

Presented on : 23.09.2002
Registered on : 23.09.2002
Decided on : 08.12.2011
Duration : 09Y. 02M.16D.

**IN THE COURT OF JOINT CIVIL JUDGE JUNIOR DIVISION,
AT PATAN.**

(Presided over by : Kiran R. Deshpande)

**REGULAR CIVIL SUIT NO. 139/2002
EXH. NO.**

1. Sou. Malan Dinkar Kumbhar
Age: 45 years,
2. Shri. Rajaram Kesu Kumbhar.
Age: 60 years,
Occu. of No.1 : Household
Occu. of No.2 : Agriculture
All R/o. Chopdarwadi, Tal. Patan,
Dist.Satara.

.....**Plaintiffs**

VERSUS

1. Shri. Popat Kesu Kumbhar
Age: 43 years,
2. Shri. Mohan Kesu Kumbhar
Age: 40 years,
3. Shri. Govind Kesu Kumbhar
Age: 36 years,
4. Sou. Housabai Dinkar Kumbhar
Age: 70 years,
5. Sou. Vaijayanta Tatyaba Kumbhar

.....**Defendants**

Age: 67 years,

Occu. of No.1: Agriculture.

Occu. of Nos. 2 & 3: Service, Agri.

Nos. 1 & 3- R/o. Sangwad, Tal. Patan,

Dist. Satara.

No.2- R/o. Kasam Ismail Chawal, Marathi

School, near Bekari, Khar(East), Mumbai

Nos. 4, 5- R/o. Shiravade, Tal. Karad.

6. Shri. Atmaram Khashaba Kumbhar

Age: 45 years,

7. Shri. Balaso Khashaba Kumbhar

Age: 42 years,

Occu. of 6,7- Agriculture,

R/o. Sangvad, Tal. Patan.,

Dist. Satara.

8. Shankar Krishna Kumbhar

Age: 55 years, Occu: Agriculture

R/o. Chopdarwadi, Tal. Patan,

Dist. Satara.

9. Vasant Mahadev Kumbhar

Age: 50 years, Occu: Agriculture

R/o. Chopdarwadi, Tal. Patan,

Dist. Satara.

.....**Defendants**

Suit claim for Rs. 1712/- & V.O.S.M. of Rs. 15,000/-

CLAIM :- SUIT IS FOR DECLARATION, PARTITION & PERMANENT INJUNCTION.

Advocate for the plaintiff : Shri. P.M. Bahulekar

Advocate for the defendants : Shri. D.P. Jadhav

Defendant Nos. 5 to 7 and 9 : Suit proceeded exparte against them

Defendant No.8 : Suit is dismissed against him

J U D G M E N T
(Delivered on : 08.12.2011)

1. This is a suit for declaration and partition and permanent injunction.

2. Brief facts of the case.

Plaintiff No.1 is real sister of plaintiff No.2 and defendants 1 to 5 are real brother and sisters of the plaintiff. The plaintiffs have given genealogy in para 2 of the plaint to show their relations. The plaintiffs and defendants 1 to 5 have joint family and joint family possess the joint family properties at village Sangvad and Chopadarwadi, Tal. Patan, Dist. Satara. Those properties are described in para 1 of the plaint. These properties are subject matter of present suit; henceforth the above properties would be referred to as the 'suit lands' in short. It is the contention of plaintiffs that out of the suit land Gat No. 285-4 anne share and the suit properties described in para 1B, out of which the share of Janabai Shankar Kumbhar was purchased by father of plaintiff and defendants in year 1962 and other properties in which father of plaintiff had ½ share; those are ancestral one. Name of plaintiff No.2 is recorded

to all these lands and plaintiff and defendants are cultivating it as per the family arrangement.

