

Dusane

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO.267 OF 2016
WITH
CIVIL APPLICATION NO. 511 OF 2016**

Purushottam Bapu Nachankar ...Appellants
& Ors.

V/s.

Rajesh Anant Nachankar & Ors. ...Respondents

Mr. Sanjiv Sawant a/w Mr. Abhishek Matkar and Ms.
Bhakti Wast for Appellants/Applicants.

Mr. Rakesh Bhatkar a/w Mr. Mohit Dalvi for
Respondent nos.1, 3, 4 and 5.

**CORAM: MADHAV J. JAMDAR, J.
DATE: 30th NOVEMBER, 2022**

P.C.:

1. Heard Mr. Sawant, learned Advocate appearing for Appellants and Mr. Bhatkar, learned Advocate appearing for Respondent nos. 1, 3, 4 and 5.

2. It is the submission of Mr. Sawant that following two substantial questions of law are involved in this Second Appeal:-

(1) Whether effect of Certificate issued under Section 32-M of the Bombay Tenancy and Agricultural Lands Act, 1948 in the name of Bapu was ignored while recording the finding that the property is joint family property and therefore, the impugned judgment of the

learned Appellate Court is illegal and perverse?

(2) Whether the decree passed by the learned First Appellate Court in Regular Civil Appeal No. 17 of 2012 is nullity as widow of Appellant namely Anant Ganpat Nachankar was not brought on record?

3. The factual position on record shows that earlier Regular Civil Suit No. 67 of 1984 was filed by one Bablya Bhikaji Nachankar against legal heirs of one Bapu Nachankar. It was the contention of said Bablya Nachankar that the suit properties in the said 1984 Suit are the joint family properties of Plaintiffs and Defendants. The present Appellant i.e. Purushottam Bapu Nachankar was Defendant no.1 in 1984 suit. He filed written statement in 1984 suit. In that written statement, following averment was made:

"अशा प्रकारे दावा मिळकती बाबाजी व तुकाराम यांचेकडे कुळ वहिवाटीला होत्या व त्या अखेरीस बापू बाबाजीचे नावे विक्रीही झालेल्या आहेत (In such a way suit properties were cultivated by Babaji and Tukaram as tenant and ultimately suit properties are sold in the name of Bapu Babaji)".

(Emphasis added)

4. In the cross-examination conducted of present Appellant no.1 (Defendant no.1 in the present suit) following admissions were found :

"Survey number mentioned in Exh. 149 are changed. Bablya Nachankar had filed Regular Civil Suit No. 64/87

against Purushottam Bapu Nachankar and other 8 persons. In that suit deceased Anant was defendant no. 9. All the properties in the present suit mentioned in Annexure A & B and S. No. 50, H. No. 1/4, S.No. 217, H. No. 6/2 were mentioned in Regular Civil Suit No. 64/87."

(Notice:- Instead of R.C.S. No. 67 of 1984 wrongly R.C.S. No. 64/87 is mentioned.)

5. On the basis of said admissions and contents of the written statement, the learned Appellate Court has recorded finding that, the said properties in the present suit are the suit properties in the said 1984 suit. On the basis of the aforesaid admissions given in the written statement by the present Appellant no.1, the learned Appellate Court has come to the conclusion that the present suit properties are the joint family properties of the Plaintiffs and the Defendants. The learned Appellate Court has rightly observed that in view of the admission given in 1984 suit, the present Appellants are estopped from changing their stand. In any case, the effect of above admissions given in the cross-examination of Appellant no.1 and contentions raised in the written statement in said suit clearly show that the suit properties are joint family properties.

6. Mr. Sawant has heavily relied on 32-M Certificate issued under the provisions of Bombay Tenancy and Agricultural Lands

Act, 1948, which was issued in the name of Bapu Babaji Nachankar. However, the aforesaid written statement in 1984 suit clearly admits that Babaji Nachankar and Tukaram Nachankar were agricultural tenants of the said lands and same were sold as per the provisions of Bombay Tenancy and Agricultural Lands Act, 1948 in favour of Bapu Babaji Nachankar. Thus, there is clear admission that both Babaji Nachankar and Tukaram Nachankar were the tenants and 32-M certificate was issued in favour of Bapu Babaji Nachankar. The evidence on record clearly shows that the properties are joint family properties. Therefore, there is no perversity in the finding recorded by the learned Appellate court.

7. It is further significant to note that the said 32-M Certificate is issued in the year 1960; whereas in the written statement filed in 1984, in the said Suit, the above admissions were given. In view of this the factual position that the 32-M Certificate was issued in favour of Bapu Babaji Nachankar and therefore he is absolute owner of the said property is not tenable.

8. The further aspect which has been considered by the learned Appellate Court that after the death of Anant Ganpat Nachankar i.e. father of the present plaintiff (Respondent no.1), the names of legal heirs of Anant Nachankar were included as

co-sharer in the revenue record of the suit property by mutation entry No. 335 on 28th June 2004. The said mutation entry is certified and the present Appellants have not raised any objection to the same. Therefore, on the basis of the evidence on record, the learned Appellate Court has recorded finding that the suit properties are joint family properties of the Appellants and Respondents. Therefore, there is no illegality, irregularity or perversity in the said finding and there is no substance in the first substantial question of law raised by Mr. Sawant.

