

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

**SECOND APPEAL NO. 359 OF 2017
WITH CIVIL APPLICATION NO. 6114 OF 2017**

1. Lalitmohan s/o Dattuprasad Mishra
(Since deceased, through LR's) ...(Orig. Defendant No.2)
- 1-A. Subhash s/o. Lalitmohan Mishra
Age : 69 years, Occ. Agri. & Pensioner,
- 1-B. Arvind s/o Lalitmohan Mishra
Age : 68 years, Occ. Agri.,
Both R/o. Nagarsoga, Tq. Ausa, Dist. Latur
- C. Jagdish s/o Lalitmohan Mishra
Since deceased
- C-1. Sarla w/o Jagdish Mishra,
Age : 55 years, Occu. Household,
R/o. Arihant Nagar, Pratapgad Colony,
Sarola Road, Ausa, Tq. Ausa, Dist. Latur.
- C-2. Yogita w/o Shailesh Tiwari,
Age : 34 years, Occu. Household,
R/o. At Post Pulgaon, Tq. Deoli Camp,
Dist. Vardha
- C-3. Rita w/o Chetan Misar,
Age : 32 years, Occ. Household,
R/o. Near Sakri Municipal Council,
Sakri, Tq. Sakri, Dist. Dhule.
- C-4. Yogesh s/o Jagdish Mishra,
Age : 36 years, Occu. Service,
R/o. Arihant Nagar, Pratapgad Colony,
Sarola Road, Ausa, Tq. Ausa, Dist. Latur.
- D. Ushabai w/o Sanjay Dube
Age : 59 years, Occ. Household,
R/o. Nagarsoga, Ausa, Tq. Ausa,
Dist. Latur. ... APPELLANTS

VERSUS

1. Prakash s/o Dattuprasad Mishra
Age : 63 years, Occ. : Agri.,
2. Shrikant s/o Dattuprasad Mishra
Age : 58 years, Occ. : Agri.,
3. Shashikant s/o Dattuprasad Mishra
Age : 56 years, Occ. : Agri.,
4. Sonabai w/o Dattuprasad Mishra
(Deleted as Dead)
Res. No. 1 to 4 R/o. Nagarsoga, Tq. Ausa,
Dist. Latur.
5. Dattuprasad s/o Ambarprasad Mishra
(Died, Through his L.R.)
- 5-A. Mandodhari Narendraprasad Mishra
Age : Major, Occ. : Household,
R/o. Ranisavargaon, Tq. Gangakhed,
Dist. Parbhani.
- 5-B. Jashoda w/o Ramesh Pande
Age : 94 years, Occ. : Household,
R/o. Bhawani (Jahagir), Tq. Pusad,
Dist. Yavatmal.
- 5-C. Premila w/o Dayashankar Pande
Age : 84 years, Occ. : Household,
R/o. Bhawani (Jahagir), Tq. Pusad,
Dist. Yavatmal.
- 5-D. Urmila w/o Prashant Vithalprasad Tiwari
Age : 76 years, Occu.: Household,
R/o. Dhrampuri, Tq. Ambejogai,
Dist. Beed.
6. Manohar Limbaji Limbalkar
(Died through his L.R.)

- 6-A. Hirkana s/o Manohar Limbalkar,
Age : 76 years, Occ.: Agri.,
- 6-B. Balaji s/o Manohar Limbalkar,
Age : 56 years, Occ. : Agri.,
- 6-C. Bhimashankar s/o Manohar Limbalkar,
Age : 53 years, Occ. : Agri.,
- 6-D. Popatbai s/o Madhukar Waghe,
Age : 46 years, Occ. : Household,
All R/o. Dapegaon, Tq. Ausa,
Dist. Latur.
- 7. Ram Malhari Gade (Danger)
(Died through his L.R.)
- 7-A. Trivenabai w/o Ram Gade
Age : 78 years, Occ. : Household,
- 7-B. Goroba s/o Ram Gade
Age : 58 years, Occ. : Agri.,
- 7-C. Chandrakant s/o Ram Gade
Age : 56 years, Occ. : Agri.,
- 7-D. Vilas s/o Ram Gade
Age : 54 years, Occ. : Agri.,
- 7-E. Abhiman s/o Ram Gade
Age : 51 years, Occ. : Agri.,
- 7-F. Kisan s/o Ram Gade
Age : 48 years, Occ. : Agri.,
- 7-G. Vijayabai Laxman Landage,
Age : 51 years, Occ. : Household,
R/o. Deapegaon, Tq. Ausa,
Dist. Latur.
- 8. Baburao s/o Gopalrao Shinde,
Age : 81 years, Occ.: Agri.,
R/o. Nagarsoga, Tq. Ausa,

