

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

**SECOND APPEAL NO. 456 OF 2021
ALONGWITH
INTERIM APPLICATION NO. 3293 OF 2019
IN
SECOND APPEAL NO. 456 OF 2021**

1. Sadashiv Nama Jadhav,
Deceased through legal heirs:

1A. Smt. Sakhubai Sadashiv Jadhav,
Age 76 years, Occu. Agriculture

1B. Shri. Deelip Sadashiv Jadhav,
Age 62 years. Occu. Agriculture

1C. Shri. Arun Sadashiv Jadhav,
Age 56 years. Occu. Agriculture

1D. Shri. Bajrang Sadashiv Jadhav,
Age 54 years. Occu. Agriculture

1E. Shri. Tukaram Sadashiv Jadhav,
Age 51 years, Occu. Agriculture
All R/O. At Islampur, Taluka Walva,
District Sangli.

2. Hirabai Maruti Patole,
Age 53, Occu. Household
R/O. At Rethare Harnaksh,
Taluka Walva, District Sangli.

3. Balabai Anandrao Chavan,
Age 48, Occu. Household
R/O. At Kalamwadi, Taluka Walva,
District Sangli.

...Appellants

vs.

1. Shri Jagannath Gunda Jadhav and Ors.

Age 50, Occu. Agriculture.

2. Shri. Dinkar Gunda Jadhav, (Since Deceased Through LR's)
Age 40, Occu. Agriculture.

2A. Babutai Dinkar Jadhav
Age 60, Occu. Household.

2B. Hanumant Dinkar Jadhav
Age 35, Occu. Service.

2C. Rani Sanhay Chavan
Age 32, Occu. Household.
No. 2A to 2C R/o. At Islampur
Tal. Walwa, Dist Sangli

2D. Jayashri Satish Mandle
Age 30, Occu. Household.
R/o. At Vita, Tal. Khanapur
Dist. Sangli

2E. Vaishali Abhijeet Madane
Age 28, Occu. Household.
R/o. At Rajapur borgaon, Tal Tasgaon
Dist Sangli

3. Shri. Dhondiram Nama Jadhav
Since deceased through LR's

3A. Anil Dhondiram Jadhav,
Age 60 years. Occur. Agriculture,

3B. Shri Ananda Dhondiram Jadhav,
Age 58 years. Occu. Agriculture,

3C. Vilas Dhondiram Jadhav,
Age 56 years. Occu. Agriculture,
All R/o. At Opposite Rajaram
Bapu Sugar factory, Walva Road,
Near Laghun Pit, House in RS No. 175/2,
Islampur, Taluka Walwa, District Sangli.

4. Sajabai Shamrao Patole,
Age 43, Occu. Household,
R/O. At Ambavade, Taluka Khatav,
District Satara.

5. Smt. Sonabai Gunda Jadhav
(Deleted as per Court order dated 16.12.2021 and 28.02.2022)
Age 88, Occu. Nil,
R/O at Umaji Naik Chowk,
Islampur, Taluka Walva, District Sangli.

6. Amar Husen Mulla Deceased,
Through his legal heirs.

6A. Noorjahan Husen Mulla,
Age Major, Occu. Household.

6B. Ramjan Umar Mulla,
Since deceased, through LR's

6B1. Rajiya Ramjan Mulla,
Age 48 years. Occu. Agriculture,

6B2. Shri Rajjab Ramjan Mull
Age 32 years. Occu. Agriculture,

6B3. Najma Ramjan Mulla,
Age 43 years. Occu. Agriculture,

6B4. Shri Rahil Ramjan Mulla,
Minor through guardian
Najma Ramjan Mulla.
All R/O. At Sakhrule, Taluka Walva,
District Sangli.

6C. Saheblal Umar Mulla,
Age Major, Occu. Agriculture.
No.6A to 6C R/O at Sakhrule,
Taluka Walva, District Sangli.

6D. Balkas Hazi Kasam Gadkari,
Age Major, Occu. Agriculture,

R/O at Sakhrale, Taluka Walva,
District Sangli

6E. Suraiyya Nayar Pathan,
Age Major, Occu. Household,
R/O. At Ogalewadi Station, Wagheri
Road, Taluka Karad, District Satara.

