

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

SECOND APPEAL NO. 283 OF 2015
WITH CA/7315/2015 IN SA/283/2015
WITH SA/167/2023

GORAKH AAHILAJI LABHADE
VERSUS
KACHARU BABURAO LOHOKARE AND OTHERS

...
Advocate for Appellant : Mr. V.R. Dhorde
and Mr. Sanjay Dudhane
Advocate for Respondent No. 1 : Mr. S.S. Chapalgaonkar
Advocate for Respondent Nos. 3, 5 to 7 & 13 to 15 : Mr. P.C. Mayure
Advocate for Respondent No. 20 : Mr. P.B. Shirsath

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CORAM : R.M. JOSHI, J.
DATE : 16th March, 2023

PER COURT :

1. Heard learned counsel for both sides. Carefully considered pleading, evidence on record and judgments of both Courts below.

2. Second Appeal No. 283 of 2015 is filed by original defendant no. 13, and Second Appeal No. 167 of 2023, is filed by original defendant nos. 2, 3, 4 and LRs of original defendant no. 1, being aggrieved and dissatisfied by judgment and decree dated 16th March, 2015 passed in Regular Civil Appeal No. 129 of 2012,

confirms judgment and decree dated 30th April, 2009 passed by Civil Judge Junior Division, Kopargaon, Ahmednagar, in Regular Civil Suit No. 580 of 1995. Parties are referred by their nomenclature in the suit.

3. Appellants / original Defendants in Second Appeal No. 167 of 2023 challenge the judgments and decrees impugned, on the ground that both Courts below erred in holding that their property is still Joint Hindu Family property and never partitioned before and consequently granted of share to plaintiffs and defendants. Whereas the challenge by defendant no. 13 is restricted to the refusal of the Trial Court to allow him to hold the land purchased by him and instead directing partition of suit properties by metes and bounds.

4. Plaintiffs have filed suit for partition and separate possession against defendants of their Hindu joint family properties. It is the contention of the plaintiffs that defendant no. 13 is brother of wife of defendant no. 3 and he purchased property described in para 1 (C) of the plaint i.e. Gat No. 195 admeasuring 5 H 66 R and, therefore, he is joined party defendant. It is the contention of the plaintiffs that whatever property was sold by defendant no. 3 to defendant no. 13, be given to the share of defendant no. 3.

5. Defendant nos. 1 to 3, claimed previous partition of suit properties and possession of respective lands coming to their share. Similarly other defendants except defendant nos. 3 and 13 by filing written statements raised different contentions. Defendant nos. 8 to 11 claimed that Survey No. 69/2 was purchased by deceased Karbhari Lohkare from his own income as tenant of the said land.

6. Plaintiff examined himself at Exh. 78 and relied upon documentary evidence (Exh. 140 to 184) in respect of suit properties. On the other hand, on behalf of Defendant No. 8 to 11 Kesharbai was examined at Exh. 91 and she relied upon Will of Karbhari (Exh. 137). Defendant no. 20 was examined at Exh. 138.

7. Learned Trial Court on the basis of evidence led before it recorded finding that while purchasing Survey No. 69/2, as protected tenant, apart from Karbhari, Kushinath also had paid part amount. It is further held nor there is no evidence to show that Baburao had any independent source of income than suit properties. Learned Trial Court, thereafter, proceeded to hold that the amount paid was from joint family's income and, thereafter, it is joint family property. Consequently, Will executed by Baburao was held to be ineffective and inconsequential.

8. On the point of claim of previous partition of Defendant nos. 8 to 11, plaintiff has deposed that the suit properties were given in cultivation of member of family for convenience. In the cross-examination nothing is brought on record to hold that there was partition of properties previously. The revenue record also indicates that in fact in 7/12 extract of all suit properties, names of plaintiffs and defendants are recorded. There is strong presumption of jointness of joint Hindu Family and who claims partition thereof must prove the same. In the instant case, there is no evidence on record to hold previous partition of suit properties.

9. After holding that suit properties are ancestral Joint Hindu Family properties of plaintiffs and defendants except defendant no. 13 and 20 and recording finding that there is no previous partition, Trial Court determined share of the respective parties. There is no challenge to the said determination of shares. The First Appellate Court has also re-appreciated evidence in the light of pleadings and evidence led by parties and confirmed the judgment of Trial Court. This Court does not find any perversity in the concurrent findings recorded by both Courts.

10. By referring to the judgment of the Trial Court, only

contention raise by counsel for appellant / defendant no. 13 is that before the Trial Court, plaintiffs made request for retainment of the land possessed by each share holders of the entire suit property, but in spite of such prayer Trial Court has committed an error in directing the partition of the suit property by metes and bounds.

11. It is not in dispute that neither defendant no. 3 nor defendant no. 13 have filed written statement before the Trial Court. The contention of the plaintiffs with regard to the sale of the subject property by defendant no. 3 to defendant no. 13 has gone unchallenged. In absence of any specific contention of defendant no. 13 to be *bonafide* purchaser of the suit property, now, it is not open for this defendant to take exception to the findings recorded by the Trial Court.

12. The judgment of Trial Court indicates that the prayer of the plaintiffs was that as far as possible, the lands held by the respective parties be retained in their possession. This is nothing but a request made for consideration of court, which is ofcourse subject to all the parties agree to the same. From judgments in question it does not appear that any consensus was there between the parties, for this suggestion nor any attempts seems to have been made to make

adjustments of shares. Even otherwise for partition of suit properties by metes and bounds, it may not be possible to allow parties to retain their respective possession over part of suit properties. The learned Trial Court, therefore, had no option but to direct the partition of the suit property by metes and bounds. In the circumstances, the said direction of the learned Trial Court in the judgment and decree cannot faulted with.

13. Appellants have failed to make out involvement of any substantial question of law in this appeal, resultantly Appeal stands dismissed.

14. Pending Civil Application No. 7315 of 2015 also stands disposed of.

[R.M. JOSHI, J.]