Dist. Latur.

9. Subhashchandra s/o Lalitmohan Mishra
Age : 60 years, Occ. : Agri.,
R/o. Nagarsoga, Tq. AUSA,
Dist. Latur.

... RESPONDENTS

(Res. No. 1 to 4 Orig. Plaintiffs,
Res. No. 5 to 9 Orig. Deft. No. 1, 3 to 6)

Mr. R. S. Deshmukh, Senior Advocate i/b Mr. T. M. Venjane, Advocate for
the appellants

Mr. B. N. Patil, Advocate for respondent Nos. 1 to 3

**WITH
SECOND APPEAL NO. 360 OF 2017
WITH CIVIL APPLICATION NO. 6574 OF 2022
WITH CIVIL APPLICATION NO. 6115 OF 2017**

1. Subhashchandra s/o Dattuprasad Mishra
Age : 60 years, Occ.: Agri.,
R/o. Nagarsoga, AUSA, Tq. AUSA,
Dist. Latur.

... APPELLANTS
(Ori. Defendant No.6)

VERSUS

1. Prakash s/o Dattuprasad Mishra
Age : 63 years, Occ. : Agri.,
2. Shrikant s/o Dattuprasad Mishra
Age : 58 years, Occ. : Agri.,
3. Shashikant s/o Dattuprasad Mishra
Age : 56 years, Occ. : Agri.,
4. Sonabai w/o Dattuprasad Mishra
(Deleted as Dead)
Res. No. 1 to 4 R/o. Nagarsoga, Tq. AUSA,
Dist. Latur.
5. Dattuprasad s/o Ambarprasad Mishra
(Died, Through his L.R.)
- 5-A. Mandodhari Narendraprasad Mishra

Age : Major, Occ. : Household,
R/o. Ranisavargaon, Tq. Gangakhed,
Dist. Parbhani.

- 5-B. Jashoda w/o Ramesh Pande
Age : 94 years, Occ. : Household,
R/o. Bhawani (Jahagir), Tq. Pusad,
Dist. Yavatmal.
- 5-C. Premila w/o Dayashankar Pande
Age : 84 years, Occ. : Household,
R/o. Bhawani (Jahagir), Tq. Pusad,
Dist. Yavatmal.
- 5-D. Urmila w/o Prashant Vithalprasad Tiwari
Age : 76 years, Occu.: Household,
R/o. Dhramपुरi, Tq. Ambejogai,
Dist. Beed.
6. Lalitmohan s/o. Dattuprasad Mishra,
Age : 86 years, Occ.: Agri.,
R/o. Nagarsoga, Tq. AUSA, Dist. Latur.
7. Manohar Limbaji Limbalkar
(Died through his L.R.)
- 7-A. Hirkana s/o Manohar Limbalkar,
Age : 76 years, Occ.: Agri.,
- 7-B. Balaji s/o Manohar Limbalkar,
Age : 56 years, Occ. : Agri.,
- 7-C. Bhimashankar s/o Manohar Limbalkar,
Age : 53 years, Occ. : Agri.,
- 7-D. Popatbai s/o Madhukar Waghe,
Age : 46 years, Occ. : Household,
All R/o. Dapegaon, Tq. AUSA,
Dist. Latur.
8. Ram Malhari Gade (Danger)
(Died through his L.R.)

