

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**SECOND APPEAL NO.490 OF 2011
WITH
CIVIL APPLICATION NO.10851 OF 2019**

1) Durgadas s/o Dagdu Giri
and Ors. = **APPELLANTS**
(Orif.Deft.Nos.2,7 & 8)

VERSUS

1) Ganesh Giri s/o Dagdu Giri
and Ors. = **RESPONDENTS**
(Resp.No.1 is orig.Pltff. &
Nos.2 to 6 are orig. defts.
Nos.2 to 6)

Mr.VR Dhorde, Advocate for Appellants;

Mr.DP Palodkar, Advocate for Resp.Nos.1 and 3-A;

Mr.PS Dighe, Advocate for Resp.No.5.

CORAM : SMT.VIBHA KANKANWADI,J.

RESERVED ON : 20/07/2021

PRONOUNCED ON : 26/07/2021

PER COURT :-

1. Heard learned Advocates appearing for the respective parties.

2. Present appeal has been heard for admission. Present appellants are the original defendant Nos.2, 7 and 8. Present Respondent No.1 is original plaintiff, who had filed Regular Civil Suit No.55/2003 before Civil Judge, Junior

Division, Sillod, Tq. Sillod, District Aurangabad for declaration, partition and separate possession. It came to be decreed on 24.11.2008. Present appellants then preferred Regular Civil Appeal No. 353/2008 before the District Court at Aurangabad. It was heard by learned District Judge-3, Aurangabad and came to be dismissed on 31.1.2011. Hence, the present Second Appeal.

3. Before turning to the submissions, the legal position will have to be reiterated here, which has been laid down by the Hon'ble Supreme Court in the case of Kirpa Ram (Deceased) Through L.Rs. And Ors. Vs. Surendra Deo Gaur and Ors. - (2021) 3 Mah.L.J. 250, and Ashok Rangnath Magar Vs. Shrikant Govindrao Sangvikar - (2015) 16 SCC 763

4. Though before admission of the Second Appeal, the respondents are not even required to be called upon, however, it appears that in this case already, way back in the year 2013, notices were issued to the respondents.

5. It has been vehemently submitted on behalf of the appellants that both the courts below have not properly considered the facts and the law involved in this case. The suit properties were belonging to father of Respondent No.1 (original plaintiff) and original defendant Nos.3 to 6. However, defendant No.2, i.e. present appellant No.1 had taken a specific contention that after demise of their father Dagdu, the family properties were partitioned in 1975. Separate shares were given to the plaintiff and defendant Nos.3 and 4 from the ancestral lands bearing Gut No.61 and 18 from village Kelgaon. The daughters had relinquished their shares. At that time, no share was given to deft.No.2 from those two gut numbers, but he accepted that he would take the suit fields, which were mortgaged by Dagdu and were under litigation. He had taken that step at his risk. Later on, he had spent huge amount on the litigation and repaid the loan taken on the suit lands from Land Development Bank. The litigation was in his favour and, therefore, after decision of the said litigation, he has become an exclusive owner of the suit properties and thereafter he has

partitioned it amongst his sons – deft.Nos.7 and 8 and, therefore, now the plaintiff cannot seek partition. The learned Courts below have wrongly interpreted the alleged admission given by present appellant No.1 in his cross-examination, wherein he has stated that he had sold certain portion from Gut No.18. In fact, there was nothing produced by the plaintiff on record to support the said suggestion. It was not even the case of the plaintiff that deft.No.2 has sold any such portion rather it was not even contended that in the earlier partition, which is an accepted position, certain portion of the land was given to deft.no.2. He placed reliance on the decision in the case of Kesharbai alias Pushpabai Eknathrao Nalawade (Dead) by L.rs.and Anr. Vs. Tarabai Prabhakar Rao Nalawade and Ors. - (2014) 4 SCC 707, wherein, it has been held and observed that, the joint and undivided family being the normal condition of a Hindu family, it is usually presumed, until the contrary is proved, that every Hindu family is joint and undivided and all its property is joint. This presumption, however, cannot be made once a partition (of status or property) whether general

or partial, is shown to have taken place in a family. Once a partition in the sense of division of right, title or status is proved or admitted, the presumption is that all joint property was partitioned or divided. Therefore, with this law, it can be definitely said that, at the time when the partition had taken place, the statement of deft.No.2, that he would take the suit properties, which were under litigation, was accepted by all and those properties were put to the share of deft.No.2. Now, when he has succeeded, with ill-intention, the suit for partition was filed. Therefore, substantial questions of law are arising in this case in respect of theory of 'partial partition'. The learned Advocate, therefore, pointed out that Ground Nos.VI and VII in the memo of the Second Appeal are the substantial questions of law, which he wants to press.

