

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

**SECOND APPEAL NO.556 OF 2021
AND
CIVIL APPLICATION NO.3405 OF 2020**

1. Balaji s/o. Sayabu Pandilwad,
Age : 67 years, Occ. Agri.,
2. Ananda s/o. Balaji Pandilwad,
Age : 35 years, Occ. Agri.,
Both r/o. Kapsi (Kh.)
Tq. Loha, Dist. Nanded

..Appellants
(Orig. Deft. Nos.1 and 2)

Vs.

1. Gayabai w/o. Madhavrao Tikalwad,
Age: 62 years, Occ. Household &
Agri., r/o. Kapsi (Kh),
Tq. Loha, Dist. Nanded
2. Sayabai @ Shantabai w/o. Narayan
Pandavwad, Age-54 years,
Occ. Household and Agri.
r/o. Raheer (Harnal),
Tq. Naigaon (Khaurgaon),
Dist. Nanded
3. Pandit s/o Eknath Methe,
Age : 65 years, Occ. Agri.,
r/o. Kapsi (Kh), Tq. Loha,
Dist. Nanded

..Respondents
(Resp. Nos.1 and 2 - Orig.
plaintiffs and Resp. No.3 –
Orig. Deft. No.3)

Mr.A.K.Gawali, Advocate for appellants

Mr.S.R.Bagal, Advocate h/f. Mr.B.N.Gadegaonkar, Advocate for
respondents nos.1 and 2

CORAM : R.G. AVACHAT, J.
DATE : JULY 04, 2022

ORDER :-

This Second Appeal is taken up for final hearing at admission stage with the consent of learned counsel for the parties thereto. A substantial question of law crops up in this appeal is as follows:-

(a) Whether the case of the appellants/ original defendant nos.1 and 2 of oral partition of some of the suit properties gets covered in view of the legal proposition expounded by the Apex Court in the case of **Vineeta Sharma Vs. Rakesh Sharma and ors. AIR 2020 SC 3717 ?**

2. Heard learned counsel for the parties.
3. The facts relevant for deciding present appeal are as under :-

Sayabu was a common ancestor. He died on 07.01.1989. He was survived by his widow – Nagarbai and three children namely, daughters – Gayabai and Sayabai and son – Balaji. Sayabu's widow, Nagarbai, passed away on

12.10.2005. The suit has been filed by two sisters against their brother and his son (appellants herein) for partition and separate possession of the ancestral / joint family properties. The trial Court decreed the suit, being R.C.S. No.83 of 2012. The first appellate Court partly allowed the appeal with modification of shares.

4. Learned counsel for the appellants would submit that the appellants, in their written statement (Exh.39), have specifically averred the case of oral partition. He adverted this Court's attention to paragraphs 3 and 4 of the written statement. According to him, the relationship between appellant no.1 and his wife were not cordial. Partition of the family properties, therefore, took place between him and his son (appellant no.2). Appellant no.2 was minor that time. The suit land bearing gut no.84 (2H 34 R) was, therefore, given to the share of appellant no.2. The revenue record to that effect came into being way back in 1989. It was soon after the death of common ancestor – Sayabu. He would further submit that

the plaintiffs were given some gold and cash amount by Sayabu himself. The plaintiffs were all along aware of the factum of partition and the revenue record thereof. They were served with notice before certification of the mutation entry in that regard. In such circumstances, the appellants were required to file a suit for reopening of partition. When the land gut no.84 came to be allotted to the share of appellant no.2, it was incumbent upon the plaintiffs to pray for setting aside such alienation or, at least, there should have been averment in the plaint to ignore the same. According to learned counsel, thus, the case of oral partition did get proved. Both the courts below, however, ignored the same. The trial Court simply dealt upon the case of partition that was said to have been effected by the father in his life time. According to learned counsel, the trial Court ought to have relied on the case of partition that took place between both the appellants and effect thereof came to be reflected in the revenue record. According to learned counsel, it was the partition effected by the revenue authorities in terms of Section 85 of the Maharashtra Land Revenue Code.

A certified copy of mutation entry no.9 was, therefore, placed on record.

Learned counsel relied on a judgment of the Apex Court in **Vineeta Sharma** (supra). He also relied on a judgment in the case of **Venigalla Koteswaramma Vs. Malampati Suryamba and ors., AIR 2021 SC 27**, to submit that the plaintiffs ought to have claimed relief of setting aside the partition/alienation of one of the suit lands that took place between both the appellants or at least, there should have been averments in the plaint for ignoring the revenue record. He, therefore, urged for allowing the appeal.

