

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

SECOND APPEAL NO. 411 OF 2011

Shankar Babarao Nalawade,
Aged about 60 years, Occupation: Agriculture,
Resident of Krushnapur, Tahsil : Umarkhed,
District: Yavatmal.
(Ori.Def. No.1 as on R.A.)

.... **APPELLANT.**

// VERSUS //

1. Bapurao Babarao Nalawade,
Aged about 61 years
(Ori. Plaintiff as on R.A.)
2. Laxmibai Pandurang Jadhav,
Aged about 56 years,
No.1 R/o Krushnapur, Tq. Umarkhed,
Dist. Yavatmal,
No. 2. R/o Wategaon,
Tq. Hadggaon, district: Nanded.
3. Sau. Shakuntalabai Prabhakar Kadam,
Aged 55 years, R/o Vasantnagar, Tq.Umarkhed,
Dist. Yavatmal.
4. Laxmibai Jayawantrao Wankhade,
Aged 51 years, R/o Sakra, Tq. Umarkhed,
District :Yavatmal.
5. Sau. Aruna Diliprao Wankhade,
Aged 44 years, R/o Kharus Tq. Umarkhed,
Dist. Yavatmal.

6. Sau. Chandrakala Ashokrao Shinde,
Aged 44 years, R/o Ashti, Tah. Hadgaon,
Dist. Nanded.
(No. 2 to 6 original defendants no.2 as on R.A.)

.... RESPONDENTS.

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Shri Y.S.Gorle, Advocate for Appellant.
Shri V.N.Patre, Advocate for Respondent Nos.1 to 6.

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CORAM : ANIL S. KILOR, J.
DATED : DECEMBER 02, 2021

ORAL JUDGMENT :

1. This is an appeal arising out of the judgment and decree dated 14/12/2010 passed in Regular Civil Appeal No. 28 of 2007 by the Extra-Joint Ad-hoc District Judge, Pusad, dismissing the appeal filed by the defendant No.1 and thereby confirming the judgment and decree dated 18/06/2007 passed in Regular Civil Suit No. 148 of 2001 decreeing the suit for partition and thereby declaring that the plaintiff and defendant No.1 have 8/21 share each and defendants No.2 to 6 have 1/21 share each in the suit

properties excluding 60 R land in possession of family of Govinda Mahadu.

2. The brief facts of the present case are as under: (The parties are referred as per their status before the trial Court):

3. The plaintiff/respondent No.1 filed suit for partition claiming that the plaintiff and the defendants are brothers and sisters and the suit property is an ancestral property of the family of the plaintiff and defendants.

4. It is the case of the plaintiff that in the year 1978 there was a partition between the plaintiff and the defendant No.1 and deceased father. It is further the case of the plaintiff that the suit property came in the share of deceased father and after the death of his father the plaintiff and the defendant Nos. 1 to 6 became owners of the suit property as successors.

5. Defendant No.1 appeared in the suit and filed his written statement stating that the father of the plaintiff died in the year 1988. It is further pleaded that on the date of Padwa in the year 1989, in presence of Panchas, the defendant Nos.2 to 6 relinquished their rights in favour of the plaintiff and defendant No.1 and partition had taken place between the plaintiff and defendant No.1.

6. The learned trial Court after considering the oral as well as documentary evidence, decreed the suit partly and held that the plaintiff and defendant No.1 have 8/21 share each, whereas the defendant Nos.2 to 6 have 1/21 share each in the suit property excluding 60 R land in favour of the family of Govinda Mahadu.

7. Defendant No.1, feeling aggrieved by the said judgment and decree dated 18/06/2007 carried the appeal before Extra-Joint Ad-hoc District Judge, Pusad, vide Civil Appeal No.28 of 2007, which came to be dismissed vide judgment and decree dated 14/12/2010, the same is challenged in this appeal.

