

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 15 OF 2019
WITH CIVIL APPLICATION NO. 865 OF 2019

Sukuraj Suryabhan Mali (Jadhav) & Ors. ...Appellants

Versus

Dattatray Babruwan Jadhav (Mali) & Ors. ...Respondents

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Mr. V. P. Golewar, Advocate for Appellants.

Mr. V. M. Vibhute, Advocate for Respondents No. 1 to 5 & 6/1 to 6/5.

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CORAM : **SMT. VIBHA KANKANWADI, J.**

DATE : **16-01-2019.**

ORDER :

01. Heard Mr. V. P. Golewar, learned Advocate for Appellants and Mr. V. M. Vibhute, learned Advocate for Respondents No. 1 to 5 & 6/1 to 6/5.

02. Present appeal has been filed by the original defendants No. 2 to 8 challenging the Judgment and decree in R. C. A. No. 45 of 2017 dated 16.1.2018 passed by learned District Judge-1 Nilanga; arising out of Judgment and decree passed in R. C. S. No. 218 of 2009 dated 24.7.2017 passed by learned Second Joint Civil Judge,

Junior Division at Nilanga, Dist. Latur. Present respondents No. 1 to 6/5 are the original plaintiffs, who had filed suit for partition and separate possession. The said suit came to be decreed. The said decree was challenged in appeal, however, the appeal has been dismissed. Therefore, the defendants No. 2 to 8 have filed the present second appeal.

03. The plaintiffs had come with a case that the original plaintiff No. 6 and respondent No. 1 are the real brothers. Plaintiff No. 1, 2, 4 and 5 are children of Babruwahan, who was the brother of plaintiff No. 6 and defendant No. 1. Plaintiff No. 3 is the mother of plaintiff No. 1, 2, 4 and 5. Defendants No. 2, 3, 5 to 8 are the children of deceased Suryabhan, who was another brother of plaintiff No. 6. Defendant No. 4 is the mother of defendant No. 2, 3, 5 to 8. Defendants No. 9 and 11 are the children of one more brother of plaintiff No. 6 deceased Abhimanyu and defendant No. 10 is the mother of defendants No. 9 and 11. It is stated that they all are members of joint Hindu family. The ancestor Krushnaji Parsuram Mali had left behind 5 sons - Suryabhan, Babruwahan and Abhimanyu, Tamradhwaj and Manik. Suryabhan expired 4 years prior to the suit, Babruwahan expired 18 years prior to the suit, Abhimanyu is missing since 20 to

22 years ago. Krushnaji was having two daughters by name Shanibai Bhagwantrao Patil, who expired 35 years ago prior to the suit and another daughter by name Vasantabai Manohar Yadav, who expired about 2 years prior to the suit. Krushnaji had expired 70 years prior to the suit. Krushnaji had left properties at village Rathoda and Nitur, which have been described in para No. 3 of the plaint. After his death, name of his children was mutated to those properties. Name of Suryabhan was shown as karta, as he was the eldest. All of them were cultivating the lands jointly. When Suryabhan was alive, at that time, he had made family arrangement in respect of survey No. 42 and new gut No. 120 admeasuring 2H 12R situated at village Rathoda. It was also effected, in order to take benefit of certain Govt. scheme. The details of the family arrangement have been given and it is stated that Suryabhan had kept 43 R out of the said land to himself and then sold it to his cousin brother Gundu Govind Mali. It is stated that therefore, there is no question of any share in the said property Gut No. 120 for Suryabhan. It is also then stated that out of Gut. No. 282 situated at village Nitur admeasuring out of 2H 84R, some portion was acquired by Govt. of Maharashtra for percolation of tank in 1976. Now, only 1H 28R land is remaining. The award

was passed in the name of Suryabhan. It is also stated that from Gut No. 280 situated at Nitur certain portion was acquired. The compensation in respect of those properties has been received by Suryabhan. However, the other brothers or sharers had given consent for the same. It is stated that now the land bearing survey No. 79 new Gut No. 282 admeasuring 1H 25R is yet to be partitioned. It is stated that after death of Suryabhan, now, his heirs are trying to grab the said land and therefore, they do not want to keep their share jointly with the defendants and therefore, they have prayed for effecting partition in the said land by metes and bounds. It will not be out of place to mention here that this is the contention raised by the plaintiffs after making certain amendments in the suit.