- 8-A. Trivenabai w/o Ram Gade
Age : 78 years, Occ. : Household,
- 8-B. Goroba s/o Ram Gade
Age : 58 years, Occ. : Agri.,
- 8-C. Chandrakant s/o Ram Gade
Age : 56 years, Occ. : Agri.,
- 8-D. Vilas s/o Ram Gade
Age : 54 years, Occ. : Agri.,
- 8-E. Abhiman s/o Ram Gade
Age : 51 years, Occ. : Agri.,
- 8-F. Kisan s/o Ram Gade
Age : 48 years, Occ. : Agri.,
- 8-G. Vijayabai Laxman Landage,
Age : 51 years, Occ. : Household,
R/o. Deapegaon, Tq. Ausa,
Dist. Latur.
9. Baburao s/o Gopalrao Shinde,
Age : 81 years, Occ.: Agri.,
R/o. Nagarsoga, Tq. Ausa,
Dist. Latur.

... RESPONDENTS

(Res. No. 1 to 4 Orig. Plaintiffs,
Res. No. 5 to 9 Orig. Deft. No. 1 to 5)

Mr. G. V. Wani, Advocate for the appellants
Mr. B. R. Kedar, Advocate for respondent No. 1

CORAM : R. M. JOSHI, J.
RESERVED ON : 14/03/2023
PRONOUNCED ON : 23/03/2023

JUDGMENT :-

1. Second Appeal No. 359 of 2017 is filed by Lalitmohan Dattuprasad Mishra and Second Appeal No. 360 of 2017 is filed by his

son Subhashchandra taking exception to judgment and decree passed by the Trial Court in Reg. Civil Suit No. 276/1981 dated 06/12/2010 and judgment and decree passed in Reg. Civil Appeal No. 23/2011 dated 17/03/2017 confirming decree passed in the suit for partition and possession of the properties.

2. Plaintiffs are sons of original defendant No.1 Dattuprasad Ambaprasad Mishra. They are begotten from his second wife Sonabai to whom he married after death of his first wife Subhadrabai. Defendant No.2 is son of Subhadrabai. As per the case of the plaintiff defendant No.2 is eldest son of Dattuprasad and after his marriage disputes arose between his wife and wife of defendant No.1 and for this reason they started residing separately. It is further stated that some portion of the suit properties was given to the defendant No.1 for his livelihood without any partition by metes and bounds. It is alleged that by taking advantage of said arrangement defendant No.2 got his name mutated in records in respect of those lands and had sold some portion of the land from survey No. 249/3 to defendant No.3 and survey No. 251 to defendant No.5. Plaintiffs claimed 4/6th shares in the suit properties.

3. Defendant No.2 filed written statement contending that there was a family partition between him, defendant No.1 and plaintiffs

in the year 1964 and in view of the said partition survey No. 249/3, 260/3, 261/3 and 262/7 came to his share whereas lands survey No. 251, 253, 254 and 255 were allotted to the shares of plaintiffs and defendant No.1. He further contended that on the basis of said partition mutations were sanctioned in respect of those properties. He further averred that plaintiffs and defendant No.1 jointly sold some of the properties. So also defendant No.1 sold the properties in the capacity of being exclusive owner thereof. This fact according to him indicates factum of previous partition. It is further averred that suit is barred by limitation and plea of adverse possession is also raised.

4. The suit was decreed on 06/12/2010 whereby the Trial Court allotted 10/63 share to plaintiffs No. 1 to 3 and defendant No.2. Whereas plaintiff No.4 and LR's of respondent No.1 were allotted 19/63 and 1/63 share respectively in the suit properties. Defendant No.2 preferred Reg. Civil Appeal No. 23/2011 which came to be dismissed by judgment and order dated 17/03/2017.