6. Per contra, learned Advocate Mr. Palodkar appearing for Respondent Nos.1 and 3-A and learned Advocate Mr. Dighe, appearing for Respondent No.5, have opposed admission of the second appeal and submitted that none of the grounds, those have been

mentioned in the memo of appeal, can be termed as substantial questions of law arising in this case. Both the Courts below have correctly appreciated the evidence brought on record. The admissions given by deft.No.2 in the cross-examination have been properly considered. It is not in dispute that the suit properties, which were Gut No.57, admeasuring are 67 Ares; Gut No.59 are admeasuring 52 Ares and Gut No.65 area admeasuring 2 Ares, land of well, in which Dagdu had 1/3rd share from village Kelgaon, Tq. Sillod, were the ancestral properties and those properties were not available for partition as the litigation was still pending, when admittedly, in respect of the land Gut No. 61 and 18, there was a partition in the year 1975. After the partition was effected, in view of Para No.328 of the Hindu Law by Mulla, (Sixteenth Edition) everybody gets separate share in possession. The Plaintiff as well as deft.No.1, who is their mother, were specific in saying that everybody was enjoying the separate property from those two Gut numbers and they have sold certain portion from those properties. After the present suit properties were made available or brought into

the hotch-pot, deft.No.2 has started claiming it to be his exclusive property. In fact, he had received the properties in the earlier partition and he has sold some of the portion from Gut No. 18. Deft.No.2 in his cross-examination has admitted that the possession of the suit properties was received by way of execution in the said litigation by him as well as the plaintiff and deft.Nos.1, 3 to 6. So he received the possession on behalf of all. Under such circumstance, he cannot treat it as his exclusive property and, therefore, now the partition has been rightly granted.

7. There is absolutely no dispute that the suit fields were belonging to Dagdu. He had mortgaged those properties to one Pundlik Mule and Gawangee. It appears from the record that Dagdu had filed RCS No.22/1976 for redemption of mortgage. It was dismissed, however, he filed RCA No.156/1979, challenging the said dismissal. Date of death of Dagdu has not been brought on record. But it appears that, after his death, his legal representatives were brought on record in that

appeal. At this stage itself, if we consider cross-examination of deft.no.2, it would show that he has received the possession of the suit properties in execution of the decree that was passed in favour of legal heirs of Dagdu in the said RCA No.156/1979, through Court in the year 1982-1983. He, in unequivocal terms, has admitted that, as his father expired during pendency of that proceedings, the possession of the suit lands was received by him, mother and his brothers. It is also stated by him that he was looking after the litigation even during life time of his father Dagdu. At the cost of repetitions, it can be seen that he has come with a case that after death of father, when the partition had taken place, he has stated that his proposal of keeping the suit properties with them, at his own risk, was accepted by others. If that is so and if according to him, it was the partition, then the natural course for him would have been to represent the concerned Court at the time of bringing the legal representatives of Dagdu on record to state that he has received the said properties in the partition and, therefore, he is the only person, who can

represent the suit properties after Dagdu. But, this natural conduct has not been adhered to. On the contrary, he admits that he has received the possession along with other heirs of Dagdu. Therefore, there is no documentary or oral evidence to support the contention about receiving that properties in partition by him. It will not be out of place to mention here that though there is an attempt by him to produce a document on record, showing Memorandum of partition and he has even led evidence by examining witness to support the said contention; yet both the Courts below have, after due appreciation of the evidence, discarded that document. The learned First Appellate Court has observed that even if we consider evidence of DW-2 Purushottam Dabhade, accepting the proof regarding *Sammati-Patra*, it contradicts the case of deft.No.2 that the suit lands were given to the share of deft.No.2 in general partition.

8. Now, as regards partial partition is concerned, the ratio laid down in the aforesaid two decisions (cited supra), cannot be denied. However, it is to be noted that Para 328 of Hindu Law by

Mulla accepts the position regarding partition between co-parcener can be partial in respect of the property or person. A basic differentiating fact would be that the fact of partition was never accepted in Kesharbai's case (cited supra). But here deft.No.2 is accepting some partition and according to him, it was not partial. It is a cardinal principle that partition can be effected in respect of those properties, which are available for partition on the day when the partition is done or gets effected. Admittedly, on the day when Gut Nos.61 and 18 were partitioned, the present suit properties were under the litigation and it cannot be said that they were available for partition on that day. Definitely, after the decree in favour of legal heirs of deceased Dagdu, they were available for partition amongst them. Again, at the cost of repetitions, there was an opportunity to deft.No.2 to put-forth that partition on record in the said appeal itself by saying that he has received the properties in partition and, therefore, he should alone be allowed to represent the estate. This circumstance gives a death blow to the contention of deft.No.2.

9. Further, as regards the admissions are concerned, deft.No.2 specifically admitted that he has sold some portion of land and in bracket, it is specifically stated that to the extent of 20 to 22 gunthas he has sold. Now, at the Second Appeal stage, the explanation to the admission cannot be accepted as there was an opportunity to him, through his Advocate, to explain that admission by way of re-examination. No objection was raised when the said answer was going on record. Therefore, whatever explanation is now tendered is of no use. It will have to be held that deft.No.2 has admitted that he has received certain portion of land in the earlier partition from Gut No.18. When that fact was admitted by him, there was no necessity for the plaintiff to produce any documentary evidence as admitted facts need not be proved.

10. Both the Courts below have properly considered the oral as well as documentary evidence on record. So also, they have properly dealt with the legal point involved in the case. As no substantial questions of law, as contemplated by

the appellants, are arising in this appeal and in view of the decision in the case of Kripa Ram (supra), the Second Appeal deserves to be dismissed, without framing any substantial question of law at the stage of admission itself. Accordingly, the Second Appeal stands dismissed. The Civil Application stands disposed of.

(SMT. VIBHA KANKANWADI)
JUDGE

LATER ON:

1. After pronouncing decision in the Second Appeal, the learned Advocate appearing for the appellants, prayed for continuation of the interim relief for a period of four weeks as the appellants intend to approach the higher Court.

2. It is to be noted that both the Courts below are against the appellants and by a reasoned order, the contentions raised by the appellants have been rejected. Under such circumstance, the oral request, for continuation of the interim relief, is rejected.

(SMT. VIBHA KANKANWADI)
JUDGE