

Filed on : 28.10.2013

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Decided on : 22.12.2016

Duration : 03 Y. 01 M. 25 D.

IN THE COURT OF CIVIL JUDGE JUNIOR DIVISION, MURUD
(Presided over by Shri. H.V.Kulkarni)

Regular Civil Suit No. 38/2013

Exh. 51/A

Janardan Hasha Kabukar,
Age : 55 yrs., Occ : Agriculture,
R/at. Majgaon,
Tal. Murud, Dist. Raigad.

.... Plaintiff

Versus

- 1 . Smt.Durga Ramkrishna Kabukar,
Age : 70 yrs, Occ : Agriculture,
- 2 . Shri.Harischandra Ramkrishna Kabukar,
Age : 40 yrs., Occ : Agriculture,
3. Shri.Rajan Ramkrishna Kabukar,
Age : 35 yrs, Occ : Agriculture,
4. Shri.Vinayak Ramkrishna Kabukar,
Age : 25 yrs, Occ : Agriculture,
5. Smt.Nathi Dattatray Mali,
Age : 42 yrs, Occ : Agriculture,
6. Smt.Manisha Ashok Dhamale,
Age : 24 yrs, Occ : Agriculture,
7. Smt.Nari/Padi Govind Gavandi,
Age : 65 yrs, Occ : Agriculture,
All R/at. Majgaon, Tal. Murud Janjira,
Dist. Raigad.

.... Defendants

Suit for partition

Shri. M.J.Tambadkar, Advocate for Plaintiff

Shri. D.N.Patil, Advocate for Defendant No. 1 to 7

JUDGMENT

(Delivered on 22.12.2016)

1 . The present suit is filed for partition and declaration.

The case of the plaintiff in short is as under.

2 . The house property bearing No.259A situated at village Majgaon, Tal. Murud and agricultural property bearing gut No.75 admeasuring 0.56.1 H.R are the subject matter of the present suit. The said properties are herein after referred to as "suit properties." The suit properties are the ancestral properties of both plaintiff and defendants. The *Karta* of the family i.e. deceased Hasha Kabukar was possessing the suit properties. The wife of the deceased i.e. Bali died prior to 20 to 25 years. The deceased Hasha left behind him two son, one daughter and deceased wife. The son of the deceased Hasha namely Ramkrishna also died in 1986. The deceased Ramkrishna, plaintiff and defendant No.7 are the real brother and sisters whereas defendant No.1 to 6 are the legal heirs of deceased Ramkrishna. The plaintiff is having 1/2 share in the suit properties. The defendant No.7 got married during the life time of deceased Hasha whereas she has relinquished her share out of suit properties orally in favour of plaintiff and deceased Ramkrishna. The suit properties are in the possession of defendant No.1 and she is taking the income out of the said suit properties. When plaintiff made the demand of his share to defendant No. 1, she refused for the same and never acted upon as per the demand of the plaintiff. Therefore, plaintiff constrained to file the present suit for the relief of partition and mesne profit. The plaintiff has also filed family diagram along with the plaint so as to give the details of the relations between the parties.

3 . The defendant No.1 to 7 have contested the present suit by filing their written statement at Exh.12. All the defendants have denied the contentions raised on behalf of the plaintiff except their relations and the nature of the suit properties. According to the defendants deceased Hasha Kabukar was having two wives namely Jani and Mahali. The plaintiff has wrongly mentioned the name of the deceased wife of deceased Hasha as Bali, the second wife. The plaintiff is the son of deceased Mahali whereas deceased Ramkrishna and defendant No.7 are the children of deceased Jani. Further, plaintiff has not included the other ancestral properties. The suit properties and the property in the possession of the plaintiff were partitioned by the deceased Hasha during his life time. Therefore, the plaintiff has not included the agricultural property bearing gut No.222 admeasuring 0.57.1 H.R. situated at village Majgaon, Tal.Murud in the present suit. The house property bearing No.259 was also the ancestral property which was divided into two parts as house No.259A and house No.259B. As per the oral partition the house No.259B was allotted to the share of the plaintiff whereas the remaining house property is still in the name of deceased Hasha. The defendant No.7 has never relinquished her share in favour of plaintiff and the remaining defendants. The plaintiff has also never made the demand of his share to the defendant No.1. therefore, as the suit properties are already partitioned amongst the parties, plaintiff is not having any right to file the present suit against the defendants. Therefore, considering these reasons defendants have prayed for the dismissal of the suit and in the alternative relief they have prayed to include the remaining properties for the partition and their share in the said properties if the suit is decreed in the favour of the plaintiff.