9. The other substantial question of law raised by Mr. Sawant is that the decree has been passed against dead person and therefore the same is nullity. It is to be noted that the appeal before the learned First Appellate Court was filed by Rajesh Anant Nachankar, Deceased Anant Ganpat Nachankar, Smt. Vaishali Anant Nachankar alias Sanchita, Vidya Anant Nachankar and Smt. Vijaya Anant Nachankar. It appears that said Anant Nachankar expired on 17th July 2013 and thereafter instead of bringing on record names of his legal heirs, his name was deleted. It is required to be noted that Respondent no.1- Rajesh, Respondent no.3- Vaishali, Respondent no. 4- Vidya and Respondent no. 5- Vijaya are the legal heirs of said Anant Ganpat Nachankar and they were parties to the said Appeal. The only contention raised by Mr. Sawant is that the widow of

said Anant Nachankar was not brought on record. Thus, all legal heirs of Anant Nachankar were already on record i.e. one son and three daughters except the widow. By the impugned decree half share is allotted to the Appellants and half share is allotted to the Respondents. It is further significant to note that Appellant no.1 in said Regular Civil Appeal No.17 of 2012 i.e. Rajesh Nachankar (present Respondent no.1) has filed an application bearing Exhibit 52 to bring on record name of mother as one of the legal heir of deceased Anant Nachankar in Final Decree Application No.18 of 2015. The said Exhibit 52 application was allowed by the learned Civil Judge, Senior Division, Ratnagiri. In the said order, it is specifically mentioned that the present Appellants are not at all going to be prejudiced in any manner whatsoever as the mother will get share in the half share, which has been allotted to the present Respondents.

10. In any case, it is to be seen that in the present case, the partition suit has been decreed by the learned First Appellate Court. There is no decree passed against dead person. In fact, all legal heirs of Anant Nachankar were already on record except widow and after the death of Anant Nachankar, they also represented the share of Anant Nachankar.

11. Mr. Sawant has relied on the judgment of this Court in the matter between **Govind Laxman Jadhav Vs. Namdeo Balu**

Jadhav¹ and another judgment of this Court in the matter between **Narhari s/o Shrawan Moon Vs. Silas s/o Kannobaji Punwatkar**². In both these cases, decrees were passed against the dead person. In the present case, suit for partition was dismissed by the learned Trial Court and in appeal, the same was decreed. Therefore, this is not a case where decree has been passed against dead person. In fact, decree has been passed in favour of a dead person when in fact the other legal heirs of the deceased Anant Nachankar i.e. one son and three daughters were already on record. As set out hereinabove in the final decree proceeding, name of widow of Deceased Anant has been directed to be included and in any case she will get share in the share which has been allotted to the present Respondents. Therefore, there will not be any prejudice to the present Appellants.

12. Mr. Sawant has relied on the judgment of Patna High Court in the matter between **S.M. Kalim s/o S.M. Aziz Vs. S.M. Sarfudin**³. Mr. Sawant has more particularly relied on paragraph 32 of the said judgment. The same reads as under:-

"32. In view of the judicial pronouncements made by the Hon'ble Apex Court, referred to above, it is now

1 [2005 (1) Mh.L.J. page 8]

2 [2022 0 Supreme (Bom) 280]

3 A.I.R. 2014 Patna, 148.

well settled that in a suit for partition each and every co-sharer/co-owner is in the position of a plaintiff as also defendant. For an effective decision of a partition suit/appeal, all the parties/co-owners or their heirs and legal representatives, in case of death of any of them, are required to be represented and absence of any of them would make the suit/appeal incompetent. It is also well settled that appeal is a continuation of the suit. Where claim of the parties with respect to the suit properties is indivisible or inseparable, in that case on account of non-substitution of heirs of any of the parties, the suit/appeal as a whole becomes incompetent and is liable to be dismissed."

13. There cannot be two views about the above referred legal position. However, in the present case, there is no prejudice to the Appellants as he has been granted half share in the suit properties. Not impleading widow of Anant Nachankar as legal heir of Anant Nachankar has not prejudiced the case of the present Appellants. By impleading her name or by not including her name there will not be any change in the shares of the Appellants and the Respondents. In fact the mother has been impleaded as party in the final decree proceeding and while allowing the said application, the learned executing Court has specifically stated that there won't be any prejudice to the present Appellants as in view of the same, there is no effect on the share allotted to the present Appellants. In view of this,

there is no substance in the second substantial question of law argued by Mr. Sawant.

14. At this stage, Mr. Sawant states that the order passed by the learned executing Court below Exhibit 52 is challenged by filing separate Writ Petition. It is clarified that the observations made in this order are with respect to considering the illegality and validity of the impugned judgment and decree of the learned First Appellate Court, which is subject matter of the Second Appeal and not concerned with the contentions raised in the Writ Petition filed by the Appellants.

15. Second Appeal is dismissed with no order as to cost.

16. In view of dismissal of Second Appeal, nothing survives in the Civil Application and the same is disposed of.

(MADHAV J. JAMDAR, J.)