



सत्यमेव जयते

Received	24	04	2015
Registered	24	04	2015
Decided	27	08	2018
Duration	Y	M	D

IN THE COURT OF 2nd ADDITIONAL CIVIL JUDGE & JMFC COURT, KATHOR
(SHRI R. K. AGARWAL SAHEB) AT KATHOR

RCS (O) NO:- 43 of 2015

EXHIBIT : 46

PLAINTIFF :

1. Ramanbhai Bhavanbhai Patel
Residing at :- Asta, Kamrej, Surat
2. Maganbhai Bhavanbhai Patel
Residing at :- Asta, Kamrej, Surat
3. Lallubhai Bhavanbhai Patel
Residing at:- Asta, Kamrej, Surat

AGE

Adult

Adult

Adult

OCCUPATION

Farmer

Farmer

Farmer

V/s.

DEFENDANT:

1. Dhanjibhai Bhavanbhai Patel
Resident of:- Asta, Kamrej, Suart. Presently residing at USA
2. Ranjanbehn A Patel
Resident of:- Asta, Kamrej, Surat. Presently residing at USA

Adult

Adult

Farmer

Housewife

Sub : Suit for the Declaration, Partition & Injunction.

- =====
1. Ld. Advocate **Shri D. P. Parmar** appearing for Plaintiff.
 2. Ex-Parte to Defendants.
- =====

-: J U D G M E N T :-

1. **PLAINT:-** The fact dossier of the plaintiff's case states that the plaintiff and defendant along with their family members resides at the given above address. The Plaintiff asserts that all the three plaintiffs are real brothers and defendant No 1 is also their real brother and Defendant No 2 is their real sister and they all are siblings of Bhavanbhai Madhavbhai Patel and Kamlabehn Bhavanbhai Patel.

Bhavanbhai Madhavbhai Patel and Kamlabehn Bhavanbhai Patel had various property on their names such as the first property is situated at Asta, Kamrej, Surat having block Number 199 Survey Number 133/1 admeasuring 1-00-16 having Akar of Rs. 11.31 to be referred as Property 'A'. The second property is situated at Asta, Kamrej, Surat having block Number 139 Survey Number 108/2 admeasuring 1-67-79 having Akar of Rs. 08.69 to be referred as Property 'B'. The third property is situated at Asta, Kamrej, Surat having block Number 251 Survey Number 220/2 admeasuring 0-32-37 having Akar of Rs. 03.56 to be referred as Property 'C'. The fourth property is situated at Asta, Kamrej, Surat having block Number 313 Survey Number 301/2 admeasuring 0-14-16 having Akar of Rs. 01.75 to be referred as Property 'D'. The said suit for the partition is relating to partition of property A, B, C and D.

All the above four properties is jointly in name of Bhavanbhai Madhavbhai Patel, Plaintiff's and defendant. The plaintiff further asserts that Bhavanbhai Madhavbhai Patel expired on 29/10/2003 and his wife Kamlabhen Bhavanbhai Patel expired on 30/04/2000. The plaintiff asserts that they and defendant no 1 are the lawful legal heir of deceased Bhavanbhai Madhavbhai Patel but they have made an application before

revenue authority to enter the name of defendant no 2 who being sister has equal right over the said properties alike brothers. The plaintiff no 2, 3 further assert that they have cancelled the POA done in favor of son of defendant no 2 with regard to all transactions of disputed property due to some problem occurred between them. The plaintiff further asserts that they reside out of India and defendants are managing the property and they are not sharing the profits out of it and enjoying all mesne profits. The plaintiff further asserts that they came to know that defendants are trying to sale, mortgage or transfer the above disputed property which they don't have any right to do so without their permission as the said disputed property is jointly owned by all, hence the need was felt to file the said suit for the declaration, permanent injunction and the partition of the disputed property situated at Asta, Kamrej, Surat.

