

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 555 OF 2023

WITH

INTERIM APPLICATION NO. 15600 OF 2023

IN

SECOND APPEAL NO. 555 OF 2023

Smt. Sonyabai Kaharu Jadhav (Dead Deleted) & Ors. .. Appellants

Versus

Aniruddha @ Rudha Shankar Jadhav (Padir) & Ors. .. Respondents

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Mr. Pramod Narayan Joshi for the Appellant.

Mr. Rajiv Patil, Senior Advocate a/w Mr. Prashant D. Patil for Respondent
No. 1 B, 1-C-A, 1-C-B, 1-C-C.

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CORAM : SANDEEP V. MARNE J.

DATE : 5 MARCH 2024.

P.C. :-

1) This Second Appeal is filed by Appellants challenging the Judgment and Decree dated 30 January 2023 passed by District Judge-4 Nashik, dismissing Regular Civil Appeal No. 72 of 2013 and confirming the Decree dated 31 January 2013 passed by Civil Judge Junior Division Nashik

Road in Regular Civil Suit No. 7 of 2008. The Trial Court has decreed the suit filed by the Plaintiff for partition and perpetual injunction and has declared that the Plaintiff (his heirs) along with Defendant Nos. 1 to 6 and Defendant No. 7 have 1/3 share each in the suit property bearing Survey No. 28/4 and that Plaintiff and Defendant Nos. 1 to 6 are entitled to 1/2 share in the other suit properties.

2) The suit properties were originally owned by Shankar Bapu Padir (Jadhav) who had two wives Anandabai and Tulsabai. Out of Shankar's wedlock with Tulsabai, five children were born viz three sons - Kachru, Aniruddha and Sakharam and 2 daughters - Bhimabai and Shantabai. The suit was filed by the son Aniruddha claiming partition essentially against the heirs of Kachru (Defendant Nos. 1 to 6). The third son Sakharam was apparently separated from the family and was given his share in the year 1956.

3) Defendant Nos. 1 to 6, who are Appellants before me, resisted the suit filed by Aniruddha denying that Suit properties were ancestral properties and claim that their father-Kachru had purchased suit properties. The second defence of Defendant Nos. 1 to 6 was about partition already effected between the brothers in the year 1956, in which Defendant No.7 Sakharam received separate share whereas Plaintiff- Aniruddha received monetary benefit.

4) The Trial Court however rejected both the claims of Defendant Nos. 1 to 6 about suit properties not being ancestral properties as well as alleged partition effected between the three brothers and decreed Plaintiffs suit. It appears that Plaintiff- Aniruddha expired during pendency of the suit and his heirs (Plaintiff Nos. 1a to 1c) were brought on record. The Trial

Court accepted that Defendant No.7-Sakharam had separated from family and was given his own share in the properties of the family. Therefore, Sakharam has been denied in the share in the suit property except Survey No. 28/4. Thus the Plaintiff- Aniruddha and Defendant Nos. 1 to 6-Kachru (his heirs) are held to be entitled to one-half share each in all suit properties except Survey No. 28/4. So far as the land bearing Survey No. 28/4 is concerned all the three brothers are granted 1/3 share each.

5) Aggrieved by the decree of the Trial Court, Defendant Nos. 1 to 6 filed Regular Civil Appeal No. 72 of 2013 in the Court of District Judge-4 Nashik. The First Appellate Court has however proceeded to dismiss the Appeal by its decree dated 30 January 2023. Aggrieved by the decisions of the Trial and the First Appellate Court, Defendant Nos. 1 to 6 have filed the present Appeal.

6) I have heard Mr. Joshi the learned counsel appearing for the Appellants and Mr. Patil the learned senior advocate appearing for the heirs of Plaintiff-Anirudha (Respondent Nos. 1 B, 1-C-A, 1-C-B, 1-C-C).

7) Mr. Joshi has raised following three contentions in support of challenge to the Orders passed by the Trial Court and the First Appellate Court:

- i) Non joinder of necessary properties and parties: Mr. Joshi submits that Properties given to Sakharam (Defendant No.7) were not brought into the common hotchpot. That since Defendant No.7 was impleaded in the suit and has been granted share in land bearing Survey No. 28/4, all properties given to the share of Sakharam ought to have been included the suit properties. He would rely

upon judgment of the Apex Court in **Kenchegowada (Since Deceased) by Legal Representatives Vs. Siddegowda Alias Motegowda**¹. Additionally, Mr. Joshi would contend that subsequent purchasers of some of the lands were not impleaded to the suit who were necessary parties.

- ii) Previous Partition: That previous partition was proved by Defendant Nos. 1 to 6 as both Trial and the First Appellate Court have proceeded on a footing that Sakharam separated from the joint family in the year 1956 by taking his share.
- iii) Erroneous grant of share to Sakharam: Sakharam is erroneously given share in land bearing Survey No. 28/4 despite recording a finding that his share was already partitioned and separated in the year 1956.
- iv) That the shares grantable to the daughters-Bhimabai and Shantabai were not ascertained and it was erroneously assumed that they relinquished their share without holding an enquiry about the exact party, in whose favour such relinquishment was made.

8) I have considered the submissions canvassed by Mr. Joshi which are opposed by Mr. Patil.

