

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**SECOND APPEAL NO. 53 OF 2019
WITH CA 1907/2019**

Kaushalyabai Nanasaheb Walunj & Ors. ...Appellants

Versus

Babasaheb Dhondiram Walunj & Ors. ...Respondents

.....
Mr. S. J. Salunke, Advocate for Appellants.
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CORAM : SMT. VIBHA KANKANWADI, J.
DATE : 30-01-2019.

ORAL ORDER :

01. Heard learned Advocate appearing for the appellants. Appellants are the original legal representatives of defendant No. 3.

02. The present respondent No. 1 is the original plaintiff who had filed R. C. S. No. 185 of 2007 before Civil Judge, Junior Division, Rahata for partition and separate possession. The said suit came to be decreed on 27.9.2012. The present appellants had challenged the said Judgment and decree in R. C. A. No. 4 of 2013 before learned District Judge-2, Kopargaon. The said appeal came to be dismissed on 23.4.2018. Those appellants want to

challenge the said Judgment and decree in this second appeal.

03. The plaintiff had come with a case that defendant No. 1 is his mother, defendant No. 2, 4 are his brothers. So also the original defendant No. 3 Nanasaheb was his brother, defendants No. 5 and 6 are his sisters. Their father Dhondiram expired on 25.8.2001 leaving behind the plaintiff as well as defendants No. 1 to 6 as legal heirs. Original defendant No. 3 Nanasaheb had pre-deceased Dhondiram on 27.4.1994, who is survived by the present appellants. Plaintiffs had come with a case that Dhondiram had made family arrangement on 17.6.1981 and accordingly, the mutation entry No. 1319 was effected. It is stated that at that time the plaintiff as well as the defendant No. 4 were minors. Thereafter, a mutation entry bearing No. 6914 came to be effected in 1998 whereby the said mutation entry No. 1319 was canceled. So also the mutation entry No. 5295 was also canceled by which the legal representatives of Nana were brought on the revenue record. It is stated that since the land was situated in village in which the transactions like partition, sale, mortgage, lease etc. was banned since 1978 in view of the provisions of Maharashtra Project Affected Persons Rehabilitation Act. The effect of mutation entry No. 1319

was canceled and the suit properties reverted back in the name of Dhondiram. The plaintiff contends that he as well as defendants No. 1 to 6 have share in the suit properties i.e. the agricultural lands which have been more particularly described in the plaint and therefore, they prayed for separation of his share and possession of the same.

04. Except defendants No. 3 to 7, other defendants did not appear and contest the suit. The defendant No. 7 is the Secretary of the society and it appears that he is a formal party. He filed written statement, but, did not appear later. In their written statement the legal representatives of defendant No. 3 came with a case that in fact the partition was effected by Dhondiram during his life time being the karta of the family and in response to the same the mutation entry No. 1319 was effected. Each one of the sharers are possessing the respective piece of land which went to their share exclusively and they have made improvements therein. Therefore, the partition can not be re-opened again.

05. With these rival contentions issues were framed. Parties went to trial. They relied on the documentary evidence in the form of revenue record. The oral evidence was also adduced. Taking into consideration the evidence

on record, the learned Trial Court has decreed the suit. It was declared that the plaintiff has 4/21st share in the suit properties, so also defendants No. 1, 2 and 4 have 4/21st share each. The defendants No. 3a to 3c were collectively held to entitled 4/21st share and the defendants No. 5 and 6 are held to be entitled to have 1/42nd share.

06. As aforesaid, the said decree was challenged in appeal. However, the said appeal has been dismissed after hearing both the parties.

07. The learned Advocate appearing for the appellants submitted that both the Courts below have not considered that by mutation entry No. 1319 the properties were already partitioned. each one of them was possessing and cultivating the respective land. Further, in evidence it was clarified by DW-1 Machhindra i.e. defendant No. 3B as to why the some of the brothers were given less share and his father was given more share. According to him, taking into consideration the quality of the land the said separation was made. This fact has not been considered by the Courts below. When the lands were partitioned by Dhondiram in his life time which he was entitled to being the karta of the family. As per the Hindu Law the said partition ought not to have been questioned and can not be

re-opened.

08. Perusal of the mutation entry No. 1319 would show that the application was given on 17.6.1981 by Dhondiba bifurcating his various properties in the name of himself and his sons. Admittedly, the plaintiff as well as Babasaheb were minor at that time. No doubt, as per Hindu law a father can effect partition during his life time. However, when in this particular case defendants No. 3a to 3c were coming with a case that whatever was done on 17.6.1981 was partitioned, then the burden was on them to show that it was the partition by metes and bounds. Perusal of the said mutation entry would show that uneven lands were given. It appears that Dhondiram had kept only 2H 37R in his name, whereas 7H 27R land was given to Nanasaheb. Admittedly, there was not a written document of partition. In the written statement the defendants No. 1a to 1c are not coming with a case or giving any explanation as to why the uneven distribution was made by Dhondiram anything stated at the time of evidence by way of explanation can not be taken into consideration, when it required specific pleading to that effect. Another fact that is also required to be considered is that there is no explanation either in the mutation entry or in the written statement that as to why

no share was given to Gangubai. When the partition was to be effected between father and sons, then definitely a share ought to have been carved out for Gangubai. One more aspect that is required to be considered is that when plaintiffs had come with a specific case that the act of partition was prohibited since 1978 in the said village, then how in violation of the legal provision there could have been a partition either on 17.6.1981 or prior to that. So that it could have been reflected by way of mutation entry No. 1319.

09. Defendants No. 3a to 3c had not denied that the suit properties are the joint family properties. Their limited defence is that the suit properties were already partitioned on or before 17.6.1981 as per mutation entry No. 1319. Even bare perusal of the mutation entry would show that the application was given just to mutate name of the sons of Dhondiram. It does not absolutely make a reference of partition effected either on that day or prior to that and in consequent thereto the said entry is required to be taken. Therefore, both the Courts below were right in rejecting the theory put forward by defendants No. 3a to 3c that there was a previous partition between the coparceners by metes and bounds. No case is made out to admit the second appeal. It deserves

to be dismissed. However, it appears that when suit was decreed Gangubai was alive, so also she was alive at the time of first appeal, but now in second appeal it is stated that she has expired. As per the decree, she has been held to be entitled to have 4/21st share in the suit properties. Now, taking into consideration the fact that she is dead, her share is required to be again distributed which can be done by the Executing Court. With that liberty the appeal is disposed of. Pending civil application is also disposed of.

[SMT. VIBHA KANKANWADI]

JUDGE

Dahibhate/-