2. **WRITTEN STATEMENT:** - Then as per the civil procedure, after hearing on the admissibility of the suit, thereafter the court issues a notice to the other side for the reply. In the present case, the said notice was not found to be duly served. Hence, the plaintiff moved an application vide an exhibit 6 for serving process hand to hand which was duly allowed. Now, perusing the records, it is found that plaintiff produces slip of speed post vide exhibit 9 with regard to issuance of notice on concerned address to other side. In spite being issuance of notice vide a speed post the other side paved no seriousness for appearing before the court hence the said suit was ordered to be continued as Ex-Parte by passing order below exhibit 1 dated 18/9/2015.
3. **EVIDENCE BY PLAINTIFF:** - Moving towards the discussion of the facts and the material of the case, at brief is shown that the plaintiff has adduced following oral and documentary evidences in support of its averments:-

**** ORAL EVIDENCE:**

- | | |
|----------|--|
| Exh. 14 | Deposition of Mayurbhai Rameshbhai Patel. |
| Exh. 40A | Deposition Kalpeshbhai Mavjibhai Dhori Talathi cum Mantri of Asta, |

Kamrej, Surat.

**** DOCUMENTARY EVIDENCE:**

- Exh. 19 POA by Plainitff No 1. 2 in favor of Mayur Rameshbhai.
Exh. 20 Xerox Pedinama of Bhavanbhai Madhavbhai Patel.
Exh. 21 7/12 extract of old block no 199 and new block no 208.
Exh. 22 7/12 extract of old block no 139 and new block no 128.
Exh. 23 7/12 extract of old block no 251 and new block no 263.
Exh. 24 7/12 extract of old block no 313 and new block no 318.
Exh. 25 7/12 extract of old block no 228 and new block no 245.
Exh. 26 Village Form 8A of all above block.
Exh. 27 Village Form 6 of all above property.
Exh. 28 Entry 691 showing above properties as Ancestral.
Exh. 29 Public Notice in Gujarat Samachar.
Exh. 30 Village form 12 of sugarcane farming in Block no 128 in 2014 to 2017.
Exh. 31 Village form 12 of sugarcane farming in Block no 208 in 2014 to 2017.
Exh. 32 Village form 12 of sugarcane farming in Block no 245 in 2014 to 2017.
Exh. 33 Village form 12 of sugarcane farming in Block no 263 in 2014 to 2017.
Exh. 34 Village form 12 of sugarcane farming in Block no 318 in 2014 to 2017.
Exh. 41 Certificate by Talathi cum Mantri of Gram panchayat Asta, Kamrej, Surat

- 4. EVIDENCE BY DEFENDANT:** - Moving towards the discussion of the facts and the material of the case, it is found that as the said suit is tried as ex-parte the other side has produced no oral or documentary evidence.

**** ORAL EVIDENCE:**

No oral evidence adduced.

**** DOCUMENTARY EVIDENCE**

No Documentary evidence adduced.

5. **CLOSING CUM ARGUMENTS:** - Once the parties moved their evidences then the Plaintiff moved his closing purses vide an **exhibit 43** and the defendant did not moved any kind of oral or documentary evidence to counter the claim of plaintiff. The court heard Ld. Advocate D T Parmar on the behalf of the plaintiff and no one appeared for and argued on behalf of defendants.
6. **ISSUES:** - On basis of the facts and the pleadings, Court framed the issues dated 23/12/2016 vide **Exhibit 13** to decide the suit, which are as under :
 1. Whether the Plaintiff proves that the disputed property is Joint Ancestral property?
 2. Whether the Plaintiff proves that they being the legal heirs are entitled for share in disputed property?
 3. Whether the plaintiff proves that they are entitle for the mesne profits from the disputed property?
 4. Whether the Plaintiff proves that they are entitle for the relief claimed for?
 5. What order and decree?
7. **My answers to the above issues are as under:**
 - a. In the Affirmative.
 - b. In the Affirmative.
 - c. In the Negative.
 - d. In the Partly Affirmative.
 - e. As per Final Order.

-: REASONS :-

8. ISSUE NO :- 1 to 4: -

All the above-mentioned issues being so interconnected and intermingled, therefore, to avoid repetition they are discussed and decided together. Above all the stated issues are inter-related and intermingled because firstly plaintiff need to proves that the disputed properties are the ancestral property and then the plaintiff needs to show that they are the legal heirs of the deceased and hence they will get automatic rights over the same according to law.

