



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

**SECOND APPEAL NO.389 OF 1995
WITH
CIVIL APPLICATION NO.5807 OF 1995**

1. Digambar S/o Rajaram Uttarwar
Age: 75 years, Occu: Agriculture,
and business R/o. Osmannagar,

2. Vijaykumar S/o Digambar Uttarwar,
Age: 35 years, Occu: Agriculture,
and business R/o. Osmannagar at
present Hadgaon, Tq. Hadgaon,
Dist. Nanded.

..Appellants
(Orig. Defendants)

Versus

Vishwanath S/o Digambar Uttarwar,
Age: 44 years, Occu: Business and Agriculture
R/o. Osmannagar at present at
Old Mondha Nanded,
Tq. and Dist. Nanded.

..Respondent
(Orig. Plaintiff)

...

Smt. S. G. Chincholkar h/f Mr. G. M. Chincholkar, Advocate for
Appellants.
Mr. V. V. Bhavthankar, Advocate for Respondent.

...
CORAM : S. G. CHAPALGAONKAR, J.
DATED : 06th MAY, 2025.

JUDGMENT :-

1. The appellants (original defendants) impugn judgment and decree dated 26.06.1995 passed by 3rd Additional District Judge, Nanded in Regular Civil Appeal No.177/1989, thereby reversing judgment and decree dated 20.04.1989 passed by Civil Judge Junior Division, Kandhar in Regular Civil Suit No.113/1987.

(Hereinafter, parties are referred to by their original status for the sake of convenience and brevity).

2. The respondent (original plaintiff) instituted Regular Civil Suit No.113/1987 before Civil Judge, Junior Judge, Kandhar seeking relief of declaration of ownership and perpetual injunction against appellants/original defendants contending that suit properties as specified in plaint are ancestral properties of plaintiff and defendants. Those were orally partitioned two years prior to institution of suit. The land Gut Nos.978 and 980 and House Property Nos.960 and 209 have been allotted to his share in partition. Since then, he acquired ownership and possession of suit properties. The plaintiff further contends that oral partition was reduced into writing on Stamp Paper on 06.04.1987. However, mutation was not carried in pursuance to oral partition of Hindu Joint Family of plaintiff and defendants. The mutation entries continued in the name of defendant nos.1 and 2 in respect of suit properties, therefore, defendants by taking disadvantage of mutation record, trying to dispossess him. Hence, he filed suit.

3. The defendants refuted plaintiff's claim and denied theory oral partition. They denied execution of partition deed dated 06.04.1987. They raised defence that suit is bad for non-joinder of necessary parties, as two brothers of plaintiff, who were also members of joint family and coparcener, were not added in suit.

Similarly, there is no reference of other properties owned by joint family.

4. The Trial Court framed issues based on pleadings of parties, recorded evidence tendered into service and finally dismissed suit vide judgment and order dated 20.04.1989 holding that plaintiff failed to prove oral partition and allotment of share, so also partition deed dated 06.04.1987 is inadmissible for want of registration. The Trial Court further concluded that plaintiff failed to prove his exclusive possession in respect of suit properties.

5. Aggrieved plaintiff filed Regular Civil Appeal No.177/1989 before District Court at Nanded. The learned District Judge reversed decree, thereby accepting case of plaintiff regarding oral partition and allotment of share. Similarly, recorded findings that plaintiff proved his exclusive possession and enjoyment of suit property and granted decree of declaration of ownership and perpetual injunction in favour of plaintiff.

6. Aggrieved defendants filed present Second Appeal, which has been admitted vide order dated 19.09.1997, which reads as under:

“Admit, on the grounds (E) and (H). So also the additional print which needs decision in the present Appeal is, a document which is on the record (Exh.67), whether it is a document executed after the actual partition was effected and therefore to indicate the shares of the parties this Exh.67 is reduced or, whether till the date of execution of that document there was no partition, and, as to whether,

in that case, considered the said document be read in evidence, inspite of the same having been not duly registered and properly stamped”

7. Grounds Nos.(E) and (H) reads thus :

“(E) Whether the unregistered and insufficiently stamped partition deed dt. 06/04/1987 is admissible to prove the title of any of the co-parceners to the properties mentioned in it.

(H) It may be seen that, as per AIR 1968 S.C. Page 1299, in absence of registration of partition deed, it is inadmissible to prove title of any coparceners to any property. In such circumstances, the Lower Appellate Court was not right in law, in holding with the help of unregistered partition deed, that the plaintiff proved his case for declaration of ownership and injunction.”

8. In light of aforesaid question of law, learned Advocates appearing for respective parties advanced their submissions.

9. Smt. Chincholkar, learned Advocate appearing for appellants vehemently submits that Trial Court had recorded well reasoned findings while declining to accept claim of plaintiff as regards to oral partition. She would further submit that partition deed dated 06.04.1987 was patently inadmissible in evidence for want of registration and stamp duty. The Appellate Court could not have relied upon same, even for collateral purpose. In support of her contentions she relies upon judgment of Supreme Court of India in

case of *Yellapu Uma Maheswari and another Vs. Buddha Jagadheeswararao and other*¹.

