

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.204 OF 2016

- 1] Smt. Maltibai Nivrutti Kale
Since deceased through her L.R
Shri Jayant Nivrutti Kale
Age 47 years, occu: Service.
R/o.15 Prabhat Colony,
Jalgaon, District Jalgaon.
- 2] Shri Suhas Vinayak Mahajan
Age 57 years, Occu: Service
R/o. 44 L.I.C. Colony,
Nagpur.

... APPELLANTS

VERSUS

- 1] Shri Omprakash Sitaram Agrawal
Age 68 years, Occu: Business
R/o. 'Ganesh Building'
Navi Peth, Jalgaon,
District Jalgaon.
- 2] Shri Soma Shivram Bhole
Since deceased through L.Rs
- 2A] Vasant Soma Bhole
Age 72 years, Occu: Business
(Civil Appeal No.9/2003 dismissed
for want of steps)
- 2B] Mr. Jagannath Soma Bhole
Civil Appeal No.9/2003 abated.
- 2C] Mr. Satish Soma Bhole
Age 50 years, Occu: Business
R/o. Bhavani Peth, Jalgaon.

Tal. & Dist. Jalgaon.

- 3] Shri Satish Soma Bhole
Age 60 years, Occu: Business
R/o. Bhavani Peth,
Jalgaon, District Jalgaon.
- 4] Shri Sarjubai Ramchandra Kale
Age 70 years, Occu: Household
R/o. Navi Peth
Jalgaon, District Jalgaon.
(Civil Appeal No.9/2003 dismissed
for want of steps)
- 5] Smt. Sarswatibai Raghunath Rathi
Deceased through her legal
representatives,
- 5A] Yogesh Raghunath Rathi
Age 56 years, Occu: Business,
R/o.19, Navipeth, Jalgaon,
Dist. Jalgaon.
- 6] Dr. Shrikant Prabhakar Mhaskar
Age 55 years, Occu: Medical Practice,
R/o. Golani Market,
Jalgaon, District Jalgaon.
- 7] Smt. Kamal Prabhakar Mhaskar
Age 70 years, Occu: Medical Practice
R/o. Bhavani Peth
Jalgaon, District Jalgaon.
- 8] Dr. Prabhakar Raghunath Mhaskar
Civil Appeal No.9/2003 abated.
- 9] Sau. Prabhavati Ramdas Kale
Age 57 years, occu: Household.
R/o. 14 Prabhat Colony,
Jalgaon, District Jalgaon.

- 10] Shri Bhalchandra Nivrutti Kale
Age 54 years, Occu: Service
- 11] Shri Suresh Nivrutti Kale
Age 54 years, Occu: Service
- 12] Vijay Nivrutti Kale
Age 42 years, Occu: Service
- 13] Smt. Vaishali Bhaskar Patil
Age 54 years, Occu: Service
- 14] Smt. Suman Bhaskar Patil
Age 32 years, Occu: Service.
All Resp. Nos.10 to 14
R/o 15, Prabhat Colony,
Jalgaon, District Jalgaon.

... RESPONDENTS

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Mr. Girish S. Rane, Advocate for appellants.
Mr. A.S. Bajaj, Advocate for respondents No.1 and 3.
Mr. Vinod P. Patil, Advocate for respondents No.9 to 14.

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CORAM : SMT. VIBHA KANKANWADI, J.

Date : 10th OCTOBER, 2019.

ORAL JUDGMENT :

. Present appeal has been filed by original plaintiffs No.1 and 3 challenging the concurrent judgment and decree passed in Civil Appeal No.9 of 2003 by learned Principal District Judge, Jalgaon dated

05-07-2014 arising out of judgment and decree dated 26-08-2002 passed by 4th Joint Civil Judge Junior Division, Jalgaon in Regular Civil Suit No.125 of 1990.

2. Original plaintiffs had filed the said suit for partition and separate possession. It was the case of the plaintiffs that agricultural land bearing survey No.26/3 admeasuring about 1 Acre 20 R was purchased by plaintiff No.1 on 28-07-1964 from one Yashwant Supdu Bendale for proposed housing society in the capacity as Chief Promoter thereof. Thereafter, the land was re-numbered as survey No.236/3K. The housing society could not be registered and therefore, the land was mutated in the name of 12 members as per their shares. According to the plaintiffs, there was no partition in respect of the suit land between the members and, as such, they all were the co-owners. Except the plaintiffs, other co-owners sold their shares to the defendants and thereafter, the defendants got Mutation Entry No.17816 mutated, though there was no partition. The defendants could not have become owners of the suit

land by virtue of said entry. Under such circumstance, the plaintiffs claimed partition of their share from the defendants. As the defendants did not agree, suit was filed. It further appears that during the pendency of the suit, defendants No.1 and 2 got the plan sanctioned from the Municipal Council and it was also contended that defendants No.4 and 5 had encroached upon northern portion of the suit property, which later on they have sold it to defendants No.6 to 8. Plaintiffs filed separate suit for injunction against those defendants for not to carry out any construction.

