

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 180 OF 2019

- 1) Ananda s/o Mohanji Wagh (Deceased)
Through L.Rs. i.e. Appellants No.2 to 4.
- 2) Annapurnabai w/o Ananda Wagh,
Age 60 years, Occupation Agriculture,
- 3) Gautam s/o Ananda Wagh,
Age 25 years, Occupation Agriculture,
- 4) Dyaneshwar s/o Ananda Wagh,
Age 24 years, Occupation Agriculture,

All R/o Kosgaon Tq. Bhokardcan
Dist. Jalna.

....Appellants.

VERSUS

- 1) Indubai w/o Kaduba Wagh,
Age 42 years, occupation Labour,
R/o Jafrabad Tq. Jafrabad.
- 2) Reena w/o Sandesh Jadhav,
Age 24 years, Occupation Household,
R/o Nanded Dist. Nanded.
- 3) Rajesh s/o Kaduba Wagh,
Age 21 years, occupation Education,
R/o Jafrabad Tq. Jafrabad.
- 4) Vinod s/o Kaduba Wagh,
Age 19 years, Occupation Education,
R/o As above.
- 5) Pramod s/o Kaduba Wagh,
Age 17 years, Minor U/G.
Of His Mother Indubai Kaduba Wagh.

- 6) Mandabai w/o Salikram Kharat,
Age 47 years, Occupation Agriculture,
R/o Monhalai Tq. Dist. Buldhana.
- 7) Subhadrabai w/o Natuba,
Age 42 years, occupation Agriculture,
R/o Mohalai Tq. Dist. Bhokardan.
- 8) Trimbak s/o Ananda Wagh,
Age 52 years, Occupation Agriculture,
R/o Aurangabad.

...Respondents.

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Mr. A. R. Vaidya, Advocate for appellants.
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CORAM : SMT.VIBHA KANKANWADI, J.

**Date of Reserving the Order :
19-03-2019**

**Date of Pronouncing the Order :
11-04-2019**

ORDER :

1. Present appeal has been filed by the original defendants challenging the concurrent findings. Present respondent had filed Regular Civil Suit No.167 of 2007 before Civil Judge, Junior Division, Bhokardan Dist. Jalna for partition and separate possession in respect of three lands situated at village Kosgaon and four lands situated at village Mohlai Tq. Bhokardan. According to plaintiffs the lands at Kosgaon, so also land Gut No.103 admeasuring 44 R at village Mohlai, have been illegally partitioned by defendant No.1 between defendants

No.4 and 5. It is stated that, 20 R land out of Gut No.1 is still in the name of plaintiffs. Defendant No.1 has sold 81 R land out of Gut No.104 to defendant No.7 and remaining 80 R land was transferred in the name of defendant No.2. Further land of 1 Hectare 5 R was transferred in the name of defendants No.3 and 4 illegally. Thereafter, defendant No.1 nominally executed sale deed of 68 R land as well as 80 R land out of Gut No.16 to defendant No.6. Plaintiffs had contended that their predecessor i.e. Kaduba Ananda Wagh who was the son of defendants No.1 and 2 had share in the joint family properties. Defendants No.3 to 6 are the sons and daughter of defendants No.1 and 2. Plaintiffs claimed their share to be partitioned amongst the suit properties, however it was refused and therefore they filed suit for partition and possession.

2. Defendants No.1, 2 and 4 to 7 contested the suit by filing written statement. They admitted the relationship and it was also admitted that the suit properties are the joint family properties of the family. However it was contended that, deceased Kaduba was employed in Police. He received amount of Rs.28,000/- in lieu of his undivided joint $1/7^{\text{th}}$ share in the suit property. It is stated that, the alienations made by defendant No.1 in favour of defendant No.6 are out of legal necessities. After the acknowledgement was given by deceased Kaduba

regarding amount in lieu of his undivided share, defendant No.1 has partitioned the land at Mohalai in 1994 and again in 2006 he has also partitioned the lands from village Kosgaon between defendants No.4 and 5. Defendant No.3 who is in service at Aurangabad demanded cash amount instead of the agricultural land towards his share, and therefore, he has been given amount of Rs.50,000/- towards the share. Therefore, according to the defendants plaintiffs have no right to claim partition.

3. Taking into consideration the rival pleadings, issues came to be framed. Parties have led oral as well as documentary evidence. Taking into consideration the evidence on record and hearing both the sides, the suit was partly decreed. Suit as against defendant No.7 was dismissed. It was held that, the plaintiffs are entitled to get their share i.e. $1/7^{\text{th}}$ share as a whole partition from all the suit properties. The said decree came to be passed by learned Civil Judge, Junior Division, Bhokardan on 02-12-2009.

4. The original defendants No.1 to 5 filed appeal before learned District Judge -2 , Jalna and after hearing both sides the said appeal came to be dismissed on 03-02-2018. Hence, present second appeal filed by them.

