

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

**SECOND APPEAL NO. 478 OF 2020
WITH
INTERIM APPLICATION NO. 1346 OF 2020
WITH
INTERIM APPLICATION NO. 1361 OF 2020**

Suka Sakru Shid & Anr.

..Appellants.

v/s.

Ganga Kalu Shid (since deceased
thr. Lrs) Pandu Ganga Shid & Ors.

..Respondents

Mr. R.M.Haridas i/b. Rukmini Khairnar for the Appellants.

Mr. Prafulla Shah a/w. Ms. Gunjan Shah for the Respondent Nos.1 to 3.

**CORAM : ANUJA PRABHUDESSAI, J.
DATED : 9th NOVEMBER, 2023.**

P.C.

1. The appellant, who was the defendant in the suit, has challenged the judgment and order dated 27.10.2019, whereby the learned District Judge, Nashik, dismissed the Regular Civil Appeal No.466 of 2015, and confirmed the partition decree dated 28.04.2010 passed by the learned Civil Judge, Junior Division, Nashik in Regular Civil Suit No. 62 of 2008.

2. The respondents are the legal heirs of the original plaintiff and the appellants were the defendants in the suit, and shall be hereinafter referred to as the plaintiffs and defendants respectively. The dispute is

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in respect of the properties which were original owned by the common ancestor Mallu. The details of the property are as under:

Sr. No.	Gat No	Area in Hectare	Area in Acre	Land Acquired Acre	Current possession of appellants in Acre	Current Possession of respondents in Acre
1	465	3 H 53 R	8.72	15 gunthas i.e. 0.375	4.22	4.12
2	476	8 H 25 R	20.38	0	5.5 (Appellants have sold 10 acres)	5
3	480	20R	0.49	0	0	0.49
4	467	3 H 52 R	8.69	8.69	0	0
5	469	2 H 61 R	6.44	5.31	0.56	0.56
6	450	5 H 53.5 R	13.66	13.66	0	0
7	466	5 H 46 R	13.5	9.06	4.44	0
	Total		71.88	37.095	24.72	10.17

3. It is not in dispute that the suit properties were owned by the common ancestor Mallu, who had two sons- Manga and Kalu. The plaintiffs are the successors of Kalu, whereas the defendants are the successors of Manga. The plaintiff filed a suit for partition stating that the successors of Manga and Kalu have equal share to the joint family property. The plaintiff claimed that as per the family arrangements, the parties were cultivating the property separately, however, there was no partition of the property by metes and bounds as per the respective shares of the parties. The plaintiffs therefore sought partition of the joint

family properties which were originally owned by Mallu.

4. The defendants have not disputed that Mallu had two sons Kalu and Manga, and that the plaintiffs are the successors of Kalu and that they are the successors of Manga. The only contention of the defendant is that there was oral partition and that the parties are enjoying and possessing the property as per the share allotted to them as per the oral partition.

5. The trial Court, framed the issues and after considering the evidence on record held that there was no oral partition between the parties. The trial Court observed that the plaintiffs have half share in the property of Mallu and accordingly, ordered partition of the suit as per the respective shares of the parties.

6. Being aggrieved by the judgment of the trial Court, the defendants filed an appeal under Section 96 of the Civil Procedure Code before the First Appellate Court. The defendants also sought to produce revenue records before the First Appellate Court under Order 41 Rule 27 of the C.P.C. The Appellate Court dismissed the said application on the ground that the defendants had not assigned any reasons for not producing the documents before the trial court. On merits of the matter, the Appellate Court confirmed the findings of the trial Court that there

was no oral partition, and that the plaintiffs as well as the defendants being the successors of Kalu and Manga, are entitled for half share each in the property. These concurrent findings of both the Courts below are sought to be challenged in this appeal filed under Section 100 of C.P.C.

7. The defendants have once again filed an application under Order 41 Rule 27 and sought to produce additional documents viz. revenue records, to contend that some of the properties are tenanted property of Manga. In ***Ibrahim Uddin and Anr (supra)*** the Apex Court has observed as under:-

“Order XLI Rule 27 C.P.C.