3. It is the case of plaintiffs that Chandrabai, mother of plaintiffs and defendants who had share in the suit properties bequeathed her share in the name of plaintiff No.1 by will-deed dtd. 24/11/1988. Father of plaintiff namely Kesu expired on 28/12/1975; the name of plaintiff No.2 was recorded as a 'Karta'. Apart from the suit properties, there were other properties which were sold by defendant No.1 for the project of Sugar Factory and got employed defendant nos. 2 & 3 in Sugar Factory. Since 1978 as per the family arrangement all the parties were cultivating the lands. As per that family arrangement plaintiffs, defendants 1 to 3 and their mother Chandrabai; they were cultivating 35 gunthas each and Gat Nos. 32 and 43 were kept for cultivation of plaintiff No.2 and other lands were waste lands. Plaintiff No.1 was taking sugar crop and supplying it to the Sugar Factory. There was dispute in respect of gat No.151 between father of plaintiff and Nivrutti Kumbhar, it was fought up to the Hon'ble High Court. Plaintiff No.2 being 'Karta' of family was looking after the proceedings. He has spent his own amount for fighting this litigation. There was dispute regarding the share purchased by father of plaintiff from Janabai Kumbhar in Gat No. 285. In that proceeding also plaintiff No.2 has spent Rs. 50,000/-. For money he had executed conditional sale-deed in favour of Shivaji Tukaram Chopdar in respect of land Gat No. 32 & 44 & these lands are in possession of Shivaji Chopdar.

4. Mother Chandrabai had special love and affection towards plaintiff No.1; therefore she executed will-deed in favour of plaintiff No.1 and given her share. She expired on 9/9/1992. After death plaintiff No.1 became owner of her share as well as share which she got through will-deed.

5. It is contended that plaintiff No.1 got performed marriage of her daughter, therefore she was in need of money, that time her share from Gat No. 285 was given to Ishwar Dnyandev Kadam by executing mortgage deed for Rs. 20,000/-. Plaintiffs 1 & 2 have got released the lands from Shivaji Chopdar and Ishwar Kadam by repaying the loan amount. In the year 1991 there was quarrel between plaintiffs and defendants, on entering their names they have given statement before the Circle Officer that their cultivators are separate still they tried to interfere. Hence Plaintiffs in the month of June, 2002 demanded partition, defendants 1 to 3 refused it. Hence plaintiffs have instituted this suit and sought declaration that plaintiff No.1 became owner on the basis of will-deed dtd. 24/11/1988 and they have 10/48, 9/48 share in the suit properties and they sought possession and also sought permanent injunction against the defendants.

6. Defendants 1 & 2 have filed say to the application below Exh.5 and subsequently filed pursis below Exh.52, 55 respectively and adopted this say as a written statement. This say is at Exh.41 which is adopted as a written statement. According to defendants 1 & 2, as per the oral partition Mohan Kumbhar, Popat Kumbhar had got 35 gunthas & 32

gunthas land respectively out of 285 land and since 1977-78 they are cultivating separately. Only there was no partition of house property of Sangvad and Chopdarwadi. Since partition, the defendants are taking sugarcane crop and supplying it to Sugar Factory. Plaintiffs have no concerned with it. There was no will-deed, it was not implemented. Defendants have taken care of their mother Chandrabai and she had no love and affection towards the plaintiffs because plaintiffs No.1 withdrawn her husband and came here at the instance of plaintiff No.2. The false and bogus will-deed is brought on record. Plaintiffs are not in possession of suit properties. They have no concerned right, hence they prayed for dismissal of the suit.

7. Defendant No.4 has filed pursis below Exh.46 and claimed that her share in the suit property may be given to her along with other co-parcener. As far as defendants 5 to 9 are concerned, they were served by suit summons, but they remained absent hence exparte orders were passed except defendant No.8 against whom no steps were taken to serve the suit summons, therefore suit was dismissed against defendant No.8.

8. During pendency of proceeding plaintiffs have amended plaint and deleted one land Survey N. 40 from the suit and added two persons as a new defendants. The defendants 1 to 3 have also amended their written statement below Exh.117 and they claimed that the suit properties are ancestral one and came with the case that at village Chopdarwadi there is one ancestral property bearing Grampanchayat No.

430, this property is not joined in the suit, hence they came with counter claim and sought partition of this property. The plaintiffs have not filed written statement to this counter claim.

9. My learned predecessor has framed the issues Exh.86, thereafter I have framed additional issues, those are reproduced below & my finding thereon as under.