8.1) ARGUMENT OF PLAINTIFF: - In the said case the plaintiff argued that he filed the said suit for the partition along with interim Injunction application which was rejected. The plaintiff further argued that they are the class 1 legal heirs of the Bhavnabhai Madhavbhai Patel and Kamlabehn Bhavanbhai Patel who died intestate leaving behind various properties shown as property A, B, C, D. The plaintiff further argued that though the interim application was rejected but they have shown their case at hand and they have shown that the disputed properties is jointly owned hence, the plaintiff have their equal share in the property as per law. Hence, the need was felt to file the said suit for the declaration, injunction and partition. The plaintiff argued that he has produced the oral and documentary evidence to show that they are family members and have undivided interest in the property. Hence, the suit of the plaintiff be allowed.

8.2) ARGUMENT OF DEFENDANT: - In the said case, as seen above the defendants were duly served with the notice still they failed to appear before the court and contest the case. Hence, their right to reply and contest was closed and the matter was ordered to continue as ex-parte. Hence, the court has considered that they have nothing to say and to contest the claim of plaintiff.

8.3) WITH REGARD TO ISSUE NUMBER 1:- Now, in the said issue the burden is upon plaintiff to prove that the disputed properties are the Joint Ancestral properties. For the same the plaintiff has produced oral and supportive documentary evidences. Basically, the opponents being the family members of the plaintiff in-spite being served with the notice failed to appear and defend. Now, moving ahead in the discussion this court finds that there are primarily two conditions for the property to qualify as ancestral property; firstly, the property should be four generations old and secondly, it should not have been divided or partitioned by the previous three generations. As, it is basic principle of Hindu law that one gets a right by birth in an ancestral property and one inherit self-acquired property on death of owner. If father owns ancestral and self-acquired property then he can exclude son and daughter from self-acquired property but not from ancestral property.

8.3.1) Now, the plaintiff has asserted in his plaint vide an exhibit 1 and affidavit on oath Vide exhibit 14 that the said property number A, B, C, D was in the name of their father Bhavnabhai Madhavbhai Patel and thereafter it was entered in their names in the revenue records. For the same, it is must to observe the Pedinama of Bhavanbhai Madhavbhai Patel vide exhibit 20 which is issued by appropriate authority which removes all doubt with regard to it. Perusing the same, it is found that Bhavanbhai Madhavbhai Patel died on 29/10/2003 leaving behind 4 son and 1 daughter and his wife name as Kamlabhen Bhavnabhai Patel who was already expired on 30/4/2000. So, from the above fact one thing is very clear that plaintiff and the defendant are the legal heirs and family member of deceased Bhavanbhai Madhavbhai Patel from who's property they are claiming partition. Further, it is also clear that the property was in the name of Bhavanbhai Madhavbhai Patel and later names of parties to suit was entered and finally it has not been partitioned. So, this court finds that suit for the partition is rightly made out by the plaintiff because one can claim partition of undivided joint property only. *Further perusing the document vide an exhibit 28 shows the entry number 691 dated 30/1/1978 which specifically mention about the fact that the property A,B,C,D are the ancestral property owned by Bhavanbhai Madhavbhai Patel.* Further all such facts are mentioned on affidavit on oath by plaintiff vide exhibit 14 over which the other side has not done any cross which in turn also add to the strength of the

plaintiff's case. Furthermore, document vide an exhibit 27 shows that on death of Bhavanbhai Madhavbhai Patel names of all 4 son and daughter (plaintiff and defendant) was added vide entry number 2388 which was later certified which leaves no scope for doubt. Further lastly, perusing document vide an exhibit 26 shows Village Form No 8A which shows names of all parties and also shows Khatta No of all properties as 129 which in turn also add to the case of the plaintiff. So, from above document vide exhibit 26, 27, 28 one thing is very clear that the above mentioned property are the joint ancestral property running in the names of all the parties to the suit.

8.3.2) The plaintiff in order to prove his burden supported the claim with the help of 7/12 extract vide an exhibit 21 of property No 208 along with Village form 12 vide exhibit 31 which no doubt shows the name of all the plaintiff & defendant which in turn again forces the court to think that they are the joint owner of the disputed property as they are revenue payers also. Further the plaintiff produces 7/12 extract vide an exhibit 22 of property No 128 along with Village form 12 vide exhibit 30 which no doubt shows the name of all the plaintiff & defendant which in turn again forces the court to think that they are the joint owner of the disputed property as they are revenue payers also. Further the plaintiff produces 7/12 extract vide an exhibit 23 of property No 263 along with Village form 12 vide exhibit 33 which no doubt shows the name of all the plaintiff & defendant which in turn again forces the court to think that they are the joint owner of the disputed property as they are revenue payers also. Further the plaintiff produces 7/12 extract vide an exhibit 24 of property No 318 along with Village form 12 vide exhibit 34 which no doubt shows the name of all the plaintiff & defendant which in turn again forces the court to think that they are the joint owner of the disputed property as they are revenue payers also. Perusing the above revenue records, this court firmly find that above documents contains name of all the parties, hence, the said document adds to the strength of the plaintiff's case. Further other side in spite being served with the notice has failed to appear and contest the suit which in turn also add to the strength of the plaintiff case.