36. The general principle is that the Appellate Court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order XLI Rule 27 CPC enables the Appellate Court to take additional evidence in exceptional circumstances. The Appellate Court may permit additional evidence only and only if the conditions laid down in this rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, the provision does not apply, when on the basis of the evidence on record, the appellate court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the Rule itself. (Vide: K.Venkataramiah v. A. Seetharama Reddy

and Ors., AIR 1963 SC 1526; The Municipal Corporation of Greater Bombay v. Lala Pancham and Ors., AIR 1965 SC 1008; Soonda Ram & Anr. v. Rameshwarlal and Anr., AIR 1975 SC 479; and Syed Abdul Khader v. Rami Reddy and Ors., AIR 1979 SC 553).

37. The appellate court should not, ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the Court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment. (Vide: Haji Mohammed Ishaq Wd.S.K. Mohammed & Ors. v. Mohamed Iqbal and Mohamed Ali and Co. AIR 1978 SC 798).

38. Under Order XLI , Rule 27 CPC, the appellate court has the power to allow a document to be produced and a witness to be examined. But the requirement of the said Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the appellate court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate Court is empowered to admit

additional evidence. [Vide: Lala Pancham & Ors. (supra)].

39. It is not the business of the appellate court to supplement the evidence adduced by one party or the other in the lower court. Hence, in the absence of satisfactory reasons for the non- production of the evidence in the trial court, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence under this Rule. So a party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal. (Vide: State of U.P. v. Manbodhan Lal Srivastava, AIR 1957 SC 912; and S. Rajagopal v. C.M. Armugam & Ors., AIR 1969 SC 101).

40. The inadvertence of the party or his inability to understand the legal issues involved or the wrong advice of a pleader or the negligence of a pleader or that the party did not realise the importance of a document does not constitute a "substantial cause" within the meaning of this Rule. The mere fact that certain evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal.

41. The words "for any other substantial cause" must be read with the word "requires" in the beginning of sentence, so that it is only where, for any other substantial cause, the appellate court requires additional evidence, that this rule will apply, e.g., when evidence

has been taken by the lower court so imperfectly that the appellate court cannot pass a satisfactory judgment.

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48. To sum up on the issue, it may be held that an application for taking additional evidence on record at a belated stage cannot be filed as a matter of right. The court can consider such an application with circumspection, provided it is covered under either of the prerequisite conditions incorporated in the statutory provisions itself. The discretion is to be exercised by the court judicially taking into consideration the relevance of the document in respect of the issues involved in the case and the circumstances under which such an evidence could not be led in the court below and as to whether the applicant had prosecuted his case before the court below diligently and as to whether such evidence is required to pronounce the judgment by the appellate court. In case the court comes to the conclusion that the application filed comes within the four corners of the statutory provisions itself, the evidence may be taken on record, however, the court must record reasons as on what basis such an application has been allowed. However, the application should not be moved at a belated stage.”

8. In the instant case, the defendants have not explained the delay in filing the application. It is also to be noted that the defendants had not raised a defence that some of the properties were tenanted properties or self acquired properties of Manga but had admitted that the suit

properties are joint family properties of their common ancestor Mallu. The defendants cannot be permitted to take an inconsistent stand or withdraw the admission at the appellate stage. The documents sought to be produced are not required by the Court to pronounce the judgment or for any other cause. Hence the application under Order 41 Rule 27 is dismissed.

9. Now coming to the merits of the matter, Shri Haridas, learned Counsel for the defendants submits that having raised the plea of family arrangement, the burden was on the plaintiffs to prove the said issue and that it was not for the defendants to prove the oral partition. Learned Counsel for the defendant further submits that having acted on the family settlement, the plaintiffs cannot resile from the said arrangement and seek partition of the suit property. He further submits that the land is Adivasi Land and hence the suit itself was not maintainable.