4 . In view of the rival pleadings of both parties and their submissions in the court, the following issues (Exh. 14) are framed which are reproduced herein along with my findings thereon which are as follows,

Sr. No.	Issues	Findings
1.	Whether suit property is an ancestral property of both the parties or is of self acquisition of defendants ?	In the affirmative
2.	What are the shares of both the parties in the suit property ?	In the Negative
3.	Whether the suit is bad for non joinder of necessary parties ?	In the affirmative.
4.	Whether the suit is within limitation ?	In the Affirmative
5.	Whether the suit properties are already partitioned between both the parties ?	In the Negative
6.	Whether the plaintiff is entitled to the partition and separate possession of his share in the suit property ?	In the Negative
7.	Whether the plaintiff is entitled for the mense profit from defendant No.1 ?	In the Negative
8	What order and decree ?	As per final order

REASONS

5 . In order to prove the contents of the suit, the plaintiff has examined himself at Exh.16 and thereafter closed his oral evidence by filing pursis at Exh.32. Thereafter, the defendant No.1 has examined himself vide Exh.35 and he has also examined one

witness D.W.2 namely Bhalchandra Bhoir vide Exh.49. The evidence of the defendants came to be closed as per order below Exh.1. Along with the oral evidence, plaintiff and defendants have also placed reliance on the documentary evidence.

6. The plaintiff has filed on record the following documents namely

1	Certified copy of 7/12 extract of gut No.75	Exh. 20
2	Assessment extract of house No.259A	Exh. 21
3	Notice dated 26.6.2013	Exh. 22
4	Acknowledgement of notice	Exh. 23
5	Certified copy of mutation entry No.645	Exh. 24
6.	Certified copy of 7/12 extract of S.No.19/5	Exh .25
7.	Certified copy of mutation entry No.180	Exh. 26
8.	Death certificate of deceased Bali Kabukar	Exh. 27

To the contrary, the defendants have filed on record the documents namely

1	Assessment extract of house No.259B	Exh. 30
2.	Assessment extract of house No.259A	Exh. 31
3.	7/12 extract of gut No.75	Exh.43
4.	7/12 extract of gut No.222	Exh.44

7. **As to Issue No. 1 :-**

With regard to the nature of the suit properties is concerned, it is the contention of the plaintiff that the suit properties are the ancestral properties of all the parties. Further all of them are the legal heirs of the deceased *karta* of the family viz., Hasha

Kabukar. The *karta* of the family i.e. Hasha Kabukar left behind him his deceased wife Bali, son Ramkrishna and plaintiff. The plaintiff, defendant No.7 and deceased Ramkrishna are the real brother and sister. It is admitted fact on record that plaintiff and defendants are the legal heirs of deceased Hasha Kabukar. After considering the contentions raised on behalf of both the parties, it is necessary to have the reference to the evidence which is came on record on behalf of the both parties.

8. In support of their contentions, the plaintiff has examined himself vide Exh.16. He has reiterated all the contentions during his evidence as per his case. He reiterated his contention that suit properties are the ancestral properties of the parties. So far as regards to the house property bearing No.259B is concerned, he admitted that house property was purchased by his father i.e. deceased Hasha Kabukar and after his death his name came to be recorded to the assessment extract of the said house property. He further admitted that house property bearing No.259A and the assessment extract (Exh31) thereof is still in the name of deceased Hasha Kabukar. The 7/12 extract (Exh.20 and 43) of the suit property i.e. agricultural land bearing gut No.75 bears the name of the plaintiff and the defendants as the owner and possessor of the said property. On perusal of the evidence of the defendants and their written statement, it can be seen that defendants have admitted that suit properties are their ancestral properties. Therefore, in view of foregoing discussion it is proved on behalf of the plaintiff that the suit properties are their ancestral and they are the legal heirs of deceased Hasha Kabukar. Hence issue No. 1 is answered in affirmative.