8.3.3) Now, the same burden of they all being the joint owner was tried to be proved

with the help of oral evidence of plaintiff vide an exhibit 14. The other side was given due chance to contest the case but he failed to do so which in turn paved the way for ex-parte trail and favored the case of plaintiff. Further, deposition on oath was given by POA of the plaintiff but it does not matter much because usually such cases of partition are based on paper cum documentary evidence more than oral. Further the law provides that one can carry the trail through POA if he wishes so and no one can take it otherwise in eyes of law. So, above documents along with oral deposition on oath finally paved the way to conclude that the above mentioned properties are the joint ancestral property.

8.3.4) Finally the plaintiff has examined Talathi Cum Mantri of Asta, Kamrej, Surat vide exhibit 40A who has deposed on oath and sated that disputed properties are the jointly owned property and Certificate by him was issued with regard to same which was exhibited as 41. He deposed that he has given said certificate on the bases of 7/12 extract, 8A and 6 Village form which in turn also add to the point that the above mentioned property is jointly owned property by all the parties and no other person has any kind of right over the same. Further the said witness has perused document vide exhibit 28 and entry no 691 over same and stated that such entry means that the disputed property is to be considered as ancestral property. Hence, the court finds that said witness is the government servant and court find no reason for not accepting his averment. Hence, from the above oral and documentary evidence it can said that the plaintiff has succeeded in showing that all the property A, B, C, D are the joint ancestral property and they are the joint owner of the disputed property as stated and claim. Hence if one is found to be member of joint family which has ancestral property being un divided then generally as per 'universal rule of law' he is also entitle for the share in the same. Hence, the issue number 1 result in positive.

8.4) WITH REGARD TO ISSUE NUMBER 2: - Now, in the said issue the burden is upon plaintiff to prove that they are entitle for share as legal heirs from total disputed property of their deceased father. For the same the plaintiff has succeeded in showing that the above disputed property is the joint ancestral property and they are joint owner of the

same. Over the same the other side being the family members and also the interested parties have not taken any objections hence the said matter was ordered to be continued as ex-parte.

8.4.1) What is Partition:- the partition denotes its magnetism and the eventualities thereof, has been considered by the Apex Court in *Shub Karan Bubna Shub Karan VS. Sita Saran Bubna & Ors* reported in (2009)9 SCC 689, which are as follows:-'Partition' is a re-distribution or adjustment of pre-existing rights, among co-owners/coparceners, resulting in a division of lands or other properties jointly held by them, into different lots or portions and delivery thereof to the respective allottees. The effect of such division is that the joint ownership is terminated and the respective shares vest in them in severally. A partition of a property can be only among those having a share or interest in it. A person who does not have a share in such property cannot obviously be a party to a partition. 'Separation of share' is a species of 'partition'. When all co-owners get separated, it is a partition. Separation of shares refers to a division where only one or only a few among several co-owners/coparceners get separated and others continue to be joint or continue to hold the remaining property jointly without division by metes and bounds. Hence, it can be said that partition can be claimed by joint owner of the joint share and in the present case the plaintiff in above issue number 1 has prove their status as joint owner and the status of property as joint.

8.4.2) Joint Family:- In *Kesharbai Pushpabai Eknathrao Nalawade (D) by L.Rs & Anr. v. Tarabai Prabhakarrao Nalawade & Ors* as reported in AIR 2014 SC 1830, it has been held that it is a settled principle of law that once a partition in the sense of division of right, title or status is proved or admitted, the presumption is that all joint property was partitioned or divided. Undoubtedly the joint and undivided family being the normal condition of a Hindu family, it is usually presumed, until the contrary is proved, that every Hindu family is joint and undivided and all its property is joint. And the same was observed in *Bhagwati Prasad Sah & Ors. v. Dulhin Rameshwari Kuer & Anr* [1951] SCR 603. So, it can be said that until and unless contrary is proved that every Hindu family will be deemed to be joint for the purpose of the partition and separation. In the case at hand the plaintiff has duly proved of their joint family holding joint ancestral property.