5. Learned senior counsel for the appellants states that Trial Court as well as First Appellate Court have committed serious error of law and the facts in not accepting the voluminous evidence regarding the previous partition. According to him partition deed (Exhibit 271)

ought to have been treated as the recording of the family arrangement between the parties which did not require registration and both Courts below have erroneously invoked provisions of Section 49 of the Registration Act. He further argued that alleged unequal partition cannot become a ground for setting it aside as the lands allotted to the plaintiffs and defendant No.1 were irrigated lands whereas the lands came to the share of defendant No.2 where not fertile lands. He further raised objection with regard to the refusal of the learned First Appellate Court to permit defendant No.2 to adduce additional evidence in respect of an application which was filed by the plaintiffs on 07/05/2016 i.e. much after the judgment of the learned Trial Court. However, the First Appellate Court has refused to entertain the same on the wrong impression that this document was available during the course of trial and the same was not produced without any justified cause. Thus, according to him this is a fit case to set aside the impugned judgment and decree to remand the matter for decision afresh.

6. Learned counsel for plaintiffs opposed the said contention by stating that there is evidence on record to indicate that it is only for the reason of disputes between the wife of defendant No.2 and wife of defendant No.1 they started staying separately and which cannot be construed as partition. With regard to the document (Exhibit 271) it is

stated that the said document as admitted by defendant No.2 in his cross-examination is not memo of previous partition but it is actual partition allegedly arrived by between defendant No.1 and defendant No.2. Thus, according to him this requires registration and in view of such Section 49 of the Registration Act such documents and registration cannot be read in evidence. He further argued that there is evidence on record to show that the quality of land came to the share by virtue of the alleged partition to the parties were of the same quality and as such it is clearly unequal distribution of the properties which is not sustainable. With as regards the age of the plaintiffs at the relevant time it is submitted that they were minors and from the evidence on record it is clear that their mother was not present at the time of alleged partition. So also the father has not executed the said document for an on behalf of the minors. Thus, the interest of the minors has not been taken care while effecting the said alleged partition. Thus, according to him on these amongst other grounds the partition does not sustain.

7. These appeals under Section 100 of the Code of Civil Procedure can be entertained only in the event any substantial question of law is made out. In this regard reference can be made to judgment of Apex Court in case of ***Ramathal V. Maruthathal, AIR 2018 SC 340***, wherein it is observed that,

"15. A clear reading of sections 100 and 103 of the CPC envisages that a burden is placed upon the appellant to state in the memorandum of grounds of appeal the substantial question of law that is involved in the appeal, then the High Court being satisfied that such a substantial question of law arises for its consideration has to formulate the questions of law and decide the appeal. Hence a prerequisite for entertaining a Second appeal is a substantial question of law involved in the case which has to be adjudicated by the High Court. It is the intention of the Legislature to limit the scope of second appeal only when a substantial question of law is involved and the amendment made to section 100 makes the legislative intent more clear that it never wanted the High Court to be a fact finding court. However it is not an absolute rule that High Court cannot interfere in a second appeal on a question of fact, Section 103 of the CPC enables the High Court to consider the evidence when the same has been wrongly determined by the courts below on which a substantial question of law arises as referred to in Section 100. When appreciation of evidence suffers from material irregularities and when there is perversity in the findings of the court which are not based on any material, court is empowered to interfere on a question of fact as well. Unless and until there is absolute perversity, it would not be appropriate for the High Courts to interfere in a question of fact just because two views are possible, in such circumstances the High Courts should restrain itself from exercising the jurisdiction on a question of fact."

8. Similarly, when finding of fact is perverse, it can be interfered in second appeal in case of **S. R. Tewari Vs. Union of India and Anr. (2013) 6 SCC 602**, wherein the Apex Court has held thus:

"30. The finding of fact recorded by a court can be held to be perverse if or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is "against the weight of

evidence”, or if the finding so outrageously defies logic as to suffer from the vice of irrationality. If a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with. (Vide Rajinder Kumar Kindra v. Delhi Admn.; Kuldeep Sing v. Commr. Of Police; Gamini Bala Koteswara Rao v. Stat of A. P.; and Babu v. State of Kerala)”

9. Keeping in mind aforesaid dictum of law, the facts and circumstances appearing on record are ascertained. Reverting back to the facts of the present case the relationship between the parties is not in dispute. So also there is consensus about the fact that the suit properties are ancestral and joint family properties of plaintiffs and defendants. The defendant No.2 does not deny plaintiffs right to have share in the suit properties however the suit is opposed with the contention that the suit properties are already partitioned in the year 1964 and pursuant thereto mutations entries were made in the revenue record recording name of respective parties against the lands came to their share. Plaintiffs and defendant No.2 led evidence before the Trial Court. Plaintiffs deposed as per the plaint and maintained the stand that there was no partition of the properties and that the family arrangement due strained relations between defendant No.1 and defendant No.2 cannot be treated as partition. Defendant No.2 on the other hand

examined himself and also examined other witnesses amongst whom Shankarprasad (DW-7) and Vijaykumar (DW-8) are relevant.