04. The defendants No. 2 to 4 had filed the written statement, additional written statement after amendment in the plaint and thereafter, the defendants No. 3 to 5 have passed a purshis stating that they are adopting the written statement filed by the defendant No. 2. Defendants No. 1, 9, 10 and 11 have admitted the claim of the plaintiffs and they have prayed for the decree. While objecting the claim of the plaintiffs, defendants No. 2, 3 to 4 and 5 have denied the contention that the suit

property was joint family property. It is stated that the property belonging to Krushnaji was partitioned on 22.4.1976. It is stated that partition was done by Krushnaji during his life time. At another place it is stated that the said partition has been done by the father in 1949. It is stated that Krushnaji expired in 1954. Except 3 Acres 3 gunthas in the name of Suryabhan in survey No. 79, all other properties were acquired by govt. for percolation tank. However, the effect of the same was not given to the 7x12 extract showing the remaining area of the land. The plaintiffs are taking disadvantage of the same and therefore, the suit has been filed. It is stated that after the partition which was effected on 22.4.1976, Suryabhan had sold 1 Acre 5 guntha to Gunderao Jadhav on 8.7.1977. The mutation in respect of the partition was certified on 10.4.1987. It is stated that the land bearing survey No. 42, 37 and 79 are not available for partition now. It is stated that Abhimanyu is still alive and he resides at Chandigadh. The compensation in respect of his share have been taken by his son and wife. All the other contentions have been denied stating that only for the purpose of taking advantage of Govt. scheme, only one property was partitioned. It is denied that the compensation has been

received by Suryabhan when consent was given by others. After amendment to the plaint, it has been stated that Suryabhan has purchased land gut No. 146 admeasuring 2H 83R on 18.4.1983 situated at Mauje Takviki, Tq. Osmanabad by utilizing the amount of compensation. Out of that land he has sold 0H 81R to Bhaaurao Bhimrao Yadav on 4.8.1999 and therefore, that property is required to be brought in the hotchpotch. It is also stated that the house property is not brought in the hotchpotch and therefore, suit is liable to be dismissed.

05. With these rival contentions issues came to be framed. Parties went to trial. Taking into consideration the oral as well as documentary evidence, the learned Trial Court has decreed the suit in appeal. The Appellate Court has dismissed the appeal.

06. The learned Advocate appearing for the appellant submitted that both the Courts below had not considered the evidence properly. They were under presumption that partial partition has been proved. The burden was unnecessarily placed on the defendants to prove that there was a previous partition. The documentary evidence in the form of mutation entries and the record of the land acquisition office has not been properly considered. When

the documents on record showed there was a partition, it ought to have been seen that it can not be re-opened. He, therefore, submitted that the substantial question of law would be whether the partition can be re-opened when there is evidence regarding partition.

07. In this case, the plaintiff has come with a specific case that there was a partition in respect of a specific property i.e. survey No. 42. According to them, rest all the properties were still joint. They had given a reason as to why the partition was effected in respect of survey No. 42. As against this, the defendants are coming with a specific case that Krushnaji had effected partition in the year 1949 during his life time. Under such circumstance, the burden was on the defendants to prove the previous partition. It is to be noted that some of the defendants are claiming a different thing that the property was partitioned on 22.4.1976, but, then as per the written statement of defendants No. 2 to 5, Krushnaji had expired in 1954 or 1958. Therefore, the obvious question is that if he had expired in 1954 or 1958 how he could have effected partition on 22.4.1976. Mere entry in the mutation register will not amount to partition. It has to be shown that the partition was done by metes and bounds. It will not be out of place to mention here that

DW-1 has admitted in the cross-examination that the partition deed was prepared in the year 1987. However, the defendants have not made any attempt to bring the said document on record. Under such circumstance, when the primary evidence in the form of the document was available, in its absence the secondary evidence i.e. the mutation can not be relied upon. It is rather to be seen that in the cross, the question was put regarding partition deed prepared in 1987. However, defendants have come with a case that the partition has effected in the year 1976. Thus, the stand taken by the defendants was not at all certain in respect of the previous partition. Both the Courts have correctly held that as per para 328 of Hindu Law by Mulla a partial partition can be effected by father and accordingly, it appears that there is only evidence regarding partial partition. Further, the plaintiffs have given specific reason that in order to take advantage of Govt. schemes, it was shown that it is partitioned.

08. The another circumstance which shows that the other properties were still joint is that two of the lands belonging to the family were acquired by the Govt. for percolation tank. Though, at that time lands were in the name of Suryabhan, at the time of taking compensation it

has been brought on record that he had obtained consent of other co-sharers. If those properties were given exclusively to Suryabhan then question of obtaining consent of his brothers did not arise. Exhibit 100 demonstrate that the brothers of Suryabhan had jointly filed an application before land acquisition Officer on 14.9.1978 thereby giving consent that the amount of award be paid to Suryabhan in the capacity as legal representative of Krushnaji on behalf of all of them. Thus, when there are specific acts showing that the properties were joint and then the defendants-present appellants were coming with a case about previous partition, the burden was on them to prove the same, in which they have failed.

09. As regards other objections regarding non-joinder of necessary parties and non-joinder of alleged other properties are concerned, both the learned Trial Courts have taken into consideration the factual aspect and also the law then prevalent when the partition was opened. In that circumstance, no substantial question of law have been made out to admit the second appeal. Hence, the appeal is dismissed.

10. Since the second appeal is dismissed, the

pending civil application stands disposed of.

[SMT. VIBHA KANKANWADI]

JUDGE

Dahibhate/-