3. Defendants No.1 to 3 filed their common written statement and denied that there was no partition in respect of the suit property and a false Mutation Entry has been got effected. According to them, there was a partition effected orally between the plaintiffs and the defendants as per their shares in November, 1988. Plaintiffs agreed to take the share from the southern side numbered as 236/3K/3, as it was found advantageous by them, which was abutting the

road. After the partition, parts from the suit property were numbered as 236/3K/1, 236/3K/2 and 236/3K/3. According to the defendants, Ravindra Ramdas Kale and Saroj Ramdas Kale have share in the suit property which was in the share of plaintiff No.2 – Smt. Prabhavati. Those two persons have not been added as necessary party to the suit and therefore, the suit is bad for mis-joinder of parties. It is also stated that since the partition had taken place amongst the co-owners, it cannot be reopened again. Defendants made application to Talathi for effecting mutation on 30-01-1989. The plaintiffs claimed 3 Aana 7 Pai share, whereas the area which was allotted to them is 3 Aana 5 Pai. It is stated that the difference is because of change in calculation over the period of time. In fact, the plaintiffs had objected the said mutation entry, however, they did not prefer any appeal after it was allowed in due course. Defendant No.1 had, thereafter, made an application to District Inspector of Land Records on 01-02-1989 for effecting measurements. After issuing notices, the measurement was carried out

on 04-05-1989. It is stated that there was no road from survey No.236/3K/3, but thereafter plaintiffs did not take care of their share and the Municipal Council constructed a tar road from the share of the plaintiffs and installed electric poles. The road was constructed without acquiring the land, but it was for the plaintiffs to take a call against the appropriate authority. Government had issued notices dated 19-11-1991 regarding road from survey No.236/3K/3, but no objection was taken by the plaintiffs. It is contended that the State Government is also a necessary party to the present proceedings. The defendants have got layout sanctioned in respect of the property which had come to their share to which the plaintiffs have no right, title or interest and therefore, the suit is not maintainable.

4. Defendants No.4 and 5, by their written statement, denied the contention that they have made encroachment, on the land belonging to the plaintiffs. Defendant No.6, by filing separate written statement,

contended that he has no concern with the suit property.

5. After considering the rival contentions issues were framed. Both the parties have led oral as well as documentary evidence. The learned trial Court after hearing both sides and perusing the evidence on record, dismissed the suit. The appeal filed by the plaintiffs has been dismissed as aforesaid, by the learned Principal District Judge. Hence, this Second Appeal.

6. Heard learned Advocate Mr. Girish Rane for appellants, learned Advocate Mr. A. S. Bajaj for respondents No.1 and 3 and learned Advocate Mr. Vinod Patil for respondents No.9 to 14.

7. It has been vehemently submitted on behalf of the appellants that few persons had purchased the property jointly and they were not the members of joint Hindu family. Defendant No.1 purchased pieces of suit land by various sale deeds. It was alleged by the

defendants that the mutation entry had taken place in the year 1989 by which partition took place. It was also stated that though it was challenged by the plaintiffs, still the mutation entry was certified in favour of the defendants. The mutation entry produced on record, though a public document it cannot be stated that the contents have been proved. Defendant No.1 is, in fact, the purchaser from the original land owner and he cannot be said to be the person who could have proved the contents of the mutation entry. The demarcation has been done on the application filed by defendant No.1. In fact, the defendants had relied on the sole mutation entry to support their contention about oral partition amongst plaintiffs and defendants. The question that ought to have been considered by both the Courts below was, as to whether oral partition is permissible when the parties are not the members of the joint Hindu family. When they were the co-owners, there ought to have been a document regarding partition and it ought to have been registered under Section 17 of the Indian Registration Act. The application for

demarcation Exhibit-147 was, in fact in respect of earlier measurement got done by defendant No.1. Exhibit-151 shows that the boundaries were fixed towards southern and northern side. The learned first Appellate Court has also stated that since all the legal heirs of plaintiff No.1 were not party to the appeal and out of 6 legal heirs of original plaintiff - Maltibai, only 1 legal heir Jayant Kale filed appeal, the remaining 5 legal heirs were added as respondents, but the appeal against them was dismissed on 23-08-2011. Respondents No.2-A and 2-B and the added respondents, who are the legal heirs of original plaintiff No.1, are the co-owners in respect of the suit property and therefore, they were the necessary parties. However, the learned first Appellate Court did not consider it properly that the property was represented by the appellants. Therefore, substantial questions of law are arising in this case.

