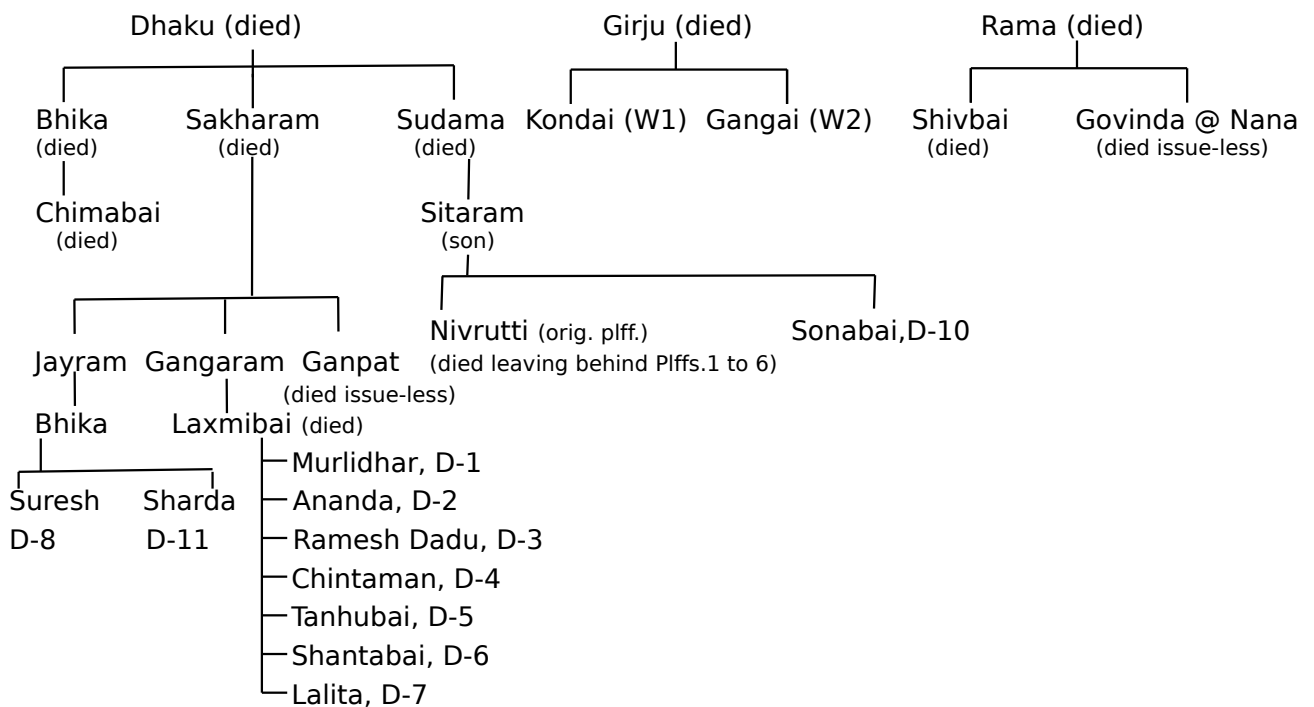
Mr. Vishwanath S. Talkute, Advocate for Petitioner.
Mr. Shailendra S. Kanetkar, Advocate for Respondent no.2.

CORAM : R.G.KETKAR,J.
DATE : 01/03/2016

PC:

1. Heard Mr. Vishwanath Talkute, learned counsel for the petitioner and Mr. Shailendra Kanetkar, learned counsel for respondent no.2 at length.
2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the Judgment and order dated 11.12.2014 passed by the learned Jt. Civil Judge, Jr. Dn, Pune below Exh. 320 in Regular Civil Suit No.1814 of 2012. By that order, the learned trial Judge allowed the application Exh.320 made by defendants no. 1 to 4 seeking direction against the petitioner, hereinafter referred to as 'defendant no.11', to begin her evidence before defendants no.1 to 4 commencing their evidence. Parties shall, hereinafter, be referred to as per their status in the trial Court.
3. Respondents no.1A to 1F instituted Special Civil Suit No.384

of 2001, renumbered as Regular Civil Suit No. 1814 of 2012, against defendants no. 1 to 11 (petitioner is defendant no.11) for partition and separate possession. The case of the plaintiff is that the suit properties are the joint family properties of three brothers, by names, (1) Dhaku. (2) Girju, and (3) Rama. According to the plaintiff, Genealogy is as follows:



Dhaku died leaving behind three sons, by name, Bhika, Sakharam, Sudama.

Bhika died leaving behind widow Chimabai.

Sakharam died leaving behind three sons, by name, Jayram, Gangaram, Ganpat.

Ganpat died issueless.

Defendants no. 1 to 7 are sons and daughters of Gangaram.

Defendants no. 8 and 11 are children of Bhika.

