

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD**

SECOND APPEAL NO.52 OF 2013

1. Tukaram Rambhau
Shinde, Age 63 years
2. Pandurang @ Ganesh
Tukaram Shinde,
Age 15 years
3. Dnyaneshwari Tukar Shinde,
Age 18 years, Occu.Education
4. Arjun Shripati Tanpure,
Age 71 years, Occu.Agril.,
5. Dilip Arjun Tanpure,
Age 45 years, Occu.Agril.
6. Sanjay Arjun Tanpure,
Age 41 years, Occu.Agril.,

Appellant No.2 minor through
guardian appellant no.1
Appellants No.1 to 3
R/o Chapadgaon, Taluka Karjat,
District Ahmednagar
Appellants No.4 to 6
R/o Wadgaon Tanpura,
Taluka Karjat, District
Ahmednagar

..Appellants
(Orig.Deft.Nos.1,4,5,6, 7 & 9)

Versus

1. Chhayabai Vilas Walunjkar,
Age 34 years, Occu.Agril.,
R/o Khandavi, Taluka Jamkhed,
District Ahmednagar
 2. Mandabai @ Asha Tukaram
Shinde, Age 32 years,
Occupation Agriculture
 3. Vithabai Tukaram Shinde,
Age 59 years, Occu.Agril.,
 4. Dipabai Tukaram Shinde,
Age 28 years, Occu.Agril.,
- Resp.No.2 to 4 R/o Sangavi,

Taluka Ashti, District Beed

5. Maujabai Sukhdeo Shinde,
Age 60 years, Occu.Agri.,
6. Dagadu Nivrutti Bhandare
(dead) through proposed L.Rs.
- 6A Laxmibai Dagadu Bhandare,
Age 90 years, Occu.Nil
- 6B Vitthal Dagdu Bhandare,
Age 68 years, Occu.Agri
- 6C Kisan Dagdu Bhandare,
Age 65 years, Occu.Agri.,

All above Resp.No.6A to 6C
R/o Chapadgaon, Taluka
Karjat, Dist.Ahmednagar

- 6D Dr.Adinath Dagdu Bhandare,
Age 62 years, Occu.Doctor,
R/o Bhandare Hospital,
At and Post Karmala,
District Solapur
- 6E Indubai Bhimrao Chendge
(since deceased through
her L.Rs.)
Daughter

6E(1) Shriram Bhimrao Chendge,
Age 45 years, Occu.Nil

6E(2) Dilip Bhimrao Chendge,
Age 43 years, Occu. Nil

6E(3) Appa Bhimrao Chendge,
Age 39 years, Occu. Nil

All Resp.No.6E(1) to 6E(3)
R/o At & Post Kolgaon,
Taluka Karmala,
District Solapur

6E(4) Jijabai Pandurang Jagtap,
Age 41 years, Occu. Nil
R/o At & Post Hiwre,
Taluka Karmala,
District Solapur

7. Chhagan Eknath Ghogare
(dead through L.R.)

respondent no.8
 Ahilyabai Chagan Chogare,
 Age 53 years, Occu.Agril.

8. Ahilyabai Chagan Chogare,
Age 53 years, Occu.Agril.,
9. Magan Bhagchand Shinde,
Age 45 years, Occu.Agril.,
10. Sakhar Bhagchand Shinde,
Age 50 years, Occu. Agri
11. Balasaheb Shivdas Shinde,
Age 50 years, Occu. Agril.
12. Parmeshwar Shivdas Shinde,
Age 48 years, Occu. Agril.
13. Jaykumar Sukhdeo Shinde,
Age 51 years, Occu. Agri.
14. Subhash Haribhau Shinde,
Age 43 years, Occu. Agri.
15. Narayan Rambhau Shinde,
Age 73 years, Occu. Agri.
16. Bhagchand Rambhau Shinde,
Age 75 years, Occu. Agri,
17. Haribhau Rambhau Shinde,
Age 78 years, Occu. Agri.,
18. Shivdas Rambhau Shinde
(deceased)
19. Rajaram Arjun Tanpur,
Age 48 years, Occu. Agri.

