IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 405 OF 2015

1. Sunil Anna Kakade
   Age : Adult, Occ: Agriculturist
2. Sou. Kamal @Sitabai Parshuram Pawar
   Age : Adult, Occ: Housewife

   Both residing at: Sibwadi, Tal: Daund, Dist: Pune
3. Sou. Suman Bajirao Jagtap
   Age : Adult, Occ : Housewife
   Residing at Ambale
   Tal. Purandar, Dist. Pune
4. Kanta Kundlik Hinge
   Age : Adult, Occ: Housewife
   Residing at Hingne Vathar
   Tal. Purandar, Dist. Pune — Appellants (Org. Defendants)

Versus

1. Laxmi Balu Kakade
   Age: Adult, Occ: Housewife
2. Sachin Balu Kakade
   Age : Adult, Occ: Agriculturist

3. Vishal Balu Kakade
   Age : Adult, Occ : Agriculturist
4. Ujjwala Sundam Bhoite
   Age : Adult, Occ : Agriculturist
5. Sujata Santosh Kale
   Age : Adult, Occ: Housewife

   All residing at Sonwadi
   Tal. Daund, Dist. Pune
6. Deepak Nana Kakade
   Age : 26 years, Occ:Agriculturist/Service
7. Pravin Nana Kakade
   Age : 18 years, Occ : Agriculturist/Service
   All residing at Sonawadi, Tal. Daund,Dist:
   Pune
8. Smt. Usha Balasaheb Bhoite
   Age : 30 years, Occ : Housewife
   Residing at Sonwadi
   Tal. Daund, Dist : Pune
9. Smt. Krishnabai Jotiram Sapkal
   Age : 48 years, Occ : Housewife
   Residing at Jotiram Dayaram Sapkal,
   Nityanand Road, Sharifbhai Chawl
   In front of Society shop — Respondents
   Ghatkopar, Mumbai-86 — (Original Plaintiffs)

WITH

CROSS OBJECTION (ST) NO. 24888 OF 2024

IN

SECOND APPEAL NO. 405 OF 2015

1. Shri Balu Waman Kakade
   Since deceased through his Legal heirs

1A. Laxmi Balu Kakade
   Age: Adult, Occ: Housewife

1B. Sachin Balu Kakade
   Age : Adult, Occ: Agriculturist

1C. Vishal Balu Kakade
   Age : Adult, Occ : Agriculturist

1D. Ujjwala Sundam Bhoite
   Age : Adult, Occ : Agriculturist

1E. Sujata Santosh Kale
   Age : Adult, Occ: Housewife

   All residing at Sonawadi
   Tal. Daund, Dist. Pune

2. Smt. Sushila Nana Kakade
   Since deceased through her legal heirs

3. Deepak Nana Kakade
   Age : 26 years, Occ:Agriculturist/Service

4. Pravin Nana Kakade
Age : 18 years, Occ :
Agriculturist/Service
All residing at Sonawadi, Tal.
Daund,Dist: Pune

5. Smt. Usha Balasaheb Bhoite
Age : 30 years, Occ : Housewife
Residing at Sonwadi
Tal. Daund, Dist : Pune Appellants

Versus

1. Shri Anna Waman Kakade
Since deceased through Legal heirs

1A. Sunil Anna Kakade
Age : Adult, Occ: Agriculturist

1B. Sou. Kamal@Sitabai Parshuram Pawar
Age : Adult, Occ: Housewife

Both residing at: Sibwadi, Tal: Daund,
Dist: Pune

1C. Sou. Suman Bajirao Jagtap
Age : Adult, Occ : Housewife
Residing at Ambale
Tal. Purandar, Dist. Pune

1D. Kanta Kundlik Hinge
Age : Adult, Occ: Housewife
Residing at Hingne Vathar
Tal. Purandar, Dist. Pune

2. Smt. Krishnabai Jotiram Sapkal
Age : 48 years, Occ : Housewife
Residing at Jotiram Dayaram Sapkal,
Nityanand Road, Sharifbhai Chawl
In front of Society shop
Ghatkopar, Mumbai-86 Respondents

Mr. J. S. Kini a/w. Mr. Arun Kini i/b. Mr. Suresh Dubey for Appellants/Applicants.
Mr. Balasaheb Deshmukh for Respondent Nos. 1 to 8.
Mr. Vilas Tapkir for Respondent No. 9

CORAM: GAURI GODSE, J.
RESERVED ON: 24th OCTOBER 2024
PRONOUNCED ON: 3rd MARCH 2025

JUDGMENT:

1. This Second Appeal is preferred by the original defendants to challenge the judgments and decrees passed by the First Appellate Court granting partition and separate possession to the plaintiffs. Respondents had filed a suit for partition and separate possession,

claiming one-fourth share in the suit property. The suit was dismissed. The first appeal preferred by the plaintiffs is allowed, and the suit is decreed granting one-third share to plaintiff no.1, legal heirs of deceased Nana and defendant no. 1 each excluding the land already sold by defendant no. 1 to defendant no. 2 to the extent of 2 anas 4 paise out of suit land bearing Gat No. 70A. Being aggrieved by the decree for partition and separate possession the defendants filed the present Second Appeal. Being aggrieved by the determination of shares and exclusion of the land given to defendant no. 2, plaintiffs have filed cross-objections.

2. By order dated 22nd March 2024, the Second Appeal is admitted on the following substantial questions of law:

(I) Whether it was permissible for the Appellate Court to disregard the partition between the parties for the reason that the partition was an unequal partition?

(II) Whether the Appellate Court committed an error in law by ignoring the subsequent conduct of the parties dealing with their individual shares and alienating the same in favour of the

third parties which indicated the clear intention of severance of joint status?

(III) Whether the alienation of the properties as individual properties subsequent to the Mutation Entry- Exh.“37”supports the theory of previous partition ?