7. Shamsuddin Husen Mulla,
Age 55, Occu. Agriculture.
R/O. At Sakhrale, Taluka Walva,
District Sangli.

8. Mirza Husen Mulla,
Age 53, Occu. Trading.
R/O. At Sakhrale, Taluka Walva,
District Sangli.

9. Gulshanbi Ramjan Pathan,
Deceased, through LR's:

9A. Shripal Jahangir Mujawar,
Age 50, Occu. Agriculture,
R/O. At Mangle, Taluka Shirala,
District Sangli.

...Respondents

Mr. Nikhil N. Pawar - Advocate for the Appellants
Mr. Umesh H. Pawar - Advocate for the Respondents

CORAM : S. M. MODAK J.

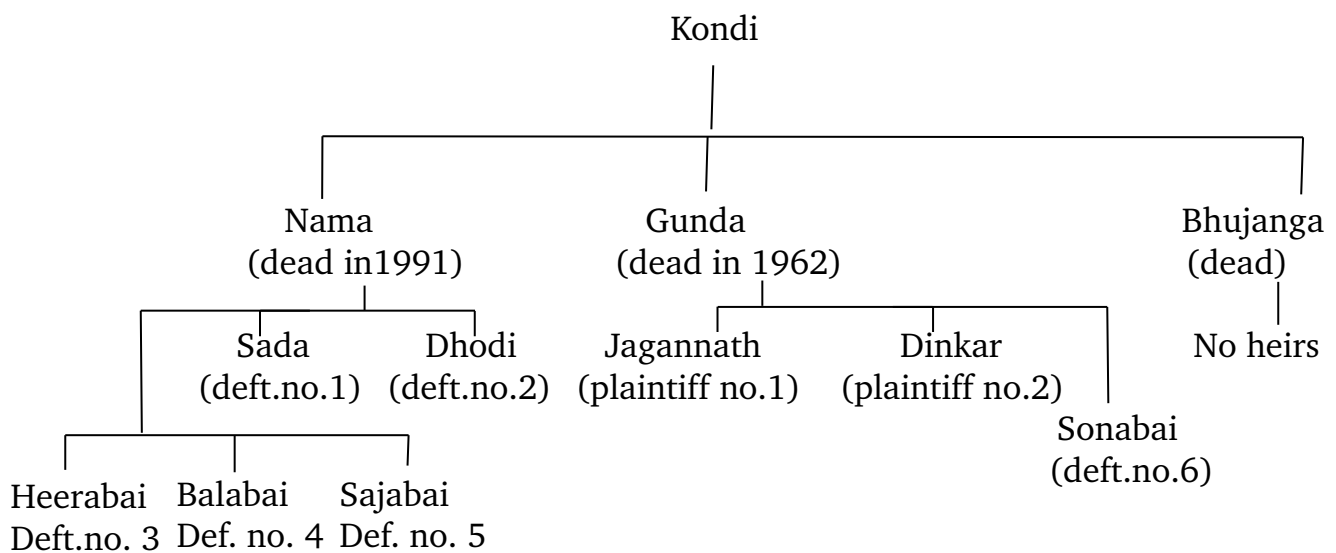
DATE : 21st SEPTEMBER 2022

JUDGMENT :-

1. Heard learned Advocate for the Appellants and learned Advocate
for the contesting Respondents.

2. The present Appellants are Defendants No. 1, 3 and 4. There is a partition decree passed by the trial Court against them. When they filed First Appeal, it was confirmed by the First Appellate Court. That is how, the Second Appeal is preferred by them.

3. The relationship in between the parties is not disputed. They are the members of a joint family. They are heirs of their respective ancestors. The joint family consists of three brothers. They are Nama, Gunda and Bhujanga. The two Plaintiffs are the sons of Gunda. Whereas Defendant Nos. 1 and 2 are the two sons of Nama. Defendant Nos. 3, 4 and 5 are the married daughters of Nama. Whereas Defendant No. 6-Sonabai is the mother of the Plaintiffs. Whereas Defendant No. 7 and after his death the LRs are the owners of one land bearing Survey No. 198/1. This is a tenanted property. The family tree is given below:



4. The Plaintiffs have prayed for partition of the three properties described in Para No. 2 of the Plaint (Page 56). Plaintiffs contend that these properties belong to joint family and as such they have got a right to claim partition. Whereas this claim was contested by Defendant No. 1.