8. Per contra, learned Advocate appearing for the respondents submitted that the partition was

permissible amongst the co-owners and accordingly, the oral partition had taken place way back in the year 1989. Even on the basis of the said oral partition, when the application before the Talathi was given, it was objected too by the plaintiffs, that means they had every knowledge about the contention of the defendants that there was a partition thereby the plaintiffs' share has been demarcated or severed, yet, no immediate action was taken by the plaintiffs and the suit has been filed in the year 1990. The plaintiffs had examined Power of Attorney, who had no personal knowledge at all, therefore, his evidence cannot be considered in view of the decision in **Janki Vashdeo Bhojwani and another Vs. Indusind Bank Ltd. and others [AIR 2005 SC 439]**. The learned first Appellate Court has also dealt with the point regarding abatement of the appeal as against some of the respondents and therefore, dismissal of appeal was the only option left with the first Appellate Court. Since both the Courts have concurrently held in favour of the defendants, there is no question of any substantial question of law

arising in this case.

9. To buttress his submissions, learned Advocate for the appellants has relied on the decision in **Mahabir Prasad Vs. Jage Ram and others [AIR 1971 SC 742]**, wherein it has been held :

"when a party respondent in an appeal dies and one of his legal representatives is already on record in another capacity the appeal does not abate even though no application is made to bring them on record."

10. Further reliance has been placed on the decision in **Om Prakash Berlia and another Vs. Unit Trust of India and others, [AIR 1983 BOMBAY 1]**, wherein it has been observed :

"The production of certified copies under the provisions of Section 63 is a means of leading secondary evidence. Secondary evidence can, obviously, be led only of what the document states, not as to whether what the document states is true. Under Section 65(e), secondary evidence may be given when the original is a public

document within the meaning of Section 74 and only a certified copy of the public document is admissible. Secondary evidence of a public document so led only proves what the document states, no more. In other words, he who seeks to prove a public document is relieved of the obligation to produce the original. He can produce instead a certified copy. All other requirements he must still comply with."

11. In order to buttress his submissions, learned Advocate Mr. Bajaj representing respondents No.1 and 3 relied on the decision of this Court in **Ganu Santu Mhakavekar Vs. Shankar Tukaram Chougule Choughule** [1969 Mh.LJ 379], wherein it has been held :

"a partition whether of joint family property or between co-owners who are strangers can be made orally. A right of partition is an incident of property held in joint tenancy or tenancy in common which by virtue of Section 2(b) of the Transfer of Property Act, 1882, is not affected by the said Act and partition of

such property can by virtue of the said Section and Section 9 of the Act be made orally. This is true not only of partitions between members of joint Hindu families but also of partition between co-owners where property is held in joint tenancy or tenancy in common."

He further submitted that learned first Appellate Court has rightly relied on the catena of judgments to hold that in view of the fact that the matter abated against one of the respondent and it was dismissed in respect of another respondent, the appeal itself had abated.

Reliance has been placed on the decision of this Court in **Kishor Bansi Patil Vs. Vishnu Kushal Borole (Deceased) and others [Civil Revision Application No.38 of 2013]**, wherein this Court after placing reliance on **Budh Ram and others Vs. Bansi and others [2010 AIR SCW 5071]** and **State of Punjab Vs. Nathu Ram [AIR 1962 SC 1989]** and other cases, had come to the conclusion that in absence of bringing the legal representatives of the deceased-respondent on record,

when possibility of contrary judgments are arise, the appeal abates as a whole.

12. Taking into consideration the pleadings of the parties and substantial part of the evidence, it can be seen that the parties are not at dispute that property was jointly purchased and the purchasers were not from the same family. Since the purpose for which the lands were purchased could not materialize, it was stated that initially it was in the name of 12 members as per their shares. It is also not in dispute that the Mutation Entry No.17816 has been carried out though there was an objection by the plaintiffs. It is also not in dispute that except the plaintiffs other co-owners have sold their shares to the defendants prior to the mutation.

