

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

**Review Application No.98 of 2015
In
First Appeal No.1725 of 2012**

Dnyandeo s/o Nivrutti Gondkar. .. **Applicant.**

Versus

Sampat S/o Nivrutti Gondkar
And Others. .. **Respondents.**

Shri. R.R. Karpe, Advocate, holding for Shri. Sandeep S.
Deshmukh, Advocate, for applicant.

Shri. S.S. Kulkarni, Advocate for respondent Nos. 2A to
2E, 3A to 3F.

With

**Civil Application No.6624 of 2015
In
Review Application No.98 of 2015**

Digambar s/o Tulshiram Gondkar. .. **Applicant.**

Versus

Dnyandeo s/o Nivrutti Gondkar
And Others. .. **Respondents.**

Shri. V.D. Sapkal, Advocate, holding for Shri. Yuvraj S. Choudhari, Advocate, for applicant.

Shri. R.R. Karpe, Advocate, holding for Shri. Sandeep S. Deshmukh, Advocate, for respondent No.1.

Shri. S.S. Kulkarni, Advocate for respondent Nos. 2A to 2E, 3A to 3F.

With

**Review Application No.99 of 2015
In
First Appeal No.1623 of 2012**

Sampat s/o Nivrutti Gondkar. **.. Applicant.**

Versus

Dnyandeo S/o Nivrutti Gondkar
And Others. **.. Respondents.**

Shri. R.R. Karpe, Advocate, holding for Shri. Sandeep S. Deshmukh, Advocate, for applicant.

Shri. S.S. Kulkarni, Advocate for respondent Nos. 2A to 2E, 3A to 3F.

With

**Civil Application No.6623 of 2015
In
Review Application No.99 of 2015**

Digambar s/o Tulshiram Gondkar. .. **Applicant.**

Versus

Sampat s/o Nivrutti Gondkar
And Others. .. **Respondents.**

Shri. V.D. Sapkal, Advocate, holding for Shri. Yuvraj S.
Choudhari, Advocate, for applicant.

Shri. R.R. Karpe, Advocate, holding for Shri. Sandeep S.
Deshmukh, Advocate, for respondent No.1.

Shri. S.S. Kulkarni, Advocate for respondent Nos. 2A to
2E, 3A to 3F.

With

Civil Application No.4088 of 2015
Civil Application No.4089 of 2015
Civil Application No.4090 of 2015
In
First Appeal Stamp No.1748 of 2015

Digambar s/o Tulshiram Gondkar. .. **Applicant.**

Versus

Bajirao s/o Sopanrao Gondkar
(Since deceased) through his
Legal Representatives
And Others. .. **Respondents.**

Shri. V.D. Sapkal, Advocate, holding for Shri. Yuvraj S. Choudhari, Advocate, for applicant.

Shri. A.M. Phule, Advocate, for respondent Nos.1A to 1E.

Shri. S.S. Kulkarni, Advocate for respondent Nos. 2A to 2F.

CORAM: T.V. NALAWADE, J.

DATE : 6th JULY 2015

ORDER:

1) The review applications are filed for review of the judgment and order delivered by this Court in First Appeal Nos.1623/2012 and 1725/2012. The first appeals were decided by other Hon'ble Judge of this Court on 26-2-2014. The review applications came to filed in the month of June 2014, after retirement of the Hon'ble Judge who decided the appeals In view of these circumstances, it is necessary to narrate some relevant facts and circumstances.

2) These appeals were filed by review petitioners against judgment and decree of Special Civil Suit No.163/2010 which was pending in the Court of the Civil Judge Senior Division Kopargaon. The suit for the relief of

partition and possession of ancestral property is decided in favour of the plaintiff. The two defendants of the suit had filed aforesaid appeals. Civil Application No.4088 of 2015 is filed for granting permission to file appeal against the decision of the trial Court given in Special Civil Suit No.133/2010. Civil Application No.6624/2015 is filed for permission to intervene in aforesaid review applications and it is filed by Digambar, applicant from Civil application No.4088/2015. Both the sides are heard.

