

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

SECOND APPEAL NO. 408 OF 1994

Ramesh Gopal Nakhate,
since deceased by his legal heirs
and representatives

1a) Rajani w/o Ramesh Nakhate & Ors.

...Appellants

vs.

Arvind Gopal Nakhate & Anr.

...Respondents

Mr.Saurabh Oka for Appellants.

Mr.Suresh S. Shah for Respondent Nos.1 and 2.

CORAM : S.C. GUPTE, J.

6 JANUARY 2017

P.C. :

Heard learned Counsel for the parties.

2 This second appeal was admitted on the basis of the following two substantial questions of law :

“(I) Whether, pursuant to the partition between the Appellant, Respondent No.1, and their father in the year 1964, the southern ½ portion of Gat No.465 was allotted to the share of the Appellant and northern ½ portion was allotted to the share of Respondent No.1 and both of them started cultivation of their respective shares separately?

“(II) Whether, as per application Exh.278 dt.2.11.1964, southern ½ portion – survey No.1 159-162 fell to the share of the Appellant and the northern ½ portion of the suit land fell to the share of Respondent No.1?”

3 The case of the Appellant (original Plaintiff) is that the Appellant is in exclusive possession of a certain property which has come to his share on partition between the joint family of himself, his father and his brother. Based on this partition and his exclusive possession, he has applied for perpetual injunction restraining the Defendants, who are, respectively, the brother and brother's wife, from disturbing his peaceful possession of the suit property. The suit was dismissed by the trial court and the appeal was also dismissed by the first Appellate Court on concurrent findings of facts.

4 In the first place, the first Appellate Court has commented on admission of the instrument of partition relied on by the Appellant. It is the Appellant's case that this document is a partition deed which divides the property between the co-owners. If it is an instrument of partition, it needs to be properly stamped and registered in accordance with law. The first Appellate Court has held that the document was not sufficiently stamped and was also unregistered and could not have been read in evidence. There is no answer to this objection insofar as the Appellant is concerned. None was attempted at the hearing of the Appeal. Secondly, it may be seen from the impugned order of the first Appellate Court that it has extensively gone through the evidence led by the parties. The court has noted several circumstances, including the odd places where signatures appear on the so-called document of petition, want of steps towards making of mutation entries, representations made to the father and the brother as to the nature of the document, want of explanation as to the exclusive possession of the parties as a result of the partition and contradictions in the pleadings and evidence of witnesses examined before the court. Based on this material, the first Appellate Court came to the conclusion that the factum of partition as well as exclusive possession of the Appellant on the date of the institution of

the suit was not proved. The first Appellate Court came to the conclusion that the property was in joint possession of the Appellant and Respondent No.1 and there was no evidence of partition. The Court has, in the premises, dismissed the appeal. These are all pure questions of fact. There is no error in law in appreciation of evidence here.

5 Learned Counsel for the Appellant submits that the trial court and the first Appellate Court have completely disregarded sale deeds effected by the father and the brother, which take up a position that there was a partition between the parties. Learned Counsel relies on the sale deeds effected by Respondent No.1 on 5 February 1985 and 24 December 1985 in respect of certain properties. These sale deeds do not disclose any partition of the property as between the parties. In fact, the sale deed of 5 February 1985 transfers the property as an undivided property coming to the share of Respondent No.1. The other sale deed, namely, the sale deed of 24 December 1985, claiming possession and mutation in favour of Respondent No.1, does not reflect any partition between the parties. The third sale deed dated 16 October 1979, which is effected by the father, does refer to the property sold by the father as coming to his share upon partition. The document, however, does not have any decisive bearing on the issue as to whether or not there was partition between the parties. It is but one piece of evidence and needs to be appreciated in the context of the material placed before the court. Such appreciation does not disclose any substantial error of law.

6 There is no merit, accordingly, in the appeal and the appeal is dismissed. No order as to costs.

(S.C. Gupte, J.)