5. After considering the submissions on behalf of appellants as well as the Judgments by Courts below, it is not necessary to issue notice to the respondents. Here there is a concurrent finding of fact as well as on the point of law regarding entitlement by both the Courts below. Therefore, unless a substantial question of law has been pointed out as contemplated under Section 100 of Code of Civil Procedure, even a notice need not be issued to the other side. Submissions have been made on behalf of the appellants that, it is not in dispute that the suit properties are ancestral properties, however the defendants had come with a case that, Kaduba was in need of money, and therefore, by selling two lands for which the sale deeds have been produced at Exhibits 59 and 62. Amount of Rs.28,000/- in all was generated and it was paid to Kaduba. Kaduba acknowledged the receipt of said amount of Rs.28,000/-. That agreement Exhibit 62 has been produced and proved by the defendants. They have also examined the attesting witness to the document i.e. D.W.2 Santosh Palkar. Both the Courts below have not considered the said agreement Exhibits 59 and 62 in proper perspective. Those are only an agreements which may not be on a stamp paper and need not be registered at all. Because those were not relinquishment of his share. What he was acknowledging was that he has received the amount towards his undivided share. Therefore, when instead of the property he preferred to have money

equivalent to the value of his share. The said document ought to have been considered by both the Courts below. There was no question of creating or extinguishment of any right by agreement Exhibits 59 and 62, and therefore, those were not compulsorily registrable documents under Section 17 of the Indian Registration Act. Defendants have proved that, initially after the acknowledgement was given by Kaudba, there was partition between defendants No.1, 4 and 5. Defendant No.1 being the 'Karta' of the family had right to execute partition amongst his sons, and therefore, partition in respect of Kasegaon properties were done first and later on it is also done in respect of Mohlai properties. Under the said circumstance, when Kaudba had received amount towards his share in the property of the joint family, the heirs of Kaduba cannot get any share again. Kaduba had not tried to assert his right during his lifetime. Therefore, though there is a concurrent finding, there are substantial questions of law involved in this case.

6. Before turning towards the discussion, the admitted facts are required to be considered first. The description of the suit property and the fact that the suit properties are the ancestral or joint family properties, is not in dispute. Relationship is not in dispute. Execution of sale deeds in respect of Kosgaon and Mohlai are also not in dispute. Under such circumstance basically the burden was on the defendants to

prove that deceased Kaduba through whom the plaintiffs were claiming share or right in the suit properties, had received the amount in lieu of his share. In order to prove the said fact, the defendants have produced agreement Exhibits 59 and 62. In order to prove the said document they have also examined D.W.2 Santosh Palkar. His testimony has been considered by both the Courts below in detailed and they have come to the conclusion that his testimony is not at all trustworthy. The basic fact that was considered is that, D.W.2 Santosh did not say in specific words that, the said document Exhibits 59 and 62 were signed by Kaduba in his presence. Another witness was also examined that is D.W.3 Dalsing Jadhav. Though he had stated that, Kaduba signed those documents in his presence but his testimony is silent on the point of receipt of the amount on that day. As regards the nature of the documents are concerned, it has been contended that, those are Kararnama (Agreement). The defendant No.1 has come with a case that amount of Rs.28,000/- was given to Kaduba when he was in need of money and it was towards his 1/7th share in the joint family properties. There is absolutely no evidence on record to show that, what was the value of all the seven properties at the time when either Exhibits 59 or Exhibit 62 were executed. In order to prove the fact, the equation ought to have been put that, whatever would have been got by deceased Kaduba, that is the 1/7th share in all the suit properties

was of the value of Rs.28,000/-. In absence of such evidence and the further fact that though two witnesses were examined, their testimony appears to be not trustworthy. One witness does not say that the document was executed in his presence and another witness says that, he had not seen amount being transferred from defendant No.1 to deceased Kaduba. We need not go into the aspect as to whether agreement Exhibits 59 and 62 were compulsorily registrable documents or not for the simple reason that the said documents have not been properly proved by examining appropriate witness.

7. Both the Courts below have considered that, Exhibits 59 and 62 were inadmissible for want of registration. If we perused Section 17 of the Indian Registration Act, then Sub-section 1 (c) provides that,

"A non-testamentary instrument which acknowledged the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest is a compulsorily registrable document."

Therefore, even if we may say that Exhibits 59 and 62 are not relinquishment deeds but then the documents as it is, were compulsorily registrable under Section 17 (1) (c) of the Indian Registration Act. Therefore, the said documents have not been rightly considered by both the Courts below. If we brush aside those

documents then the picture becomes very clear. Kaduba will have right in the suit properties since defendants would be failing in their duty to prove that Kaduba had received amount equivalent to his share. Therefore, the decree that has been passed by both the Courts is correct and lawful. No substantial question of law has been shown requiring admission of the second appeal. Hence, second appeal is disposed of as **not admitted**.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.