

Presented on : 18-10-2005.
Registered on : 18-10-2005.
Decided on : 13-10-2014.
Duration : 08 Y. 11 M. 25 D.

IN THE COURT OF 2nd JT. CIVIL JUDGE (JR.DN.), WANI
(Presided over by R. S. Wankhede)

REG. CIVIL SUIT No.86/2005

Exh.No.110

PLAINTIFFS : Sau. Gopikabai Mahadeorao Gurukar, **(Dead)**
Age : 70 years, Occp.: Household,
R/o. Bopapur, Taq. Zari,
Dist. Yavatmal.

(Legal heirs)

1. Mahadeo Baliram Gurukar,
Age : 74 years, R/o. Balapur,
Taq. Zari, Dist. Yavatmal.
2. Ashok Mahadeorao Gurukar,
Age : 54 years, R/o. Balapur,
Taq. Zari, Dist. Yavatmal.
3. Ghanshyam Mahadeo Gurukar,
Age : 50 years, R/o. Shendurjana Ghat,
Taq. Warud, Dist. Amravati.
4. Sau. Mala Sureshrao Zode,
Age : 45 years, R/o. Chichpalli,
Taq. Dist. Chandrapur.
5. Sau. Padmawati Govindrao Dange,
Age : 42 years, R/o. Chora (Khurda),
Taq. Bhadrawati, Dist. Chandrapur.
6. Sau. Usha Jagdish Randive,
Age : 40 years, R/o. Aasan (Khurda),
Taq. Korpana, Dist. Chandrapur.

- V E R S U S -

DEFENDANTS

- :1. Shri Raghobaji Narayanrao Lanjewar, **(Dead)**
Age : 80 years, R/o. Rangari Pura Wani,
Wani, Taq. Wani, Dist. Yavatmal.

(Legal heirs)

1. Shri Suresh Raghobaji Lanjewar
Age : 50 years, R/o. Ward No. 14, Wani,
Taq. Wani, Dist. Yavatmal.
2. Shri Pandurang Raghobaji Lanjewar
Age : 45 years, R/o. Ward No. 14, Wani,
Taq. Wani, Dist. Yavatmal.
3. Sau. Shashikala Giridharrao Tapale,
Age : 40 years, Mujumdar Ward,
Hinganghat, Dist. Wardha.
4. Sau. Chandrakala Sukhdeorao Ramatkar,
Age: 35 years, R/o. Prashant Nagar,
Amravati, Taq.Dist. Amravati.
5. Sau. Rekha Dnyaneshwarji Harde,
Age: 30 years, R/o. Main Road, Nandanvan,
Nagpur, Taq. Dist. Nagpur.
2. Shri Dilip Yadaorao Lanjekar,
Age: 45 years, R/o. Rangaripura, Wani,
Taq. Wani, Dist. Yavatmal.
3. Sau. Sunita Narayanrao Randive,
Age: 41 years, R/o. Baroj,
Taq. Bhadravati, Dist. Chandrapur.
4. Shri Dinkar @ Digambar Narayanrao Lanjewar,
Age: 55 years, R/o. R/o. Rangaripura, Wani,
Taq. Wani, Dist. Yavatmal.
5. Shri Ganpat Harbaji Dhabekar,

Age: 65 years, R/o. R/o. Kumbha,
Taq. Maregaon, Dist. Yavatmal.

Shri A. D. Deshpande, advocate for the plaintiff.
Shri V. D. Kakde, advocate for the defendant.

J U D G M E N T

(Delivered on 13th October, 2014)

This is a suit for partition, separate possession and declaration.

02 The case of legal heirs of the deceased plaintiff, in brief, is as under :

Defendant Nos. 1, 4 are brothers of the deceased plaintiff. Defendant Nos. 2, 3 are son and daughter respectively of one deceased brother of the deceased plaintiff. Defendant No. 5 is husband of deceased sister of the deceased plaintiff. The father of deceased the plaintiff was owner of land admeasuring 2800 sq. ft. and a house thereon. This is the suit property in respect of partition which is more particularly described in plaint para No.1. The father of the deceased plaintiff died on 01-01-1967. After the death of father of the deceased plaintiff mutation entries were carried in respect of the suit property on 15-11-1993. The name of the deceased plaintiff was not entered. Therefore, the deceased plaintiff appealed to the Superintendent, Land Record, Yavatmal. The appeal was allowed. Defendant No. 2 preferred an appeal against order of the Superintendent, Land Record, Yavatmal to

Deputy Director, Land Record, Amravati. The appeal is dismissed on 09-08-2010. The deceased plaintiff has 1/5th share in the suit property. The deceased plaintiff did not intend to keep her share bound with the defendants. Therefore, she had issued such notice to defendants. The notice was not acted upon. Therefore, the deceased plaintiff had prayed for partition of the suit property and separate possession of her 1/5th share. During pendency of the suit on 18-01-2006 defendant No. 2 sold land 77.76 sq. mt. out of the suit property to defendant No.6. Therefore, defendant No. 6 was added as a defendant. The deceased plaintiff has prayed to declare sale-deed dated 18-01-2006 to be null, void and not binding.

