

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE JURISDICTION

SECOND APPEAL NO.229 OF 1993

Shri Popat Khanderao Malode

Since deceased through his

legal heirs

... Appellants.

1a) Yamunabai Popat Malode

(Deleted as per Court's order
dated 21/6/2010)

1b) Kailas Popat Malode

1c) Vilas Popat Malode

1a to 1c residing at and post
Adgaon Taluka and Dist. Nashik

1d) Jijabai Maruti Date

Gondegaon Post Chandovi
Taluka: Niphad, Dist. Nashik

1e) Sangeeta Vithal Nisal

Residing at Shingre Bahula,
Post: Devlali Camp, Dist. Nashik

V/s.

Ganpat Khanderao Malode

Since deceased through his

legal heirs

... Respondents.

1a) Smt. Chandrabai Ganpat Malode

1b) Shri Bhalchandra Ganpat Malode

Both residing at – Adgaon,
Tal: Nashik, Dist. Nashik.

2 Nivrutti Khanderao Malode

Since deceased by legal heirs

2a) Parvatibai Nivruti Malode

Aged about 75 years,

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- 2b) Meghanath Nivruti Malode
Aged about 40 years
Residing at 2a to 2b R/o-
Post: Adgaon, Tal & Dist-Nashik
- 2c) Mandabai Nivruti Malode
Aged about 52 years
At & Post: Dhondegaon,
Taluka & District: Nashik
- 2d) Sulochanda Ratan Jagale
R/o-Panchavati Kavaji, Malvi
Chowk,
Residing at Shingre Bahula
Post: Devlali Camp,
Dist: Nashik
- 2e) Anjana Baban More
R/o-Dhondegaon, Tal
& District: Nashik
- 2f) Kalpana Manik Gore
R/o-Sangamner Post
Mandi, Tal: Dongari
District-Nashik
- 3 Shri Gopinath Khanderao Malode
- 4 Sou. Chandrabai Ganpat Malode,
- 5 Shri Bhalchandra Ganpat Kalode
- 6 Shri Yashwant Trimbak Shinde
Since deceased through legal heirs
- 6a) Jankabai Yashwant Shinde
Aged about 70 years,
- 6b) Bajirao Yeshwant Shinde,
Aged about 50 years,
- 6c) Kisan Yeshwant Shinde,
Aged about 46 years,
- 6d) Namdev Yeshwant Shinde,
Aged about 43 years,
Nos.6a to 6d, residents of
At & Post:Adgaon Pir Mandir
Taluka & District-Nashik
(Panchvati)

- 6e) Tulsabai Ramdas Thete
Aged about 48 years,
R/O-At & Post: Girnare
Taluka & District: Nashik
- 7 Smt. Chandrabhagabai Shankar Divate
(Deleted)
- 8 Shri Shankar Keshav Divate
Since deceased by legal heirs
- 8a) Shri Prabhakar Shankar Divate
- 8b) Shri Yashwant Shankar Divate
- 8c) Shri Uttam Shankar Divate
- 8d) Shri Pandit Shankar Divate
- 8e) Smt. Jijabai Shankar Divate
- 8f) Smt. Meerabai Shankar Divate
- 8g) Shri Ramdas Shankar Divate, (Minor)
- 8h) Shri Babaji Shankar Divate (Minor)
Nos.8g and 8h minor through
Their Guardian Mother No.7.
- 9 Shri Deoram Khanderao Malode
Since deceased through heirs
- 9a) Manjulabai Deoram Malode
Aged about 63 years
- 9b) Rajaram Deoram Malode
Aged about 42 years,
- 9c) Dinkar Deoram Malode
Aged about 39 years,
- 9d) Krishna Deoram Malode,
Aged about 35 years,
- 9e) Savitrabai Bhanudas Deoram Malode
Aged about 37 years,
All Nos.9a to 9e residing at

Adgaon Tal & District-Nashik.

10 Shri Gopinath Khanderao Malode
All Nos.1 to 10 residing at
Adgaon, Tal & District-Nashik

11 Sou. Gangabai Laxman Ugale
Since deceased to legal heirs

11a) Yemunabai Tukaram Ugale
Aged about 62 years,

11b) Rakhamabai Dattatraya More
Aged about 55 years,

11c) Madhukar Laxman Ugale
Aged about 55 years,

11d) Ramdas Laxman Ugale,
Aged about 53 years
All residing at Lokhande Wadi
Post: Kopal, Tal: Dindori,
Dist-Nashik

...Respondents
(Orig. Defendants)

Mr. S.A.Sawant with Ms. Ruchita Kadam i/by S.M.Railkar,
Advocates for the Appellants and Applicants.