ISSUES

FINDINGS

- | | |
|---|---------------------|
| 1 Does plaintiffs prove that, suit lands described in plaint para No.1Ad and 1B are joint family properties of plaintiffs and defendants? | In the affirmative. |
| 2 Does plaintiff No.1, proves that, her mother Chandrabai has bequeathed her share out of the suit lands, by executing will dated 24/11/1988, in favour of plaintiff No. 1? | In the negative. |
| 3 Does defendant No. 1 to 3 prove that, partition with respect to agricultural lands has been executed between plaintiffs and defendants? | In the negative. |
| 4 Do the plaintiffs are entitle for separate share and possession in suit lands? If yes, what is the share of plaintiffs? | In the negative. |

- | | | |
|---|--|---|
| 5 | Do the plaintiff No.1, is entitle for the relief of declaration as prayed? | In the negative. |
| 6 | What judgment and decree? | Suit is partially decreed as per final order. |

Additional Issues

Findings

- | | | |
|---|---|---------------------|
| 7 | Whether defendant No. 1 to 3 prove that house property in counter claim bearing Grampanchayat No. 430 is joint family property? | In the affirmative. |
| 8 | Are defendant No. 1 to 3 are entitled to get reliefs? | In the affirmative |

R E A S O N S

10. In order to prove the claim plaintiffs have examined plaintiff Rajaram, his affidavit is filed below Exh. 120. They have examined witness Krishnarao Bhise below Exh.132 to prove will as well as they have examined attesting witness Exh. 134 to prove the will-deed. The plaintiffs have filed documentary evidence and closed evidence by filing pursis below Exh.138. On behalf of defendant Nos. 1 to 3 they have filed affidavit of examination in chief of Govind Kumbhar below Exh.139 and closed evidence by filing pursis below Exh. 144. Heard learned counsel for plaintiffs and defendants.

As to Issue No.1 :-

11. The plaintiffs have claimed that suit properties are ancestral properties and those are joint family property. Defendants 1 to 3 have admitted this fact in their written statement below Exh.117; therefore I answer issue No.1 in the affirmative.

As to Issue No.2 :-

12. Plaintiff Rajaram has deposed in his affidavit as per the contents of plaint. Though the affidavit of examination in chief of plaintiff No.1 Malan was filed, but she was not made available for cross-examination. In order to prove execution of will, plaintiffs have examined witness Krishnarav Bhise who is scribe of the will. According to him, he was working as a bond writer from 1982 to 2007 and he was shown will-deed. He identified his hand writing over it and claimed that Chandrabai has told him information and he reduced it to writing, he signed and identified her thumb impression, therefore will-deed was exhibited at 133. He does not know who were the witnesses and after preparing deed, he given it to them for registration. The attesting witness Mahadev claimed that he knows Chandrabai Kumbhar and on 24/11/1988 Chandrabai came in Tahasil Office at Patan along with Rajaram Kumbhar, Vishnupant Gurav, however he does not know that the said document was prepared for what purpose, only he signed it, he identified his signature on will-deed. He admits that he knows Chandrabai, therefore he signed for identification marks. Defendant Govind has deposed as per his written statement and claimed that this will-deed is bogus and false and it was not executed by

Chandrabai.

13. I have perused oral as well as documentary evidence and find that this will-deed is produced by plaintiff at Exh.133. On perusal of this will-deed it revealed that in the name of Chandrabai Kesu Kumbhar, this will-deed appeared to be executed. By this will-deed she had given her share to plaintiff No.1, however plaintiff No.2 has signed over it as a attesting witness and another signature is of witness Mahadev Nangare. There is no record to show that on the basis of this will, name of plaintiff No.1 was mutated to the suit lands till filing of this suit, though Chandrabai reported to be dead in the year 1992. From 1992 till 2002 this will was not brought on record and it was not implemented at all. Plaintiff No.2 being one of the attesting witnesses, he was aware about this will, still he has not tried to mutate the name of plaintiff No.1. The learned counsel for plaintiff has submitted that evidence of scribe Krishnarav and attesting witness clearly shows that Chandrabai had executed will and she had special love and affection towards plaintiff No.1, therefore she bequeathed her share. He vehemently submitted that if really plaintiff No.2 created this false and bogus document, then he could have executed will in his favour, but he did not do like this from which it is clear that will is genuine one. According to him, evidence of Govind is not for the other defendants, in his cross examination he admits that still there is name of plaintiff No. 2 as a 'Karta' to the suit properties and all are the parties cultivating as per family arrangement. Chandrabai was residing with Rajaram, in his ration card her name was appearing; there is no evidence

of partition, hence he has placed reliance on case law reported in **Indranarayan V/s. Roop Narayan- AIR 1971 SC 1962** & another case law reported in **Shankarrao Shinde V/s. Vithalrao Shinde-AIR 1989 SC 879**.

