

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

**SECOND APPEAL NO.372 OF 2018 WITH
CIVIL APPLICATION NO.6810 OF 2018**

Anil s/o Sayaji Waje

... APPELLANT

VERSUS

Sandeep s/o Haribhau Waje

... RESPONDENT

.....
Shri V.D. Hon, Senior Counsel with
Shri A.V. Hon, Advocate for appellant
Shri Y.V. Kakade, Advocate for respondent
.....

CORAM : R. G. AVACHAT, J.

Date of reserving order : 3rd August, 2022

Date of pronouncing order : 11h August, 2022

ORDER :

This is original defendant's Second Appeal, from the judgment and decree dated 17/11/2011, passed by 3rd Jt. Civil Judge, Junior Division, Shrigonda in Regular Civil Suit No.221/2007 and confirmed by the Court of District Judge-9 Ahmednagar in Regular Civil Appeal No.480/2011, by judgment and order dated 1/1/2018. For the sake of convenience, parties to this Second Appeal are referred to as per their ranking in the suit.

2. The plaintiff and defendant are cousins. Their fathers are real brothers inter-se. The plaintiff filed the suit (Regular Civil Suit No.221/2007) for partition and separate possession of the agricultural land Gut No.685/1. It is the case of the plaintiff that, the suit land came to the share of him and the defendant in a partition that took place way back in 1996. Since the plaintiff wanted to have his share in the suit land partitioned, the suit was filed.

3. The defendant (appellant herein) resisted the suit, contending that, no partition of the family property took place in 1996. It was a family arrangement that was effected pursuant to the Mutation Entry No.3416. According to him, the partition of the family properties took place on 19/7/2001, wherein the suit land has been allotted to the share of his father. The dismissal of the suit was, therefore, urged for. The trial Court decreed the suit, holding the plaintiff to have proved his case of partition of the family properties to have been effected way back in 1996. The first appellate Court has affirmed the said decree.

4. Mr. Hon, learned Senior Counsel appearing for the appellant/ defendant would submit that, following two

substantial questions of law arise in this Second Appeal namely :-

- (I) The grandfather did not have authority to effect partition of the joint family properties between him and his grandsons and, therefore, whatever mutation entry (No.3416) was effected in the revenue record does not constitute partition of the family properties.
- (II) The suit was bad for non-joinder of necessary parties and non-compliance of principle of hotch-potch.

5. According to learned Senior Counsel, it was a family arrangement made between Hausrao (grandfather of the plaintiff and defendant) and his brothers. Hausrao then effected partition of property that came to his share. He executed a document of partition in 2001, wherein the suit land came to the share of father of the defendant. Learned Senior Counsel invited attention of this Court to the cross-examination of the plaintiff to contend that the plaintiff admitted that the sugarcane in the suit land was sent to the sugar factory in the name of the defendant. It was the defendant who had raised wheat crop in the suit land. According to learned Senior Counsel, this falsifies the case of partition propounded by the defendant. He would further submit that, it being a suit for partition, all the persons who

are entitled to share in the family properties are necessary parties. It is a suit between two cousins only. Same is, therefore, bad for non-joinder of necessary parties. He would further submit that, all the family properties are not the subject matter of the suit. The suit, therefore, suffers for non-compliance of principle of hotch-potch.

6. Mr. Kakade, learned counsel for the respondent/plaintiff would, on the other hand, submit that, the factum of partition is an issue of facts. Both the Courts have concurrently held the suit land to have fallen to the share of the plaintiff and the defendant equally. The defendant did not lead any evidence in the suit. The document of alleged partition was not proved. The written statement is silent to raise the issue of non-joinder of necessary parties and principle of hotch-potch. The learned counsel relies on Order I Rule 13 of the Code of Civil Procedure which reads thus :-

“13. Objections as to non-joinder or mis-joinder:-

All objections on the ground of non-joinder or mis-joinder of parties shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived.”

According to learned counsel for the respondent, no substantial question of law does arise in this Second Appeal. He, therefore, urged for dismissal of the Second Appeal.

7. Considered the submissions. Perused the pleadings, evidence relied on and the judgment of the trial Court and that of the first appellate Court. The plaintiff and defendant are cousins. Way back in 1996, a Mutation Entry (No.3416) came into being. A close reading thereof would indicate Hausrao (grandfather of the plaintiff and defendant) and his three brothers had moved an application to the revenue authorities to record the family lands in the name of respective family member/s who are in possession of specific portion thereof. The said Mutation Entry was effected in August 1996. The effect thereof appears to have remained undisturbed. From the recitals of the Mutation Entry, it does not appear that Hausrao had alone moved such application for effecting mutation Entry. In the written statement, the defendant did not raise any issue about the grandfather Hausrao to have no authority to effect partition of the family properties between him on one hand and his grandsons (plaintiff and defendant) on the other. The learned Senior

Counsel although may be right in contending the same, relying on the authorities in case of **M.S.M.M. Meyyappa Chettiar Vs. Commissioner of Income Tax, Madras [AIR 1951 Mad 506]** and **P.N. Venkatasubramania Iyer & ors. Vs. P.N. Easwara Iyer & ors. [AIR 1966 Mad 266]**, the fact remains that the Mutation Entry No.3416 does not indicate the partition of the family properties to have been effected by the grandfather alone. By virtue of the change in the revenue record pursuant to Mutation Entry No.3416, the suit land is shown to have been possessed by the plaintiff and defendant in equal share.