His contention in written statement is as follows:

“a) Though land bearing Gut No. 175/1 was purchased by three brothers Nama, Bhujanga and Gunda, the consideration for purchase of this land was contributed only by his father Nama and Plaintiffs father Gunda. So far as his uncle Bhujanga is concerned, he has not contributed any part over consideration and in fact his share of consideration by contributed was Nama only. Further Defendant No. 1 has pleaded that Bhujanga was unmarried and there were no issues to him and as such his share has on bestowed Nama. He has further pleaded that after the death of Bhujanga, the Revenue Authorities have transferred his share in the name of Nama and as such Nama owned 2/3rd share in that land and Plaintiffs father was only having 1/3rd share. Furthermore he has pleaded that there was a partition 20 years back and Plaintiffs father Gunda was not having any share in that land.

b) So far as CTS No. 3011 is concerned, Defendant No. 1 has pleaded that his father Nama purchased this piece of land from his own income and it has nothing to do with the joint family.”

5. The Defendant No. 2 being (who is the brother of Defendant No. 1) has admitted the claim of the Plaintiffs. Defendant Nos. 3, 4 and 5 are the sisters of Defendant Nos.1 and 2. Whereas Defendant Nos. 3 and 4 were proceeded without written statement and suit proceeded *ex-parte* against

Defendant No.5. Defendant No.6 who is mother of the Plaintiffs has admitted the claim of the Plaintiffs. Defendant No. 7/3 denied the Plaintiffs claim.

6. The contesting parties have adduced evidence before the trial Court. The Plaintiff examined himself and one Prakash who is a son of a scribe. Whereas Defendant No. 1 examined himself and examined two more witnesses.

7. Trial Court decreed the suit in toto. The contention of Defendant No.1 about the partition and the properties are not joint family properties was not accepted by the trial Court. The trial Court declared the shares as follows:

- a) *The Plaintiffs and Defendant No. 6 were granted 1/2 share amongst them;*
- b) *Defendant Nos. 1 and 2 were granted 1/3rd share amongst themselves;*
- c) *Defendant Nos.1 and 2's father was granted 1/3rd share and this 1/3rd share was distributed amongst two sons Defendant Nos.1 and 2 and three daughters defendant nos. 3, 4 and 5.*

8. In other words, the trial Court has not granted Defendant Nos. 3, 4 and 5 independent share but they were granted share from the share

allotted to their father-Nama. Trial Court held “that Hindu Succession Act amendment has not come into force at that time”.

9. The first appellate Court has confirmed the findings of the trial Court about nature of suit properties being joint family properties, except one land bearing No. 198/1. It was excluded from joint family properties. It was a tenanted property and as such it was not capable of partition. Appellate Court confirmed a demarcation of share, as done by the trial Court. That is how the present second appeal.

10. Learned Advocate for the Appellants tried to convince me how the findings of both the Courts below on the point of nature of properties and not accepting the stand taken by the contesting Defendant No.1. He submitted that the findings are perverse and not according to the evidence. It is denied by learned Advocate for the Respondents.

11. Law on the point of admission of second appeal is very clear. It can be admitted only if there is a substantial question of law. At the stage of admission of appeal, the Court is required to see whether substantial question of law is made out for admission of the appeal. The Court is not supposed to go into the evidence in detail. It can be done during the final

hearing if the appeal is admitted on substantial question of law.

12. It is also well settled that when there is concurrent findings of facts, there is a less scope for interference by this Court. It does not mean to say that this Court will not entertain the appeal in any eventuality. If the appellant is successful in pointing out that the findings are perverse, then certainly this Court can entertain and admit the appeal. So the hearing is conducted for a limited purpose of verifying whether the facts, warrants, admission of appeal on any substantial question of law.

13. After hearing both the learned Advocates, one may understand that the points raised are based on appreciation of evidence. So question relates to appreciation of evidence and not about interpretation of the provisions of law. After hearing both of them, this Court finds that the findings are not perverse but they are well reasoned findings and as such no substantial question of law as argued on behalf of appellants do arise.

