

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

SECOND APPEAL NO.249 OF 1992

**WITH
X.OBJ/41/2022 IN SA/249/1992
WITH
CA/1776/1992 IN SA/249/1992**

Late Gumansing Shivram Patil,
since deceased (Expired on 08.12.1991)
through his legal representatives.

1. Shri Abhiman Gumansing Patil,
Age : 29 years, Occu: Agriculture,
Resident of Gadhoda,
Taluka and District Jalgaon.
2. Shri Bhaidas Gumansing Patil,
Age : 41 years, Occu: Agriculture,
Resident of Gadhoda,
Taluka and District Jalgaon.
3. Shri Bhagwan Gumansing Patil,
Age : 35 years, Occu: Agriculture,
Resident of Gadhoda,
Taluka and District Jalgaon.
4. Smt. Tirunabai w/o. Gumansing Patil,
Age : 50 years, Occu: Household,
Agriculture, Resident of Gadhoda,
Taluka and District Jalgaon.
5. Smt. Neelabai d/o. Gumansing Patil,
Age : 37 years, Occu: Household
and Agriculture, Resident of Gadhoda
Taluka and District Jalgaon.
6. Smt. Sindhubai w/o Santosh Patil,
Age : 25 years, Occu: Household
R/o. C/o. Shri Santosh Dinkar Patil
Hnumand Khede Pimpri, Taluka Erandol,
District Jalgaon.
7. Smt. Sanjubai w/o. Subhash Patil,
Age : 20 years, Occu: Household,
C/o. Subhash Kautik Patil,
Resident of Pimpaljotha, post Rigangaon,
Taluka Erandol, District Jalgaon.

... APPELLANTS

(L.R.'s of deceased defendant)

VERSUS

1. Shri Bhika Harsing Patil,
Age : 35 years, Occu: Agri.
Resident of Avahane, Taluka
and District Jalgaon.
2. Shri Ekanath Harsing Patil,
Age : 30 years, Occu: Agri.
Resident of Avahane,
Taluka and District Jalgaon.
3. Smt. Sayabai w/o. Harsing Patil,
Age : 68 years, Occu: Agri.
Resident of Avahane,
Taluka and District Jalgaon.
4. Smt. Kokilabai w/o. Shivaji Patil,
Age: 28 years, Occu: Household
R/o. Pimpri, Tq. Bhusawal, Dist. Jalgaon.
5. Smt. Sakhubai w/o. Raghunath Patil,
Age : 27 years, Occu: Household,
R/o. Nirul, Tq. Raver, Dist. Jalgaon.

... RESPONDENTS

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Advocate for Appellants : Mr. S.B. Yawalkar h/f. Mr. B.R. Yawalkar
Advocate for Respondent Nos.1 to 5 : Mr. S.V. Dixit

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CORAM : MANGESH S. PATIL, J.
Reserved on : 19.04.2022
Pronounced on : 22.04.2022

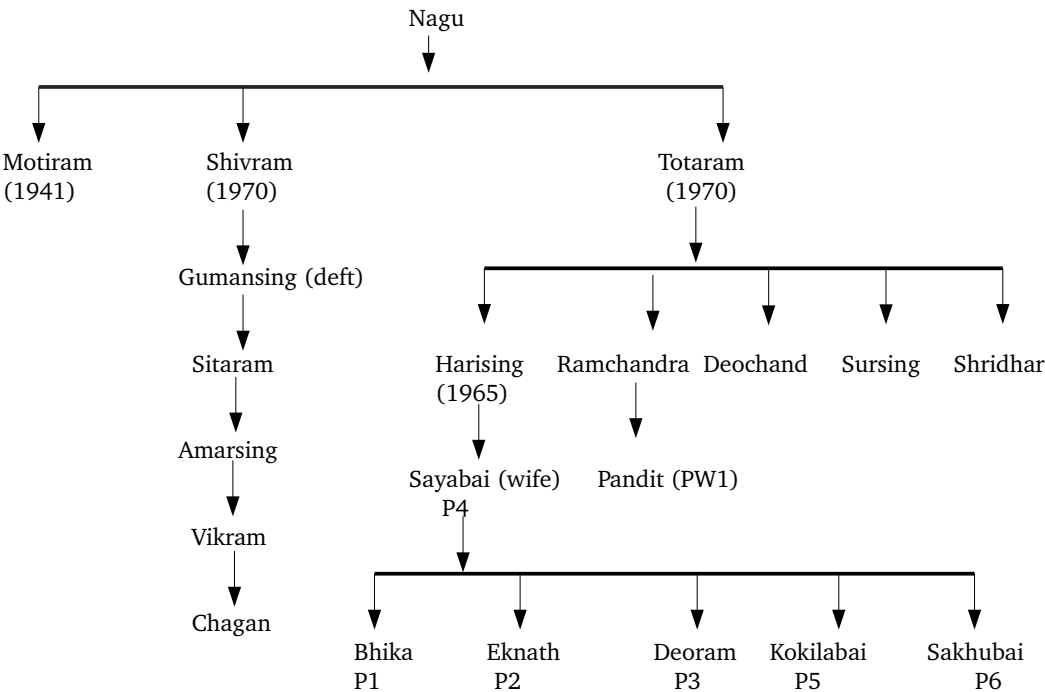
JUDGMENT :