Mr. R.A.Thorat, Senior Advocate with Mr. P.J.Thorat and
S.P.Chavan, Advocates for the Respondent Nos.1-a to 1-b, 2a to 2f,
3 to 5, 7, 8-a to 8-h, 10, 11-a to 11-d.

Ms. Nazia Shaikh, Advocates for Respondent Nos.9-a, 9-b, 9-d, 9-e.

***CORAM : N.M. Jamdar, J.
Friday 17 June, 2016.***

Oral Judgment:

1. The appellants have challenged the judgment and order passed by the District Judge, Nashik dated 2nd April, 1993 allowing appeal filed by the respondents and setting aside

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judgment and decree passed by the Civil Judge Senior Division, Nashik dated 27.2.1987. The learned Civil Judge decreed the suit filed by the appellants declaring that the appellants and the respondents are entitled to $7/36^{\text{th}}$ share in the suit property and the respondent no.5 is entitled to $1/36^{\text{th}}$ share in the suit property.

2. The parties are related. Original plaintiff and the defendant nos.1 to 4 are brothers. Defendant no.5 is their sister. The present appeal is being prosecuted by the heirs of the original plaintiff.

3. The appellants filed Regular Civil Suit bearing no.184 of 1983 in the Court of Civil Judge Senior Division, Nashik for partition of the properties mentioned in the schedule of the plaint. The case of the appellants was: the properties mentioned in the plaint, which are situated at village:Adgaon, Taluka: Nashik, were joint family properties of the appellants and the respondents. There were frequent quarrels amongst the family members. Some loans taken by the family members had to be repaid. A deed was executed on 13th July, 1979, for temporary partition which was not to be acted upon. Taking advantage of this temporary partition, the respondent no.1, who was Karta of the joint family started mismanaging the properties and started claiming that some of the properties were his self acquired properties. Therefore, it was necessary that the partition is effected, properties are divided and members should be given their respective share.

4. The respondents filed Written Statement and contended: On 13th July, 1979, a deed of family arrangement was executed and there was severance in the joint family. The appellants and the respondent nos.1 to 4 were given their respective shares and there was no question of re-opening the partition. Certain properties were self acquired by the respondent no.1. Parties led their oral evidence. Two persons, who attended the signing of the deed dated 13th July, 1979 were examined. The learned Civil Judge, after hearing both the sides, concluded that the document dated 13th July, 1979 was a temporary arrangement for the convenience of the family; and respondent no.1 had shown certain bogus debts and fraudulently purchased the properties in the name of wife and son. The learned Civil Judge held that the appellants proved that the properties in paragraph 3a and 3c of the plaint were ancestral properties and the properties in paragraph 3b and 3d were purchased from nucleus of the joint Hindu family. Accordingly, the learned Civil Judge decreed the suit by the judgment and decree dated 27.2.1987.

5. The respondents filed an appeal bearing no.602 of 1987 in the District Court, Nashik. The learned District Judge after considering the evidence concluded that the deed dated 13th July, 1979 was a family arrangement and it was not for a temporary purpose and, therefore, partition having already been effected, could not be re-opened. As regards whether the respondent no.1

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purchased property in the name of his wife and son, the learned District Judge held that the issue did not survive. The learned District Judge held that prior to execution of deed of 13th July, 1979, there were various talks and incidents took place, which were recorded in the family arrangement dated 13th July, 1979 and such document did not require registration under the Indian Registration Act, 1908. The learned District Judge, after taking into consideration, various factual aspect arising from the evidence of the parties and from the language of the deed, held that the family arrangement was not temporary as alleged by the appellants. The learned District Judge also held that the fact that the mother of the appellants and the defendants did not sign the deed was not of much relevance as from the record it was clear that she consented to the arrangement. Accordingly, the learned Judge by the judgment and order dated 2.4.1993 allowed the appeal.

6. Thereafter the present second appeal is filed. The second appeal was admitted on 29.4.1993. Grounds at Serial Numbers 4,6,9,14,16,17 and 20 as taken in the Appeal Memo, were framed as substantial questions of law. The questions of law framed were whether the lands in paras.3A,3B, 3C and 3D are joint family properties; on whom the burden of proof that said properties were not purchased from the joint family funds lay; whether the learned Judge has erred in law in fixing the burden of proof; the implications of the registration of the document dated Shivgan

13.07.1979 Exh.53; whether it was rightly concluded that Gangubai had relinquished her share in the Joint Family; whether since the partition effected by Exh.53 and is inadmissible document. The partition can be reopened by a separate suit; whether The Learned Appellate Judge wrongly applied the principles of estoppels against the Appellants since the document Exh.53 was not acted upon.

