

Harish

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.383 OF 2016

WITH

CIVIL APPLICATION NO.740 OF 2016

IN

SECOND APPEAL NO.383 OF 2016

Pravin Raosaheb Navale And Ors.

...Appellants/
Applicants

Versus

Suresh Baburao Navale And Ors.

...Respondents

Adv. Umesh H. Pawar for the Appellants/Applicants.

Adv. S. G. Deshmukh i/b Adv. Ramdas Shelke for Respondent Nos.
1 to 4.

CORAM : SHARMILA U. DESHMUKH, J.

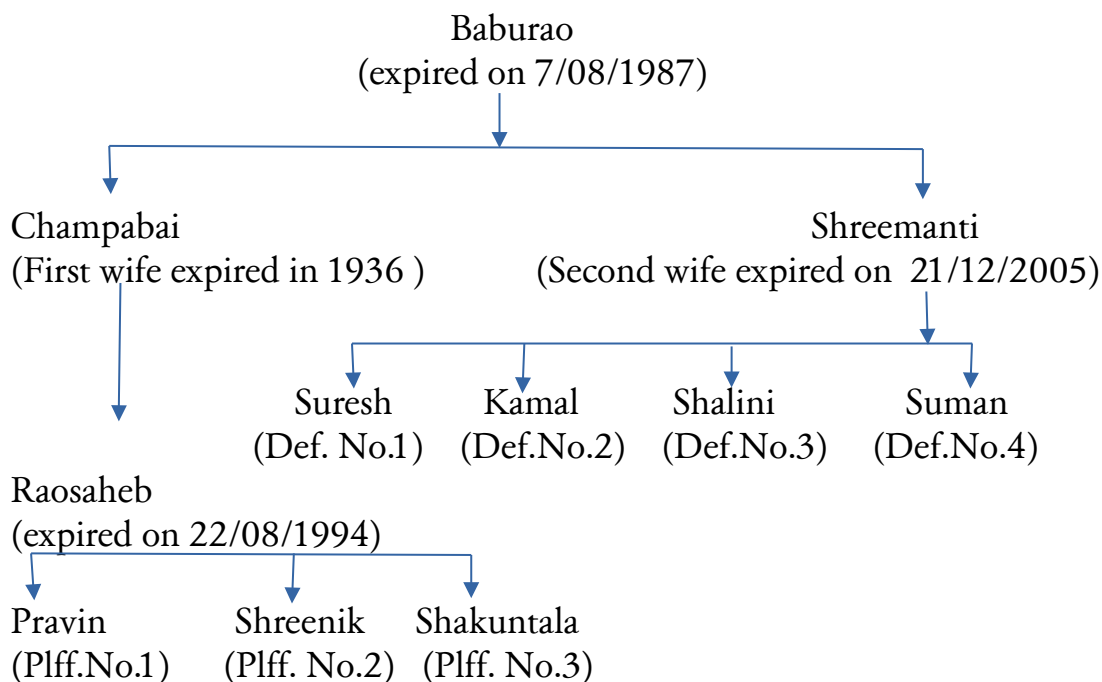
DATE : MARCH 6, 2024

P. C. :

1. Heard,

2. Being dissatisfied by the judgment dated 28th August, 2015 passed by the Appellate Court in Regular Civil Appeal No. 259 of 2009 by which the Appeal filed by the Defendants has been allowed setting aside the judgment and decree dated 27th August, 2009 passed by the Trial Court in Regular Civil Suit No. 553 of 2008, the original Plaintiffs are before this Court.

3. The propositus of the parties was one Baburao. For the better understanding of the relationship the genealogy is reproduced as under :



4. Regular Civil Suit No. 553 of 2008 was filed by the Plaintiffs seeking partition and separate possession of the suit properties described as Gat No. 1206, 68/2 and Gat No. 72. The case of the Plaintiffs was that, the suit properties were the joint family properties of the Plaintiffs and Defendants and standing in the name of propositus Baburao. It was pleaded that after the death of Baburao, the Defendants have got the suit property described in paragraph 1(b) i.e. Gat No. 68/2 and 72 recorded in their names and in respect of property described in paragraph No. 1(a) i.e. Gat No. 1206, the Defendants are trying to mutate their names.

