



IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.

**SECOND APPEAL NO. 356 OF 2000
(WITH CIVIL APPLICATION NO. 8302 OF 2018)**

1. Dilipkumar S/o Hansraj Jain
Age – Major, Occ :- Agri. and Service,
R/o Hatnoor, Tq. Kannad, Dist. Aurangabad.
2. Nirmalkumar S/o Hansraj Jain
Age – Major, Occ and R/o As above.
3. Rikhabchand S/o Hansraj Jain
Age- Major, Occ – and R/o As above.

..APPELLANTS

-VERSUS-

1. Fatechand S/o Gulabchand Jain
Since deceased through his L.R's.,
- 1-a) Padmabai W/o Fatechand Kasliwal (Jain),
Age :- 70 years, Occ . Household,
R/o Near Deshmukh Hospital,
Beed-Bye pass Road, Aurangabad.
- 1-b) Anil S/o. Fatechand Kasliwal (Jain),
Age : - 60 years, Occ : - Business,
R/o Hiwarkheda Road, Kannad,
Tq. Kannad, Dist. Aurangabad.
- 1-c) Ramesh S/o. Fatechand Kasliwal (Jain),
Age :- 58 years, Occ : - Service,
R/o Plot No.73, Kalandinagar,
Indore-Dewas Road, Indore (M.P)
- 1-d) Vijay S/o Fatechand Kasliwal (Jain),
Age :- 56 years, Occ : - Business,
R/o Plot No.103, 1st Floor,
Geetanagar, Near Tilaknagar,
Indore (M.P)
- 1-e) Sanjay S/o. Fatechand Kasliwal (Jain)
Age : 50 years, Occ : - Business,
R/o House No.29, Darshan Vihar,
Near Deshmukh Hospital,
Beed-Bye-Pass Road, Aurangabad.

- 1-f) Sau. Sunanda W/o. Vilas Sethi
Age : - 48 years, Occ :- Household,
R/o Rajabazar, Opp. Jain Mandir,
Aurangabad.
- 1-g) Sau. Meena W/o. Bharatkumar Gangwal
Age :- 45 years, Occ : - Household,
R/o Jain Mandir Lane, Kannad,
Tq. Kannad, Dist. Aurangabad.
2. Nemichand S/o. Gulabchand Jain
Since deceased, through his L.R's.
- 2-a) Pradipkumar S/o Nemichand Jain
Age :- 50 years, Occ. Service,
R/o 227/5989, 'Surajkiran',
Pantnagar, Ghatkopar (E),
Mumbai – 75.
- 2-b) Dilipkumar S/o Nemichand Jain
(Since deceased) Through L.Rs.
- 2b-1) Veer S/o Deelipkumar Jain
Age 15 years, Occ : Education
Under guardian of
Resp. no. 2b3 his mother,
Smt. Kalpana wd/o Deelipkumar Jain
- 2b-2) Ruchita d/o Deelipkumar Jain
Age 19 years, Occ : Education,
- 2b-3) Smt. Kalpana Deelipkumar Jain
Age : 50 years, Occ : Household,

Resp. Nos.2b-1 to 2b-3 R/o 182/4965,
Pantnagar, Ghatkopar East,
Greater Mumbai 400 075.

..RESPONDENTS

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Advocate for appellants : Mr.C.K. Shinde
Advocate for Respondent Nos.1/1-a : Mr.H.K. Mundhe
Advocate for Respondent Nos.1/1-b, 1-e, 1-f & 1-g : Mr.PF. Patni
Advocate for Respondent Nos.2b-1 to 2b-3 : Mr. A.H. Kasliwal

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CORAM : ROHIT W. JOSHI, J.