7. I have heard Mr. Sawant learned counsel for the Appellants and Mr. R.A.Thorat, Senior Advocate for the Respondents.

8. Two main submissions of Mr. S.A.Sawant are that the deed dated 13th July, 1979 was temporary in nature and it required registration. Mr. Sawant submitted that though the Deed did not mention that it is for temporary purpose, the fact that there were no entries made in revenue record and the properties were not divided by metes and bounds clearly indicated that it was only treated as temporary arrangement. He submitted that two witnesses who were present at the time of execution of the deed and were examined also deposed to that effect. Mr. R.A.Thorat, the learned Senior Advocate for the respondents submitted that in view of Section 91 of the Indian Evidence Act, 1872 deed will have to be read as it is and even otherwise, there is sufficient evidence to show that it was not for temporary basis.

9. I have gone through the copy of the deed dated 13th July, 1979. The deed is signed by the appellants and the respondents. The deed states that all the brothers through their consent and voluntary basis had partitioned their properties and taken possession. All the properties are listed, including the properties bearing gat nos.2050 and 1147. It is also mentioned that loan will have to be repaid by the respondents. It is stated in the deed that the properties will be enjoyed on ownership basis by all concerned, none will be entitled to raise any objection to this position and if anyone obstructs the other from enjoyment of the property, affected parties is entitled to launch a prosecution. It is also admitted by the appellants that there were long standing quarrels between the parties. It was also admitted that there were various meetings between the parties. This fact is specifically stated by the Respondents in their Written Statement and evidence, to which there is no serious contradiction. It was clear that there was distrust amongst the siblings. It is nobody's case that there were cordial relations between the parties. In this background, deed which specifically stated that none was entitled to raise objection to distribution specified in the deed and if one does is liable to face prosecution, would not have been accepted if it was only temporary arrangement. The appellant-plaintiff in the cross-examination clearly admitted that there was severance in status of family after the deed was executed and each party was in possession in their own right.

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10. The deed of 13th July, 1979, which is in writing, is admittedly signed by all the parties. It does not mention that it was for temporary purpose. The surrounding facts, which have been appreciated by the learned District Judge, also show that the said deed was not for temporary basis. Appreciation of oral evidence in this Second Appeal is to find out what was the intention of parties, in spite of clear language of the deed, itself is of limited nature. In this assessment of evidence, which is the domain of the fact finding Courts interference is not possible unless perversity is shown. As a matter of general principle, the Family arrangement has to be given due importance, as it brings peace within the family and if allowed to be re-opened casually, it will disrupt the peace, bring discord and give rise to further litigation, which in this case unfortunately has taken place. The factual finding that family settlement was not for temporary basis and the conclusion that it could not be re-opened, can not be faulted with.

11. Next ground of challenge to this deed by the appellants is, that it is not registered. Mr. Sawant relied upon the decision of the learned Single Judge of this Court in **Rajaram Gopal Govekar v. Arjun Gopal Govekar** 2015 (5) Mh.L.J. 771 and **Narendra Kante v. Anuradha Kante and Others** 2010 (2) SCC 77 of the Apex Court. I have considered this submission. Issue in this case is whether partition of the properties is brought out by deed in Shivgan

question or it merely records an earlier partition. The second category does not require registration. This is the position laid down by the Apex Court in the decision in the case of **Roshan Singh and Others v. Zile Singh AIR 1988 Supreme Court 881** relied upon by Mr. Thorat. Therefore, it will have to be seen whether the deed dated 13th July, 1979 creates right of partition of the property or it records the factum of earlier partition. The learned District Judge has dealt with this issue. The learned District Judge held that the deed itself mentions that the partition was already made and delivery of possession was already done with consent and without influence of all parties. If deed dated 13th July, 1979 is perused, it does state that partition had taken place and certain house properties had come to the share of the defendant no.1. The defendant no.1 had deposed that there were various meetings and in these meetings, it was decided to partition the properties and separate the shares so that there is quietus to long standing disputes between the parties. It was decided to record the same before the panchas. If this position is accepted, then document dated 13th July, 1979 becomes family arrangement regarding the past partition. That, if the evidence is re-appreciated, this Court can come to another conclusion that the deed is partition deed, is not a ground to interfere with the factual finding that it was only a document recording past partition. The view taken by the learned District Judge by reading recitals in deed as well as the evidence of the parties regarding the meetings held in past, cannot be said to be a perverse view.