3. By order dated 26th September 2024 following substantial questions of law were framed in the cross objection:

(I) Whether defendant no. 2 would be entitled to get any share in the suit property?

(II) Whether the First Appellate Court erred in excluding the area from Gat No. 70A to an extent of 2 annas 4 paise on the ground that it was sold by defendant no.1 to defendant no.2 in as much as it was never the case of defendants that the said area sold to defendant no.2?

(III) Whether the area to an extent of 2 annas and 4 paise out of Gat No. 70A can be excluded on the ground as pleaded by defendant no.1, stating that by consent the said share was given to defendant no.2, as she had contributed towards

amount of purchase price paid at the time of issuing 32M certificate in the name of defendant no.1?

Facts in brief:

4. The suit was filed for partition and separate possession with respect to Gat No. 46 (old Survey No. 14) and half share of Gat No. 70A (old Survey No. 24, 30 and 31). The plaintiffs are claiming partition and separate possession through Waman. Waman had two wives, both by the name of Hausabai. After the demise of the first wife, Waman married Hausabai (plaintiff no.2). Waman had one son, Anna (Defendant no. 1), from his first wife. Waman had two sons from his second wife, Nana and Balu (Plaintiff no.1). Nana expired in 1984. Nana's wife, Sushilabhai (Plaintiff no.3) and their sons are plaintiff nos. 4 and 5. Plaintiffs claimed that the suit properties were ancestral joint family properties of Waman, and thus, plaintiffs claimed one-fourth share in the suit properties. Plaintiff no. 2, i.e. Waman's second wife, expired during the pendency of the suit. Since her heirs and legal representatives were already on record, her name was deleted in the trial court.

5. There is no dispute that the common ancestor of the parties was Waman, who had two wives. The relationship between the parties is not in dispute. The dispute between the parties is whether the suit properties are self-acquired properties of defendant no. 1- Anna, or is it the ancestral property through the common ancestor Waman?

Submissions on behalf of the Appellants (Original defendants)

6. Learned counsel for the appellants submitted that;

a) Waman died sometime in the year 1942. Gat No. 70A was the self-acquired property of Anna. There was a partition between the parties, and plaintiffs were given a share even in Gat No. 70A. The pleadings of the plaintiffs indicate that 6 acres of land out of Gat no. 70A was sold by Nana, i.e. predecessor in title of plaintiff nos. 3 to 5. After acting upon the earlier partition and alienating their share received in the earlier partition, the plaintiffs were not entitled to seek partition and separate possession.

b) To support the appellant's contention regarding prior partition,

learned counsel for the appellants relied upon the admission given by plaintiff no.1 in his cross-examination, thereby admitting that there was a settlement between three brothers and accordingly, shares were allotted to plaintiff no.1.

c) Learned counsel for the appellants further relied upon the oral evidence of defendant no. 1, thereby stating that defendant no.1-Anna and father of plaintiff nos. 4 and 5, i.e. Nana, had borrowed money from defendant no. 2 for payment of purchase price under The Maharashtra Tenancy and Agricultural Lands Act, 1948 (“Tenancy Act”) for Gat no. 70A. Hence, by consent of all the parties, an area to the extent of 2 anas and 4 paise out of Gat No. 70A was given to defendant no.2. Defendant no. 2 is the maternal sister of defendant no.1. In view of prior partition and the parties acting upon prior partition the plaintiffs were not entitled to seek partition and separate possession by reopening earlier partition.

d) The pleadings and evidence on record clearly indicated that prior partition had taken place and that it had been acted upon.

Hence, there is no joint family property, and thus, there was no question of any partition. The First Appellate Court completely disregarded the earlier partition between the parties on the ground that the partition was an unequal partition and, therefore, the plaintiffs were entitled to partition.

e) Once partition takes place and the same is admitted and proved, the joint family property does not exist, and thus, it is not open to partition. To support his submissions learned counsel for the appellants relied upon the decision of the Hon'ble Apex Court in the case of ***Kesharbai alias Pushpabai Eknathrao Nalawade (Dead) By Lrs and Another vs. Tarabai Prabhakarrao Nalawade and Others***[1]***.***

f) Pursuant to the prior partition, an application was filed by defendant no. 1, i.e. Anna, to record the partition in the revenue record. Accordingly, Mutation Entry No. 112 was affected, and the same was certified, which shows that Gat No. 70A was also partitioned. In view of Section 150 of the Maharashtra Land

[1] (2014) 4 SCC 707

Revenue Code,1966 (“MLRC”), once the mutation entry recording partition was certified and the same was not disputed, the First Appellate Court erred in granting partition and separate possession by ignoring the prior partition.

g) To support the submissions of the appellants regarding prior partition and that the reasons recorded by the First Appellate Court would amount to a perverse appreciation of the evidence, learned counsel for the appellants relied upon the decision of this court in the case of ***Shekoji Bhimrao and Others vs. Motiram Maruti Maratha and Others***[2]. Learned counsel for the appellants thus submitted that the prior partition recorded by way of mutation entry could not have been ignored by the First Appellate Court.

h) With reference to Mutation Entry No. 112, learned counsel for the appellants relied upon the oral evidence of plaintiff no. 1, admitting that he has been in possession of his share since 1974 in view of the settlement between the three brothers. Thus, on

[2] 2007(1) Mh.L.J 747

receiving a share in the partition that took place in the year 1974, Nana, i.e. predecessor in title of plaintiff nos. 3 to 5 executed the sale deed dated 21st January 1983, alienating 6 acres area out of the total area of 16H 45 R. The heirs of plaintiff no. 1 alienated his share of 6 acres out of the total land of 16 H 45 R by sale deed dated 3rd March 2015. Thus, the plaintiffs not only accepted the shares allotted to them at the time of partition but also acted upon the partition by alienating their respective shares. The learned counsel for the appellants relied upon the decision of this court in the case of ***Rajaram Patil Vs Nitin Patil*** [3] to contend that the mutation entry and the admission of plaintiff no.1 would support the theory of partition.