10. Per contra, Mr. Bhavthankar, learned Advocate appearing for respondent/original plaintiff would submit that Appellate Court considering overall conspectus of matter and referred to partition deed dated 06.04.1987, for limited purpose and decreed the suit. According to Mr. Bhavthankar even keeping aside partition deed dated 06.04.1987, plaintiff has brought on record sufficient material to prove oral partition, which has been acted upon by parties. Therefore, he justifies decree passed by Appellate Court. In support of his submissions, he relies upon observations of Supreme Court of India in case of *Subraya M. N. Vs. Vittala M. N. and others*² and *Thulasidhara and another Vs. Narayanappa and other*³.

11. Having considered submissions advanced by learned Advocates appearing for respective parties, first and foremost question that requires consideration in present Appeal is admissibility of partition deed dated 06.04.1987 and its effect on claim set out by plaintiff. The plaintiff asserts that document dated 06.04.1987 is not partition deed and same is memorandum of partition, which would not require registration. As such, it could

¹ 2015 (16) SCC 787.

² (2016) 8 SCC 705.

³ (2019) 6 SCC 409.

be used for collateral purpose in terms of Section 49 of Indian Registration Act. Even otherwise, same can be used as corroborative evidence for explaining arrangement made thereunder and conduct of parties. The family settlement would operate as complete estoppel to parties to such settlement, even though it has not been registered.

12. The defendants, however, refutes contentions of plaintiff on the ground that document is not only unregistered, but it is unstamped instrument. It can neither be admitted in evidence nor has acceptability for collateral purpose, until same is impounded. If plaintiff wanted to rely upon said document, it was open for him to impound the same with penalty.

13. Careful reading of document Exh.67 shows that it is titled as consent deed. It merely states that panchas mentioned therein have been authorized to partition the properties owned by Digambar S/o Rajaram Uttarwar (defendant no.1) amongst his sons. It further records that partition deed prepared by them shall be binding on all the parties. It bears signatures of defendant no.1- Digambar, plaintiff and his brothers. If aforesaid document is accepted to be true and correct, theory of plaintiff that there was oral partition two years prior to institution of suit cannot be countenanced. If there would have been oral partition in the year

1985, there was no need to appoint panchas for effecting partition amongst Digambar and his sons. The document Exh.67 itself cannot be read as evidence of oral partition as claimed. Therefore, document itself cannot be said to be deed of partition, which is susceptible to registration or payment of stamp duty. The defendant no.1 admitted his signature. The plaintiff relied upon said document. Therefore, there is no difficulty in admitting aforesaid document in evidence. However, as submitted by plaintiff, this cannot be accepted as evidence of oral partition.

14. In addition to aforesaid evidence, plaintiff relied upon his oral evidence and evidence of two witnesses. The plaintiff has further relied upon documents Exh.65 and 66 i.e. letters addressed by defendant no.1 to plaintiff. The letter dated 01.05.1985 merely refers intention of parties to effect partition, whereas another letter Exh.66 refers that dispute is settled because of mediation of panchas. Careful analysis of aforesaid letters does not put forth theory of oral partition as claimed. The aforesaid documents cannot be read as evidence of oral partition.

15. The Trial Court has rightly observed in paragraph no.12 of judgment that from contents of said letters inference can be drawn that in the year 1987 dispute has been settled through Mediator and plaintiff shall come to Osmannagar for further needful acts. Therefore, theory of oral partition put forth by plaintiff does not get

support. The plaintiff relied upon evidence of Nandkumar Nagnath, Exh.68, who is scribe of consent deed Exh.67, who states that panchas were authorized to effect partition. He does not support theory of previous partition.

16. Admittedly, there was no mutation in pursuance to alleged oral partition of the year 1985. The suit lands were standing in the name of defendant nos.1 and 2. The plaintiff failed to prove that he was put in possession of agriculture lands and he was cultivating the same through his servant Sambha. Evidence of said Sambha is not recorded. Another witness Mr. Rajesaheb, alleged tenant in Grampanchayat House No.209 examined to prove that plaintiff is receiving rent from him and he is in possession of property as tenant. However, said witness admitted that he do not know whether plaintiff is receiving rent for himself or on behalf of father.

17. The Appellate Court gave reference to plaint in Regular Civil Suit No.173/1988 that was instituted by one of brother of plaintiff, who is not party to present suit. Relying upon contents of said plaint, theory of oral partition is sought to be put forth. However, plaintiff in that suit i.e. Rajesaheb has not stepped into witness box. The contents of plaint, which is filed in the year 1988 stipulates about oral partition effected 10 years prior to institution of suit, which relates back to 1978. Therefore, even by accepting contents of plaint in Regular Civil Suit No.173/1988, theory of oral

partition in the year 1985 as claimed by plaintiff (two years prior to institution of suit) cannot be countenanced.

18. In result, this Court holds that plaintiff has miserably failed to prove his ownership and possession over the suit property, particularly on the basis of oral partition. Therefore, findings recorded by Appellate Court cannot be countenanced, whereas findings recorded by Trial Court appears to be in tune with oral and documentary evidence on record. Hence, following order:

ORDER

- a. Second Appeal is allowed.
- b. The judgment and decree dated 26.06.1995 passed by 3rd Additional District Judge, Nanded in Regular Civil Appeal No.177/1989 is quashed and set aside and judgment and decree dated 20.04.1989 passed by Civil Judge Junior Division, Kandhar in Regular Civil Suit No.113/1987 stands restored.
- c. In view of observations made in Second Appeal, pending Civil Application stands disposed of.

(S. G. CHAPALGAONKAR)
JUDGE