10. Shivprasad (DW-7) has accepted that after marriage of defendant No.2, there used to occur of quarrels between his wife and defendant No.4 i.e. wife of defendant No.1. He further accepted that to avoid family dispute the parties were living separately in mess and cultivating property separately. This supports the case of the plaintiffs that there in order to maintain the peace in the family the parties were having separate resident and mess, which cannot be construed as partition.

11. Defendant No.2 claimed that in the year 1964 the partition deed came to be executed between him and his father, defendant No.1. To prove the said execution he examined Vinaykumar -DW-8, scribe of the document. This witness deposed about effecting the said writing as per the instructions of Dattuprasad. On the basis of his evidence the said document came to be admitted in evidence and marked Exhibit 271. Admittedly, the said document is not registered one. Defendant No.2 has admitted in his cross-examination about reduction in writing of the partition deed immediately.

There is strong presumption of jointness of family in Hindus. In view of the same the burdens squarely lies on the person who claims partition thereof. The evidence on record does not indicate that there was any previous family arrangement and which was for the purpose of record reduced in writing vide Exhibit 271. Merely because defendant No.1 and defendant No.2 were separate in mess and because they were cultivating the suit property independently, will not lead to the conclusion that there was a partition between them.

12. Even if it is accepted that it was a deed of partition, the same requires registration under Section 17 of the Registration Act. Section 49 of the Registration Act provides that,

"49. Effect of non-registration of documents required to be registered.- No document required by section 17 ¹[or by any provision of the Transfer of Property Act, 1882] to be registered shall-

(a) affect any immovable property comprised therein, or

(b) confer any power to adopt, or

(c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered:

¹[Provided that an unregistered document affecting immovable property and required by this Act, or the Transfer of Property Act, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877, or as evidence of any collateral transaction not required to be effected by registered instrument.]"

Objects and Reasons – Clause 49.- The words "in accordance with the provisions of this Act occurring at the end of section 49 of the Act may give rise to some difficulty if they are retained in this clause. No doubt seems ever to have been cast on the view that under the law, as it stands, documents prior to the Act of 1877, if registered in accordance with the law for the time being in force, are not rendered imperative or inadmissible in evidence by this section. Regard being had, however, to the terms of clause 17, which reproduces section 17 of the Act, a strict adherence to the definition of the word 'registered" contained in the General Clauses Act, section 3(45), might lead to a construction of clause 49 which would make these documents inoperative and inadmissible if the words quoted above are retained. They have, accordingly, been omitted."

13. Since the document of partition is not registered, in view of the aforesaid provision of the Registration Act it is not admissible in evidence. Merely because the document is exhibited it cannot be treated as admissible in evidence. The learned Trial Court has rightly considered the material evidence on record and has recorded the finding about the inadmissibility of said document and evidence.

14. Plaintiffs have come out with specific case about unequal distribution of the suit properties. There is no dispute about the fact that 49% of the suit properties are in the possession of defendant No.2 whereas in common plaintiff Nos. 1 to 3 and defendant No.1 shared 51% of the suit properties. It is not in dispute that at the relevant time

plaintiff Nos. 1 to 3 were minors. DW-7 Shankarprasad who is witness to the said document has candidly admitted absence of any one else except executants of the documents. This goes to show that the mother of plaintiffs was not present at the time of alleged partition, which falsifies the case of defendant No.2 in this regard. Moreover, there is no evidence on record to show that the interest of minors was considered and that on behalf of the minors in the capacity of guardian any one has executed the said document. Apart from this there is no dispute about the fact that the share of defendant No.1 as well as his wife was also not ascertained in the said partition. Thus, all the persons interested in the suit properties were not party to the said partition. In the result, such partition would not bind them including plaintiffs herein.