i) Waman expired sometime in 1942, i.e. prior to the Tenancy Act coming into force. Defendant no. 1, i.e. Anna, was cultivating the suit property as an independent tenant. The landlord had failed to pay the occupancy price towards nazrana; hence, the suit land, i.e. Gat No. 46, was regranted in the name of Anna by order dated 6th June 1961. He submitted that Anna paid the

[3] 2024 SCC Online Bom 1742

entire occupancy price, and the challan was produced on record at Exhibit 49. There was no evidence on record to show that any joint family funds were used to pay the occupancy price. The payment challan also stands in the name of defendant no.1.

j) Learned counsel for the appellants relied upon the certificate issued under Section 32M of the Tenancy Act received in the name of defendant no. 1 in respect of Gat No. 70A. He thus submits that all the documents on record clearly support the defendants' case that suit properties were a self-acquired property of defendant no. 1 and thus plaintiffs were not entitled to seek any partition in respect of the same.

k) If the partition of the year 1974 is accepted as a valid partition, the remaining questions of law would be redundant. However, regarding the determination of shares, according to the learned counsel for the appellants, the plaintiffs would not be entitled to three-fourth share. Plaintiff no. 2, being a female heir, would have no rights regarding the tenanted property. To support his submissions regarding the applicability of Section 40 of the

Tenancy Act, learned counsel for the appellants relied upon the decision of the Hon'ble Apex Court in the case of ***Vithal Dattatraya Kulkarni and Others vs. Smt. Shamrao Tukaram Power and Others***[4].

l) The admissions on record support the defendants' case that at the time of payment of the purchase price for Gat No. 70A, money was taken by plaintiff no. 1 along with deceased Nana and Anna from defendant no. 2. Hence, defendant no. 2 was given a share in Gat No. 70A with the consent of all the parties. Hence, defendant no. 1, being in cultivation, as a tenant of Gat No. 70A, the suit property Gat NO. 70A was purchased by defendant no. 1.

m) Though Anna, the other two brothers, Nana and Balu, were not entitled to any share in Gat no. 70A, in view of the settlement between the parties, they were granted a share in the year 1974. Thus, the plaintiffs were not entitled to seek partition in both the suit properties. So far as Gat no. 46 is concerned, plaintiffs were already given a share in the year 1974. In Gat No. 70A, the

[4] (1979) 3 SCC 212

plaintiffs had no right in the said property as it is Anna's self-acquired property. However, in view of the settlement between the brothers in Gat No. 70A, the plaintiffs were given a share.

n) Thus, the First Appellate Court completely ignored the prior partition, which was affected in the year 1974 and granted a decree for partition and separate possession on the erroneous ground that the earlier partition was unequal. It is not the plaintiffs' case that since the earlier partition was unequal, they had prayed to reopen it. He thus submits that the reasons recorded by the First Appellate Court for granting a decree for partition and separate possession amounts to disregarding the earlier partition and the plaintiffs' admission of alienating their individual shares. Learned counsel for the appellants thus submitted that all the questions of law framed in the Second Appeal and the cross objection must be answered in favour of the appellants.

Submission on behalf of respondents nos. 1 to 8 (original plaintiffs)

7. Learned counsel for respondents nos. 1 to 8, i.e. original plaintiffs, supports the impugned judgment and decree to the extent of

granting partition and separate possession; however, the plaintiffs filed cross-objection and raised a dispute on the determination of the shares and exclusion of the shares to the extent of the area given to the defendant. 2. Learned counsel for the plaintiffs submitted that;

a) The proceeding under the Tenancy Act was initiated in the name of defendant no. 1 on behalf of the joint family, and the certificate under Section 32M was issued in the name of defendant no. 1 on behalf of the joint family. The suit properties originally belonged to Waman, and thus, defendant no. 1 is not entitled to seek any exclusive rights over the suit property.

b) The occupancy price and the purchase price under the Tenancy Act were paid from the income of the joint Hindu Undivided Family properties. Thus, defendant no. 1 is not entitled to seek any exclusive right in respect of the suit properties. The defendants had brought in a theory of prior partition; hence, the burden was upon them to prove that there was a partition by metes and bounds. In the absence of any evidence regarding partition by metes and bounds either by way of registered deed

or by way of partition by following provisions under Section 85 of the MLRC, the settlement between the parties cannot be accepted as partition by metes and bounds. If there is no partition of the suit properties by metes and bounds, the same has to be presumed as joint family property, and the plaintiffs would be entitled to seek partition and separate possession.

c) There is no evidence brought on record to support the defendant's case that defendant no. 1 was an independent tenant in respect of the suit property, and therefore, the proceeding under the Tenancy Act was initiated in his name in an individual capacity. The admission given by defendant no. 1 in his cross-examination clearly indicates that Waman was a protected tenant of the suit property, and after his death, the name of defendant no. 1 was recorded as Karta or Manager of the ancestral property. Learned counsel for the plaintiffs referred to the suit notice calling upon defendant no. 1 to partition the suit properties. However, it was a reply on behalf of defendant no. 1, refusing to grant partition when defendant no. 1 had admitted in the reply that Waman was a tenant in respect of both the suit

properties.

d) In the absence of any evidence of the independent right of defendant no. 1, he would not be entitled to seek exclusive rights in respect of the suit properties and deny the plaintiffs' right to get their shares separated. Learned counsel for the plaintiffs supports the First Appellate Court's judgment and decree to the extent of granting partition and separate possession to the plaintiffs. However, he opposes the determination of the shares made by the First Appellate Court and the exclusion of 2 anas 4 paise area given to defendant no. 2 on the ground that it was sold to defendant no. 2.