Orig.Plaintiff-Nivrithi and defendant no.1D are children of Sitaram.

Sitaram is son of Sudama.

Girju died leaving behind Kondai, widow no.1, and Gangai, widow no.2. They died issueless.

Similar is the case of the branch of Rama who died leaving behind Shivbai who had one son Govinda alias Nana. Govinda alias Nana died issueless.

4. It is the case of the plaintiff that shares of Girja and Rama came to the share of Dhaku. Out of three sons of Dhaku, by names, Bhika, Sakharam and Sudama, Bhika and his wife Chima died issueless. As such, the property of Bhika's came to remaining two brothers, i.e. Sakharam and Sudama who inherited the entire suit properties equally having undivided half share each. Sudama had one son, by name, Sitaram who is survived by his son Nivrithi, i.e. original plaintiff, since deceased, and defendant no.10. Nivrithi and defendant no.10 inherited half share in the suit properties. Sakharam had 3 sons, by name, Jayram, Gangaram and Ganpat. Out of the three sons of Sakharam, Ganpat died issueless. The defendants are successors of Gangaram and Jayram who had inherited the remaining undivided half share. It is the case of the plaintiff that Gangaram was the Karta of the joint family of the plaintiff and defendants and that the partition of the suit properties is not yet

effected. The plaintiff, therefore, instituted suit for partition and separate possession of their shares.

5. Defendants no. 1 , 2 and 4 filed written statement Exh.142 as also set up counter claim on 28.9.2005. Defendant no.11 filed written statement on 5.1.2007, inter-alia, contending that genealogy reproduced by the plaintiff is to some extent correct. Sakharam's father is shown as Dhaku which is not correct. Sakharam's father name is Govinda. Defendant no.8 and defendant no.11 are children of Bhika. Bhika is the son of Jayram. Jayram died in 1946. Jayram had two brothers, Gangaram and Ganpat. Ganpat died issueless. Gangaram died leaving behind sons defendants no.1 to 4 and daughters defendants no.5 to 7. It is the case of defendant no.11 that among the three sons of Sakharam, Gangaram is the eldest and Karta of the Joint Hindu Family. Defendant no.11 further denied the genealogy given by the plaintiff. In the genealogy the plaintiff claims that Jayram is the eldest son of Sakharam. On the contrary, according to defendant no.11, Gangaram is the eldest son. Jayram is elder than Ganpat. When the family was joint, Gangaram and Jayram expired. Defendant no.9 Nanibai is aunt of defendant no.11. She does not get any right by succession. The suit properties are not separate properties of either Gangaram or Jayram. Though some properties stand in the name of Gangaram and Jayram, they are joint family properties. Jayram and Gangaram were cultivating

the suit lands. Assuming that Gangaram had acquired some properties, the said properties were blended with the joint family properties and thus all the properties are joint family properties of Gangaram and Jayram, since deceased. Defendant no.11, therefore, claims partition and separate possession of half share and expressed her readiness and willingness to pay necessary court fees. Defendant no.11 also filed written statement to the counter claim set up by defendants no.1, 2 and 4 on 13.8.2009.

6. During the pendency of the suit, defendants no.1 to 4 filed application praying, inter-alia, for refusing permission to defendant no.11 to cross examine the plaintiff on the ground that defendant no.11 is supporting the plaintiff and/or there is collusion between the plaintiff and defendant no.11. It appears that by order dated 23.9.2009, the learned trial Judge allowed the application. Aggrieved by that decision, defendant no.11 instituted Writ Petition No.8842 of 2009 in this Court. By order dated 7.4.2010, this Court set aside the order dated 23.9.2009 and dismissed the application made by defendants no.1 to 4. This Court directed the learned trial Judge to permit defendant no.11 to cross examine and complete the trial in accordance with law. It was further made clear that in case defendants no.1 to 4 apply for re-cross-examination of the plaintiff, if defendant no.11 supports the plaintiff, the Court may consider to grant such application in accordance with law.

7. Defendants no.1 to 4 thereafter filed application dated 15.2.2012 at Exhibit 302, inter-alia, praying for directing defendant no.11 to first cross examine the plaintiff and their witnesses and after completion of cross examination by defendant no.11, permission may be granted to defendants no.1 to 4 to cross examine the plaintiff's witnesses. After the plaintiff's complete their evidence, defendant no.11 may be directed to lead evidence and thereafter the plaintiff should be directed to first cross examine defendant no.11 and her witnesses and defendants no.1 to 4 will thereafter cross examine witnesses of defendant no.11. By order dated 19.6.2013, the learned trial Judge allowed the application and directed defendant no.11 to first cross examine the plaintiff's witnesses before defendant no 1 to 4 cross examine the plaintiff's witnesses. The learned trial Judge further directed that after plaintiff finishes their evidence defendant no.11 shall lead evidence and thereafter the plaintiff will cross examine witnesses of defendant no.11 and thereafter defendants 1 to 4 will cross-examine witnesses of defendant no.11.