The Second Appeal was admitted on 07.07.1992 on following
substantial questions of law :

- i. Whether in a suit for partition and possession of the field all
the sharers and co-partners are necessary parties ?
- ii. Whether suit for partition and possession is bad for non-
joinder of necessary parties, and therefore, ought to have
been dismissed ?

iii. Whether in the circumstances of the case, the observation regarding non-joinder of necessary parties, made by appellate court, in para 10 of the Judgment are proper ?

2. The substantial questions arise from following set of facts :
- a. A suit for partition and separate possession of the suit property was filed by the respondents herein against the predecessor of the appellants by name Mr. Gumansing, claiming that they had 1/2 share in the suit property.
 - b. Though it was not specifically pleaded, the parties are unanimous about the genealogy which is as under :



- c. The respondents are the wife and children of Harising who contested the suit by his written statement. He admitted that the suit property was the ancestral property. He also admitted genealogy. He put up a plea of previous partition about 70 years back, however, admitted that the suit property remained joint. He claimed to be the exclusive owner of the suit property and

also claimed to be in possession thereof.

- d. The trial court concluded that the suit property was the ancestral and joint family property but denied to give any share on the ground of non-joinder of all the coparceners namely all the sons of Shivram and all the sons of Totaram, by referring to para 333 (sic) of the Mulla's Principles of Hindu Law.
- e. The respondents challenged the judgment and order passed by the trial court before the district court. By the judgment and order under challenge the district court quashed and set aside the judgment of the trial court and decreed the suit partly. It has held that though all the coparceners were not parties to the suit, in view of the provisions of Order I Rule 8 and Order I Rule 9 the suit could be decreed. Though it declared that the respondents had 1/10th share collectively and so did the rest of the coparceners, it directed partition to be effected by dividing the suit property in two equal portions to be delivered in possession of all the sons of Shivram as also all the sons of Totaram each.

3. Learned advocate Mr. Yawalkar for the appellants would submit that the district court had grossly erred in decreeing the suit in spite of the fact that all the coparceners who are entitled to have a share in the suit property were not made parties to the suit. He would submit that the trial court had correctly observed and concluded that no partition could be legally effected in the absence of all the coparceners and still the district

court has held otherwise. The conclusion is clearly illegal.

4. Mr. Yawalkar would further refer to the decision of the Supreme Court in the matter of **Kanakarathanammal Vs. V.S. Loganatha Mudaliar and Ors.; AIR 1965 SC 271** and submit that by following this decision a coordinate bench of this Court in the matter of **Savitribai and Ors. Vs. Deorao and Ors.; 2011(3) Mh.L.J. 794** has also considered this aspect.

5. The learned advocate Mr. Dixit for the respondents would submit that admittedly there were two branches, one of Shivram and the other of Totaram. It was specifically averred in the plaint that the appellant Gumansing was the head of the branch of Shivram. The respondents were representing the branch of Totaram. Since both this branches were represented by a coparcener each, though the other brothers were formal parties they were not the necessary parties. Ultimately, the lower appellate court merely divided the suit property in two halves with a specific direction to the Collector to effect partition and to allot only of 1/2 share each. There was no direction to separate the individual shares of all the coparceners. He would further submit that the trial court had erred in referring to a paragraph No.333 of the Mulla's Principles of Hindu Law. In fact the situation would be governed by paragraph No.332. No prejudice has been caused to any of the coparceners by the decree passed by the lower appellate court which had all the powers to pass such a decree in view of Order XLI Rule 33 of the Code of Civil Procedure.

6. The learned advocate Mr. Dixit would further submit that since

the lower appellate court failed to award mesne profit and issue any direction for ascertainment of future mesne profit, the respondents have preferred the cross objection which may be allowed. In support of his submission he would rely upon the decision in the matter of **Bhagwati Prasad Vs. Chandramaul ; AIR 1966 Supreme Court 735.**

7. I have carefully considered the rival submissions and perused the papers. Though three different substantial questions have been formulated they revolve around the issue regarding non-joinder of parties.

8. As is cursorily mentioned herein above there is no dispute about the genealogy. Common ancestor Nagu was survived by three sons Motiram, Shivram and Totaram. Motiram died in the year 1941 without any issue. Shivram has five sons Gumansingh (deft), Sitaram, Amarsingh, Vikram and Chagan. Totaram is also survived by five sons Harising, Ramchandra, Deochand, Sursing and Shridhar. Admittedly, the respondents are the heirs of Harising and claim through him.

