

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 723 OF 2017

IN

CIVIL APPEAL NO. 94 OF 2003

IN

REGULAR CIVIL SUIT NO. 101 OF 1999

ALONGWITH

CIVIL APPLICATION NO. 236 OF 2017

Aappa Shankar Kokani (Suryavanshi)
and Ors.

.....Appellants

V/s.

Dundya Pandu Kokani and Ors.

....Respondents

* * * *

M. Ashok B. Tajane, Advocate for the appellants.

Mr. S.R. Ganbawale a/w. Ms. Pooja P. Joshi, Advocate for
respondents no.1A, 1B, 2D, 2F to 2J, 3 to 6 and 11.

Ms. Tanya Goswami for respondent no.12 in Cont. Petition
(St) No. 25840 of 2018.

CORAM : SANDEEP K. SHINDE, J.

Tuesday, 15th January, 2019.

P.C. :

1. The appellants were defendants in a suit for
partition being Regular Civil Suit No. 101 of 1999. The

plaintiff sought partition of three properties i.e. Gats No. 85, 13 and 105. The area of these three suit lands admeasures about 13 Hectares and odd. Pandu Kokani was common ancestor. Shankar is the son of the second wife of Pandu Kokani. The parties to the suit are tribal. The defendants are the legal heirs of the branch of Shankar. The suit was resisted by the defendants on the ground that the lands were partitioned about 20 years before in accordance with the provisions of Section 85 of the Maharashtra Land Revenue Code, 1966. That upon appreciating the evidence, the suit was decreed by the trial Court and it was held that the defendants failed to prove the previous partition.

2. It may be stated that, out of the three suit lands Gat No. 105 which admeasures 5 hectares 16 Ares appears to be is in the exclusive possession of the defendants through their predecessor, Shankar. It may also be stated that the defendants raised the plea of adverse possession in alternative on the ground that they are in possession of Gat No.105 openly and with the express knowledge of the

plaintiffs since more than 12 years. On the assertion, defendant sought declaration that they became owners of Gat No.105 by adverse possession. The trial Court rejected the defence of the previous partition, as well as, declined to accept the plea of adverse possession.

3. Aggrieved by the partition decree passed by the trial Court, the defendants preferred Regular Civil Appeal No. 94 of 2003. The findings of the trial Court were affirmed by the Appellate Court. However, the share of each of the parties was modified to some extent whereby the share of the sister of the plaintiffs was carved out. The defence of previous partition and adverse possession was not accepted by the Appellate Court.

4. Before advertng to the arguments of the learned Counsel for the parties, it may be stated that the suit was resisted by the defendants on the ground that partition was effected in terms of Section 85 of the Maharashtra Land Revenue Code. I say so because in the Appeal Memo filed in

Regular Civil Appeal, this ground was urged as Ground No.

(1). Be that as it may, the defendants have relied on mutation entry no.82 recorded in the year 1981 whereby according to them Gat No.105 has fallen to his share in view of the oral partition. It may be stated that, D.W.1 deposed on behalf of all the witnesses and admitted in the cross-examination that the mutation entry no.82 was made at the instance of his father, Shankar and the statements of the other co-owners were not recorded. He further admitted that this mutation entry was set aside and he has challenged the said order, before the Collector. In view of these facts, the contention that partition had taken place twenty years before the filing of suit cannot be accepted. Thus, I do not find any infirmity or illegality in rejecting the defence of the defendant.

5. That even otherwise, the defence witness had admitted in his evidence that, while recording the said mutation entry, the hearing was not given to the co-holders which is the requirement of sub-section 3 of Section 85 of

the Maharashtra Land Revenue Code. Thus, on all counts, the mutation entry on the basis of which defence of previous partition was taken up does not hold ground at all.

6. The learned Counsel appearing for the appellant, has taken me through the evidence of the plaintiff's witness by name, Sonu. It is to be stated that the parties are tribble and therefore their evidence has to be appreciated carefully. No doubt this witness had stated that partition had taken place and Gat No.105 is in the possession of Shankar, (the predecessor-in-title of the defendants), however, the stray admission is not sufficient at all to interfere and hold that the factum of previous partition stood proved. There are attending circumstances which clearly indicates that the partition had not taken place as contended by the defendants. It may also be stated that in respect of Gat no.13, (one of the suit properties) the name of Shankar was recorded as a Karta of the Family, which is admitted fact. Another circumstance which is required to be considered is that, out of 13 hectares of land, 5 Hectares and 16 Ares is

claimed and being allotted in partition to Shankar and the remaining land to the extent of 8 hectares and odd was allotted to five brothers and sister. There is nothing in the evidence of defendants to show as to why there was no equal distribution of suit land between the co-owners.

6. That even otherwise, evidence of the defendants on the point of previous partition has not established that defendant's intention to separate was within the knowledge of the plaintiffs, which is one of the requirements besides, unequivocal indication to separate. It is so evident from the evidence of defence witness and the manner in which mutation entry no.81 was recorded and later cancelled by the Revenue Authority. Thus, in my view, the finding recorded by the Courts below is just and proper and no interference is called for. The Appeal does not give rise to any substantial question of law. The Appeal is rejected.

8. At this point of time, the learned Counsel for the appellants prays that the order of status-quo passed by this Court on 9th April, 2018 may be continued for the period of

four weeks. This prayer is opposed by the respondents. It is pointed out that, on 9th August, 2016 the Collector had partitioned the property evident as could be seen from the order dated 9th August, 2016 passed by the Tahsildar, Baglan. In view of this fact, the prayer for continuation of order of status-quo is rejected.

9. In view of dismissal of Appeal, the Civil Application does not survive. The same is also disposed of.

(SANDEEP K. SHINDE, J)