e) The defendants have not pleaded that area of 2 anas 4 paise share from Gat no. 70A was anytime sold to defendant no. 2. The reasons recorded by the First Appellate Court excluding an area of 2 anas 4 paise on the ground that it was sold to defendant no. 2 is a perverse finding, and thus, the judgment and decree is liable to be interfered with to that extent.

f) Admittedly, defendant no. 2 had not filed any counter-claim seeking any declaration of her right regarding the area that was excluded on the ground that it was sold to defendant no. 2. There was no foundation to the submissions made on behalf of the defendants that the area of 2 anas 4 paise share in Gat no. 70A was given to defendant no. 2 by consent of the parties. The pleadings have no clarification regarding the particulars of the alleged consent. Even otherwise, without any documentary evidence of a valid transfer of the share to defendant no. 2, the area could not have been segregated or excluded by the First Appellate Court.

g) There was no evidence on record to show that defendant no. 2 had contributed towards payment of the purchase price for Gat no. 70A in the proceeding under the Tenancy Act. Even otherwise, a mere contribution for payment of purchase price under the Tenancy Act would not create any right in favour of defendant no. 2. Thus, the question of law framed in the Second Appeal, as well as cross objections, are required to be answered in favour of the plaintiffs.

h) Plaintiff no. 1 and deceased Nana are sons of Waman through his second wife, who was plaintiff no. 2. Anna, defendant no. 1, is the son of Waman from his first wife. Thus, plaintiff no. 1, deceased Nana, plaintiff no. 2 and defendant no.1 are Class I heirs of Waman who would get one-fourth share each and not one-third as held by the First Appellate Court. After the death of plaintiff no. 2, the plaintiffs are entitled to receive the share of plaintiff no. 2, i.e. one-fourth share of plaintiff no.2 needs to be divided amongst her two sons, i.e. Nana and Balu. Hence, according to the learned counsel for the plaintiffs (respondent nos. 1 to 8), the plaintiffs are entitled to receive plaintiff no.2, Hausabai's one-fourth share. Hence, according to the learned counsel for the appellants, deceased Nana and Balu, i.e. plaintiff no. 2's sons both are entitled to receive a three-eighth share, and the three-eighth share of Nana would be further divided amongst heirs of Nana, which would be one-eight share. Thus, the judgment and decree passed by the First Appellate Court deserve to be modified to set aside the exclusion of the area given to defendant no. 2 and redetermination of the share of the

parties.

i) Defendant no. 1 – Anna, being step-son of Hausabai-plaintiff no. 2 would not be entitled to receive any share in plaintiff no. 2's undivided share. To support his submissions that defendant no. 1 would not be entitled to receive any share in plaintiff no. 2's share, learned counsel for the plaintiffs relied upon the decision of the Hon'ble Apex Court in the case of ***Lachman Singh vs Kirpa Singh and Others***[5].

j) In the absence of any evidence of partition by metes and bounds, the First Appellate Court rightly disregarded the theory of prior partition brought in by defendant no.1. The conduct of the plaintiffs by executing the sale deed is concerned, learned counsel submits that the plaintiffs executed the sale deeds in respect of their undivided share. Hence, according to the learned counsel for the plaintiffs, at the most, the area already sold by them would be excluded from the area allotted to the plaintiffs pursuant to the partition decree. He thus submits that the

[5] [1987] 2 SCR 933

questions of law be answered in favour of the plaintiffs.

k) Defendant no. 2 is not entitled to seek any share in the suit properties through Waman as she is the maternal sister of defendant no. 1. The only reason for excluding the area given to defendant no. 2 is on the ground that the area was sold to defendant no. 2. However, it is nobody's case that any part of the area is sold to defendant no. 2 by way of a valid transfer document. The theory of giving away area to defendant no. 2 by consent of parties is not supported by any evidence. Even otherwise, the area cannot be validly transferred only by consent. Thus, the impugned judgment and decree deserve to be modified by setting aside the exclusion of the area of 2 anas 4 paise given to defendant no. 2.

l) The impugned judgment and decree also require modification so far as the determination of shares is concerned. He thus submits that the question of law framed in the cross objections must also be answered in favour of the plaintiffs.

Submissions on behalf of Respondent no. 9 (Defendant No.2)

8. Learned counsel for defendant no. 2, i.e. respondent no. 9 in the Second Appeal, adopted the submissions made on behalf of defendant no. 1, i.e. appellants. Learned counsel for defendant no. 2 submits that by way of Mutation Entry no. 112, the name of defendant no. 2 was recorded in the revenue record to the extent of 6 acres of land, an area of about 1 A 23.5 R was acquired by the railway department by private negotiation and area to the extent of 4 Acres, and 8.5. gunthas was given to defendant no. 2's daughter by a registered gift deed. He submits that an area of 8R is recorded in the name of defendant no. 2's son. He thus submits that in view of the prior partition between the parties and the allocation of shares to the plaintiffs and defendant no. 1, an area was transferred to defendant no. 2 in view of the contribution made by her for payment of purchase price in respect of Gat no. 70A. He thus submits that pursuant to the valid allotment in favour of defendant no. 2, further alienation is done by executing valid documents. He thus submits that the area of 6 acres allotted to defendant no. 2 is presently not available with defendant no. 2, and the same is transferred and acquired as stated hereinabove. He thus

submits that at this stage, no adverse order can be passed in respect of 6 acres of land allotted to defendant no. 2.

9. Learned counsel for defendant no. 2 thus submits that plaintiffs are not entitled to seek any partition or separate possession, and thus, the impugned judgment and decree deserve to be quashed and set aside.