9. **As to Issue No.5 :-**

According to the defendants the suit properties are already partitioned amongst the parties during the life time of deceased Hasha Kabukar. As per the oral partition both the plaintiff and the defendants are in the possession of their respective shares of the properties. The said oral partition was effected in presence of village panch and accordingly house property No.259 was divided into two parts as No.259A and No.259B. In furtherance thereof, plaintiff recorded his name to the assessment extract of house property No.259B whereas the assessment extract of the house property No.259A is still in the name of deceased Hasha Kabukar.

10. In support of their contentions the defendants have examined witness D.W.2 Bhalchandra Bhoir(Exh.49) who has stated that prior to 15 to 20 years when he was acting as a village panch, the deceased Hasha Kabukar had effected the oral partition of his properties in their presence. The agricultural land bearing gut No.222 situated at village Majgaon has been allotted to the share of plaintiff whereas agricultural land bearing gut No.75 situated at village Aaravghar has been allotted to the share of deceased Ramkirshna. He also stated that the said oral partition was effected during the year 1980 to 1982. However, he is not aware whether the effect of such oral partition has been given to the revenue record.

11. The defendant No.1 during his evidence(Exh.35) has admitted that he has not filed any documentary evidence with regard to such oral partition. He has also admitted the fact that 7/12 extract of the suit property i.e. agricultural land bearing gut No.75 is still in the name of both plaintiff and defendants. He further admitted that

such alleged oral partition has not been effected to the revenue record. To the contrary the plaintiff has denied that suit properties are partitioned as per the oral partition effected by deceased Hasha.

12. In view of the rival contentions and the evidence produced by the both parties in that behalf, it can be seen that the assessment extract of the house property No.259A is in the name of deceased Hasha Kabukar whereas the other house property is in the name of the plaintiff. The defendants have raised the contention that plaintiff has not included one of the ancestral property i.e. agricultural land i.e. gut No.222 situated at village majgaon in the present suit. On the perusal of 7/12 extract(Exh.44) of gut No.222, it can be seen that the said property is also in the name of plaintiff, defendants and step son-daughters of deceased Hasha Kabukar. Therefore, even though the defendants have produced the oral evidence of one of the witness to show the prior oral partition, there is nothing on record that the said oral partition has been effected to the revenue record. The defendants have not produced any other evidence or any other circumstances by which it can be gathered that by way of such oral partition, both the parties have been allotted with their respective shares. Therefore, in the absence of any cogent evidence on record, it can not be concluded that the suit properties are already partitioned as per the oral partition effected by the deceased Hasha Kabukar. Hence, in view of the discussion, issue No.5 is answered in the negative.

13 . **As to Issue No. 2, 3 and 6 :-**

As these issues are related to each other, the discussion for the same is made together so as to avoid the repetition of the

facts. It is settled position of law that in the suit of partition it is necessary to consider the nature of relations between the parties, previous owner of the property, nature of acquisition of the property, nature of the properties and lastly whether such properties are capable of being partitioned amongst the parties. With reference to the same, it is necessary to consider the observations of Hon'ble Supreme Court in the case of **Shasidhar V/s. Ashwini Uma Mathad (2015)11 S.C.C. 269** wherein it observed that,

It is well-settled principle of law that in a suit filed by a co-sharer, coparcener, co-owner or joint owner, as the case may be, for partition and separate possession of his/her share qua others, it is necessary for the court to examine, in the first instance, the nature and character of the properties in suit such as who was the original owner of the suit properties, how and by which source he/she acquired such properties, whether it was his/her self-acquired property or ancestral property, or joint property or coparcenary property in his/her hand and, if so, who are/were the coparceners or joint owners with him/her as the case may be. *Secondly*, how the devolution of his/her interest in the property took place consequent upon his/her death on surviving members of the family and in what proportion, whether he/she died intestate or left behind any testamentary succession in favour of any family member or outsider to inherit his/her share in properties and if so, its effect. *Thirdly*, whether the properties in suit are capable of being partitioned effectively and if so, in what manner? *Lastly*, whether all properties are included in the suit and all co-

sharers, coparceners, co-owners or joint owners, as the case may be, are made parties to the suit? These issues, being material for proper disposal of the partition suit, have to be answered by the court on the basis of family tree, inter se relations of family members, evidence adduced and the principles of law applicable to the case.