RESERVED ON : 19.03.2025

PRONOUNCED ON : 28.03.2025

JUDGMENT :

CIVIL APPLICATION NO. 8302 OF 2018 :-

1. This application under Order XLI Rule 27 of the Code of Civil Procedure is filed by the appellants seeking permission to lead additional evidence. Vide order dated 12th June, 2018, it was directed that the application will be taken up for hearing at the time of final hearing. Appeal was heard on 19.03.2025. The learned Advocate for the appellants had made submissions on this application as well. He had referred to only one document filed along with the application i.e. mortgage deed dated 10.11.1933. This document is considered while deciding the second appeal. Apart from this, learned counsel for the appellants did not urge to take into consideration any other document.

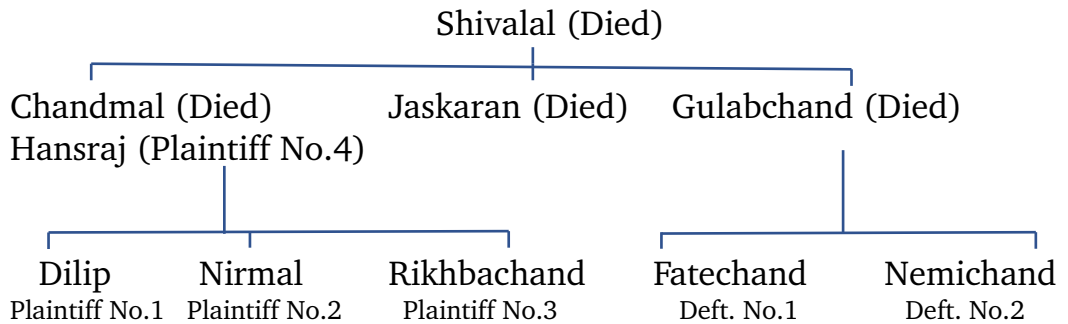
2. The learned Advocate for the respondents did not object to take the mortgage deed into consideration while deciding the appeal. It was decided that the mortgage deed will be considered while deciding the appeal without formal proof of the same, since both the parties were not disputing the said document.

3. The civil application is partly allowed only with respect to mortgage deed.

SECOND APPEAL NO. 356 OF 2000 :-

1. The present second appeal is filed by the original plaintiffs challenging the judgment and decree dated 26.07.1991 passed by the learned Joint Civil Judge, Junior Division, Kannad, Dist. Aurangabad, dismissing Regular Civil Suit No.108/1984 as also the judgment and decree dated 07.08.1999 passed by the learned Extra Joint District Judge, Aurangabad in Regular Civil Appeal No.227/1991, whereby the first appeal filed by the present appellants came to be dismissed. The appellants are hereinafter referred as “plaintiffs” and respondents are referred as “defendants”.

2. The following family tree explains the *inter se* relationship between the parties :-



3. Perusal of the family tree will indicate that late Shivalal had three sons namely (i) Chandmal, (ii) Jaskaran, (iii) Gulabchand. Jaskaran had expired without leaving behind any legal heirs. The dispute in the matter pertains to properties of the family. The plaintiffs are decedents of Chandmal S/o Shivalal. Plaintiff No.4 is son of

Chandmal and plaintiff nos.1 to 3 are his sons. Likewise, the defendants are decedents of Gulabchand S/o Shivilal. The plaintiffs had filed suit seeking possession of the suit properties, which are agricultural lands bearing Gat Nos.361/2 admeasuring 0.81 HR and Gat No.362 admeasuring 7.18 HR situated at village Hatnoor, Tq.Kannad, Dist. Aurangabad. It is the case of the plaintiffs that land bearing Survey No.282, 283 and 284 of village Hatnoor, originally belonged to one Mr.Albert James. It is stated that land bearing survey nos.282 and 283 were received by late Chandmal, (predecessor of the plaintiffs) and land bearing survey no.284 was received by Gulabchand (predecessor of the defendants) from the said Mr.Albert James. It is further stated that the brothers Chandmal and Gulabchand separated by virtue of partition between them in the year 1931. Chandmal, father of plaintiff no.4 expired in the year 1931, and therefore, his uncle Gulabchand, father of defendant nos.1 and 2 was looking after him and also taking care of his properties. It is alleged that Gulabchand sold land bearing survey no.284, which was owned by him in the year 1931. It is further alleged that Gulabchand had mortgaged land bearing survey nos.282 and 283 with one Kesharchand Dipchand acting as guardian of plaintiff no.4, who was minor at that time. It is stated that plaintiff no.4 has thereafter redeemed the mortgage in the year 1946. The plaintiffs state that plaintiff no.4 was recorded as sole owner of land bearing survey nos.282 and 283 in the revenue records till the year 1959. They allege