Consideration of the submissions:

10. I have considered the submissions made on behalf of the parties. I have carefully perused both the judgments, pleadings and evidence on record. The relationship between the parties is not in dispute. Defendant no. 1 claims exclusive right in respect of Gat No. 70/A on the ground that he is an independent tenant purchaser of Gat No. 70/A. So far as Gat No. 46 is concerned, defendant no. 1 claims that it was an Inam land, he paid the occupancy price, and it was regranted in his name to the extent of 14 Ana shares, and 2 Ana shares were regranted in the name of the landlord. Defendant No. 1 also contended that though both the suit properties were his

exclusively owned properties, a share was given to plaintiff No.1 and deceased Nana in 1974 in respect of Gat No. 70A. Thus, prayer for partition was opposed claiming that there was partition in 1974 and accordingly Mutation Entry No. 112 was effected to record partition. Defendant No. 2 is the maternal sister of defendant no. 1. Defendants claim that defendant no. 2 contributed to the payment of purchase price under the Tenancy Act for Gat No. 70A; hence, an area to the extent of 2 Ana 4 paise was given to defendant no. 2, with the consent of all the parties.

11. The trial court held that Waman expired prior to the Tenancy Act coming into force. Hence, at the most Waman was a cultivator or possessor of the suit properties. However, the trial court accepted defendant no.1's contention regarding his independent right in the suit properties and the theory of prior partition. The trial court held that the plaintiffs were unable to show that the three brothers jointly cultivated the suit lands. The trial court held that the plaintiffs admitted the settlement between the three brothers and the allotment of shares in the oral evidence. Hence, the trial court held that once the parties accepted the partition and the parties had acted upon the partition, it

was not open for the plaintiffs to seek partition and separate possession. The trial court thus refused to grant partition and separate possession by accepting that there was a prior partition in the year 1974.

12. The First Appellate Court allowed the parties to place on record documents by way of additional evidence. The plaintiffs produced Mutation Entries 211, 923 and 499. The defendant no. 1 produced registered sale deeds executed by plaintiffs, the certificate under section 32M of the Tenancy Act issued in the name of defendant no. 1 and the payment challans.

13. The first appellate court held that Waman died in 1942 before the Tenancy Act came into force. It is held that Gat No. 46 was an Inam land and Gat No. 70A was governed under the Tenancy Act. The first appellate court referred to the provisions of Section 40 of the Tenancy Act and relied upon the decision of this court in the case of ***Sarjerao Maruti Sathe vs. Pralhad Laxman Sathe***[6]. Based on the evidence and admissions given by defendant no. 1, the first appellate court held that

[6] 2010 (2) MhLJ 970

at the time of the death of Waman, plaintiff no. 1 was 3 to 4 years old, Nana was 5 to 6 years old, and defendant no. 1 was 20 to 15 years old. Thus, it was rightly held that plaintiff no. 1 and Nana, being minors, could not consent for defendant no.1 to claim tenancy rights or assert their tenancy rights through Waman. It is further held that the name of defendant no. 1 was thus, substituted in place of Waman in the capacity as manager of the joint family. Thus, the First Appellate Court accepted the plaintiffs' contention that the suit property belonged to the joint family.

14. However, the First Appellate Court accepted the case of defendant no. 1 regarding the contribution made by defendant no. 2 for payment of the purchase price for Gat No 70A. The First Appellate Court referred to the oral evidence of the parties to believe the allotment of 2 anas 4 paise share to defendant no. 2. Mutation Entry No. 112, relied upon by defendant no. 1 to contend that he had been cultivating land since 1942, was examined by the First Appellate Court. However, the First Appellate Court held that the name of defendant no. 1 was entered in respect of the suit land as Manager of the Joint Family. The first appellate court held that plaintiff no. 1 and Nana were

not parties to the partition of 1974. The theory of settlement between three brothers, as pleaded by defendant no. 1 was disbelieved by the First Appellate Court. The subsequent conduct of the plaintiffs regarding alienating shares is also taken into consideration by the First Appellate Court. The First Appellate Court held that the sale deeds executed by plaintiffs were with regard to their undivided share.

15. The First Appellate Court, thus, after verifying the record, held that both the suit lands were seen to be in possession of Waman during his lifetime and thus refused to accept defendant no. 1's case that the suit properties were his self-acquired property. The First Appellate Court accepts the theory of joint family nucleus based on the evidence on record. The First Appellate Court, being the last fact-finding court, has thoroughly examined the pleadings and evidence on record and disbelieved defendant no. 1's case that he was an independent tenant with respect to the suit property Gat No. 70A. The First Appellate Court held that Waman was a tenant in respect of both the suit lands and after his death, the name of defendant no. 1 was entered into the revenue record as Karta or Manager to the joint family.

16. I have perused the record and proceedings. The defendant no. 1 has relied upon Mutation Entry 112 to support his theory of partition. The observations by the first appellate court about unequal partition are with reference to the Mutation Entry 112, which records the name of plaintiff no. 1 and Nana. On an application made by defendant no. 1 in 1974, the names of plaintiff no. 1 and Nana were recorded in Gat No. 70A to the extent of 2 Ana and 4 paise share in Gat No. 70A. Hence, the observation made by the first appellate court would only mean that by referring to the record it was observed that the partition as alleged by defendant no. 1 was unequal. Thus, the reasons recorded by the First Appellate Court do not indicate that the First Appellate Court disregarded the prior partition on the ground of unequal partition. Hence, individual allotment as recorded in mutation entry is not accepted in support of the theory for prior partition.

17. A perusal of the record indicates that 32M certificate was issued in 1972, and the Mutation Entry 112 was effected on an application made by defendant no. 1 in 1974. On an application made by defendant no. 1, the names of plaintiff no. 1 and Nana were recorded in respect of Gat No. 70A to the extent of 2 Ana and 4 paise each.

