

**(2007) 04 BOM CK 0177**

**Bombay High Court**

**Case No:** Letters Patent Appeal No. 244 of 2000 in First Appeal No. 569 of 1985

Smt. Narmadabai Rama

Kamalcha

APPELLANT

Vs

Smt. Godabai N. Manjucha,

(since deceased her heirs Mr.

Vishnu N. Manjucha and

Another)

RESPONDENT

**Date of Decision:** April 3, 2007

**Citation:** (2007) 4 ALLMR 501 : (2007) 6 BomCR 373 : (2007) 4 MhLJ 696

**Hon'ble Judges:** Roshan Dalvi, J; J.N. Patel, J

**Bench:** Division Bench

**Advocate:** R.A. Thorat and Prachi Tatake, for the Appellant; M.J. Kajale, for the Respondent

**Final Decision:** Dismissed

**Judgement**

Roshan Dalvi, J.

This Letters Patent Appeal is filed impugning the judgment and order dated 8th June 2000 passed by the learned Single Judge, under which First Appeal No. 569 of 1985 has been dismissed.

2. The Appellant and the Respondent are two sisters. They were legal representatives of one Mahadeo Shinwar Kamalcha. The said Mahadeo had one son Shinwar, who pre-deceased him.
3. The Appellant and the Respondent, as the only heirs of the said Mahadeo, are entitled equally to his estate and properties. There is one property for which both the sisters are entitled to an equal share.
4. It is the case of the Appellant that her father executed an Agreement in favour of her husband during his lifetime on 5.2.1950, under which he agreed to give half share in the property to her husband, who was Mahadeo's son-in-law, if he

maintained the father and took care of his business. The Agreement is not registered.

5. The husband has not sued for specific performance of the Agreement. The Appellant claims half share in the property on his behalf.

6. It is also her claim that she would be entitled to the entire property by way of adverse possession since she and her husband lived with her father Mahadeo during his lifetime. That contention is incorrect. By mere residence, no party can claim a hostile title by prescription. At best, her husband was his gratuitous licensee.

7. The Trial Court has considered the rival claims and contentions of the parties and has, upon specific issues being raised, considered correctly the equal claim of the two sisters, entitled to their father's properties.

8. The impugned order has also considered the case of the parties as well as the fact of the unregistered Agreement being executed, under which no legal entitlement can be claimed. The judgment does not warrant any interference in the Letters Patent Appeal.

9. On behalf of the Appellant, our attention has been drawn to a Division Bench judgment of this Court in the case of Khatunbi wd/o Mohammad Sayeed and Ors. v. Aminbabai w/o Mohammad Sabir reported in 2006 (6) M L J 759 wherein the Division Bench has held that the provisions of Order 41 Rule 31 must be complied with in the First Appeal and they are not a mere formality. However, in the said judgment, it has been observed that the judgment in the First Appeal should apparently disclose the points which are considered by the Judge as relevant for consideration while dealing with the matter. It is also observed that when the Appellate Court has reversed the judgment of the Trial Court, it was absolutely necessary to consider the points involved in the matter and to formulate the points for determination while dealing with material on record.

10. In this case, the judgment apparently discloses the points considered. Each of the points, which have been argued before us on behalf of the Appellant, have been considered in the impugned judgment. Besides, the impugned judgment has not reversed the judgment of the Trial Court. It has upheld the judgment and dismissed the Appeal. In the circumstances, therefore, the observations with regard to Order 41 Rule 31 set out in the judgment also would not apply to the present case.

11. The Letters Patent Appeal is devoid of merits. Both the sisters are entitled to equal share. The defence that the husband of the Appellant is entitled to any rights under the unregistered Agreement is completely devoid of merits and untenable in law. The Letters Patent Appeal is, therefore, dismissed.

12. The order of the Trial Court is a preliminary decree in the partition Suit. The Court Commissioner has been appointed since 1985 when the preliminary decree was passed. It has been seen that the property is imitable. In view of the same, it

is open to the Respondents to apply for placing the Suit on board of the Trial Court for final decree for auctioning the property in accordance with the directions passed in the case of [Hasham Abbas Sayyad Vs. Usman Abbas Sayyad and Others,](#).

13. The Letters Patent Appeal is dismissed accordingly. There shall be no order as to costs.

14. In view of the disposal of the Letters Patent Appeal, nothing survives in Civil Application No. 331 of 2006 taken out in this matter and the same is disposed of as infructuous.