



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
SECOND APPEAL NO.460 OF 2022
WITH
CIVIL APPLICATION NO.10462 OF 2022
IN
SECOND APPEAL NO.460 OF 2022**

1. Dharmendra Pratap Valvi,
Age: 40 Years, Occ.: Agri.
R/o. Umaj, Tq. & Dist. Nandurbar.
2. Smt. Dagadibai Pratap Valvi.
Age: 65 Years, Occ.: Agri.
3. Bharat Supdu Valvi,
Age: 65 Years, Occ.: Agri.
4. Amarsing Supdu Valvi,
Age: 62 Years, Occ.: Agri.
5. Virsing Supdu Valvi,
Age: 60 Years, Occ.: Agri.
6. Ramu Supdu Valvi,
Age: 55 Years, Occ.: Agri.

Appellant Nos.2 to 6 are
R/o. Umaj Post Kothali,
Tal. and Dist. Nandurbar.

..Appellants
(Org. Defts)

Versus

1. Raising Rubji Valvi
Deceased since through LR's
- 1A] Kisan Raising Valvi,
Age: Adult, Occ.: Agri.
R/o. Vedapavala Tal. and Dist. Nandurbar.
- 1B] Lahu Raising Valvi,
Age: Adult, Occ.: Agri.
R/o. Waghshempa Post Kothali,
Tal. and Dist.Nandurbar.
- 1C] Rawan Raising Valvi,
Age: Adult, Occ.: Agri.

R/o.Khatgaon Tal.Navapur.

1D] Abdul Raising Valvi,
Age: Adult, Occ.: Agri.
R/o.Vedapavala Tal. and Dist. Nandurbar.

1E] Kalpana Prabhakar Valvi,
Age: Adult, Occ.: Agri.
R/o.Bhawanipada Post Natawad.
Tal. and Dist. Nandurbar.

1F] Laxmi Karansing Padvi,
Age: Adult, Occ.: Agri.
R/o.Ahwa Post Matawad.
Tal. Nizar Dist.Surat.

1G] Anita Gulabsing Valvi.
Age: Adult, Occ.: Agri.
R/o.Vedapavala
Tal. and Dist. Nandurbar.

2] Gona Rubji Valvi (Died)

3] Tapsing Rubji Valvi,
Age: 62 Years, Occ.: Agri.

4] Brijlal Rubji Valvi.
Age: 55 Years, Occ.: Agri.

5] Tukaram Rubji Valvi.
Age: 45 Years, Occ.: Agri.

Respondent Nos.2 to 5 are
R/o. Umaj Tal.Nandurbar.
Dist. Nandurbar.

6] Baliram Magan Valvi
Age: 62 Years, Occu: Agri,
R/o. Umaripada (Khandbara)
Tal. Navapur Dist. Nandurbar

7] Smt. Vimala Ramdas Valvi,
Age: 40 Years, Occ.: Agri.
R/o.Adada Tal. Nizar Dist. Surat (Gujrat).

8] Smt. Kaushalyabai Ranjit Valvi,
R/o.Veda Tal.Nizar Dist.Surat.

9] Chhagan Banya Valvi (Deceased)
Through legal representative
Dashrath Chhagan Valvi,
Age: 35 Years, Occ.: Agri,
R/o. Umaj Tq & Dist. Nandurbar ..Respondents
(Org. Plaintiffs)

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Mr. P. V. Barde, Advocate for the Appellants.
Mr. A. S. Abhyankar h/f Mr. S. V. Natu, Advocate for Respondent
Nos.2 to 5 (caveator).

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CORAM : S. G. CHAPALGAONKAR, J.
DATE : 02nd DECEMBER, 2024.

ORDER:-

1. The appellants/original defendants takes exception to the judgment and decree dated 11.04.2014, passed by Joint Civil Judge Junior Division, Nandurbar in Regular Civil Suit No.69/2008 as well as judgment and decree dated 27.08.2021 passed by the Principal District Judge, Nandurbar in Regular Civil Appeal No.41/2014, thereby confirming decree passed in suit. (Hereinafter, parties are referred as per their original status in the suit for the purpose of convenience and brevity).

2. The respondents/plaintiffs instituted Regular Civil Suit No.69/2008 before the Joint Civil Judge Junior Division at Nandurbar claiming relief of grant 1/4th share in the suit property on the basis of preliminary decree in Regular Civil Suit No.221/1966 and finalize the same by making actual partition by metes and bounds so also precept be sent for effecting partition and grant of possession of separate share in favour of plaintiffs.