9) So far as the first submission about non-joinder of properties given in share of Sakharam during partition in 1956 is concerned, it is seen that the same has no effect on the rights between Plaintiff- Aniruddha and Defendant Nos. 1 to 6 (Kahru's heirs). The main contest before the Trial Court was between the two brothers Aniruddha and Kachru. Both the Courts below proceeded on footing that Sakharam was already separated and was not to be given share in suit properties. In that view of the matter, non-

¹ (1994) 4 SCC 294.

inclusion of properties given to Sakharam in the year 1956 did not affect the rights between Kachru and Aniruddha. In fact, it was the case of Defendant Nos.1 to 6 that Sakharam walked away with his share of properties in 1956 and was not entitled to any share in the suit properties. The claim of Plaintiff- Aniruddha was contested by the heirs of Kachru (Defendant Nos. 1 to 6) essentially by raising twin pleas of suit properties is being self-acquired properties of Kachru and Anirudha being given mandatory compensation in lieu of his share. Both the defences have been negated by the Trial Court and the First Appellate Court. In that view of the matter, non-inclusion of properties coming to the share of Sakharam did not have any impact on suit for partition instituted by Plaintiff Anirudha. Reliance of Mr. Joshi on judgment of the Apex Court in ***Kenchegowda*** (supra) is therefore misplaced in the facts and circumstances of the present case. In fact, concluding observations made by the Apex Court in Para 16 of the judgment completely go against the Appellants. In para 16 of the judgment, the Apex Court has held as under:

*16. Therefore, what has been held is that the property had not been allotted in favour of the first defendant in the partition. That is very different from holding that the case of partition had not been accepted by the first appellate court. This being so, a decree for partition could not have been passed on a mere application for amendment. In fact, as rightly urged by the learned counsel for the appellant that the declaration and injunction are larger reliefs and smaller relief for partition could be granted is incorrect. Even otherwise, **a suit for partial partition in the absence of the inclusion of other joint family properties and the impleadment of the other co-sharers was not warranted in law.** Thus, we find no difficulty in allowing these appeals which are accordingly allowed. The judgment and decree of the trial court as affirmed by the first appellate court are restored. However, there shall be no order as to costs.*

(emphasis supplied)

10) Thus in ***Kenchegowda***, the Apex Court has recognized filing of suit for partial partition by not including other joint family properties. Thus judgment of the Apex Court in ***Kenchegowda***, far from assisting the case of Appellants, actually militates against them. So far as objection of non-joinder of subsequent purchasers is concerned, I do not see any reason why the same

would affect the suit for partition instituted by Plaintiff-Aniruddha to claim share in properties held by the heirs of his brother Kachru.

11) So far as the second objection of alleged previous partition is concerned, the same could not be proved by the Appellants before the Trial Court. The concurrent findings of fact are recorded that no previous partition took place between the three brothers Kachru, Aniruddha and Sakharam. Mere grant of share to Sakharam in the year 1956 did not mean elimination of share on Plaintiff-Aniruddha in the suit properties. Defendant Nos. 1 to 6 took of false plea before the Trial Court that Plaintiff-Aniruddha was given monetary compensation in lieu of his share. The said defence is negated by the Trial Court. I do not find any reason to interfere in concurrent finding of fact recorded by the Trial and the First Appellate Court about absence of previous partition between Aniruddha and Kachru.

12) The third issue raised by Appellants is about grant of share to Defendant No.7 Sakharam in part of the suit property. I must admit that this issue of grant of share to Sakharam in land bearing Survey No. 28/4 at one point of time made the Court curious about reason behind grant of that relief. However after going through the evidence of Defendant No.7-Sakharam, it is seen that though Sakharam was granted his own share in respect of agricultural lands, the three brothers had apparently carved out land bearing Survey No. 28/4 by construction of their respective houses thereon. It is because of this reason that the Trial Court has granted the 1/3 share to Defendant No.7-Sakharam in Survey No. 28/4. It has also come on record that Defendant Nos. 1 to 6 have sold part of the land in Survey No. 28/4 to Defendant No. 26. The area sold by them is 14 Ares. Though Mr. Joshi attempted to create a dispute about validity of the said transaction, I am afraid this is not the issue involving the suit. Suffice it to observe that

the Appellants have already sold part of their share in land bearing Survey No. 28/4 and the disputes sought to be created about grant of share to Defendant No.7-Sakharam in that land, in that sense, becomes academic for them.

13) The last contention is about relinquishment of shares by sisters Bhimabai and Shantabai. Here again, I fail to comprehend as to how this objection can enure to the benefit of Appellants. By questioning relinquishment by sisters Bhimabai and Shantabai, Appellants are actually attempting to reduce their own shares in the suit properties. Though it is vaguely contended by them that the Trial Court ought to have ascertained the exact shares of Bhimabai and Shantabai and ought to have conducted an enquiry into the exact party in whose favour the relinquishment is made, Appellants did not plead or prove that the two sisters relinquished their shares exclusively in favour of Kachru. Therefore, the point that is sought to be raised by them about relinquishment of shares by the sisters is again totally baseless.

14) After considering the overall conspectus of the case, I am of the view that no serious error can be traced in the concurrent findings recorded by the Trial Court and the First Appellate Court. No question of law, much less any substantial question of law, is involved in the Appeal. The Second Appeal is accordingly rejected without any orders as to costs.

15) In view of the rejection of the Second Appeal, Interim Application No. 15600 of 2023 does not survive and the same is also disposed of.

[SANDEEP V. MARNE J.]