that defendant nos.1 and 2 represented plaintiff no.4 that the land bearing survey nos.282 and 283 were properties of Joint Hindu Family and got a document titled as '*Vatani Patrak*', i.e. partition deed dated 21.06.1959 executed from him. It is stated that the said partition deed dated 21.06.1959 is obtained fraudulently by misrepresenting the facts to plaintiff no.4. It is further alleged that defendant nos.1 and 2 have acting hand in gloves with the revenue authorities recorded their names in the revenue record with respect to land bearing survey nos.282 and 283. Survey nos.282 and 283 have been sub-divided on the basis of alleged partition. Land bearing survey no.282/1 admeasuring 18 acres 36 guntha is allotted to the share of plaintiff No.5 and survey no.282/2 admeasuring 2 acres is shown to be allotted to the share of defendant Nos.1 and 2 on the basis of the said partition deed.

4. As regards survey no.283 it is stated that a portion of land admeasuring 12 acres 8 guntha was sold by plaintiff no.4 and defendant no.1 vide sale deed dated 05.11.1959. With respect to this sale deed, it is stated that although plaintiff no.4 alone was the owner, signature of defendant no.1 was taken as a vendor on the sale deed on the insistence of the purchaser. It is stated that this portion of 12 acres 8 guntha came to be numbered as survey no.283/2 and remaining portion of 17 acres 30 guntha came to be numbered as survey no.283/1 and it stood in the name of defendant nos.1 and 2. The plaintiffs

further states that defendant nos.1 and 2 had no right to occupy 2 acres land in survey no.282/2, which was renumbered as gat no.361/2 and 17 acres 30 guntha land in survey no.283/1, which was renumbered as gat no.362. These two properties are referred in the plaint as suit properties and the plaintiffs have claimed possession of the suit properties in the suit claiming ownership over the same. The plaintiffs claimed that the partition deed dated 21.06.1959 on the basis of which defendant nos.1 and 2 claim ownership is obtained fraudulently by misrepresentation. It needs to be mentioned that the alleged fraud or misrepresentation is not with respect to execution of the document. It is the case of plaintiffs that the defendant nos.1 and 2 misrepresented the plaintiff no.4 that the properties bearing Survey Nos.282 and 283 were ancestral properties of the plaintiffs and defendants and on such false representation they obtained the document of partition dated 21.06.1959 from plaintiff no.4.

5. As against this, the case of defendant nos.1 and 2 is that land bearing survey nos.282 and 283 were initially acquired by late Shivalal, grand-father of plaintiff no.4 and defendant nos.1 and 2. They denied that the document of partition was outcome of fraud. They claimed that the document of partition in fact records the terms of oral partition, which was arrived at between the family members of Chandmal (plaintiff no.4) and Gulabchand (defendant nos.1 and 2).

6. Based on the rival pleadings, the learned trial Court framed issues on which the parties led their evidence. The plaintiffs examined plaintiff no.3 – Rikhabchand as their sole witness and closed their evidence. As against this, the defendants examined defendant no.1 – Fatechand as their sole witness.