14. I have considered submission of learned counsel and gone through the evidence of scribe Krishnarao & witness Mahadev. It is clear from the evidence of Krishnarao, he was not knowing the witnesses. He did not know personally Chandrabai. In cross this Krishnarao has admitted that he has not asked any proof of identification of Chandrabai. Therefore it is clear that this witness was not knowing at all either testator or the attesting witnesses. As far as attesting witness Mahadev is concerned, he does not know what type of document it was prepared, only he has signed that at the instance of plaintiff No.2. During cross examination he has admitted that he signed before stamp vendor and left that place. He did not know Chandrabai and only because Rajaram told him, therefore he signed for identification of Chandrabai. From these circumstances it is clear neither scribe nor attesting witness knew Chandrabai personally. There was no identification proof of Chandrabai. Therefore the question of execution of will-deed by Chandrabai comes under the cloud of suspicion on the point of identification. Irrespective of other things as to whether Chandrabai was knowing what she is doing and whether the witnesses were aware what type of document it was being executed.

15. The learned counsel for defendant has admitted in his argument fairly that defendant could not bring the evidence of partition. On the contrary in their written statement filed below Exh.41 as well as amended written statement below Exh.117, they have claimed that only partition of Gat No. 285 was effected. They have come with the case that partition regarding other properties were not effected. If this written statement is considered carefully, it is clear that there was no partition of other properties. The defendants have not claimed or explained as to why other properties were not partitioned at that time. On fair concealment of counsel for defendant to the effect that they have failed to bring the evidence of partition, I need not to consider this aspect more. As far as execution of will is concerned, the learned counsel for defendant submitted that there was no implementation of will from 1988 to 2002. According to him, plaintiff Malan is not examined, she is not aware about these things, witness Bhise was not knowing Chandrabai, witness Mahadev was also not knowing testator, therefore will was not executed as per provisions of Sec. 63 of the Indian Succession Act. There was no evidence to show that plaintiffs and Chandrabai were residing together. After considering the submission of learned counsel for defendant I find that there is substance in his argument. As per the provisions of Sec. 63 of the Indian Succession Act, it is necessary to prove that will-deed was executed as per the provisions of law and it is also required to prove that testator was in the state of sound mind while disposing the property. It is also settled position of law that if the suspicious circumstances came on

record it should be removed by the propounder of the will.

16. It is clear from the above circumstances that attesting witness Mahadeo was not at all aware that what type of deed was being executed. He just signed the document on the request of plaintiff No.2. Therefore it is clear that this witness has not proved the execution of will. He was not also personally knowing testator. Scribe Krishnarav was also not aware about the testator. In his examination of chief he has not stated that after preparing will he had read over to Chandrabai. From these circumstances there remains no doubt that will was not executed as per the provisions of law. There is suspicion about the identity of testator. Though plaintiff No.2 Rajaram is not directly beneficiary of this will, still he had active participation. All these suspicious circumstances leads me to the conclusion that plaintiffs have not proved the execution of will as per the provisions of law. Taking into account the above facts and circumstances I hold that plaintiffs have failed to prove issue no.2, therefore it is answered in negative.

As to Issue No. 3 :-

17. Defendants have claimed that there was partition in the year 1977-78 in respect of agricultural land Gat No. 285 and from that date they are cultivating the land and taking crops. As observed in foregoing paras that defendants counsel has conceded the fact that the defendants failed to prove the oral partition, therefore I need not to consider more, even otherwise on behalf of defendants only Govind has deposed on oath regarding oral partition, however there is no