Defendant No.1 admitted that the application was made by him and it was not signed by plaintiff no. 1 and Nana. For recording partition in revenue records by metes and bounds, either procedure prescribed under section 85 of the Maharashtra Land Revenue Code 1966 (“MLRC”) is to be followed, or the entry in the revenue record is made based on some valid document as contemplated under section 150 of MLRC. Nothing is seen on record to indicate that either of the procedures is followed for recording Mutation Entry 112. Thus, a stray admission by plaintiff no. 1 that he and Nana were cultivating their share cannot be relied upon to conclude that there was partition by metes and bounds. Other substantial material on record is sufficient to hold that Waman was the original holder of the suit properties, and after his death, the name of defendant no. 1 who was major, was substituted, being eldest in the family and more particularly when admittedly plaintiff no.1 and Nana were minors at the time of death of Waman.

18. Nothing is brought on record to show that defendant no.1 had any independent source of income, and he acquired the suit properties out of his independent income by paying the occupancy price and the

purchase price from his independent source of income. There is no evidence that after following due procedure, as contemplated under the unamended or amended Section 40 of the Tenancy Act, after the death of Waman, the tenancy was continued only in the name of defendant no.1. The first appellate court, therefore, rightly held that tenancy proceedings were decided in the name of defendant no. 1 as manager or Karta of the joint family. The joint family of Waman is not in dispute. Both the courts held that Waman was the cultivator and possessor of the suit properties. Thus, unless it is pleaded and proved by cogent evidence that there was severance of the joint family and the properties were partitioned by metes and bounds by following the due procedure as recognized by law, the plaintiffs cannot be denied their due share.

19. The first appellate court, being the last fact-finding court, examined the record thoroughly and held that partition by metes and bounds is not proved. The first appellate court examined the sale deeds executed by the plaintiffs by registered sale deeds. I have perused the documents and the evidence on record. The alienation is for an undivided share in the suit properties. Thus, the Mutation Entry

112 effected at the behest of defendant no.1 alone and the subsequent conduct of the plaintiffs of alienating their undivided share cannot be accepted as sufficient material to conclude that there is a complete partition by metes and bounds. Thus, on perusal of the record and proceedings and the reasons recorded by the first appellate court, I do not find any illegality and perversity in the reasons recorded by the first appellate court in holding that the suit properties originally belonged to Waman and after his death defendant no.1's name was substituted as manager or karta of the joint family, there is no partition by metes and bounds and thus, the plaintiffs are entitled to partition and separate possession.

20. In the decision of ***Kesharbai***, the Hon'ble Apex Court held that 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. The Hon'ble Apex Court further held that such presumption cannot be made once a partition, whether general or partial, is shown to have taken place in a family. Thus, it is held that once a division of right, title or status is proved or admitted, the presumption is that all joint

properties were partitioned or divided.

21. In the decision of ***Shekoji Bhimrao***, this court was dealing with the trial court's decree of injunction in a suit for simplicitor injunction, which was reversed by the first appellate court. This court held that ordinarily, the first appellate court would not draw inference opposite to that of the trial court in the absence of perverse appreciation of the evidence by the trial court. This court, in the case of ***Rajaram Patil*** held that a separate record of rights is a strong indicator of severance of joint status in addition to the manner in which the members thereafter deal with the properties. However, this court also held that if evidence indicates that despite separate revenue records, the enjoyment of the properties was not in severalty, partition cannot be inferred.

22. In the present case, both the courts held that Waman was the possessor and cultivator of the suit properties. The trial court held that defendant no. 1 became the owner in view of the orders passed under the Tenancy Act and the Watan Abolition Act. The trial court also accepted the theory of partition. However, the first appellate court held

that after the death of Waman, defendant no.1's name was substituted as manager to the joint family and disbelieved Defendant No.1's theory of exclusive ownership and prior partition. I have recorded reasons to confirm these findings. Hence, in view of the findings recorded disbelieving the theory of partition, the legal principles settled in the decisions of ***Kesharbai, Shekoji Bhimrao*** and ***Rajaram Patil*** relied upon by the learned counsel for the appellants would not be of any assistance to the arguments raised on behalf of appellants.

23. Learned counsel for the appellants submitted that the plaintiffs would not be entitled to a three-fourth share, and plaintiff no. 2, a female heir, would have no rights regarding the tenanted property. Regarding the applicability of Section 40 of the Tenancy Act, learned counsel for the appellants relied upon the decision of the Hon'ble Apex Court in the case of ***Vithal Dattatraya Kulkarni.*** The question before the Hon'ble Apex court for consideration was whether the heirs of the tenant whose tenancy was terminated by the landlord were entitled to exercise the right that the tenant would have, if alive, to obtain possession of the land if the landlord ceased to cultivate at any time within twelve years after he obtained possession. The Hon'ble Apex

court dealt with the unamended and the amended Section 40 after 1956. Thus, to answer the question under consideration, the Hon'ble Apex court held that under the amended Section 40, the heirs of the tenant were automatically deemed to succeed to the tenancy, however, there was no such deeming effect before the 1956 amendment. In the present case, no such controversy is involved. Hence, it is not necessary to discuss about the legal principles on applicability of unamended or amended Section 40. In the present case, Waman died prior to 1956. There is nothing on record to indicate that by following procedure under the unamended Section 40 of the Tenancy Act, the tenancy was continued in the exclusive name of defendant no. 1. There is also nothing on record to indicate that any procedure was followed after the amended Section 40, to confer exclusive tenancy upon defendant no.1. Therefore, the tenancy continued in the name of joint family. In the decision of ***Sarjerao Maruti Sathe,*** this court in similar facts held that Section 40 of the Tenancy Act merely says that the landlord shall continue the tenancy in favour of those willing. In the similar facts of the case, this court held that the other two brothers were minors, therefore the landlord had no option,

but to continue the tenancy in the name of the eldest son. This court further held that in the absence of any evidence of issuance of notice to other sons or their consent, mere certificate under Section 32M in the name of the eldest son, would not give him exclusive title. Therefore, the legal principles settled in the decision of this court in the case of ***Sarjerao Maruti Sathe*** would apply. Thus, in the present case, mere issuance of the purchase certificate or regrant order in the name of defendant no. 1 would not confer upon him any exclusive right and the same has to be construed as on behalf of joint family.