15. Defendant No.2 has sought to give explanation about the unequal distribution by contending that the lands which were given to the share of plaintiffs and defendant No.1 were fertile and irrigated lands whereas the lands came to his share were of inferior quality. This contention of the defendant No.2 is unsustainable in view of his admission in the cross-examination where he concedes to the fact that the same brook passes through the lands of plaintiffs and defendant No.2. He further admits that both lands are to the west side of the said brook and both parties take seasonal crops from the water in the brook.

It is thus clear that the considering topography quality of the land is similar. The contention of the defendant regarding inferior quality of land being allotted to him and therefore he being given larger share in the suit property cannot become acceptable.

16. It also case of the defendant No.2 that plaintiffs and defendant No.1 have sold some of the suit properties so also defendant No.2 himself sold the properties which indicate that they were exclusive owners thereof pursuant to the partition of the suit properties. He further claimed that both parties executed mortgages with the bank in respect of the some of the properties and in this regard mortgage deeds (Exhibit 111 and 112) are relied upon. Defendant No.2 himself has claimed to be *Karta* of the family. Defendant No.1 was the father of the plaintiffs and defendant No.2 and therefore in the capacity of *Karta* if any property is sold by him, the same cannot be treated as indication of partition. Apart from this the mortgage documents show that they were executed by defendant No. 1 and defendant No.2 as *Karta* of the family. Thus, the said factum of mortgage the properties and raising of the loan by respective parties as *Karta* of family cannot be considered as conclusive proof of the partition it on the contrary shows otherwise.

17. One more issue raised by the defendant No.2 about

mutation of the revenue record in respect of the suit property in the name of the plaintiffs and defendant No.2 is concerned, it is settled position of law that the entries in revenue record are essentially for fiscal purpose and they do not determine the title or the ownership of a person over the land. It is pertinent to note that the parties particularly defendant No.1 and defendant No.2 were not in good terms and therefore they were separate in residence and mess. For the purpose of their survival certain properties were cultivated by them independently. In such circumstances failure on the part of plaintiff to challenge the entries is inconsequential and does not lead to the conclusion that they have accepted the factum of partition. Apart from this only because agricultural cess is paid by defendant No.2 in respect of properties possessed by him will not indicate his exclusive right over the same, because the cess can be paid by any member of the joint family.

18. Learned senior counsel for the appellants has sought the remand of the case on the ground that error has been committed by the First Appellate Court in rejecting application (Exhibit 49) filed by the appellant/ defendant No.2 for leading additional evidence. It is contended that the document came into existence on 02/05/2016 which is an admission of the plaintiffs about previous partition and therefore the said application ought to have been allowed by the First Appellate

Court. Apart from the reason that there is no justification for production of the said evidence at that stage, the First Appellate Court has also held that those documents are not essential for the just decision of the case. In this regard it is pertinent to note that document of partition (Exhibit 271) was already on record before the Trial Court. Admittedly, said document is not registered one and hence could not have been received in evidence of transaction affecting suit property by the Trial Court. As a matter of fact his document is unregistered and no volume of additional evidence would make it admissible in evidence. Even if such application is allowed, in absence of registration of such deed it is not permissible to read the same in evidence in view of the bar of section 49 of the Registration Act. The First Appellate Court therefore has rightly rejected the said application. Thus, there is no propriety, reason or justification to accept request for leading of additional evidence by remand of case.

19. In view of the aforesaid discussions this Court finds no substantial question of law being involved in the present appeals. Both second appeals stand dismissed with costs. Pending civil applications, if any, disposed.

(R. M. JOSHI, J.)

1. After pronouncement of the judgment learned counsel for

the appellant states that interim relief is continuing in his favour. He, therefore, seeks continuation of the same for further period of six weeks.

2. Learned counsel for the other side opposed the said prayer.

3. In the interest of justice, interim relief to continue till 4th May, 2023.

(R. M. JOSHI, J.)

ssp