03. Defendant Nos. 1 to 4 resisted the suit claim vide written statement at Exh.20. Their case, in brief, is as under.

Defendant Nos. 1 to 4 has admitted the description of the suit property. The suit property is ancestral. Father of the deceased plaintiff died on 01-01-1967. Defendant No.2 possess the suit property. They have also admitted the relationship between the parties excluding defendant No. 6. The deceased plaintiff does not get any right in view of mere mutation entries in her name. The deceased plaintiff has no right of partition in view of section 23 of the Hindu Succession Act, 1956. The deceased plaintiff has no 1/5th share in the suit property. Defendant No. 1 has received the notice issued by the deceased plaintiff. On 12-01-1981 the deceased plaintiff had relinquished her share of the suit property in favour of father of defendant Nos. 2 & 3 and defendant No.4. Therefore, they prayed to dismiss the suit.

04. During pendency of the suit defendant No. 1 died. The legal heirs of defendant No. 1 are brought on record. They filed pursis (Exh.42) and thereby adopted written statement (Exh.20) filed by defendant No. 1.

05. Defendant No. 6 has also registered the suit claim vide written statement at Exh.48. Defendant No.6 has also admitted few of the facts. Description of the suit property, relation of the parties excluding defendant No.6, death of father of the plaintiff on 01-01-1967 are admitted by defendant No.6. Defendant No.6 has denied 1/5th share of the deceased plaintiff. The deceased plaintiff is not entitled to claim partition of the suit house vide section 23 of the Hindu Succession Act, 1956. He admitted that on 18-01-2006 he has purchased 77.76 sq. ft. land out of the suit property from defendant No.2 vide registered sale deed No. 168/2006. He has become owner thereof. Prior to purchase of it he has seen Akhiv Patrika, relinquishment deed dated 12-01-1981 executed by the deceased plaintiff. He is bonafide purchaser. Therefore, he prayed to dismiss the suit. In the alternative he prayed, in case of passing decree in favour of the deceased plaintiff, refund of consideration of Rs. 51,000/- from defendant No.2 with interest at the rate of 18 % per annum.

06. Record shows that summons were served on defendant No.5 through newspapers publication. It shows that the suit proceeded ex-party against defendant No.5.

07. My learned Predecessor has framed issues at Exh.15. I have reproduced those issues hereinbelow and answered each of it for the reasons stated below.

<u>I S S U E S</u>	<u>F I N D I N G S</u>
1) Does the plaintiff prove that she has 1/5 th share in the suit property ?	Yes.
2) Whether the plaintiff is entitled to the partition of the suit property as claimed by her ?	No
3) Whether the plaintiff is entitled to recover possession of her share in the suit property ?	No.
4) Whether defendant No.6 proves that he is bonafide purchaser for value without notice?	Yes.
5) Is the plaintiff entitled to the relief of declaration as sought ?	No.
6) What order & decree ?	As per final order.

R E A S O N S

08 As to Issue Nos.1, 2 & 3 : These, issues are interlinked together, therefore, they are taken together for discussion. None of the parties to the suit has denied that the father of the deceased plaintiff was owner of the suit property. So also, it is not disputed that the father of the deceased plaintiff died intestate on 01-01-1967. So also, there is no one's case that the father of the deceased plaintiff had disposed the suit property

during his life time in any manner. None of the parties have claimed previous partition. Considering the relationship between the parties, excluding defendant No. 6, the suit property is ancestral property of them. In view of this it appears that the deceased plaintiff has $1/5^{\text{th}}$ share in the suit property. Therefore, I answer issue No.1 in the affirmative. However, that entitlement is dependent on other facts of the case.

09. The deceased plaintiff has not examined herself. On behalf of the deceased plaintiff her power of attorney holder Ashok(P.W.1) has examined himself by filing affidavit of examination-in-chief at Exh.52. He proved power of attorney (Exh. 53). Ashok (P.W.1) is son of the deceased plaintiff. He has also proved certified copy of record of rights (Exh. 54). It contains an entry that father of the deceased plaintiff died on 01-01-1967. The name of the deceased plaintiff appears in record of rights (Exh.54). Notice (Exh.55) was issued by the deceased plaintiff to the defendants excluding defendant No.6. Receipts (Exh.56) to (Exh.60) are the receipts issued by the post office in respect of notice (Exh.55) issued by the deceased plaintiff to the defendant Nos. 1 to 5. Acknowledgment, (Exh.61) proves that notice was served on defendant No.1. Envelops (Exh. 62, 63, 64) prove that notice were issued to defendant No.2, 4 and 5. The deceased plaintiff has closed her evidence vide pursis (Exh.72). On behalf of defendant Nos. 1 to 5 only defendant No.2 has filed his affidavit of examination-in-chief at Exh.84 and closed the evidence vide pursis Exh.97. Defendant No.6 has filed his examination-in-chief at

Exh.98 and has closed the evidence vide pursis (Exh.103).