5. Learned counsel for the respondents would, on the other hand, submit that the mutation entry no.9 had not been relied on before both the Courts below. It has been produced before this Court for the first time. According to him, the case of the appellants is not covered by the Apex Court judgment in the case of **Vineeta Sharma** (supra).

6. Considered the submissions advanced. Perused the pleadings and relevant evidence relied on. Gone through the

citations placed on record. It is a suit filed by two sisters against their brother and his son for partition and separate possession of the ancestral/joint family properties. There is no dispute about the character of the suit properties. Their father Sayabu died on 07.01.1989 leaving behind these children and their mother – Nagarbai. Nagarbai died on 12.10.2005. As per the law then prevailing (in terms of the notional partition), the family properties could have been divided into three shares i.e. one share to son of Sayabu (deceased), Balaji, equal share to his mother – Nagarbai and one share to the deceased. The share of the deceased would have been inherited equally by his widow and three children. On demise of Nagarbai, her share in the suit properties would be inherited by her three children. Be that as it may.

7. The plaintiffs claimed share equal to that of their brother (appellant no.1) by virtue of Section 6 of Hindu Succession Act ("Act of 1956", for short). Learned counsel for the appellants relies on the proviso to Section 6 and explanation appended thereto. It would, therefore, be apposite to reproduce the relevant provisions of Section 6 of the Act of 1956, which is as under:-

6. Devolution of interest in coparcenary property:-

(1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005, in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall,—

(a) by birth become a coparcener in her own right in the same manner as the son;

(b) have the same rights in the coparcenary property as she would have had if she had been a son;

(c) be subject to the same liabilities in respect of the said coparcenary property as that of a son, and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener:

Provided that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004.

(2) Any property to which a female Hindu becomes entitled by virtue of sub-section (1) shall be held by her with the incidents of coparcenary ownership and shall be regarded, notwithstanding anything contained in this Act or any other law for the time being in force in, as property capable of being disposed of by her by testamentary disposition.

(3) Where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005, his interest in the property of a Joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship, and the coparcenary property shall be deemed to have been divided as if a partition had taken place and,-

(a) the daughter is allotted the same share as is allotted to a son;

(b) the share of the pre-deceased son or a pre-deceased daughter, as they would have got had they been alive at the time of partition, shall be allotted to the surviving child of such pre-deceased son or of such pre-deceased daughter; and

(c) the share of the pre-deceased child of a pre-deceased son or of a pre-deceased daughter, as such child would have got had he or she been alive at the time of the partition, shall be allotted to the child of such pre-deceased child of the pre-deceased son or a pre-deceased daughter, as the case may be.

Explanation. —For the purposes of this sub-section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

(4)

(5)

Explanation. - For the purpose of this section “partition” means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908) or partition effected by the decree of a Court.

The newly amended Section 6 of the Act of 1956 was subject of interpretation before a three-Judge bench of the Hon'ble Apex

Court in the case of **Vineeta Sharma** (supra). In paragraphs 126, 127 and 129(v), the Hon'ble Apex Court observed thus:-

126. The protection of rights of daughters as coparcener is envisaged in the substituted Section 6 of the Act of 1956 recognises the partition brought about by a decree of a court or effected by a registered instrument. The partition so effected before 20.12.2004 is saved.

127. A special definition of partition has been carved out in the explanation. The intendment of the provisions is not to jeopardise the interest of the daughter and to take care of sham or frivolous transaction set up in defence unjustly to deprive the daughter of her right as coparcener and prevent nullifying the benefit flowing from the provisions as substituted. The statutory provisions made in Section 6(5) change the entire complexion as to partition. However, under the law that prevailed earlier, an oral partition was recognised. In view of change of provisions of section 6, the intendment of legislature is clear and such a plea of oral partition is not to be readily accepted. The provisions of section 6(5) are required to be interpreted to cast a heavy burden of proof upon proponent of oral partition before it is accepted such as separate occupation of portions, appropriation of the income, and consequent entry in the revenue records and invariably to be supported by other contemporaneous public documents admissible in evidence, may be accepted most reluctantly while exercising all safeguards. The intendment of Section 6 of the Act is only to accept the genuine partitions that might have taken place under the prevailing law, and are not set up as a false defence and only oral ipse dixit is to be rejected outrightly. The object of preventing, setting up of false or frivolous defence to set at naught the benefit emanating from amended provisions, has to be given full effect. Otherwise, it would become very easy to deprive the daughter of her rights as a