7. The learned trial court, after hearing the arguments of respective Advocates, has dismissed the suit vide judgment and decree dated 26.07.1991. The learned trial court has drawn adverse inference against plaintiff no.4 for not entering into witness box. The learned trial court has held that pleadings of fraud are absolutely vague. It is also observed that just as defendant no.1 had executed partition deed dated 21.06.1959 (Exhibit-52) in favour of plaintiff no.4, the plaintiff no.4 had executed a similar document in favour of defendant no.2. It is held that the entries of mutation are long standing entries, which were not disturbed for a sufficiently long period. Apart from this, learned trial court has held that defendants had perfected their title by adverse possession. In view of the aforesaid, the learned trial court was pleased to dismiss the suit on 26.07.1991 for possession filed by the plaintiffs. Aggrieved by dismissal of their suit, the plaintiffs filed first appeal under Section 96 of Civil Procedure Code, being Regular Civil Appeal No.227/1991. The said appeal is dismissed vide judgment and decree

dated 07.08.1999. The learned first appellate court has also scanned the entire evidence on record and has recorded that the plaintiffs had failed to prove that the partition receipt dated 21.06.1959 was obtained by practicing fraud. The learned first appellate court has recorded categorical finding that partition had taken place between the parties on 21.06.1959. The learned first appellate court also agreed with the learned trial court that the defendants had perfected their title by adverse possession.

8. Against these concurrent decrees, the plaintiffs have filed the present second appeal, which came to be admitted vide order dated 14.02.2008, on the following four substantial questions of law :-

- a) Whether the lower courts were right in recording the finding that the possession of the defendants needs to be protected as the same being hostile to the real owner and continuous and open and adverse to the interest of the plaintiff ?
- b) Whether the trial court was justified in recording finding that the long standing revenue entries are themselves an instance signifying factum of ownership and whether such an inference can reasonably be drawn on the basis of mere recording of revenue entries ?

c) Whether the courts below were justified in construing the documents at Exh.52 as receipt of partition when the contents of the said documents prima facie indicate something else than what has been contended ?

d) Whether the continuous possession of the defendants over the disputed property coupled with fact that plaintiff and defendants are from same family lead to an reasonable inference as regards acquisition of hostile title by defendants.

9. I have perused the pleadings, depositions of plaintiff no.3 and defendant no.1 and documents on record as also findings recorded by the learned Courts with the able assistance of both the learned Advocates appearing in the matter.

10. At the outset, it needs to be mentioned that plaintiff no.4 is the eldest member in the family of plaintiffs. He is father of plaintiff nos.1 to 3. The allegation in the plaint is that the document of partition was got executed by practicing fraud upon him and misleading him. Having regard to the aforesaid, in my considered opinion, it was necessary for the plaintiffs to examine plaintiff no.4 as their witness. The learned Courts have rightly drawn adverse inference against the plaintiffs for not examining plaintiff no.4 as their witness. It will be pertinent to note that plaintiff no.3, who has entered the witness box

has stated in his cross-examination that his father has tendency to speak the truth because he is innocent. That appears to be the reason for not examining him.

Answer to all questions overlap to certain extent and therefore all questions are decided together :-

11. As regards the document of partition, learned Advocate for the appellants has vehemently argued that the document of partition is in fact document of demise under which partition has taken place, according to defendant nos.1 and 2. He contends that the said document is not memorandum of partition, which had already taken place. He contends that the document was required to be registered in view of mandate of Section 17 of the Registration Act and further that the said document could not be read in evidence in view of the bar under Section 49 of the said Act.

12. I have perused the document of partition at Exhibit-52. The contention of the learned Advocate for the appellant is correct that the said document is not a memorandum of partition that had allegedly taken place in past. It is certainly a partition deed under which separation has taken place. The document is required to be registered as per Section 17 of the Registration Act.

13. However, that by itself is not the end of the matter. The document is of the year 1959. The suit is filed in the year 1984. It will be pertinent to mention here that this original document of partition is filed on record by the plaintiffs themselves. Apart from this, it has also clear from in the evidence on record that just as defendant no.1 had issued document dated 21.06.1959 in favour of plaintiff no.4, plaintiff no.4 had also issued similar letter of partition in favour of defendant nos.1 and 2. It is therefore clear that the parties had decided to partition their jointly owned properties and had issued letters evidencing the same in favour of each other.