5. It was pleaded that the Plaintiffs have $\frac{1}{4}^{\text{th}}$ share in the suit

properties and as such, the partition and separate possession was sought. The suit came to be resisted by the Defendant Nos. 2 to 4 contending that there was an oral partition during the lifetime of Baburao. It was contended that the branch of the Champabai through whom the Plaintiffs claim was allotted Gat No. 1186 and Gat No. 68/2 and Gat No. 72 (old survey No. 312/3) came to the share of Suresh i.e. the son of Shreemanti. It was contended that accordingly mutation entry No. 9684 was certified on 21st October, 1968. It was contended that Gat No. 1206 was retained by the deceased Baburao in respect of which there was no partition. It was contended that the suit properties were not the joint family properties and there was a prior partition.

6. The parties went to trial. The trial Court framed the following issues.

अ.क्र.	मुद्दे	निष्कर्ष
१.	दावा मिळकती या वादी व प्रतिवादींच्या एकत्र कुटुंबाच्या मिळकती आहेत हे वादी शाबीत करतात काय?	होय
२.	प्रतिवादी हे मयत बाबूराव नवले यांनी पूर्वी वाटप केले होते ते शाबीत करतात काय?	होय
३.	सर्व मिळकती दाव्यात सामिल न केलेची बाब प्रस्तुत दाव्यास बाध करणारी आहे काय?	नाही
४.	वादींना वाटप व पृथक कब्जाची दाद	वादींना एकत्रीत

	मिळणारी आहे काय? असल्यास, प्रत्येक पक्षकाराचा हिस्सा किती?	<u>७/१२</u> हिस्सा तर उर्वरित हिस्सा प्रतिवादी नं. १ ते ४ यांचा
५.	आदेश व हुक्मनामा काय असेल?	अंतिम आदेशाप्रमाणे

7. The Trial Court answered the issue No. 1 as regards the suit properties being the joint family properties of the Plaintiff and Defendant in the affirmative. The Trial Court observed that in the year 1965 there was an oral partition which has been accepted by the Plaintiffs and the Defendants pursuant to which mutation entry No. 9684 was certified. The Trial Court held that in the oral partition, survey No. 353/2, 352/2 came to the share of the branch of Champabai and 312/3 came to the share of branch of Shreemanti. The Trial Court upon consideration of mutation entry No. 9684 held that 312/3 is old Gat No. 1407 and the new Gat No. 71. The Trial Court held that the Gat No. 1407 was formed from survey No. 312/3A/1 and the mutation entry No. 9684 shows the name of Suresh.

8. The Trial Court held that the contention of Defendants that in the partition of year 1965, Gat No. 68/2 and 72 was allotted to share of Suresh and was certified as per mutation Entry No. 9684 is incorrect and that in the partition of the year 1965 Suresh has been allotted old Gat No. 1407, now new Gat No. 71. The Trial Court held that the Defendants

have concealed this fact from the Court and taking advantage of the consolidation scheme by which the survey number was converted into Gat number have misled the Court. The Trial Court held that except Gat No.1186 and Gat No.71, the rest of the properties were the properties of Baburao. The Trial Court further held that the present relief is sought by the Plaintiffs being the legal heirs of deceased Baburao under the Hindu Succession Act, 1956 and being the legal heirs of Baburao, the Plaintiffs are entitled to the properties of deceased Baburao and as such, determined the shares of the parties.

9. As against this Appeal was preferred by the original Defendants. The Appellate Court held that the pleading in the plaint does not disclose the facts which were argued before the Trial Court which were also found in the judgment of the Trial Court. The Appellate Court held that once there is partition, nothing remains in the form of joint family property or ancestral property. The Appellate Court considered that the issue Nos. 1 and 2 framed by the Trial Court answering the same in the affirmative shows that the Trial Court has misunderstood the nature of the joint family and partition. The Appellate Court held that in the absence of all the properties being brought in the common hotchpotch, the suit for partition is not maintainable. The Appellate Court further held that the severance of the status is proved from the evidence which has come on

record and after partition the parties became the self acquired property of each one and after the death of Baburao, the record shows that Shreemanti was having charge over the suit properties. The Appellate Court disagreed with the Trial Court that there existed a joint family after the partition and dismissed the suit.

10. Heard Mr. Pawar, learned counsel for the Appellant and Mr. Deshmukh, learned counsel for the Respondent.

11. Learned counsel for the Appellant submits that the mutation entry No. 9684 disclosed the partition which had taken place between the parties in the year 1965. He submits that there was no question of reopening of partition and the Plaintiffs were seeking share in the properties of Baburao as per law of succession. He would submit that the Trial Court has noted the admissions of both the parties that there was a previous partition pursuant to which the properties came to be divided between Baburao, the branch of Champabai and the branch of Shreemanti. He would submit that the branch of Shreemanti were claiming rights in respect of Gat Nos. 68/2 and 72 which was retained by Baburao by taking advantage of the change from the old Gat number to new Gat number. He submits that there is perversity in the findings of the Appellate Court as the Appellate Court has held that the suit is not maintainable as in the absence of all properties being brought in the

common hotchpotch. He submits that the Appellate Court has failed to notice the admissions of the Plaintiffs and the Defendants as regards the earlier partition of the year 1965 and that by the present suit upon the death of Baburao, the Plaintiffs were claiming their share in the property.