24. I have already recorded reasons to hold that the first appellate court has not disregarded the theory of prior partition on the ground of unequal partition. Hence, the first question of law is answered accordingly. I have also confirmed first appellate court's findings that Waman was the original holder of the suit properties, and after his death, the name of defendant no. 1 was substituted as manager or karta of the joint family. There is nothing on record to show that there was partition by metes and bounds by the following procedure as recognized by law. The sale deeds on record show that the alienation by the plaintiffs is for their undivided share. Hence, the alienation

would not indicate the intention to severance of the joint status and would not support the theory of partition. Hence, the second and third questions of law are answered accordingly. Thus, the plaintiffs would be entitled to partition and separate possession, and the area already alienated by them shall be binding only on their share while determining shares. Hence, for the reasons recorded above, the impugned judgment and decree do not require any interference on the questions of law framed in the second appeal. Therefore, the questions of law framed in the second appeal are answered accordingly in favour of the plaintiffs.

Cross Objection No. 24888 of 2024:

25. The first question of law in the cross objection is regarding defendant no. 2's entitlement to claim a share in the suit property. Admittedly, defendant no. 2 is not related to Waman and thus is not entitled to claim any share by relying upon any of the provisions of the Hindu Succession Act, 1956. Admittedly, defendant no. 2 is the maternal sister of defendant no.1. Thus, question no. 1 in the cross objection is answered accordingly that defendant no. 2 would not be

entitled to claim any share in the suit property.

26. With reference to the second question of law framed in the cross objection, the theory of allotment of share to defendant no. 2 is based on the consent of the parties. However, there is no pleading with regard to any particulars of consent. There are no pleadings with regard to in what manner the consent would create any right, title, or interest in favour of defendant no.2. Admittedly, there is no document of transfer of title executed in favour of defendant no. 2, hence mere contribution, if any, by defendant no. 2 towards payment of purchase price under the Tenancy Act would not ipso facto create any right, title or interest in favour of defendant no. 2. Thus, the findings recorded by the First Appellate Court that an area of 2 anas 4 paise share allotted to defendant no.2 is required to be excluded from the partition because of the sale by defendant no. 1 to defendant no. 2 is unsustainable. Thus, the finding recorded for the exclusion of the area given to defendant no. 2 is perverse. In the absence of any valid document of transfer, it cannot be held that the said area was sold by defendant no. 1 to defendant no. 2.

27. I do not find any substance in the argument raised on behalf of defendant no. 2 that since the area allotted to defendant no. 2 is further alienated, the impugned decree cannot be interfered with. Once defendant no. 2 is held to have no title in respect of 6 acres of land claimed by her, then further alienation made by her cannot be treated as a valid transfer as it was without any entitlement. Only on the ground of further alienation by defendant no. 2, the area claimed by defendant no. 2 cannot be validated. Thus, the area claimed by defendant no. 2 cannot be excluded from the decree for partition and separate possession.

28. So far as the determination of shares made by the First Appellate Court is concerned, it is necessary to examine the submissions made on behalf of the plaintiffs. There is no dispute that the common ancestor was Waman. Though there is dispute on date of death of Waman, in view of the findings recorded by both courts, it is clear that Waman expired before 1956. Waman had two wives Hausabai no. 1(deceased) and Hausabai no. 2 (plaintiff no.2). Hausabai no. 1 predeceased Waman. Therefore, on death of Waman, property devolved upon the surviving widow, i.e. Hausabai no. 2 (Plaintiff no.2)

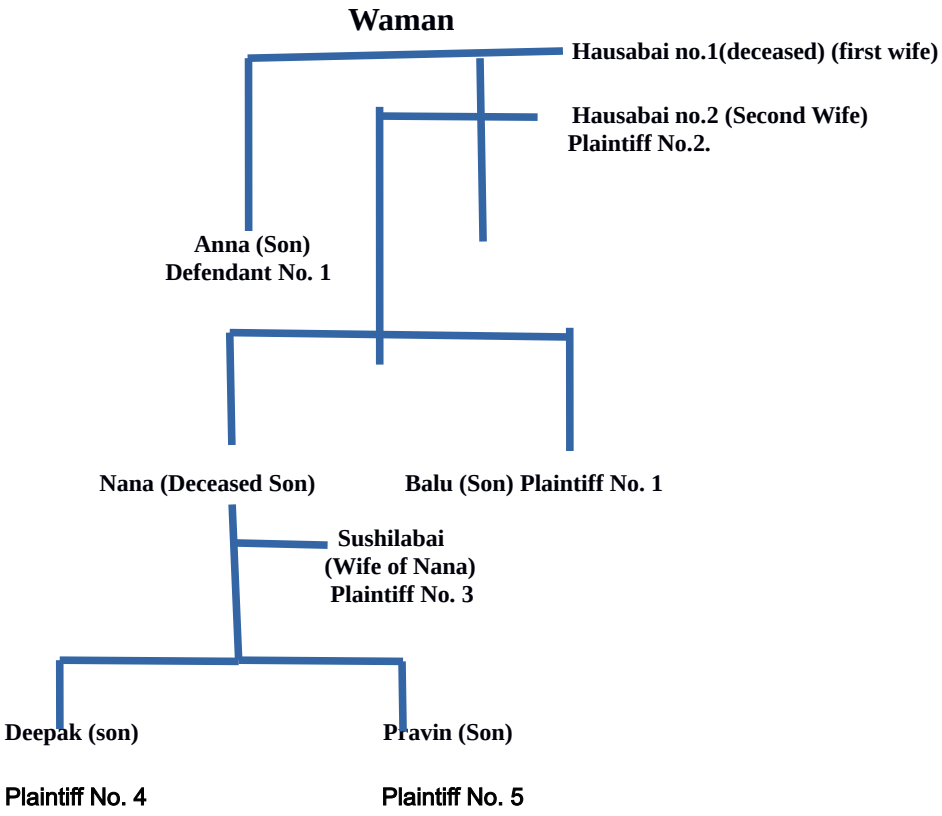
and Waman's three sons, i.e. defendant no.1, deceased Nana and Plaintiff no. 1. Anna-defendant no. 1 is the son of the first Hausabai (deceased) and Waman. Deceased Nana and Balu (plaintiff no. 1) are sons of Waman from his second wife (plaintiff no.2). Sushilabai (plaintiff no. 3) is the widow of Nana. The plaintiffs nos. 4 (Deepak) and 5 (Pravin) are the sons of deceased Nana and plaintiff no. 3.