10. The contents of examination-in-chief of Ashok(P.W.1) are almost the copy of the plaint. During cross-examination Ashok(P.W.1) deposed that he is not aware as to how many houses, shops, agricultural land were owned by father of the deceased plaintiff. He is not aware of the date of death of mother of the deceased plaintiff. He denied a suggestion that during lifetime of the father of the deceased plaintiff, father of the deceased plaintiff had partitioned his property amongst his three sons. It is pertinent to note here that earlier partition is not the case of any of the defendants. Therefore, I am of the opinion that the suggestion given to Ashok (P.W.1) cannot be considered. Otherwise also Ashok (P.W.1) has denied it.

11. A suggestion was given to Ashok (P.W.1) that the deceased plaintiff has relinquished her share on 12-01-1981 by relinquishment deed in favour of her deceased brother and defendant No.4. Ashok (P.W.1) has denied the said suggestion. The crux of the case is that the defendants are coming with a case that the deceased plaintiff had relinquished her share on 12-01-1981 by relinquishment deed and the deceased plaintiff is denying it. It is also the case of the defendants that the deceased plaintiff had signed relinquishment deed on 12-01-1981 and the husband of the deceased plaintiff had signed the said deed as a witness. In view of this when a question was put to Ashok (P.W.1) as to whether he is going to examine his father and the plaintiff, he

replied in the affirmative. Thus, the plaintiff and husband of the plaintiff were best witnesses to depose about or deny the relinquishment deed dated 12-01-1981.

12. Dilip (D.W.2) has proved relinquishment deed (Exh.94). Record shows that defendant Nos.1 to 4 had applied to impound relinquishment deed (Exh.94). That application was allowed. However, it appears that that order was not complied. Therefore, the argument of the plaintiff that relinquishment deed (Exh.94) cannot be read in evidence cannot be accepted. So also, the defendants have relied upon **Dipak Kumar Singh & another -Vs- Park Street Properties (P) Limited (AIR 2014 Calcutta 167)**. In that case Hon'ble the Calcutta High Court has held that once a document has been marked as an exhibit in the case and trial has proceeded all along on the footing that the document was an exhibit in the case and has been used by the parties in examination and cross-examination of their witnesses, section 36 of the Stamp Act comes into operation. Once a document has been admitted in evidence, as aforesaid, it is not open either to the trial court itself or to a court or appeal of revision to go behind that order. It also show that Hon'ble the Calcutta High Court has reiterated the proposition of law as found in **Javer Chand & others -Vs- Pukhraj Surana (AIR 1961 SC 1655)** and **Shyamal Kumar Roy -vs- Sushilkumar Agrawal (AIR 2007 SC 637)**.

13. Considering the principle laid down by Hon'ble the Supreme Court and Calcutta High Court I am of the opinion that

the deceased plaintiff has not objected to the exhibiting of relinquishment deed (Exh.94) and while examining defendant No.2. A question was put to defendant No.2 during cross-examination that whether it is correct that defendant No.2 is deposing that the plaintiff has relinquished her share in view of relinquishment deed (Exh.96). So also, a further question was put during cross-examination to defendant No. 2 that those persons who admitted share of the plaintiff has executed relinquishment deed (Exh.96) and therefore, the plaintiff has executed it on behalf of the persons who has brought it written. Considering this cross-examination it appears that the deceased plaintiff has admitted execution of relinquishment deed (Exh.96), if not, the deceased plaintiff has not objected to the admissibility of relinquishment deed (Exh.96). Therefore, in view of Kamal (Supra) the deceased plaintiff is estopped from agitating the admissibility of relinquishment deed (Exh.96).

14. Thus, considering the evidence on record the defendants have proved that the deceased plaintiff had relinquished her share from the suit property in favour of father of defendant Nos. 2, 3 and defendant No.4. Ashok (P.W.1) during cross-examination has deposed that he is going to examine the plaintiff and his father. Considering it, at the time of cross-examination of Ashok (P.W.1), the deceased plaintiff was alive. The defendants has already alleged in their written statement that husband of the deceased plaintiff has witnessed the execution of relinquishment deed (Exh.96). In view of this I am of the opinion that the

deceased plaintiff ought to have examined the plaintiff and husband of the plaintiff. The plaintiff did not examine either of them, therefore, I am of the opinion that adverse inference requires to be drawn that the deceased plaintiff had signed relinquishment deed (Exh.96).

