



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

SECOND APPEAL NO.40 OF 2025

APPELLANT

Ori. Def. No.1
On R. A.

:- Chhabilal S/o Gulab Turkar, Aged-60
years, Occ:- Cultivator, R/o Borgaon,
Tahsil-Tumsar, Distt. Bhandara (M.S.)

..VERSUS..

RESPONDENT

Ori. Plaintiff no.1

Ori. plaintiff. No.2

Ori. Defendant no.2

1 Indubai w/o Sundarlal Aale, Aged-64
years, Occ-Household, R/o Lonasa,
Tahsil-Warasioni, Distt- Balaghat (M.P.)

2 Rajkumar @ Narmadaprasad s/o Gulab
Turkar, Aged-62 years,
Occ-retired/Cultivator At present R/o
Durga Colony, Hasara Road, Near
House of Dr. Lanje, Tah.-Tumsar, Distt.-
Bhandara (M.S.)

amendment carried out as per registrar's order
dt. 04.01.2024

3 Purushottam S/o Gulab Turkar,
Aged-67 years, Occ:-Cultivator, R/o
Borgaon, Tahsil-Tumsar, Distt.
Bhandara (M.S.)

Mr.H. P. Lingayat, Advocate for Appellant.

CORAM : **ROHIT W. JOSHI, J.**

DATE : **02.02.2026**

J U D G M E N T :

1) Heard.

2) The present appeal is preferred by defendant No.1 in Regular Civil Suit No.34 of 2010, which came to be decided by the learned Civil Judge, Junior Division, Tumsar vide judgment and decree dated 19.01.2017. The said suit is a suit for partition and separate possession, which was dismissed by the learned Trial Court. The plaintiffs in the said suit preferred First Appeal, being Regular Civil Appeal No.29 of 2017, which is partly allowed by the learned District Judge-1, Bhandara vide judgment and decree dated 27.09.2021.

3) The plaintiffs and defendants are real brothers and sisters. The plaintiffs filed suit for partition and separate possession. The said suit was dismissed by the learned Trial Court. The appeal came to be partly allowed by the learned First Appellate Court. There are four properties forming subject matter of the suit. Two of the suit properties are purchased by defendant No.1 from mother of the parties. The learned First Appellate court has excluded the said two properties which were purchased by defendant No.1 from his mother and decree was passed with respect to two other

properties.

4) The defence of defendant No.1 is that these two properties with respect to which decree for partition is passed were bequeathed to him by the mother. It is not in dispute that although one of the attesting witnesses to the Will is examined, the fact of attestation of the Will is not proved during the course of examination in chief, since no questions were put to the said witness with respect to the due execution and attestation of Will in the examination in chief itself.

5) The learned First Appellate Court has, therefore, held that Will is not proved and decreed, the suit for partition with respect to properties which were forming subject matter of the Will.

6) The learned advocate for the appellant/defendant No.1 contends that since the Will was not disputed, the learned First Appellate Court could not have discarded the same. I am unable to accept the said contention. In order to make a Will admissible in evidence, it is necessary to prove its due execution and attestation even if it is not disputed in

view of mandate of proviso to Section 68 of The Indian Evidence Act. In the absence of such evidence, the learned First Appellate court has committed no error in discarding the Will.

7) It will be pertinent to state that the learned Trial Court has dismissed the suit with respect to the agricultural lands on the ground that partition of the same will result in creation of a fragment. The learned First Appellate Court has rightly reversed the decree in view of Section 8AA of the Maharashtra Prevention of Fragmentation and Consolidation of Holding Act which provides for mechanism for execution of decrees for partition whereby a fragment may be created.

8) No substantial question of law, therefore, arises in the Second Appeal. Second Appeal is therefore **dismissed** with no order as to costs.

(ROHIT W. JOSHI, J.)

Tanmay..