9. There is a concurrent finding of fact that the suit property which is an agricultural land is the ancestral and joint family property of the parties and there cannot be any dispute in that regard now.

10. Going by the provisions of the Hindu Succession Act, the suit property was simultaneously inherited by Shivram and Totaram who were real brothers and each one of them would be entitled to half share.

11. It was specifically averred in the plaint that Gumansing who is one of the five sons of Shivram was the head of their branch and was being

sued in that capacity.

12. Admittedly, one Pandit who happened to be the son of Ramchandra and grandson of Totaram was examined as a witness on behalf of the respondents.

13. As laid down in the Principles of Hindu Law by Mulla in paragraph No.332, in a suit for partition, the heads of all the branches are the necessary parties. Though not in so many words expressed by the district court, it was clearly observed that both the branches, of Shivram and Totaram, were duly represented in the suit and consequently, in the operative part, the suit property was directed to be divided in two equal parts and possession of one portion each was to be given to both these branches. It was further observed that the intention of the parties to have a particular relief has to be gathered from the pleadings and it was appropriate that the dispute between the two branches was settled once for all. Even if all the sons of Shivram and Totaram were not the parties to the suit, and though strictly speaking the situation was not covered by Order XLI Rule 33 of the Code of Civil Procedure, having found that there was due representation of both the branches and there could not have been any dispute as to equal share of each of these two branches, the interest of justice was met by decreeing the suit partly and by directing the suit property to be divided in two halves only. Pertinently, the district court had not directed a further division amongst the coparceners inter se from each of the branches.

14. In the matter of **Kanakarathanammal** (supra) the suit was not for partition. The plaintiff was claiming absolute ownership to a property purchased in the name of her mother by her father but it was found that it was not a property gifted by father to her mother but was a property purchased by the mother and holding that she was not entitled to claim exclusive inheritance in view of Section 10(2)(b) of the Mysore Hindu Women's Right to Property Act, 1933 but Section 10(2)(d) was applicable and therefore she was not entitled to claim exclusive ownership on the basis of Section 12 (1)(i) of that Act. It was held that she along with her two brothers would succeed to that property and as they were not the parties to the suit, it was liable to be dismissed. Pertinently, the defendants therein were propounding a will executed by the plaintiff's father on the basis of which a probate was obtained and the property was handed over to the respondent No.2 Organization on the basis of that will. The defendants were thus complete strangers and it is in view of such peculiar facts and circumstances that it was held that in the absence of brothers the plaintiff was not entitled to file the suit. The fact situation of the matter in hand is completely different. To repeat, this is a suit for partition and the judgment and decree under challenge directs it to be divided in two equal parts of the two branches of Shivram and Totaram which branches were duly represented through the parties to the suit in the light of principles laid down in paragraph No.333 of Principles of Hindu Law by Mulla.

15. The decision of a coordinate bench of this Court in the matter of

Savitribai (supra), in my considered view erroneously follows the ratio from the decision in the matter of **Kanakarathanammal** (supra). As can be seen from the judgment in **Savitribai** (supra) it was also a suit for partition. The facts apart, as can be seen from the observations in paragraph No.8 of the judgment, the decision in **Kanakarathanammal** (supra) was followed on the premise that even the dispute in that suit (Kanakarathanammal) was a suit for partition when in fact, as is demonstrated herein above, it was not. Consequently, the appellants are not entitled to derive any benefit from the decision in the matter of **Savitribai** (supra).

16. In view of the above discussion, I answer the substantial questions in favour of the respondents and the Second Appeal, therefore, must fail.

17. Coming to the cross objection under Order XLI Rule 22, the respondents have preferred this cross objection basically being aggrieved and dissatisfied by refusal by the district court to grant any mesne profits.

18. True it is that as laid down in the matter of **Bhagwati Prasad** (supra), direction for payment of future mesne profit or damages must accompany a decree for ejectment. However, this is a suit for partition and separate possession of a joint family property. The parties to the suit being the co-owners the possession of each one of them has to be regarded as possession for and on behalf of all. There is absolutely no evidence to show that the respondents were completely excluded from receiving any yield from the suit property and the entire usufructs were being enjoyed by the

appellant to their exclusion. At least there is no such finding recorded by the trial court or the lower appellate court. The respondents, therefore, are not entitled to take benefit from the decision in the matter of **Bhagwati Prasad** (supra). Consequently even the cross objection is liable to be dismissed.

19. The appeal as well as the cross objection are dismissed with costs.

20. Pending civil application is disposed of.

(MANGESH S. PATIL, J.)

21. Learned advocate Mr. Yawalkar submits that the operation of this judgment be stayed for a reasonable time.

22. Considering the nature of the dispute, the execution shall stand stayed to the extent of actual delivery of possession till 15.07.2022.

(MANGESH S. PATIL, J.)

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