14. So far as the land bearing **Survey No. 198/1** is concerned, Defendant No.1 took a plea that his father-Nama was the sole tenant and of which Defendant No.7 is the owner of the land. He has pleaded that joint family is nothing to do with this land. This theory has not appealed

to the conscious of the trial Court. However, the First Appellate Court after appreciating the evidence, has observed that the Nama was a tenant but as per the Mutation Entry No. 20647, the names of the Plaintiffs are also mutated after the death of their father Gunda. Furthermore, the First Appellate Court has considered the agreement at Exh.164. The First Appellate Court observed that the said land is in the joint possession of members of the family but still it is a tenanted land and hence not amenable to partition. The detailed reasoning finds place in Para No. 25 by the First Appellate Court. During arguments, learned Advocate for the Appellants could not point out any factual inaccuracy in those findings. He has not relied upon any provisions of law on the point of partition of tenanted property. In view of that, those findings cannot be said to be perverse.

15. So far as land bearing **Gat No.175/1** is concerned, there are concurrent findings. It is the contention of the Plaintiffs that this land was purchased by three brothers on 29/01/1954 jointly and as such their father Nama was having a 1/3rd share and it was inherited by them. Whereas contesting Defendant No.1 has contended that even though it was purchased by three brothers, he relied upon two subsequent events. One is about entering the name of Nama after the death of Bhujanga and

as such Nama owns his share as well as the share of his brother Bhujanga. Secondly, he relied upon a theory of partition that took place 20 years back. So, the issue before the Courts below was whether the events relied upon by Defendant No.1 can be trusted. Because there was no dispute that said land was purchased by three brothers.

16. However, both the Courts below have not accepted the mutation carried out as per Entry No. 25899 dated 26th April, 1987 and have also not relied upon the theory of partition taken place 20 years back.

17. With the assistance of both the learned Advocates, I have perused the findings given by both the Courts below. I do not find any perversity in it.

18. The trial Court has framed issue no. 5. Discussion finds place in para no. 31 to para no. 34. Defendant No. 1 relied upon entering the name of his father Nama as heir of Bhujanga after the death of Bhujanga. Mutation entry to that effect is of 26/04/1987. The application was made by Nama at Exh. 320 for entering his name after death of Bhujanga. The trial Court observed that “this entry in the revenue record would not extinguished the right of the Gunda (i.e. another brother of deceased

Bhujanga with father of the plaintiffs) in that property and it appears that wrong entry is made in the Mutation Entry No. 2589 as Gunda is also having share in the share of Bhujanga.

19. Whereas, the First Appellate Court has also negated the contention of the defendant no. 1 that his father Nama got the share of the Bhujanga that finds place in para no. 21 of the judgment and the First Appellate Court elaborately dealt with contention of defendant no. 1 that “his father Nama has paid even the share of the Bhujanga while purchasing the land and as such Nama claimed right over the share of the Bhujanga”. The First Appellate Court also perused the application at Exh. 320 made to Talathi informing that the Bhujanga died issueless and hence his name be struck off.

20. The First Appellate Court rightly observed that “mere entry in revenue record cannot take away the right of the plaintiff”. It is further observed that “there is no recital in the application that Nama paid the amount of share of the Bhujanga, therefore his name to be entered in place of Bhujanga”. Not filing any document by defendant no. 1 that the Nama paid share of Bhujanga was also considered as a factor against defendant no. 1 by the First Appellate Court. Learned counsel for the

Appellant with all his efforts is unable to satisfy this Court that the said finding is perverse i.e. to say arrived at by wrongly appreciating evidence or by not considering the evidence. Hence the said finding cannot be interfered with.

21. So far as CTS No. 3011 is concerned, the case pleaded by defendant no. 1 is purchase of this land only in the name of Nama. It is not disputed by the plaintiffs. However they have come with additional circumstances that as per an agreement dated 17/11/1947 (Exh. 164), three brothers Nama, Gunda, Bhujanga have decided to partition the House No. 1405 constructed on the said land. Both the Courts below have discussed theories put up by the both the parties and documentary evidence and negated the contentions of the defendant no. 1. The relevant discussion finds place in para nos. 35 to 49.

22. The land was purchased as per sale deed dated 11/06/1937 Exh. 181. Whereas there is house property bearing no. 1405 and it was purchased in the year 1957. Apart from the above, the plaintiffs relied upon an agreement (ठराना) dated 17/11/1947 (Exh. 164). There was challenge to this document by defendant no. 1. Its execution is denied and its proof also disputed. Admittedly, it was not registered document. The

trial Court has concluded that the agreement is proved.