8. Defendant no.11 filed application dated 18.7.2013 at Exhibit 308 for recalling order dated 19.6.2013 passed below Exh.302. By order dated 18.11.2013, the learned trial Judge allowed the application and permitted defendant no.11 to file say to application Exhibit 302 subject to payment of costs of

Rs.500/-. Application Exhibit-302 filed by defendants no.1 to 4 was thereafter considered by the learned trial Judge. By order dated 18.11.2013 the application Exh.302 was partly allowed. The learned trial Judge directed that the plaintiff and defendants should give evidence in examination in chief and cross examine in accordance with the provisions of the Indian Evidence Act, 1872 (for short, 'Act'). After defendant no.11 completes cross examination and if it is found that there is collusion between the plaintiff and defendant no.11, to that extent defendants no. 1 to 4 are permitted to re-cross examine the plaintiff's witnesses.

9. Defendants no.1 to 4 thereafter took out application Exhibit 320 on 25.8.2014 for modifying order dated 18.1.2014 passed below Exhibit 302 by directing defendant no.11 to first lead evidence and thereafter the plaintiff be directed to cross examine witnesses examined by defendant no.11 and thereafter defendants no.1 to 4 may be permitted to cross examine. After defendant no.11 finishes her evidence, defendants no. 1 to 4 may be permitted to lead evidence.

10. Defendant no.11 resisted the application by filing reply dated 12.9.2014 at Exhibit 322. By the impugned order, the learned trial Judge allowed the application, as indicated earlier. It is against this decision, defendant no.11 has instituted the present petition.

11. Mr. Talkute strenuously contended that perusal of the

written statement filed by defendant no.11 will clearly show that defendant no.11 is not supporting the plaintiff's case. On the contrary, defendant no.11 has specifically asserted that the plaintiff is no way connected with Sakharam. In other words, the plaintiff is no way concerned with defendants no. 1 to 8 and defendant no.11. Defendant no.11 has denied the genealogy given by the plaintiff and disputed that Jayram was the eldest son of Sakharam . Defendant no.11 contended that Gangaram is the eldest son of Sakharam followed by Jayram and thereafter Ganpat. He submitted that merely because defendant no.11 has claimed half share that, by itself, is not sufficient to conclude either defendant no.11 is supporting the plaintiff's case or there is collusion between the plaintiff and defendant no.11.

12. Mr. Talkute further submitted that in fact in the order dated 7.4.2010 passed by this Court in Writ Petition No. 8842 of 2009, this Court has specifically observed in paragraph 3 that defendant no.11 has made various averments in the written statement basically denying the case of the plaintiff. Merely because she is claiming half share in the suit property that, by itself, cannot be the reason to observe that defendant no.11 is supporting the plaintiff's case. Defendant no.11 has in fact denied the basic case of the plaintiff. He, therefore, submitted that defendant no.11 is not supporting the case of the plaintiff at all. He submitted that by order dated 18.1.2014 below Exhibit

302 the learned trial Judge directed the plaintiff and defendants to lead evidence in sequence as per the provisions of the Act by giving examination in chief followed by cross examination. It was also made clear that after defendant no.11 completes cross examination and if defendants no.1 to 4 establish that there is collusion between the plaintiff and defendant no.11 then to that extent the defendants no.1 to 4 are permitted to cross examine the plaintiff's witnesses. He submitted that instead of challenging that order, defendants no. 1 to 4 filed application Exhibit 320 on 25.8.2014 for recalling the order. In the first place, defendants no. 1 to 4 could not have applied for recalling the order dated 18.1.2014 below Exhibit 320. Secondly, this really in effect and substance amounts to seeking review of the order dated 18.1.2014. Defendants no.1 to 4 did not make out any case for recalling or reviewing the order dated 18.1.2014. He submitted that in view of the order dated 7.4.2010 passed by this Court in writ Petition No. 8842 of 2009 as also the order dated 18.1.2014 passed by the learned trial Judge below Exh.302 the present application is hit by principles of res judicata. In support of this submission, he relied upon the decision of the Apex Court in the case of Barkat Ali Vs Badri Narain , AIR 2008 SC 1272 and in particular paragraph 6 thereof to contend that the principles of res judicata not only apply in respect of separate proceedings but the general principles also apply at the

subsequent stage of the same proceedings also and the same court is precluded to go into that question again which has been decided or deemed to have been decided by it at an early state.

13. For all these reasons, Mr. Talkute submitted that the impugned order requires to be quashed and set aside thereby dismissing the application Exhibit 320 filed by defendants no. 1 to 4.

