

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.1880 OF 2019

NARAYAN BHAGWAN GIR GOSAVI AND OTHERS
VERSUS
UTTAM KAILAS GIR GOSAVI AND OTHERS

Mr.A.A.Kokad, Advocate for the petitioners.

Mr.A.D.Wange, Advocate for respondent Nos.1, 8B, 9.

(CORAM : BHARATI H. DANGRE, J.)

DATE : JANURARY 4, 2022

PER COURT :

1. Heard the learned counsel for the petitioners and the learned counsel for the respondents.

The petitioners are the original plaintiffs, who instituted RCS No.300/2012 seeking partition and separate possession of the suit property described in paragraph No.3 of the plaint, being property located in Gat Nos. 354 and 356. The suit impleaded 14 defendants and the relief in the plaint was pleaded as under :-

"(i) The plaintiffs together be kindly given khas and separate possession out of the suit land bearing Gat No.354 admeasuring 8 H. 25 Gts. and land Gat No.356 to the extent of 2 H. 53 RE situated at village

Panchincholi Tq. Nilanga, Dist.Latur, as described in para no.3 of the plaint by effecting partition, as per provisions of Section 54 of C.P.C."

2. During the pendency of the said suit, the plaintiffs brought on record a Partition Deed (Exh.97) in support of their claim, that deceased Kailas Gir and Ratan Gir, the other 2 brothers of the plaintiffs had admitted his 1/3rd share in the property. The sale deed executed by Kailas Gir and Ratan Gir is also brought on record through the plaintiffs vide Exh.147.

The defendants denied the existence of a partition deed in the wake of the relief sought in the suit and the application filed by the plaintiffs for referring the alleged Partition Deed and the sale deed to an expert for examination of thumb impression of Kailas Gir and Ratan Gir, was strongly objected to.

By the impugned order passed by the learned Civil Judge, S.D. Nilanga on 21/01/2019, the application is rejected, which is assailed in the present writ petition.

3. In the backdrop of the pleadings in the plaint and the specific stand taken by the defendants in the written statement, the learned

Judge has settled the following issues in the suit :-

(1) Whether plaintiffs prove that the suit properties are joint family properties of plaintiffs and the defendants ?

(2) Whether the plaintiffs prove that they have their individual 1/3rd share in the suit properties ?

(3) Whether the defendants prove that the suit properties are self acquired properties of the father of defendant Nos. 1 and 8 ?

(4) Whether plaintiffs are entitled for partition and separate possession, as prayed for ?

4. Perusal of the pleadings in the plaint reveal that the plaintiffs sought partition and separate possession of the 2 properties being referred as the suit properties i.e. Gat Nos. 354 and 356. The partition deed alleged to have been executed admitting the share of the plaintiffs by the deceased Kailas Gir and Ratan Gir is *sans* of any mention of the aforesaid properties. In absence of the partition deed containing a reference to the suit properties, and in the backdrop of the specific pleadings by the plaintiffs that the suit properties are purchased from the income of joint family property, but no partition is effected regarding the suit properties, subsequent reliance on the alleged

document of partition at a belated stage of the proceedings has been rightly frowned upon by the learned Judge and rejected. The learned Judge of the Trial Court has recorded that the plaint do not include any pleading about execution of the partition deed by the deceased Kailas Gir and Ratan Gir and since the burden whether the properties are purchased from the income of the joint family property is to be discharged by the plaintiffs during the proceedings in the suit, the relief sought for referring the document to an expert witness, has been declined. The learned Judge is absolutely right when he record that by permitting the same, it would be amounting to permit the plaintiffs to adduce evidence without any pleadings recording the alleged partition deed, which is alien to the suit filed by him seeking relief of partition and separate possession. Since the matter is now scheduled for final hearing, I do not deem it fit to grant any indulgence in the impugned order, as ultimately the plaintiffs will have to discharge the burden of proving the issues as to whether they are entitled for 1/3rd share in the suit property, which will be determined on the culmination of the trial. The impugned order, therefore, do not warrant any interference. Resultantly, the writ petition is dismissed.

(BHARATI H. DANGRE, J.)