23. The trial Court has given several reasons for concluding that the said agreement is proved. The document is more than 30 years old. It was executed by the three brothers and witnesses. Neither of them were examined. Whereas the plaintiff examined one Prakash Biru Tete as son of Biru Dnyanu Tete. Said Biru has written the said agreement. Three brothers were not alive and the testimony of the Prakash Tete was not challenged during cross examination.

24. There is reliance of one voters list of the year 1952 at Exh. 317. The names of three brothers Nama, Gunda, Bhujanga appears in it and their address is shown that of House No. 1405 (para no. 48)

25. This findings were challenged before the First Appellate Court. However they were confirmed. Relevant discussion finds place in para no. 17 to para no. 22. While refuting the contention about non registration of the agreement, the First Appellate Court also considered the provisions of Section 17 and 17(b) of the Indian Registration Act. After reading the contents the First Appellate Court observed that the document is memorandum of family arrangement and it is further

observed that three brothers have resolved to make a partition of land and house.(para 18) When any right is not created or not declared, registration is not necessary as per Section 17(b) of the Indian Registration Act.

26. Learned counsel for the Appellant unable to convince this Court that this findings needs interference and hence requires admission of the appeal. This Court finds no perversity in it.

27. There was feeble attempt made on behalf of the Appellant to argue that not framing the issues by the trial Court has caused prejudice to the Appellants. It is in respect of the said agreement dated 11/07/1947 at Exh. 164.

28. Whereas it is submitted on behalf of the Respondents that plaintiffs have pleaded in the plaint that the property bearing CTS No. 3011 was purchased in the name of Nama being elder brother from the joint income and later on, it was partitioned as per that agreement. Learned advocate for the Appellants submitted that these facts was denied in the written statement. It is true that issue has not been framed.

29. At the same time, if we read the judgment of the trial Court and Appellate Court, we may find observation in respect of this agreement in para no. 38 of the trial Court judgment and in para no. 19 of the First Appellate Court judgment. So even though the issue has not framed, the parties are aware about the case pleaded by them against each other and in fact there have also adduced evidence. So merely non framing of issues would not cause any prejudice to the Appellants and this issue is raised belatedly and hence not accepted.

30. In that view of the matter it can be certainly be said that plaintiffs have discharge their burden to prove property as joint family property. Hence I find no reason to interfere in that findings. So the Appellants could not convince this Court as to whether any interference is required in the findings and there is no merit in this Appeal and its admission is not warranted.

31. At this stage learned Advocate Shri Umesh Pawar for the Respondents submitted that Nama is survived by two sons who are defendant Nos. 1 and 2 and there are three daughters who are defendant Nos. 3, 4 and 5. According to him, the trial Court has partitioned the property notionally, and firstly they have ascertained the shares of Nama

and Gunda alongwith their sons. According to him, both the Courts below have given shares to the daughters of Nama in the shares of their father. He submitted that this allocation needs to be modified in view of the judgment of the Hon'ble Apex Court in case of *Vineeta Sharma Vs. Rakesh Sharma*¹. He submitted that executing Court be directed to modify the shares on that basis.

32. It is opposed on behalf of the Appellants. Trial Court has discussed this allocation in para no. 50 of the judgment. It is true that the two daughters of Nama i.e. Hirabai and Balabai, they are Appellants herein.

33. This Court feels that these issue needs to be kept open to be decided by the executing Court. The daughters of the Nama may put forth their case before the Executing Court whether they want independent share on the basis of the observations made by the Hon'ble Supreme Court in the case of *Vineeta Sharma* (supra) and executing Court can hear them and then modify the shares accordingly.

34. Hence following Order is passed:

ORDER

(i) Second Appeal is dismissed.

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(ii) The Executing Court is at liberty to hear the defendant No. 3 – Heerabai, defendant No. 4-Balabai and Defendant No. 5- Sajabai whether they want independent share as per observations made by the Hon'ble Supreme Court in case of *Vineeta Sharma* (Supra) and then modify the shares granted by the trial Court and confirmed by the First Appellate Court.

(iii) Defendant No. 1- Sadashiv Nama Jadhav and Defendant No. 2- Dhondiram Nama Jadhav are at liberty to put forth their contention on the point of the modification if any required.

(iv) It is made clear that no liberty is granted to any of the parties to request the trial Court to reopen any of the findings.

(v) Accordingly Second Appeal is disposed of.

(vi) Interim Application and Civil Application, if any, are also disposed of.

[S. M. MODAK, J.]