14. It will also be profitable to refer to the revenue record. On the basis of the document of partition at Exhibit-52 entry in the mutation register is recorded in the name of plaintiff no.4. The said extract of mutation register is at Exhibit-56. Likewise, on the basis of similar letter of partition issued by plaintiff no.4 in favour of defendant nos.1 and 2 entry with respect to suit properties is taken in the name of defendant nos.1 and 2 in the register of mutations. The said extract of mutation register is at Exhibit-53. The 7/12 extracts show ownership of respective parties with respect to portions allotted to their share thereafter. The parties are also paying taxes with respect to the properties that have fallen to their share which is also apparent from

the exhibited documents on record. The plaintiff no.3 who is the sole witness of the plaintiffs has expressly admitted that the plaintiffs are not paying taxes for the suit properties since the year 1959. In the light of aforesaid, I am of the considered opinion that the learned courts have rightly recorded the findings of fact that partition in the family had in fact taken place in which the suit properties had fallen to the share of defendant nos.1 and 2 and that the plaintiffs are not entitled to claim possession of the suit properties from defendant nos.1 and 2.

15. The learned Advocate for the appellant has placed reliance upon the several judgments of this Court as also the Hon'ble Supreme Court to contend that document which is required to be compulsorily registered cannot be read in evidence as proof of the transaction recorded in the document. Whereas, there cannot be any dispute with the said proposition, in my considered opinion, it will be more appropriate to apply principle of estoppel laid down by the Hon'ble Supreme Court in the case of *Kale and others Vs. Deputy Director of Consolidation* reported in *AIR 1976 SC 807*, which is relied upon by the learned Advocate for defendant nos.1 and 2. In the matter before the Hon'ble Supreme Court severance in a family was arrived at under a document of family settlement. The said document was not adequately stamped and was also not registered. However, the document was accepted by the parties and all the parties had acted

upon the said document all throughout. In this backdrop, when dispute arose with respect to properties of the family and the said document became a bone of contention between the parties, the document was sought to be dislodged taking shelter under the provisions of the Stamp Act and Registration Act. The Hon'ble Supreme Court has held that even if the document of settlement was not registered and not adequately stamped, it would operate as complete estoppel against the parties, who had accepted the document and acted upon the same. The Hon'ble Supreme Court has also reiterated the settled legal principle that although, an unregistered document cannot be read in the proof of the transaction recorded under it, it can certainly be read for collateral purposes, which includes determining the character of possession of a person over immovable property. The Hon'ble Supreme Court in the said judgment in para no.44 has observed as under :-

“44. The High Court further erred in not considering the fact that even if the family arrangement was not registered it could be used for a collateral purpose, namely, for the purpose, of showing the nature and character of possession of the parties in pursuance of the family settlement and also for the purpose of applying the rule of estoppel which flowed from the conduct of the parties who having taken benefit under the settlement keep their mouths shut for full seven years and later try to resile from the settlement.”

16. In my considered opinion, the principles laid down by the Hon'ble Supreme Court in the said judgment are squarely applicable to the facts of the present case, wherein the respective claims with respect to properties in the family were set at rest by the parties and the suit for possession disputing the document was instituted after a period of around 25 years from the arrangement arrived at between the parties, which was accepted and acted upon all throughout. It must be mentioned that just as provisions of Registration Act are a part of statute. Estoppel is also a principle, which is statutorily recognized. The provisions of the Registration Act cannot be pressed into service to completely wipe out Section 115 of the Evidence Act. The parties who have stood by the transaction for years together cannot be allowed to disrupt the entire understanding after an inordinate period of delay as is sought to be done in the case in hand.

17. The learned Advocate for defendant nos.1 and 2 has drawn my attention to the letters at Exhibit-70 to 72 issued by plaintiff no.4 to defendant nos.1 and 2. Perusal of these letters clearly indicate that there was no partition in the family till the year 1959 as contended by the plaintiffs. The letters issued by plaintiff no.4 are for calling upon defendant no.1 to receive his share of the sale consideration with respect to a property of the family which was sold by appellant no.4. Likewise the other two letters are issued calling upon the defendants to

make payment of money for expenses for cultivation of the land. These letters are sufficient to dislodge the claim of the plaintiffs that there was a partition in the family somewhere around the year 1930 under which the lands bearing survey nos.282 and 283 had fallen to their share.