13. The plaintiffs had come with the case that there was no partition at all and on the other hand, the defendants No.1 to 3 had come with the case, that there was a partition, to which plaintiffs were party in November 1988. The first and the foremost fact that

has not been explained by the plaintiffs is that if there was no partition at all, then why they had not objected to the sale of land by other co-owners, who had purchased the land along with them, to the present defendants No.1 to 3. That would have been the natural conduct on the part of the plaintiffs to object to the act of co-owners to sell the land. The second piece of evidence which is going against the plaintiffs is Exhibit-147, which was a document showing, that plaintiffs had applied for measurement of land bearing survey No.236/3K/3 on 19-04-1994, for fixing boundaries towards northern as well as southern side. When this document was produced on record, it was expected from the plaintiffs to have an explanation regarding the same. The said application thereby speaks about the conduct of the plaintiffs that they had accepted that the said piece of land i.e. survey No.236/3K/3 was given to their share. Another fact, which has been specifically pleaded and submitted in evidence by the defendants is, that the plaintiffs did not object to the construction of the road by the State Government

from lands survey No.236/3K/3. Even if for the sake of argument, for a moment, it is accepted that there was no partition, yet, plaintiffs could have taken objection for the construction of the said road since they could have been said, in that event, as co-owners. Total silence on the part of the plaintiffs is definitely fatal to them. Defendants have explained the silence on their part as they contend that since that part of the land went to the share of the plaintiffs and the said road was not to affect their share, they kept quiet. Thus, it can be seen, that the plaintiffs have not deposed about the act of ownership exercised by them over the piece of land and now want to take advantage of the fact, that the road has been constructed from their portion, to which they did not object. They have come with the case that there was no partition at all.

14. Taking into consideration the decision in **Ganu Santu's** case (Supra) and also the fact that the co-owners, though they may not be members of the joint

Hindu family, can effect partition orally. There was absolutely no necessity to have the said partition reduced into writing, registration of the same as piece of evidence regarding partition, since it was an agricultural land. Section 85(2) of Maharashtra Land Revenue Code also provides for partition and the defendants were justified in approaching the Talathi. Section 85(2) of the Maharashtra Land Revenue Code contemplates that if in any holding there are more than one co-holder, any such co-holder may apply to the Collector for a partition of his share in the holding. Here the word used is "co-holder" and Section 2(12) of the Maharashtra Land Revenue Code defines "to hold land" or "to be a land-holder or holder of land" means to be lawfully in possession of land, whether such possession is actual or not. Section 2(13) of the Maharashtra Land Revenue Code defines "holding" means a portion of land held by a holder.

The conjoint reading of these two definitions would make it clear, that the co-holder can approach the revenue authorities to get the partition of his

land mutated. It is to be noted that after the mutation entry was certified, it appears that the decision was not challenged by the plaintiffs further. Taking into consideration all these aspects which have been duly proved by the defendants, who had come with the case that there was already partition, both the Courts below have correctly held that there was a partition between the holders of/co-owners of the suit land.

15. Now the question is that the appeal had abated as a whole. It is to be noted that respondent No.2-B in the first appeal had expired and due to the death of respondent No.2-B, when the legal representatives were not brought on record, a specific order came to be passed on 18-06-2011 that the appeal has abated. Thereafter, the appeal was dismissed as against respondent No.2-A on 28-07-2011 as no steps were taken against him. This is one set of facts and further out of the 6 legal heirs of original plaintiff-Maltibai, who were the plaintiffs, only 3 persons filed appeal and others have been made as respondents.

However, it is to be noted that as against the other 3 legal heirs of Maltibai, the appeal was dismissed against them on 27-08-2011. This is another set of facts. Under the said circumstance, it was required to be seen as to whether the appeal had abated as a whole or it could not have been proceeded with and the only course available to the first Appellate Court was to dismiss the appeal. In order to appreciate this point, one fact which will have to be considered is that as per the contention of the plaintiffs all the parties are co-owners or co-holders. Whether one party can represent the holding of another is question. When it comes to defendants No.1 to 3, it is to be noted that they had purchased the properties by different sale deeds. Under such circumstance, it cannot be stated that one legal heir of original defendant No.2, who later on expired i.e. respondent No.2-B, could have been represented by respondent No.2-C. Even as regards respondent No.2-A is concerned, the appeal was dismissed. As regards the legal heirs of original plaintiff - Maltibai is concerned, when her all legal

heirs were brought on record when the matter was before the trial Court, only 3 out of them preferred appeal and 3 others were made respondents and the appeal against them was dismissed. Definitely the ratio laid down in **Budh Ram's** case and other catena of judgments (Supra) will have to be considered. The possibility of the contrary judgment and the fact that only the present appellants could have represented the estate, cannot be arise. The ratio of the decisions relied by the learned Advocate for the appellants is not helpful to the appellants for the aforesaid facts. For the reasons stated, no substantial question of law as contemplated under Section 100 of Civil Procedure Code is arising in this case. Hence, Second Appeal stands dismissed.

[SMT. VIBHA KANKANWADI, J.]

SCM