12. Considered the submission and perused the record.

13. The Plaintiffs had come with the case that the suit properties are the joint family properties of Baburao and upon the death of Baburao the Plaintiffs are entitled to partition and separate possession of the joint family properties. In the written statement, the specific case was put forward by the Defendants that there was an earlier partition in the year 1965 pursuant to which the mutation entry No. 9684 was certified and properties were divided amongst branch of Champabai and branch of Shreemanti and certain properties were retained by Baburao. The contention of the Defendants was that Gat No. 1186 came to the share of Champabai whereas Gat Nos. 68/2 and 72 came to the share of Shreemanti and only Gat No. 1206 remain to be partitioned. Upon a specific case being put forward by the Defendant about the oral partition, it was necessary for the Plaintiffs to amend the suit and make necessary averments therein seeking partition of the suit properties being retained by Baburao in the oral partition which had taken place in the year 1965 pursuant to law of succession. It was incumbent upon the Plaintiffs to

plead and establish the properties which came to the share of Champabai, Shreemanti and the properties which were retained by Baburao. As the suit was filed for partition, the Trial Court framed the issue No. 1 as to whether the suit properties are joint family properties. The issue No. 2 which came to be framed was, as to whether the Defendants have established the oral partition. Once it is an admitted position that there was oral partition between the parties and the parties were in possession of their respective shares there was a severance of status of the joint family property, and the issue No. 1 as regards the suit properties being the joint family properties could not have been answered in the affirmative. Once the partition has been proved the suit properties lost their status of a joint family properties and was the separate properties of Baburao. Despite there being no amendment to the pleadings and a specific case were being put forward by the Plaintiff that the suit properties were the joint family properties, the Trial Court after holding that there was a partition between the parties have thereafter answered the issue of the suit properties being joint family properties in the affirmative.

14. The Trial Court went one step further and considered whether the suit properties fell to the share of the Defendants. It was not the case of the Plaintiffs that upon partition any specific property was allotted to any specific party and neither the mutation entry was brought on record. It

was the Defendants who pleaded the case of the earlier partition and pleaded the certification of mutation entry No. 9684. There was no counter claim filed by the Defendants seeking declaration as regards the suit property being allotted to their share. The Plaintiffs having come with the case of the suit properties being the joint family properties the burden was upon the Plaintiffs to plead and establish the same. Once the Trial Court had answered the issue as regards the oral partition between the parties in the affirmative, the issue No. 1 could not have been answered to in the affirmative. The Appellate Court has therefore rightly held that the Trial Court has misunderstood the nature of the joint family and partition and answer to one of the issue in affirmative would leave to the answer to the second issue in the negative. The Appellate Court rightly considered the admission of PW-1 that other properties being Gat No. 1186, Gat No. 71 and Gat No. 1044 are also properties of the family which are not brought in the hotchpotch and kept away. As such, the Appellate Court rightly held that in the absence of all the properties being brought in the common hotchpotch the suit is not maintainable. The Trial Court could not have in the absence of any pleading as regards the properties being claimed under the law of succession directed the partition of the properties by observing that both the parties have admitted that there was a previous partition. In event that there is previous partition between the

parties, the suit of the Petitioner claiming the suit properties to be the joint family properties must necessarily fail. The Trial Court cannot on its own change the suit from one seeking partition of joint family properties to one seeking succession to the properties left behind by Baburao. The issues involved in the former suit will be different from issues involved in the later suit.

15. In light of the above, the Appellate Court has rightly appreciated the pleadings and evidence which has come on record. The Trial Court has given his findings on facts which was not pleaded in the plaint and has thereby while answering the issue No.1 in the affirmative thereafter committed error in law in answering the issue No.2 in the affirmative which error has been rightly corrected by the Appellate Court.

16. In light of the above there is not merit in the Appeal as no substantial question of law arises. Learned counsel for the Appellant has not been able to demonstrate any perversity in the findings of the Appellate Court. Appeal stands dismissed.

17. In view of dismissal of Second Appeal, Civil Application does not survives for consideration. Civil Application stands dismissed.

(SHARMILA U. DESHMUKH, J.)