8. In case of **M.S.M.M. Meyyappa Chettiar (supra)**, the Madras High Court observed in paragraph No.4 as under:-

“4. The first question is entirely one which arises under Hindu Law. Under the Mitakshara Law the father has the undoubted right and privilege of effecting a partition between himself and his sons, whether they are majors or minors, without their consent. He may divide the properties physically or may only bring about a division in status. This division may be between himself and his sons or even between the sons inter se. The partition so made, however, must be fair and equal. See *Kandaswami V. Doraiswami Aiyar*, 2 Mad. 317 and *Venkatapathi Raju V. Venkatanarasimha Raju*, I.L.R. (1937) Mad. 1 : (A.I.R. (23) 1936 P.C. 264), (*Mayne’s Hindu Law*, 11th Edn. 1950 pp. 547 and 548). This power of the father is exercisable also by the grandfather

but with the qualification that he can only separate himself from his grandsons and not make a division between the grandsons inter se. (See Subbarami Reddi V. Chenchu Raghava Reddi, I.L.R. (1945) Mad. 714 : (A.I.R. 32) 1945 Mad. 327) and Mayne, 11th Edn. p. 548). If the partition is unequal and unfair it is open to the sons if they are majors to repudiate the partition; but if they are minors, it is open to them to avoid that partition by appropriate proceedings after they attain majority. The partition, therefore, will be good until it is set aside. It is not void and is not without effect. This right of avoidance based on the inequality of the shares is a personal right of the minors and cannot be exercised by others. The power is not a conditional power in the sense that if the condition of the partition being fair and equal is not satisfied, the power ceases to have operative force. The partition will be valid in such circumstances until it is avoided by the minors, and until it is repudiated by the major sons.

9. In case of P.N. Venkatasubramania Iyer (supra), the Madras High Court held in paragraph No.129 as under:-

129. This power of the father is exercisable also by the grandfather but with the qualification that he can only separate himself from his grandsons and not make a division between the grandsons inter se. (See Subbarami Reddy Vs. Chenchu Raghava Reddi, 1945-1 Mad. L.J. 151 : (A.I.R. 1945 Mad. 327) and Mayne 11th Edn. page 548). If the partition is unequal and unfair it is open to the sons if they are majors, to repudiate the partition; but if they are minors, it is open to them to avoid that partition by appropriate proceedings after they attain majority. The partition therefore, will be good until it is set aside, it is not void and it is not without effect.”

10. It is true that, in a suit for partition, all the persons who are entitled to share in the family properties need to be made parties to the suit. In the case in hand, the appellant/ defendant did not raise any objection on this score in the written statement. It is his case that, the partition of the family properties that came to the share of grandfather Hausrao was effected by Hausrao himself on 19/7/2001. The said document was placed on record before the trial Court. The respondent/ plaintiff was confronted therewith. He denied the existence thereof. The defendant admittedly did not lead any evidence in proof of his case of partition. True, in the cross-examination the plaintiff had admitted that sugarcane in the suit land was sent in the name of the defendant to the sugar factory for crushing. He also admitted that the defendant had raised wheat crop therein for some time. The fact that the plaintiff and defendant are cousins cannot be lost sight of. When the defendant himself came with a case of partition of the family properties to have been effected in July 2001, he cannot be heard for the first time to say in this Second Appeal that the suit was bad for non-joinder of necessary parties.

11. The finding that the partition of the family

properties took place way back in 1996 and the suit land came to the share of the plaintiff and defendant therein, is a finding of fact recorded by the trial Court, based on the evidence in the case. The same has been confirmed by the first appellate Court. Close reading of the memo of appeal indicates that the appellant/ defendant contends the document of partition dated 19/7/2001 to be a Will, executed by Hausrao.

12. For the aforesaid reasons, this Court finds no substantial questions of law, as have been formulated by the learned Senior Counsel for the appellant, do arise in this Second Appeal. The Second Appeal, therefore, fails. It is dismissed. Consequently, Civil Application stands dismissed.

(R. G. AVACHAT)
JUDGE

fmp/-