12. As regards the evidence of the witnesses, who were present at the time of signing the deed, these witnesses have only stated that they had attended when the parties signed the deed of 13th July, 1979. These witnesses being strangers to the family, called only as witnesses at the time of signing of the deed, did not depose anything further than the fact that the deed was signed in their presence. Considering these factors, the contention raised by Mr. Sawant as regards the registration of this document, cannot be accepted.

13. Next challenge by Mr. Sawant to the deed of 1979 is that the sister and mother have not signed family arrangement and, therefore, such family arrangement cannot be acted upon unless signed by all the concerned. Mr. Sawant relied upon the decision in the case of **Narendra Kante (Supra)** in furtherance of his submission. This decision of the Apex Court arose from an interlocutory order where the Apex Court was considering the prima-facie case and the balance of convenience. The principle of law that is expounded by the Apex Court is that the family settlement must be acceptable to all. The best way of demonstrating this could be to show that the deed is signed by all. However, it is open to the parties to show that, even though the family settlement is not signed by one or two members, it was acceptable to all the concerned including those who have not signed it. Such evidence is not shut out. In the present case, Shivgan

mother has not signed family arrangement of 1979, but she was present when the family arrangement took place, which fact is not disputed. It is proved that she was fully aware of the family arrangement. She was given monetary share and her livelihood was taken care of by the respondent no.1. She was alive thereafter for several years and never took any objection. Therefore, in this case, merely because mother had not signed family arrangement, when there was ample evidence that it was with her consent, this family arrangement cannot be set aside on that ground alone. As regards the finding of the fact recorded by the learned District Judge that sister had relinquished her right, nothing has been argued by Mr. Sawant as to how this finding is incorrect.

14. Once the conclusion is reached that the family arrangement of 1979 was permanent and all parties were bound by it, the learned District Judge rightly did not go into the issue as to whether some of the land were rightly claimed as self-acquired or joint by the respondent no.1, as all these properties were part of deed of 1979. It is not the case of the appellants that some of the lands were left out of deed of 1979 which require to be partitioned. Therefore, the contention of Mr. Sawant that the properties gat no.2050 and 1147 were acquired from nucleus or joint family will not take the case of the appellants any further. Even assuming that they were joint family properties, they have been dealt with in the deed of 1979. The contention that mutation Shivgan

entries have not taken place or the partition has not been done by metes and bounds is concerned, the learned District Judge had held that parties have not done so in view of the fragmentation that may occur. Even otherwise once the appellants had admitted that after the deed of 1979, there was severance in the joint family status, not making an entry in the revenue record will not be of much importance.

15. In the circumstances, the conclusion of the learned District Judge that the family arrangement of 1979 is binding, is in consonance with legal position that primacy be given to a family arrangement designed to bring peace within the family. The questions of law as framed cannot be answered in favour of the Appellants. Second appeal is dismissed. No order as to costs.

(N.M. Jamdar, J.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
CIVIL APPLICATION NO.2396 OF 1993
IN
SECOND APPEAL NO.229 OF 1993

1 Nivrutti Khanderao Malode

Since deceased by legal heirs

2a) Parvatibai Nivruti Malode

Aged about 75 years & Ors.

...Applicants

Vs.

Shri Popat Khanderao Malode

Since deceased through his

legal heirs

... Respondents.

1a) Yamunabai Popat Malode

(Deleted as per Court's order
dated 21/6/2010) & Ors.

Mr. R.A.Thorat, Senior Advocate with Mr. P.J.Thorat and
S.P.Chavan, Advocates for the Applicant Nos.1-a to 1-b, 2a to 2f, 3
to 5, 7, 8-a to 8-h, 10, 11-a to 11-d.

Ms. Nazia Shaikh, Advocates for Applicant Nos.9-a, 9-b, 9-d, 9-e.

Mr. S.A.Sawant with Ms. Ruchita Kadam i/by S.M.Railkar,
Advocates for the Respondents.

CORAM : N.M. Jamdar, J.
Friday 17 June, 2016.

PC.:

In view of the dismissal of the Appeal, the application is
disposed of.

(N.M. Jamdar, J.)