coparcener. When such a defence is taken, the Court has to be very extremely careful in accepting the same, and only if very cogent, impeccable, and contemporaneous documentary evidence in shape of public documents in support are available, such a plea may be entertained, not otherwise. We reiterate that the plea of an oral partition or memorandum of partition, unregistered one can be manufactured at any point in time, without any contemporaneous public document needs rejection at all costs. We say so for exceptionally good cases where partition is proved conclusively and we caution the courts that the finding is not to be based on the preponderance of probabilities in view of provisions of gender justice and the rigor of very heavy burden of proof which meet intendment of Explanation to Section 6(5). It has to be remembered that courts cannot defeat the object of the beneficial provisions made by the Amendment Act. The exception is carved out by us as earlier execution of a registered document for partition was not necessary, and the Court was rarely approached for the sake of family prestige. It was approached as a last resort when parties were not able to settle their family dispute amicably. We take note of the fact that even before 1956, partition in other modes than envisaged under Section 6(5) had taken place.

129(v). In view of the rigor of provisions of Explanation to [Section 6\(5\)](#) of the Act of 1956, a plea of oral partition cannot be accepted as the statutory recognised mode of partition effected by a deed of partition duly registered under the provisions of the [Registration Act, 1908](#) or effected by a decree of a court. However, in exceptional cases where plea of oral partition is supported by public documents and partition is finally evinced in the same manner as if it had been affected by a decree of a court, it may be accepted. A plea of partition based on oral evidence alone cannot be accepted and to be rejected outrightly.

8. What has been observed by the Apex Court in **Vineeta Sharma** (supra) is that in exceptional case, where plea of oral

partition is supported by public documents and the partition is finally evinced in the same manner as if it has been effected by a decree of the Court, it may be accepted. The partition based on oral evidence alone cannot be accepted and to be rejected outrightly.

9. The partition is incident of jointness. The parties to the partition shall be those persons who are entitle to a share upon partition. Here, both the Courts below negatived the case of the appellants that the plaintiffs were given some cash and gold as well in lieu of their share in the joint family property. As per the case of the appellants, partition of the suit property took place only between both of them. When the alleged partition took place, plaintiff no.2 was minor. The family has two agricultural lands namely, gut no.84 and 87 admeasuring 2 H 34 R and 83 R, respectively.

10. Learned counsel for the appellants could not place on record the order passed by the Mamlatdar under Section 85 of the M.L.R.C. Thus, it found to be a misstatement made by him. A certified copy of the mutation entry no.9 was, for the first time, placed on record before this Court. It was not tendered in evidence either before the trial Court or the first appellate Court. The same,

therefore, cannot be looked into. Even, for the sake of submission made by learned counsel for the appellant, if we look at said mutation entry, it appears therefrom that appellant no.1 gave entire land gut no.84 in partition to his minor son. When Sayabu passed away in January, 1989, the plaintiff did have right, title and interest in the suit land by virtue of principle of notional partition (claim of succession to share of their father – Sayabu). Had it been a case of partition to have been effected by or between all the family members, who do have right, title and interest in the family properties, the submission made by learned counsel for the appellants would have been acceptable.

11. Here, a major portion of the family property has conveniently been transferred by appellant no.1 to his son - appellant no.2 by mere application to the revenue authorities. Such transfer or alleged partition cannot be recognised in law. True, said revenue record continued as it is till date. The plaintiffs did not take exception thereto by filing an appeal before the revenue authorities. Same also has not been challenged in the suit. In view of this Court, it was not necessary for the plaintiffs to have a recourse thereto. The suit for partition and separate possession is very much

maintenable. Suffice it to say that the appellants could not make out a case of oral partition supported by a public document before both the Courts below. Substantial question of law is, therefore, answered in the negative.

12. In view of the above, the Second Appeal fails. The same is dismissed. The Civil Application also stands dismissed.

13. The respondents/plaintiffs shall not proceed with the execution proceedings for a period of next two weeks.

[R.G. AVACHAT, J.]

KBP