

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

**SECOND APPEAL NO.453 OF 2013 WITH
CIVIL APPLICATION NO.8631 OF 2013 WITH
CIVIL APPLICATION NO.3637 OF 2021**

Manjoor Ahemad Mohammad
Umar Morve and others

... APPELLANTS

VERSUS

Jamil Ahemad Ladlesaheb
Umar Morve, Expired, through L.Rs.
Niyamatbee Jamil Ahemad Morve
and others

... RESPONDENTS

.....
Shri V.D. Salunke, Advocate for appellants
Shri A.T. Kanwade, Advocate with
Shri A.K. Athaani, Advocate for R.No.1-A to 1-G, 2-A to 2-H,
3 to 5
Shri R.N. Dhorde, Senior Counsel with
Shri A.S. More, Advocate for R.No.6-A to 6-E
.....

CORAM : R. G. AVACHAT, J.

DATE : 15th JUNE, 2022.

ORDER :

This Second Appeal has been preferred by the original plaintiffs in Regular civil Suit No.151/1999. Their suit for partition and separate possession of the agricultural lands described in the plaint was dismissed by the trial Court. The plaintiffs, therefore, preferred first appeal, being Regular Civil Appeal No.264/2012. The first appellate Court, vide its

judgment and order dated 15/1/2013, dismissed the appeal. As such, the appellants/ plaintiffs have suffered concurrent findings of facts recorded by both the courts below.

2. In short, the case of the appellants/ plaintiffs is that, the appellants/ plaintiffs are brothers inter-se. The respondents/ defendants are the cousins of the plaintiffs. A partition of family/ joint properties took place way back on 28/3/1961. The father of the appellants/ plaintiffs was party to the said document. A memorandum of partition was executed between the parties. Since the suit lands were of inferior quality, the respondents/ defendants had agreed to pay a sum of Rs.1000/- to the father of the appellants/ plaintiffs. A sum of Rs.500/- was paid. While the memorandum of partition was executed, the balance amount was agreed to be paid at the time of festival of Sati (Kharif crop). It is the specific case of appellants/ plaintiffs that if the amount was not paid, it was agreed between the parties to the document that the lands were to be treated as joint properties. Meaning thereby, no partition shall be deemed to have been effected in respect of the suit lands. It is the case of the appellants/ plaintiffs that since the respondents/ defendants did not pay the balance amount, the suit lands

remained joint. The suit for partition thus came to be filed. Both the courts below have negated the contentions of the appellants/ plaintiffs.

3. Shri V.D. Salunke, learned counsel for the appellants/ plaintiffs would submit that, both the courts below did not consider the evidence on record. What has been considered by the courts below was not part of the evidence. The learned counsel meant to say that, both the courts below have negated the contentions of the appellants/ plaintiffs on surmises and conjectures. The learned counsel first took this Court through the judgment of the trial Court, particularly the Issue No.2-A. According to learned counsel, the trial Court has not discussed the evidence on this issue and gave its findings merely on conjectures. According to learned counsel, an application (Exh.190) was preferred to the revenue authorities by the defendant No.1 in June 1986 for recording the names in revenue record in terms of the memorandum of partition. The learned counsel meant to say that, since the balance amount of Rs.500/- was not paid, the parties in fact did not act upon the document, and the suit lands continued to have been jointly held. According to learned counsel, the burden of proof to prove that the amount was paid did rest

upon the respondents/ defendants. He would further submit that, the trial Court observed that since the appellants/ plaintiffs did not make demand of the balance amount, the Court assumed the same to have been paid. Such an inference was beyond the averments in the pleadings. According to learned counsel, the first appellate Court did not frame a point in consonance with the Issue No.2-A framed by the trial Court. Since there was no evidence forthcoming indicating the payment of balance amount of Rs.500/-, the suit ought to have been decreed. The learned counsel has placed on record 7 substantial questions of law, which according to him, crop up in this Second Appeal for being answered. He, therefore, urged for admission of the appeal.

4. Shri R.N. Dhorde, learned Senior Counsel would, on the other hand, submit that, both the courts below have given concurrent findings of fact. No substantial question of law did arise in this appeal. He, therefore, urged for dismissal of the appeal at admission stage itself.

5. Considered the submissions advanced. Perused the judgments delivered by both the courts below. Gone through the evidence and the documents relied. The appellants/ plaintiffs are the brothers inter-se. The

respondents/ defendants are the cousins of the appellants. Admittedly, a partition of the family/ joint property took place way back on 28/3/1961 between the father of the appellants/ plaintiffs on one hand and the respondents/ defendants on the other. I have carefully gone through the said document to find a clause therein that, all the joint properties have been partitioned by metes and bounds.

6. The respondents/ defendants agreed to pay the appellants/ plaintiffs' father a sum of Rs.1000/-. A sum of Rs.500/- was paid at the time memorandum of partition was executed. The balance amount was agreed to be paid by the time of festival of Sati. Admittedly, there is no clause in the memorandum of partition that if the balance amount of Rs.500/- was not paid the partition is deemed to have not been effected. Admittedly, the effect of partition has been given in the revenue record except in respect of the suit lands. Application (Exh.190) was moved by the respondents/ defendants for giving effect of the partition in the revenue record in respect of the suit lands in the year 1986. The learned counsel, therefore, meant to say that, since admittedly the amount was not paid, the suit lands continued to be jointly held. There is, however, evidence on record to

indicate that, in the return submitted under Land Ceiling Act, the parties have shown the lands comprised in the memorandum of partition as their separate lands. The same is in terms of the memorandum of the partition. There is no iota of evidence to indicate that there was an oral understanding between the parties that if the amount of Rs.500/- was not paid, the suit lands shall be deemed to have continued to be joint properties.

7. The father of the appellants/ plaintiffs survived for six years post execution of the memorandum of partition. There is nothing to indicate him to have ever made a demand for the balance amount. His sons- appellants/ plaintiffs also appear to have kept mum for over 30 years i.e. until filing of the suit in 1999. The appellant/ plaintiff No.2 Maksud Ahemad has given a vital admission in cross-examination. The same is reproduced below in verbatim :-

"हे म्हणणे खरे आहे की, पैसे मिळाले म्हणून माझ्या वडिलांनी कायदेशीर कार्यवाही प्र. वादीवर केलेली नाही."

8. In view of this Court, both the courts below have given correct concurrent findings of fact/s. No substantial

question of law as have been suggested by the learned counsel for the appellants do arise in this Second Appeal. The Second Appeal is, therefore, liable to be dismissed. The same is, therefore, dismissed. Consequently, Civil Applications are dismissed.

**(R. G. AVACHAT)
JUDGE**

fmp/-