29. The Hon'ble Apex Court, in the case of ***Lachman Singh,*** was considering the question whether the word 'sons' in clause (a) of sub-section (1) of Section 15 of the Hindu Succession Act 1956, include 'step-sons' also. The Hon'ble Apex Court held that the word 'sons' in clause (a) of Section 15(1) of the Act does not include 'step-sons' and that step-sons fall in the category of the heirs of the husband referred to in clause (b) thereof. The Hon'ble Apex Court thus held that when a property becomes the absolute property of a female Hindu, it shall devolve first on her children (including children of the predeceased son and daughter) as provided in Section 15(1)(a) of the Act and then on other heirs subject to the limited change introduced in section 15(2) of the Act. Thus, it is held that the step-sons or step-daughters will come in as heirs only under clause (b) of section 15(1) or under clause (b) of

section 15(2) of the Act.

30. In the present case, the relations and determination of shares can be better understood by referring to the following family tree;

FAMILY TREE



31. Hausabai No.1, i.e. mother of defendant no.1 predeceased Waman. Thus, on the death of Waman, in view of the well-settled legal principles of Hindu Law prior to 1956, the property devolved equally upon plaintiff no. 2 (Hausabai No.2), deceased Nana, Balu (Plaintiff

no.1) and defendant no. 1- Anna, who would be entitled to one-fourth share each. The plaintiff no. 2 (Hausabai, i.e. second wife of Waman) expired during the pendency of the suit. Thus, in view of Section 14 read with Section 15 of the Hindu Succession Act, 1956, one-fourth share of plaintiff no. 2 would devolve equally upon her two sons, i.e. deceased Nana and plaintiff no. 1. Defendant no. 1- Anna being the stepson of plaintiff no. 2 would not be entitled to claim any share in plaintiff no. 2's share. The plaintiff no.1. (Balu) expired and his heirs and legal representatives are brought on record in the first appeal. The plaintiff no. 3 (Sushila) is shown as deceased in the title of first appeal represented through her heirs and legal representatives. Defendant no. 1 is also shown as deceased in the title of first appeal and represented through his heirs and legal representatives. Thus, one-fourth share of deceased plaintiff no. 2 (Hausabai) is to be divided equally between heirs and legal representatives of deceased plaintiff no.1 and heirs and legal representatives of deceased Nana, i.e. plaintiff nos. 3 to 5. Thus, heirs and legal representatives of deceased defendant no. 1 would be jointly entitled to a one-fourth share. The heirs and legal representatives of deceased plaintiff no. 1 would be

jointly entitled to his one-fourth share plus one-half share in deceased plaintiff no. 2's one-fourth share. The heirs and legal representatives of deceased plaintiff no. 3 (Sushilabai) i.e. Plaintiff No.4 (Deepak) and Plaintiff No. 5 (Pravin) would be jointly entitled to Nana's one-fourth share plus one-half share jointly in plaintiff no. 2's one-fourth share. Thus, the determination of the shares made by the First Appellate Court must be modified in the aforesaid terms.

32. Hence, for the reasons stated above, the Second Appeal and the cross objections are disposed of by passing the following order :

(i) Second Appeal is dismissed.

(ii) Cross Objection is allowed.

(iii) Judgment and decree dated 30th March 2015 passed by the District Judge-1, Baramati in Regular Civil Appeal No. 127 of 1994 is confirmed, save and except clause [5] of the operative part of the judgment and the findings thereon.

(iv) Clause [5] of the operative order of judgment dated 30th March 2015 passed by the District Judge-1, Baramati in

Regular Civil Appeal No. 127 of 1994 is substituted as follows : -

(a) The heirs and legal representatives of deceased defendant no. 1 would be jointly entitled to one-fourth share.

(b) The heirs and legal representatives of deceased plaintiff no. 1 would be jointly entitled to his one-fourth share plus one-half share jointly in deceased plaintiff no. 2's one-fourth share.

(c) The heirs and legal representatives of deceased plaintiff no. 3, i.e. plaintiff nos. 4 and 5 would be jointly entitled to Nana's one-fourth share plus one-half share jointly in deceased plaintiff no.2's one-fourth share.

(v) Save and except the above modifications, the judgment and decree dated 30th March 2015 passed by the District Judge-1, Baramati in Regular Civil Appeal No. 127 of 1994 stands confirmed.

(vi) Cross objection is allowed in the aforesaid terms with no order as to costs.

(vii) In view of the disposal of the second appeal and the cross objection, Interim Application No. 16705 of 2022 and Civil Application No. 916 of 2015 are disposed of as infructuous.

[GAURI GODSE, J.]