10. As regards the maintainability of the suit, it is not in dispute that no such plea was raised in the written statement. A perusal of the impugned judgment dated 17.10.2019 also reveals that no such arguments were advanced before the first appellate Court. Hence such a issue cannot be raised before this Court in the second appeal for the first time, without there being any foundational facts in that regards.

11. The next question is whether the property was partitioned between the parties by a mutually agreed family arrangement. In ***Ravinder Kaur Grewal & Others v. Majit Kaur & Ors. (2020) 9 SCC 706*** the Apex Court has held that

“25. ... The settled legal position is that when by virtue of a family settlement or arrangement, members of a family descending from a common ancestor or a near relation seeks seek to sink their differences and disputes, settle and resolve their conflicting claims or disputed titles once and for all in order to buy peace of mind and bring about complete harmony and goodwill in the family, such arrangement ought to be governed by a special equity peculiar to them and would be enforced if honestly made. The object of such arrangement is to protect the family from long-drawn litigation or perpetual strives which mar the unity and solidarity of the family and create hatred and bad blood between the various members of the family, as observed in Kale. In the said reported decision, a three -Judge Bench of this Court has observed thus:

“9. ... A family arrangement by which the property is equitably divided between the various contenders so as to achieve an equal distribution of wealth instead of concentrating the same in the hands of a few is

undoubtedly a milestone in the administration of social justice. That is why the term “family” has to be understood in a wider sense so as to include within its fold not only close relations or legal heirs but even those persons who may have some sort of antecedent title, a semblance of a claim or even if they have a spes successionis so that future disputes are sealed for ever and the family instead of fighting claims inter se and wasting time, money and energy on such fruitless or futile litigation is able to devote its attention to more constructive work in the larger interest of the country. The courts have, therefore, leaned in favour of upholding a family arrangement instead of disturbing the same on technical or trivial grounds. Where the courts find that the family arrangement suffers from a legal lacuna or a formal defect the rule of estoppel is pressed into service and is applied to shut out plea of the person who being a party to family arrangement seeks to unsettle a settled dispute and claims to revoke the family arrangement under which he has himself enjoyed some material benefits.”

12. In the instant case, as noted above, the suit properties were owned

by Mallu, the common ancestor of the plaintiffs and defendants, who had two sons Manga and Kalu. Manga and Kalu had equal share in the suit property, and the plaintiffs being the successors of Kalu have half share, whereas the respondents have inherited the half share of Manga. The evidence of PW1 proves that though the property was a joint family property and as per the family arrangement they were cultivating the property separately, the property was not partitioned by metes and bounds. The evidence of the plaintiffs amply proves that the property was cultivated separately for the sake of convenience and it was not equitably divided between the parties. This is fortified by the fact that as per the said family arrangement, the defendants are in possession of 20 Acres of land, whereas the plaintiffs are in possession of 10 Acres of land. It is also in evidence that some of the land was acquired by the Government. The defendants herein have received Rs.34,21,473/- in respect of 14 Acres of land, whereas the plaintiff has received Rs.22,88,160/- in respect of 9 Acres of land. The contention of the defendants that as per the oral partition, they are in exclusive possession of the property under Gat No.466, and or that as per the oral partition, the plaintiffs have no right to the said property stands negated from the fact that the compensation of Rs.4,95,156/- in respect of the acquired portion of the said land was equally shared by both the parties and the dispute is in respect of the balance amount which is pending before the Reference Court.

13. As noted above, the plaintiffs and appellant-defendants are entitled to equal share. The family arrangement between the parties does not divide the property equally. It was only for the sake of convenience that the parties were cultivating the properties separately without actually partitioning the property by metes and bounds, as per their respective shares. In such circumstances, the findings recorded by the Courts below is based on evidence on record and is not perverse. The appeal does not involve substantial question of law. Hence, the same is dismissed. Interim Applications stands disposed of.

(ANUJA PRABHUDESSAI, J.)