18. It will be pertinent to mention here that according to the defendants, survey no.284 had fallen to the share of plaintiffs and plaintiffs have already sold the said property. It has come in the evidence of plaintiff no.3 that the properties which had fallen to their share were sold by them. This further fortifies the contention of defendants that the property is partitioned.

19. It will be pertinent to mention here that the disputed document of partition is filed on record by the plaintiffs. They were obviously in the custody of the same. However, they have not chosen to challenge the said document. Plaintiff averments and evidence of plaintiff no.3 does not demonstrate as to when they got knowledge about the disputed document and wrong entries in the revenue records. In my considered opinion, it was necessary for the plaintiffs to challenge the said document and in any case to seek appropriate declaratory relief with respect to the said document. The suit as framed and filed is not maintainable. It was necessary for the plaintiffs to seek appropriate

relief of declaration to overcome the document of partition at Exhibit-52.

20. The case of adverse possession needs to be viewed in the peculiar facts of the case, wherein earlier the plaintiffs and defendants held the property together as their Joint Hindu Family property. There is a partition in the year 1959 as is evidenced from document of partition dated 21.06.1959, corresponding revenue entries and other circumstances such as plaintiffs having stopped making payment of taxes for the suit property after the year 1959 and sale of land bearing survey no.284 by the plaintiffs which had fallen to their share. Upto the year, 1959 property was held jointly. Thereafter, the defendants claimed absolute ownership over the suit property to the exclusion of the plaintiffs on the basis of partition. The plaintiffs do not allege that they were not aware about this partition. Their case is that the defendant nos.1 and 2 made a plaintiff no.4 to believe that the property was a property of Joint Hindu Family and got the partition on the basis of said misrepresentation. The plaintiffs were thus aware from the year 1959 itself that defendants claimed exclusive ownership over the suit property. The suit is filed in the year 1984 after a period of around 25 years. In that view of the matter, the possession of defendants became adverse to the interest of plaintiffs since the year 1959 and upon completion of 12 years period i.e. in the year 1971, they perfected their

title by adverse possession against the plaintiffs by virtue of Section 27 of the Limitation Act. Finding by the learned Courts on this regard cannot be faulted.

21. Both the learned Courts have correctly appreciated the factual and legal position and have rightly dismissed the suit and first appeal filed by the plaintiffs/appellants. In that view of the matter, the questions of law framed in the appeal are answered in favour of the respondents. Appeal is therefore, required to be dismissed.

22. The appellants have filed an application under Order XLI Rule 27 of Civil Procedure Code for permission to lead additional evidence. While advancing submissions on the said application, the learned Advocate has referred to the mortgage deed with respect to land bearing survey nos.282 and 283. He contends that Gulabchand had executed a mortgage as guardian for appellant no.4 since he was minor at the relevant time. Perusal of the said document indicates that Gulabchand has executed the document as guardian of plaintiff no.4 in his individual capacity. The document clearly reveals the said fact. The said circumstance also goes against the plaintiffs who contend that there was already partition in the family in the year 1933 and the suit properties had fallen to their share. It is sought to be contended that because the suit properties had fallen to the share of plaintiff no.4,

Gulabchand had executed the said document as guardian for plaintiff no.4. However, as stated above, Gulabchand had executed a document for himself and also as guardian of plaintiff no.4, which goes to show that the property was joint at the relevant time. There is no evidence with respect to partition of the said property, except the document of partition at Exhibit-52 under which property has fallen to the share of defendant nos.1 and 2.

23. Apart from the said document of mortgage, the learned Advocate did not refer to any other document filed along with the said application. The purpose of the application filed by the appellants is thus served, in as much as, the document which was pressed into service during the course of arguments is considered in the judgment as above.

24. In the result second appeal is dismissed.

25. Civil Applications, if any, stand disposed of.

[ROHIT W. JOSHI]
JUDGE

sga/