8.4.3) Status of Defendant Number 2 being daughter: - The law with regard to the share of the daughter in the property of her father is no longer res-integra. *The Apex Court in the case of Ganduri Koteswaramma & others Vs. Chakiri Yanadi & others 2011 9 SCC 788 had the occasion to deal with the Hindu Succession Amendment Act, 2005. The Apex Court in Para 11 and 12 held that the new section 6 provides for parity of rights in the coparcenary property among male and female members of a joint Hindu family on and from September 9, 2005. The Legislature has now conferred substantive right in favour of the daughters. According to the new [Section 6](#), the daughter of a coparcener becomes a coparcener by birth in her own rights and liabilities in the same manner as the son. The declaration in [Section 6](#) that the daughter of the coparcener shall have same rights and liabilities in the coparcenary property as she would have been a son is unambiguous and unequivocal. Further in case of Rakhi Gupta Vs. Zahoor Ahmad & others 1147/2012, decided on 29.11.2012 (MANU/DE/6313/2012) wherein it was observed that the judgment is quite clear that this right accrues to the daughter born in Mitakshara family only "on and from" the commencement of the amendment Act i.e. 9 September 2005. The basis of the right is, therefore, the commencement of the amended Act. This is the natural ingredient of a coparcenary interest that a coparcenary interest is acquired by virtue of birth and from the moment of birth. So, it can be said that the defendant number 2 is the daughter of the Bhavanbhai Madhavbhai Patel who is one of the joint owner and share holder of the property. Further the discussion is taking place after the above amendment that 2005 and the partition issue arises in 2015, so it can be said that the amended section 6 of the Hindu Succession Amendment Act 2005 is applicable in the present case and no other exception of the said section are applicable and the other side has even failed to bring, if any. Further the parties themselves made an application before revenue authority to add the name of defendant no 2 who is daughter of Bhavanbhai Madhavbahi Patel and sister of parties to suit also helps in coming to conclusion that she is entitle and even the parties want her to share undivided property. So, it can be said that the defendant number 2 being the joint member of the family holds equal right alike son.*

8.4.4) Decision with regard to share as legal heir of plaintiffs :- Now, as the plaintiff has proved that the Bhavanbhai Madhvabhai Patel dies intestate leaving behind property A, B, C, D admeasuring as mentioned above. Further the plaintiff's have also shown that they are the legal heirs of the deceased Bhavannhai Madhavbhai Patel as seen from exhibit 20 which is Pedinama issued by appropriate authority. So, as per Pedinama legal hiers of deceased Bhavan Madhav Patel are (1) Ramanbhai Bhavanbhai Patel (2) Dhanjibhai Bhavanbhai Patel (3) Maganbhai Bhavanbhai Patel (4) Lallubhai Bhavanbhai Patel and (5) Ranjanbehn Bhavanbhai Patel vide an entry number 2388 and property was found to be jointly owned by entry number 691 dated 30/1/1978. *Now, out of all legal heirs there are 4 are son and 2 daughter and as seen above it is found that daughter is also entitle for the joint ancestral share of her father died before 2005.* Now, perusing the tile of the suit it is found that (1) Ramanbhai Bhavanbhai Patel (2) Maganbhai Bhavanbhai Patel (3) Lallubhai Bhavanbhai Patel are the plaintiffs and the (1) Dhanjibhai Bhavanbhai Patel (2) Ranjanbehn Bhavanbhai Patel are the defendant. Now, as the law of courts have observed that in the suit for the partition all the parties to the suit are to be considered as plaintiff as right of the all parties are involved equally.

** So, it can be said that the above total property A, B, C, D needs to be divided among 4 brothers and 1 sister only. So, according to 'Basic Rule of Common Understand/Sense' also makes it clear that it comes to 1/5th of the total property A, B, C, D. It is basic rule of Hindu partition that all legal heirs on same descendant should get equal and here there are total 5 legal heirs of deceased Bhavanbhai Madhavbhai Patel so, it is but natural that each will get 1/5th of total. Further the other side was duly served with the notice but they failed to appear and the court pass an order for ex-parte which in turns shows that they do not contest any contentions of the plaintiff.