3. The plaintiffs pleaded that lands bearing Gut Nos.29, 32 and 411 situated at Umaj, Tq. and Dist. Nandurbar were jointly owned by parties to the suit. The plaintiffs' father Rubji Ramji Valvi had instituted Regular Civil Suit No.221/1966 seeking partition of suit land against his brothers namely Balya Ramji, Supadya Ramji and Ditya Ramji and claimed 1/4th share. However, since land was of new tenure, creating ban of actual demarcation of shares, decree declaring 1/4th share of plaintiff was passed with direction that plaintiff shall jointly cultivate his 1/4th share in the suit land. In execution filed by Rubji i.e. Regular Darkhast No.119/1967, the execution of the decree was granted and plaintiff was allowed to cultivate suit field alongwith his brothers. According to the plaintiffs, after death of Rubji and his brothers, present plaintiffs and defendants being legal heirs of respective parties were jointly cultivating suit field. However, dispute crept up amongst them over joint cultivation of the land. The plaintiffs have, therefore, instituted present suit for separate possession of their 1/4th demarcated share in the suit field.

4. Only defendant no.1 contested the suit contending that although joint possession was granted in favour of Rubji as per decree passed in Regular Civil Suit No.221/1966, separate share was not allotted to him despite filing of Regular Darkhast No.119/1967. Rubji never cultivated his share in the suit field.

The suit is barred by limitation. The suit is bad for non-joinder of necessary parties. The legal representatives of defendant no.10 adopted written statement filed by defendant no.1. The Trial Court framed issues, recorded evidence of the parties and held that suit claiming separate possession is maintainable in pursuance to the decree in Regular Civil Suit No.221/1966. The objection as regards to the limitation and non-joinder of the parties raised by defendants is negated and plaintiffs are held entitled for decree as prayed. The Appellate Court also concurred with the decree of Trial Court.

5. Mr. Barde, the learned Advocate appearing for the appellants submits that both the Courts have committed patent error in entertaining fresh suit, when the rights of the parties were foreclosed and finally decided under the decree of Civil Court in Regular Civil Suit No.221/1966 as well as Regular Darkhast No.119/1967. He would submit that suit is barred by principle of *res-judicata*. He would further submit that in absence of coparceners as party to the suit for partition, suit ought to have been treated as bad for non-joinder of the parties. According to him, the Courts below have assumed joint possession only on the basis of revenue entries, which is not permissible. He would further contend that defendants have acquired title by way of adverse possession.

6. Per contra, Mr. Abhyankar, learned Advocate appearing for respondents nos.2 to 5 submits that right of plaintiffs in the suit property has been already approved as per decree in Regular Civil Suit No.221/1966. In execution of the said decree, the plaintiff therein was put into joint possession alongwith defendants therein approving his 1/4th share. The present suit simply claims for carving out separate share on the basis of previous decree and put plaintiffs in separately carved out 1/4th share from the suit land. Mr. Abhyankar would support concurrent findings recorded by the Courts below.

7. Having considered submissions advanced, admittedly Rubji Valvi through whom plaintiffs are raising claim was granted 1/4th share in the suit land as per judgment and decree dated 30.09.1967 passed in Regular Civil Suit No.221/1966. In execution of said decree, he was put in to joint possession of the suit land alongwith his brothers affirming his 1/4th share. The revenue record shows that decree was acted upon and Rubji enjoyed 1/4th share alongwith his brothers in the suit property. Perusal of the judgment in Regular Civil Suit No.221/1966 shows that Rubji had claimed for separate share in the fields or joint possession alongwith defendants. The Court approved his claim for joint possession alongwith defendants observing that field survey nos.54 and 92 at Umaj and 33/21 at Vadzhakane have been re-granted on new

tenure on impartible condition. Therefore, plaintiff cannot ask for division of field and separate share therein. Therefore, prayer of plaintiff for separate possession of his share was not considered, he was allowed joint possession of 1/4th share alongwith defendants. The aforesaid observations clearly depict that since land was impartible as per mutation entry produced at Exhibits 45, 46 and 47, the decree of joint possession was passed.

8. Although copy of plaint in Regular Civil Suit No.221/1966 was not placed on record during proceeding of present suit, Mr. Barde, learned Advocate appearing for the appellants made available certified copy of plaint for perusal of this Court. Since it is impeccable document, by consent of parties taken into consideration. The prayer clause (A) seeks for declaration that plaintiff has 1/4th share in the suit property and it may be partitioned and put in his separate possession. The prayer Clause (B) is alternative prayer that if suit properties are not partible, then plaintiff be granted 1/4th joint possession and defendants be restrained from interfering in his enjoyment and possession of the property. Apparently, Trial Court granted decree of joint possession holding that new tenure land has been re-granted on impartible condition therefore, plaintiff was directed to be put into joint possession of his 1/4th share. Pertinently no specific provision

indicating that partition of land is not permissible or barred by any law has been mentioned in the judgment of Trial Court.