14. On the other hand, Mr Kanetkar supported the impugned order. He submitted that the plaintiff has instituted suit for partition and separate possession of half share on the premise that Gangaram was karta of the joint family of the plaintiff and defendants and that partition of the suit properties is not effected. Defendant no.11 in her written statement also contended that Gangaram is Karta of the joint family and that partition is not effected. Defendant no.11 also claims half share in the suit properties. In short, Mr. Kanetkar submitted that there is commonality between the case of the plaintiff and defendant no.11. As against this defendants no. 1 to 4 have asserted that right from 1971 they are in possession of the suit properties for more than 12 years and have claimed ownership by adverse possession. He submitted that the learned trial Judge has considered this aspect that the reliefs claimed by the plaintiff and defendant no.11 are identical. As against this, defendants no. 1 to 4 are claiming owners of the suit property by adverse

possession and, therefore, apprehension expressed by defendants no. 1 to 4 that serious prejudice would be caused to them is not unfounded.

15. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. As noted earlier, the common thread running between the plaintiff and defendant no.11's case is that Gangaram is the eldest brother of Jayram and Ganpat. Gangaram is Karta of the Joint family and that there was no partition of the joint family properties. The plaintiff has claimed half share in the suit properties. Likewise, defendant no.11 has also contended that Gangaram is karta of the joint family and also claimed half share in the suit properties. Perusal of paragraph 13 of the written statement of defendants no. 1 to 4 clearly shows that the defendants are claiming ownership by way of adverse possession. It is also material to note that the suit is for partition and separate possession wherein all the defendants are also the plaintiffs. It is in this contest the defence set up by defendants no.1 to 4 claiming ownership by adverse possession assumes importance. In the case of Sunil Chhatrapal Kedar Vs. Y.S.Bagde, 2004(4) Mh.L.J. 620, this Court has laid down the sequence for cross examination of the plaintiff's witnesses in the trial Court. The defendant who is supporting the plaintiff in whole or in part should address the court and lead his evidence first before the

other defendants who do not support wholly or in part the plaintiff's case. Among the defendants order of leading evidence should be (1) those defendants who fully support the case of the plaintiff, (2) those defendants who partly support the case of the plaintiff, (3) those defendants who do not support the case of the plaintiff in any part.

16. As noted earlier, suit is for partition and separate possession. Though defendants no. 1 to 4 are arrayed as defendants, they have taken the defence claiming ownership by adverse possession. It, therefore, cannot be said that defendants no. 1 to 4 are either supporting the plaintiff either wholly or partly. Defendants no. 1 to 4 are not supporting the plaintiff or for that matter other defendants and are claiming exclusive ownership by way of adverse possession.

17. While allowing the application, the learned trial Judge observed that the defendants no.1 to 4 have totally denied the suit claim. Defendant no.11 was not added as a party by the plaintiff but she got herself impleaded in the suit and claimed that she is one of the co-sharer entitled to half share in the suit property. Defendants no. 1 to 4 on the other hand contend that defendant no.11 is already divested from the family as her grandfather Jayram was given in adoption. Defendant no.11 does not have any share in the suit property.

18. In paragraph 10, the learned trial Judge noted that in

written statement filed by defendant no.11, she claims that defendant no.8 and 11 have half share and defendant no.1 to 7 have half share in the suit properties. The plaintiffs are also claiming partition and separate possession and defendant no.11 is also claiming partition and separate possession. As against this, defendants no. 1 to 4 are claiming to be the owners of the suit properties by adverse possession. Thus, the reliefs claimed by the plaintiff and defendant no.11 are identical and it cannot be said that the apprehension expressed by defendants no. 1 to 4 that serious prejudice would be caused to them, cannot be said to be unfounded. The learned trial Judge, therefore, directed defendant no.11 to lead her evidence first and she should cross examine the plaintiff and then defendant no.11 and her witnesses, if any, shall be cross examined by defendants no. 1 to 4. Defendants no. 1 to 4 shall lead evidence after completion of evidence of the plaintiff and defendant no.11.

19. Mr. Talkute submitted that in view of the findings recorded by this Court in the order dated 7.4.2010 in Writ Petition No. 8842 of 2009 and order dated 18.1.2014, below Exhibit 302, will operate as res judicata and the learned trial Judge was not justified in passing the impugned order. I do not find any merit in the submission as perusal of the prayers made in the application Exhibit 320 shows that defendants no. 1 to 4 have prayed for modification of the order dated 8.1.2014. Apart from that, Writ

Petition No.8842 of 2009 was instituted against order dated 23.9.2009 passed by the trial Court refusing defendant no.11 to cross examine plaintiff. Thus, the findings recorded therein would not operate as res judicata.

20. In view thereof, I do not find that the learned trial Judge has committed any error in passing the impugned order. Hence, Petition fails and the same is dismissed. It is, however, expressly made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in memorandum of Appeal as contemplated by Section 105(1) of C.P.C.

(R.G.KETKAR, J.)