** Further the same fact was asserted by POA of plaintiff in his affidavit on oath vide an exhibit 14 that each plaintiff has the undisputed 1/5th share and the same was not countered in any sense in cross done by other side. Hence, from the above discussion it can

be said that the disputed property are jointly owned seen from exhibit 26, 27, 28. Further there are 5 claimers of the said property and even the plaintiff has demanded their share so in all common sense it comes to 1/5th share. Further the documents vide exhibit 21, 22, 23, 24 shows 7/12 extract of all the property which in tune also shows that each and every party to the suit has the names in such documents. Hence, this court finds that each and every party to the suit being legal heirs holds 1/5th share of each. Hence, the above mentioned issue number 2 results in positive.

8.5) WITH REGARD TO ISSUE NUMBER 3:- In the said issue the burden is upon plaintiff to prove that he is entitle for the mesne profit accrued upon all the disputed property. It is basic rule of civil procedure that one who claims any relief must prove it and he cannot rely upon weak or no defense of other side. Now, perusing all oral and documentary evidence this court has failed to find any supportive evidence which shows about such facts. The plaintiff has only mentioned in plaint but he has not supported his averment with any kind of oral or documentary evidence. Now, though the said case is tried as ex-parte but that doesn't mean that one can rely on weak or no defense of other side. According to section 101, 102, 103 of the Indian Evidence Act one who assert any particular fact must prove it. As, the plaintiff has failed to prove any of such averment, hence the issue results in negative.

8.6) WITH REGARD TO ISSUE NUMBER 4:- In the said issue the burden is upon plaintiff to prove that he is entitle for the relief claimed for. In a suit for partition or separation of a share, the Court at the first stage decides whether the plaintiff has a share in the suit property and whether he is entitled to division and separate possession. Now, perusing the above discussion the court finds that the plaintiff has proved that disputed property A, B, C, D is the joint ancestral property being jointly owned by all the parties of the suit. Further the plaintiff has shown that they are the legal heirs of the deceased

Bhavanbhai Madhvabhai Patel hence they are entitle for the share and that has been come to 1/5th of total property. So, it can be said that the plaintiff are entitle for the relief claimed but partially because they have failed to prove with regard to mense profits and such arrears from disputed property.

** The decision on these two issues is exercise of a judicial function and results in first stage decision termed as 'decree' under Order 20 Rule 18(1) and termed as 'preliminary decree' under Order 20 Rule 18(2) of the Code. The consequential division by metes and bounds, considered to be a ministerial or administrative act requiring the physical inspection, measurements, calculations and considering various permutations/ combinations/alternatives of division is referred to the Collector under Rule 18(1) and is the subject matter of the final decree under Rule 18(2). Hence, the court come to the conclusion that the each plaintiff along with defendant are entitle for the 1/5th share from each of the disputed property along with the defendants from the disputed property A, B, C, D.

9. ISSUE NO 05:-

As per final order. In view of above discussion and findings, this court feels appropriate to pass following order:-

-: ORDER :-

1. The present partition suit of the plaintiff is hereby partly preliminary decreed as per CPC, 1908.
2. It is hereby declared and ordered that each plaintiff have 1/5th share from each property (1) block Number 199 Survey Number 133/1 admeasuring 1-00-16, (2) block Number 139 Survey Number 108/2 admeasuring 1-67-79, (3) block Number 251 Survey Number 220/2 admeasuring 0-32-37 and (4) block Number 313 Survey Number 301/2 admeasuring 0-14-16 having common Khatta Number 129 Asta, Kamrej, Surat.

RCS (O) 43/2015

3. As the disputed property is agricultural property, so the Collector of District Surat is hereby directed to affect the partition accordingly and to report the same accordingly as per law.
4. Parties to bear their cost.
5. Preliminary Decree to be drawn accordingly.

Signed and pronounced in the open Court today on 27th August, 2018.

Date: 27/08/2018
Place: Kathor

(Rahul. K. Agarwal)
[GJ01341]
2nd Additional Civil Judge
Kathor