8. I have heard learned counsel for the respective parties.

9. This Court, while admitting the present appeal on 18/12/2014 has framed the following Substantial Questions of Law:

“1) Whether the finding recorded by both the Courts that the defendant no.1 had failed to prove the partition on 1989 is supported by sufficient evidence?

2) Assuming that decree for partition could be passed, whether both the Courts were justified in excluding land admeasuring 60R of survey no.185 which was admittedly joint family property?”

10. Shri Gorle, learned counsel appearing for the appellant submits that, to establish the fact of 1989 partition, the defendant No.1 examined himself and one more witness. However, the evidence led by the defendant No.1 in support of his case that there was a partition in the year 1989 between the plaintiff and defendant No.1, both the Courts below have described the same and erroneously held that the defendant No.1 has failed to prove the fact of partition.

11. While arguing on the second Substantial Question of Law,

the learned counsel for the appellant submits that, the land Survey No.185 admeasuring 60 R has not been considered and it was wrongly excluded from the partition, whereas, Survey No.175 which is in possession of Vishwas Bhat.

12. Per contra, learned counsel appearing for the respondent No.1 supports the concurrent findings recorded by both the Courts below and submits that the appellants have no case on both the Substantial Questions of Law for the reason that though the defendant No.1 has come up with a case that there was partition in the year 1989 between the plaintiff and the defendant No.1, it was held by both the Courts that he failed to prove the said fact.

13. Moreover, he submits that as regards Mahadu there was an agreement executed by father of the plaintiff and defendant No.1 in favour of Mahadu and in the light of that agreement, the possession was handed over to Mahadu and he is in possession of the land prior to death of father of the plaintiff and defendant, and because

the plaintiff and defendant No.1 both are not denying the fact of sale of the said land to Mahadu the same land was excluded from the suit property and it was rightly not considered by both the Courts below for partition.

14. He further submits that as regards the land in possession of Vishwas who is son of Shankar i.e. defendant No.1 and there is no title in his favour therefore, both the Courts have not excluded Survey No. 175 from the partition. By arguing so, he submits that this appeal needs to be dismissed.

15. To consider the rival contentions of the parties, I have gone through the record and perused the judgments of both the Courts below.

16. After going through the record and the findings recorded by both the Courts below, it is revealed that both the Courts below have recorded the finding of fact that the defendant

No.1 has failed to adduce corroborative and trustworthy evidence to prove the partition at the time of Padwa of 1989 and that the ornaments were given to the plaintiff.

17. Both the Courts below have further observed that the land recorded in the name of father of the parties, was not recorded in the name of the plaintiff and the defendants and they were shown as owners or heirs of father of the plaintiff and defendants.

18. It is further observed that, unless contrary is proved, it is presumed that the property is a joint family property and the co-owners have right to claim partition.

19. It is an admitted fact that the defendant No.1 failed to examine any of his sisters to prove that they had relinquished their shares at the time of partition in the year 1989.

20. As the learned counsel for the appellant has failed to point

out any perversity in the said findings recorded by both the Courts below, I do not want to disturb the said findings or to interfere with it.

21. Accordingly, I hold that the findings recorded by both the Courts below that the defendant has failed to prove partition in the year 1989 is supported by sufficient evidence.

22. As regards the second contention, that the defendant No.1 is not disputing the fact that the father of the plaintiff and defendants had entered into an agreement with Govinda Mahadu for sale of Survey No.185 area 60 R land and the possession was handed over to Govinda Mahadu and presently son of Govinda Mahadu is in possession of the said land. There is no dispute that son of Govinda Mahadu was not party to the suit and moreover both the parties to the suit are treating that the said land was sold out by the father of Govinda Mahadu. In that view of the matter, both the Courts have rightly excluded the said property from

partition.

23. Accordingly, I have answered the second Substantial Question of Law in the above terms.

24. Having found that there is no merit in the appeal, I pass the following order:

The appeal is **dismissed**. No order as to costs.

(ANIL S. KILOR, J)

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