9. The present suit is instituted in furtherance to the decree passed in previous suit affirming 1/4th right of Rubji in suit land.

10. The Trial Court as well as Appellate Court held that once 1/4th share of plaintiffs has been approved in the suit property, their claim for separate possession can be entertained by separate suit. The view taken by Courts below appears to be in consonance with law laid down by Division Bench of this Court in case of ***Bashiruddin Khwaja Mohiuddin Vs. Binraj Murlidhar Shop at Malkapur and Others***¹, wherein it is held that final decree proceedings are mere continuation of the preliminary decree. There is no executable decree unless final decree proceedings are disposed of. Subsequent suit for partition and possession of the field would not be barred by Section 47(1) of the Code of Civil Procedure. Similarly, Courts below have taken support from observation of the Supreme Court of India in case of ***Brij Kishore Prasad Singh and others Vs. Jaleshwar Prasad Singh***², wherein it is held that second suit for recovery of actual possession is not barred, if compromise decree in partition suit could not be executed for want of producing necessary stamp paper. The

¹ AIR 1987 BOMBAY 235.

² AIR 1973 Supreme Court 1130

Appellate Court has further placed reliance on the judgment of the Supreme Court of India in case of ***Kalyani (dead) by L.Rs. Vs. Narayan and Others***³, wherein it is held that next step for partition and separate possession of the suit field was administrative task. But said task could not be accomplished in this case due to impartible nature of the field. The Appellate Court has further placed reliance on the judgment of the Supreme Court of India in case of ***M. Venkataramana Hebbar (D) by LRs. Vs. M. Rajagopal Hebbar and others***⁴, wherein it is held that the Courts should be slow in rejecting claim for partition unless it is held that there had been partition by metes and bounds. In view of the reasoning adopted by the Courts below, there is no difficulty to hold that suit of the plaintiffs to grant decree for carving out separate share and putting them in separate possession is not barred.

11. So far as objection as to maintainability of the suit for non-joinder of necessary parties is concerned, both the Courts have concurrently held that such bar would not operate in present case as defendant no.1 claims himself to be possessor of entire property. Pertinently, in previous suit only decree for partition has been passed affirming 1/4th share of Rubji in suit property. Therefore, present suit cannot be treated as suit for partition in strict sense.

³ AIR 1980 Supreme Court 1173.

⁴ 2007 (2) Mah. L R 678 (SC).

This suit simply seeks to carve out separate 1/4th share in pursuance to earlier decree and put plaintiffs in possession of that share. If defendant no.1 is only possessor, other coparcener would not be necessary party and for grant of decree to carve out plaintiffs separate share. In present suit, right of plaintiffs for separate possession of 1/4th share as per previous decree has been approved. Rest of the job would be administrative in nature and District Collector after receipt of precept under Section 54 of the Code of Civil Procedure have to give effect to the decree. Pertinently, it is not the case of defendants that now land is not partible. There is nothing on record to show that there is prohibition under any law for partition and separate possession of land owing to condition of any law time being in force. In that view of the matter, there is no impediment in passing decree as claimed.

12. Last objection that is pressed into service is as to the limitation. However, as observed in earlier paragraphs, there is evidence depicting that Rubji was put into joint possession of his 1/4th share as per decree passed in Regular Civil Suit No.221/1966. There is nothing on record to show that defendant no.1 enjoyed property in exclusion of joint possession of Rubji. The plea of adverse possession is sought to be raised first time in this appeal. The written statement filed by defendant is absolutely silent on this point. There are no specific pleadings or basis by which

requirements of adverse possession can be fulfilled. Therefore, when claim of plaintiffs is based on title and there is nothing to indicate exclusion of joint possession, bar of limitation would not operate. Consequently, no substantial question of law arises for consideration in this appeal. No perversity is found in concurrent finding of facts recorded by the Courts below. The legal issue appears to have been decided in consonance with the legal provisions and principles of law espoused by Supreme Court of India as well as this Court.

13. Hence, Second Appeal stands dismissed.

14. In view of dismissal of Second Appeal, the present Civil Application does not survive and accordingly stands disposed of.

(S. G. CHAPALGAONKAR)
JUDGE

15. At this stage Mr. Barde, learned Advocate appearing for the appellants seeks continuation of interim relief that was already granted.

16. In that view of the matter, effect of this order be kept in abeyance for the period of eight weeks from today.

(S. G. CHAPALGAONKAR)
JUDGE