15. During cross-examination of defendant No.2, the deceased plaintiff has agitated about the genuineness of signature of the deceased plaintiff on relinquishment deed (Exh.96). In such circumstances the plaintiff was expected to pray to send relinquishment deed (Exh.94) for examination and expert opinion. The plaintiff has not taken any step towards it. This unwillingness coupled with the deposition of defendant No. 2 that he has filed on record notice (Exh.93), acknowledgment (Exh.95) on record bearing signatures of the deceased plaintiff leads to form the opinion that the plaintiff has got opportunities to get it compared by the expert. But the plaintiff neglected to grab the opportunities and this conduct of the plaintiff is in conformity with the adverse inference as drawn above.

16. The learned advocate for the defendants argued that in view of section 23 of the Hindu Succession Act, 1956 the deceased plaintiff was never entitled to claim partition. It is worth here to note that the said section is omitted by Hindu Succession (Amendment) Act, 2005 with effect from 09-09-2005. It is pertinent to note that the plaint was presented on 18-10-2005. Thus, at the time of presenting the plaint the said section was in

force. Thereon, the learned advocate for the plaintiff argued that in view of amended section 6 of the Hindu Succession Act, 1956 the deceased plaintiff was entitled to claim partition. Thereon, the learned advocate for the defendants argued that the amended section 6 of the Act cannot be applied retrospectively and he relied on Kamal -Vs- Anna (2014(4) Mh.L.J. 581). I am in agreement with the argument of the learned for the defendants. Because, if the amended section 6 of the Act is allowed to apply retrospectively then there would be chaos. Such amendments would be applied retrospectively only if there is such provision in the amendment itself.

17. The plaintiff has proved that the suit property was ancestral property. It is also proved by the plaintiff that she had 1/5th share in the suit property but the defendant have proved that the deceased plaintiff had relinquished her share on 12-01-1981. Therefore, now the deceased plaintiff is estopped from claiming any share in the suit property. Therefore, I answer issue No.2 in the negative. I have found that the deceased plaintiff had already relinquished her share in favour of father of defendant Nos. 2, 3 & defendant No.4. Therefore, I am of the opinion that the plaintiff is not entitle to recover possession and partition of the suit property. Therefore, I answer issue No.3 in the negative.

18. **As to Issue No.4:-** Defendant No.6 deposed that he has purchased 77.76 sq.mt. land on 18-01-2006 from defendant No.2. Defendant No.2 had shown him relinquishment

deed dated 12-01-1981, after examining the documents he has purchased it, therefore, he is bonafide purchaser by sale deed, it is at Exh.101. During cross-examination he deposed that earlier he was residing at a distance of 50 to 60 feet away from the suit property. There was Isar Patra between him and defendant No.2, he is not able to tell the date thereof. He has not enquired about names of original owner in the column of Akhiv Patrika. Defendant No.2 has told him that defendant No.2 has sold his share to him. It is pertinent to note that defendant No.1 to 4 has contended that the suit property is still ancestral suit property. It follows that it was never partitioned. Considering the cross-examination at the most it can be inferred that defendant No.2 has sold his undivided interest from the suit property to defendant No.6. But as the deceased plaintiff has already relinquished her share long before, the plaintiff is not entitled to create a dispute about the right of defendant No.2. Therefore, defendant No.6 becomes bonafide purchaser. Otherwise also the deceased plaintiff has got no right to cast doubt over the capacity of defendant No.2 in selling portion of the suit property. Therefore, I answer issue No. 4 in the affirmative.

19. **As to Issue Nos. 5 & 6** The deceased plaintiff had 1/5th share in the suit property. The deceased plaintiff had already relinquished her share in the suit property. Therefore, the plaintiff is not entitled to the partition and separate possession thereof. The deceased plaintiff is not entitled to challenge the sale-deed executed by defendant No.2 in favour of defendant No. 6 for want of any

share in the suit property. Therefore, the plaintiff is not entitle for the declaration that sale-deed (Exh.101) executed by defendant No.2 in favour of defendant No.6 is null and void. Therefore, I answer issue No. 5 in the negative.

20. In view of answers of issue No. 1 to 5 the suit deserves to be dismissed. Considering the facts and circumstances of the case I am of the opinion that the parties to the suit require to bear their own costs. Therefore, I pass following order:-

ORDER

- 1) The suit is dismissed.
- 2) The parties to the suit do bear their own costs.

Dated : 13-10-2014.

(R. S. Wankhede)
2nd Jt. Civil Judge (Jr.Dn.)
Wani, Dist. Yavatmal.