Resp.No.5 to 17
 R/o Chapadgaon, Taluka Karjat,
 District Ahmednagar

Resp. No.19 R/o Wadgaon
 Tanpura, Taluka Karjat,
 District Ahmednagar

..Respondents
 (Resp.No. 1 and 2 Orig.
 Pltffs. & other respondents
 original defendants)

Mr A.B.Gatne, Advocate for appellants
 Mr V.P.Latange, Advocate for respondents 1 to 4

CORAM : N.W. SAMBRE, J.**DATE : 21st January 2015****PER COURT**

1. The respondents herein filed Regular Civil Suit No.6 of 1999 seeking partition and separate possession, in the Court of Civil Judge, Junior Division, Karjat, District Ahmednagar. The said suit came to be decreed by an order dated 24th September 2004. In appeal against the said judgment and decree, the present appellants preferred an application under the provisions of Order 41, Rule 27 of the Code of Civil Procedure seeking production of certain documents. According to them, all the properties in the civil suit of which partition is sought, four properties are self-acquired properties. The lower appellate Court by order dated 11.9.2012 observed that the said cause can be considered at the time of final hearing.

2. The lower appellate Court, by its judgment and decree dated 26th November 2012 affirmed the findings recorded by the learned trial Court and dismissed the appeal, as such the present second appeal.

3. The appellants – defendants submit that though the application Exh.29 should have been considered by the lower appellate Court at the time of final hearing of the appeal, as ordered on 11th September 2012 below Exh.12, however, without taking into account the said application Exh.29 and contents thereof, the lower appellate Court has proceeded to pass the order adverse to the interest of the appellants and contrary to the evidence, which was sought to be placed on record. In support of said contentions, learned Counsel for the

appellants has invited my attention to the observations made by the lower appellate Court, which read thus :

“9.The most important document on record is Mutation Entry No.2376 which shows that suit property was partitioned amongst the defendant no.1 and his brothers. The said entry exh.57, therefore, clearly shows that the suit property must be ancestral property of defendant no.1, and there is nothing on record to show that it was his self-acquired property. Though defendant Tukaram Rambhau Shinde tried to state that suit properties were self-acquired properties and that he had purchased the properties in 1968-60 and 1985, 1981, he could not state the exact year in which the exact S.No.was purchased. He also could not state the consideration for such sales. It is clear from his evidence that the property which he inherited after his father, was partitioned amongst him and his brothers.

13. In this case the defendant has cross-examined in detail the witnesses of the plaintiff i.e. plaintiff no.1 herself and has placed on record various documents also. It is also material to note that even in the affidavit of defendant No.1 Tukaram it is not mentioned as to what was his source of income for such purchasing independent properties. In the affidavit in examination-in-chief also there is a vague statement that the properties mentioned in para 1 were not ancestral properties, but they were purchased by defendant No.1. No specifications are given as to how and with what source there properties were purchased. Considering this vague pleadings, it cannot be said that the pleadings were not considered for framing issues and even otherwise since the parties led evidence and objection to framing issues were never raised in the trial Court, it cannot be said that any prejudice has been caused to the defendants by not framing issues. “

4. From the above referred submissions, it is cleared that the said application Exh.29 was not considered by the lower appellate Court which was expected of in accordance with the provisions of Order 41 Rule 27 and 28 of the Code of Civil Procedure.

5. In view of above, in my opinion, case for remand is made out. As such, I proceed to pass the following order.

6. The judgment and decree passed by the Principal District Judge, Ahmednagar in Regular Civil Appeal No.370/2004 on 26th November 2012, is hereby set aside and the appeal stands restored on the file of learned lower appellate Court. The lower appellate Court is directed to decide the application Exh.29 preferred under Order 41, Rule 27 of the Code of Civil Procedure and shall deal with the same in accordance with provisions of law.

7. Hearing of the application and further proceedings, if any, thereto be completed as expeditiously as possible.

8. The earlier order passed below Exh.7 in R.C.A.No.370/2004 by 2nd Additional District Judge, Ahmednagar on 23rd August 2005 granting interim relief, shall continue till the first appellate Court decides the appeal, as ordered.

9. Second Appeal stands allowed in above terms.

(N.W. SAMBRE, J.)