corroborating and supporting evidence to that effect. Even in his cross examination he has admitted that he has no documentary evidence to show that there was partition. He further admits in clear terms that the parties are cultivating the land as per the family arrangement. It is revealed from record that this matter was went in appeal against interim order, in that appeal the Hon'ble District Court has made arrangement that plaintiffs and defendants should cultivate land Gat No. 285 to the extent of 35 gunthas each and this position is not disputed by the parties. However from the record it is evident that defendants have not brought any cogent and sufficient evidence to prove the oral partition. The plaintiff has placed reliance on case laws reported in **Indranarayan V/s. Roop Narayan**, in this case the Hon'ble Apex Court held that as per the Hindu Law presumption is that members of Hindu family are joint and this presumption is stronger in case of a father and his son and who pleads that member has separated himself from family, has to prove it satisfactorily. In another case reported in **Shankar Shinde**, Hon'ble Supreme Court held that presumption as to jointness in family, the initial burden lies on the party claiming disruption in the joint status. The propositions laid down in the above case laws are not disputed by the defendant. They fairly admits that they failed to prove the partition, I therefore no hesitation to hold that defendants failed to prove this issue. Hence it is answered in negative.

As to Issue No. 7 :-

18. The defendants have filed counter claim and

claimed that house property situated at Chopdarwadi bearing Grampanchayat No. 430 is joint family property and they sought partition of it. It is to be noted that plaintiffs have not filed written statement to this counter claim. They have not denied at all the contention of the defendants. Therefore it is deemed admission, however the learned counsel for plaintiff submitted that name of plaintiff No.2 is recorded to this suit house and even absence of written statement, the defendants have to prove the fact of jointness of this suit house. The learned counsel for defendant has referred to the Gao Nanuma eight which is at exh. 143 and submitted that earlier this property Grampanchayat No. 430 was bearing No. 274, at that time name of plaintiff No.1 and other three brothers were recorded. It shows that this property is joint family property.

19. I have considered submissions of both the learned counsels, gone through the record and find that Gao Nanuna eight of Grampanchayat Milkat No. 430 shows name of plaintiff No.2 and his wife and son as a owner of this house. However the defendants have produced earlier old Gao Namuna eight extract which is at exh. 143. On perusal of this it is clear that this house property situated at village Chopdarwadi bearing Grampanchayat No. 274 shows that plaintiff No.2 and other three brothers are owners of this house property. The plaintiffs have not disputed this position that Grampanchayat House No. 430 was earlier bearing No. 274. It is also not claimed by the plaintiffs that this is a different property than Grampanchayat No. 430. Therefore it is clear that

in the year 1984-85 this property was registered in the names of plaintiff and defendants and therefore it can be said that it was in joint nature, therefore names of all the brothers were recorded. The learned counsel for plaintiff has submitted that this property was purchased by plaintiff No.2 on his own income. However there is no pleading to that effect in their plaint. Though the plaintiffs have produced copy of sale-deed, it is not proved. This sale-deed is produced by the plaintiff along with list of document. First of all this is not exhibited, therefore it cannot be read and consider in the evidence. Even for sake of movement, this document is considered being registered document, still it can be seen from this document that this sale-deed is in respect of land Gat No. 1133 and this property is situated at village Sangvad. Whereas house property situated at village Chopdarwadi, therefore this sale-deed is not in respect of the suit property. Having considered these documentary evidence I hold that defendants have proved that house property bearing Grampanchayat No. 430 is joint family property and they have equal shares therein. Hence I answer issue No.7 in the affirmative.

As to Issue Nos. 4, 5 and 8 :-

20. As held above there was no partition of the joint and ancestral properties, therefore plaintiffs are entitled to get relief of partition. So also it is found that property involved in counter claim is also joint family property, therefore defendants are entitled to get relief. Hence issue No. 8 is answered in the affirmative. As far as declaration of ownership on the basis of will is concerned, I find that plaintiffs have not

proved execution of will, therefore plaintiff No.1 is not entitled to get relief of declaration. Hence I answer issue Nos. 4 & 5 in the negative & pass the following order.

Order

1. The suit is decreed partially.
2. The plaintiffs have 1/7th share each and they are entitled to get it.
3. The defendants are also entitled to get 1/7th share each in the property & subject matter of counter claim.
4. The preliminary decree be drawn as per the above declaration and precept be sent to the Collector, Satara for effecting partition as per the provisions of law.
5. Relief regarding declaration and injunction is refused.
6. Parties to bear their own costs.

Place : Patan

Date : 08.12.2011

(Kiran R. Deshpande)
Jt. Civil Judge, Junior Division,
Patan

(K.D. Dhatunde.)
Stenographer(L.G.)