14. In the present suit the defendants have raised the contention that one of the ancestral property i.e. agricultural land bearing gut No.222 is not included for the partition. So also the house property which is in the possession of the plaintiff i.e. house property No.259B is also not included for the partition. The plaintiff however, has denied that the agricultural land bearing gut No.222 was owned by the deceased Hasha Kabukar and the said property was allotted to him as per the oral partition. The 7/12 extract (Exh.44) of the said property however, clearly shows that the said property is in the name of plaintiff, defendants and step-son and daughters of deceased Hasha Kabukar.

15. It is admitted fact on record that house property No.259 is divided into two parts whereas one part i.e. house No.259A is in the name of deceased Hasha Kabukar and another part i.e house No. 259B is in the name of the plaintiff. It is admitted by the plaintiff during his evidence that the said property was owned by the deceased Hasha Kabukar and after his death his name came to be recorded to the assessment extract of house No.259B. Therefore, in view of the documentary evidence produced on behalf of the defendants, it is very much clear that plaintiff has not included all the ancestral properties in the present partition suit whereas he has only

sought the relief for the some of the ancestral properties of the parties.

16. With regard to the non joinder of the necessary parties is concerned, it is brought on record by the plaintiff that he has not impleaded the step-son and daughters of deceased Hasha Kabukar in the present suit. It is the contention of the defendants that the 7/12 extract(Exh43) of the the agricultural land bearing gut No.222 bears the names of step-son and daughters of the deceased Hasha Kabukar and therefore, they are necessary parties to the present suit. During the course of argument it is submitted on behalf of plaintiff that as the 7/12 extract of the said property includes the names of step relatives along with plaintiff and defendants, plaintiff has not included the said property and the concerned parties in the present suit. However, plaintiff has not produced on record that the said property is not the ancestral property of the parties and the nature of acquisition by the step-son and daughters of deceased Hasha Kabukar for the said property.

17. As stated earlier a suit for partition of joint family properties must include the whole of the property jointly held by the parties. Therefore, as the plaintiff has not included all the ancestral properties for the partition and as the plaintiff has failed to to show the nexus between the remaining ancestral property with step-son and daughter of deceased Hasha Kabukar, they are certainly the necessary parties to the present suit. In absence of such parties and evidence thereof, it can not be determined the nature of the acquisition by them with regard to the ancestral property which is not included in the present suit. Therefore, in view of the forgoing

discussion as the plaintiff has not included all the properties and the necessary parties, he is not entitled for the relief of partition as prayed by him. Therefore, issue No.2 and 6 are answered in the negative whereas issue No.3 is answered in the affirmative.

18. **As to Issue No.4 and 7 :-**

The defendants have only raised the contention that the suit is not filed within limitation by the plaintiff. However, the defendants have not produced any evidence nor they have argued on the said point. It is the case of the plaintiff that as the defendant No.1 has refused to give him his share in the suit properties, he issued the legal notice(Exh.22) to her and then he has filed the present suit against all the defendants. In view of such documentary evidence on record, it can not be said that the present suit which is filed for the relief of partition is not within limitation. With regard to the entitlement of mense profit from the defendant No.1 is concerned, nothing has been brought on record at the instance of plaintiff for the income of the suit properties. Moreover, as the plaintiff is not entitled for the main relief of partition, he is not entitled for the mense profits as against defendant No.1. Hence, in view of forgoing discussion, issued No.4 is answered in the affirmative whereas issued No.7 is answered in the negative.

19. **As to Issue No. 8 :-**

In view of forgoing discussion, it is held that as the plaintiff has not included all the ancestral properties and he has also not impleaded the necessary parties in the present suit, he is not entitled for the relief of partition and mense profit from the defendants. Therefore, in view of my finding relating to issue No.1, 3

and 4 as affirmative and for issue No.2, 5 to 7 as negative the suit is liable to be dismissed. Both plaintiff and defendants to bear their own cost of suit. Therefore, in answer to issue No.8, I proceed to pass the following order.

ORDER

- 1 The suit is dismissed.
- 2 Decree be drawn up accordingly.

(Declared & pronounced in the open court.)

Murud,
Date : 22.12.2016

(H.V.Kulkarni)
Civil Judge, J.D. Murud