3) The suit was filed by the successors of one Sopan Gondkar. Nivrutti was real brother of Sopan and Hanumant was their father. The review petitioners and the applicant from Civil Application No.4088/2015 are the successors of Nivrutti. Thus the suit was filed by one branch, the branch of Sopan against other branch, the branch of Nivrutti. The suit was in respect of house property bearing CTS No.619 admeasuring 150.08 square meters situated in Shirdi, Tahsil Rahata, District Ahmednagar. It was the case of the plaintiffs that their father had one-half share in the suit property and this property was not partitioned. It was contended that the

defendants of the suit viz. Dnyandeo and Sampat, two son of Nivrutti had got entered their names in the city survey record of the property with oblique motive, to grab the property.

4) Defendant Nos.1 and 2 contested the suit by filing separate written statements. They contended that the suit property was allotted to the share of Nivrutti in the partition which had taken place between Nivrutti and Sopan. It was contended that after partition, the name of plaintiff No.1 was deleted from the city survey record and so this property came to the defendants. It was the case of defendant No.1 that during his lifetime, Nivrutti had allotted one-half portion of the suit property to him and the remaining one-half portion was allotted to defendant No.2 and so they are absolute owners of the respective portion allotted to their share by their father. Such defence was taken by defendant No.2 also. The issue were framed and there were issues against the plaintiffs as follows :-

(i) Whether the plaintiff proves that suit property was kept joint between plaintiffs and defendant No.1 and plaintiffs have one half share in the suit property ?

(ii) Whether the partition claimed amounts to partial partition ?

As against the defendants there were following issues :-

(i) Whether defendants prove that the suit property was allotted to their father in the partition ?

(ii) Whether the defendants prove that the plaintiffs had given up their share in October 1978 ?

(iii) Whether the defendants prove that they have become owner due to adverse possession and they have perfected their title due to lapse of time ?

5) Both the sides gave evidence and the suit came to be decided in favour of the plaintiff by answering aforesaid issues accordingly. The Appellate Court has considered all these issues and has given similar findings on these issues.

6) In the review applications it is contended by the appellants, original defendants that :-

(i) the appeals were listed for final her and they were heard for quite long time and they were heard from 8-1-2014 to 5-2-2014 but the appeal were decided on 26-2-2014;

(ii) the original plaintiff had filed application for leading additional evidence under Order 41 rule 27 of the Civil Procedure Code and he had sought production of original sale deed (certified copy) to show that the grandfather of Nivrutti and Sopan had purchased this property and the production of this sale deed was allowed when the matter was part heard in this Court. It is contended that sale deed did not relate to the suit property but it is considered in evidence and at a very late stage;

(iii) the suit was filed for partition of only one property and so it ought to have been held that it was a suit for partial partition. The circumstance that the other members of coparcenery of Joint Hindu Family were necessary parties is not considered. Some oral arguments advanced is not considered by this Court.

(iv) the allotment of the property from Nashik, Ozar to the share of Sopan in the partition is a circumstance which is not considered and the Court has committed error in holding that said property was self acquired property of Sopan.

7) In the application filed by Digambar for permission to file appeal he has contended that :

(i) he is co-sharer in the suit property but he was not impleaded as party defendant and so permission needs to

be given to him to challenge the decision of the trial Court;

(ii) there was partition between two brothers like Nivrutti and Sopan which took place in the year 1970 and the suit property had come to the share of Nivrutti. That the applicant came to know about pendency of the suit when he had gone to the Court in connection with Regular Civil Suit No.285/2014;

(iii) the applicant had at least 1/8 share in the property considering the successors left behind by Nivrutti and Sopan and so he was necessary party to the suit. The applicant was under impression that there was partition and as per partition original defendants are in possession and so he had no reason to make enquiry about this property or the litigation.

8) For considering the scope of the review application the Court is required to keep in mind provisions of Section 114 and Order 47 of the CPC. For making out a case of review it is necessary for the

applicant to show that there is mistake / error apparent on the face of the record, some material was not available at the time of the decision and it came to be discovered subsequently or there is other sufficient reason. This Court is not expected to review the matter decided already even if there is contention that it is an erroneous decision on merits or the view is erroneous on some law point unless this constitutes error apparent on the face of the record.

9) The aforesaid contentions of the defendants show that they have not disputed that the property was not the self acquired property of Nivrutti and the property had come to Nivrutti from the ancestors and then the property had come to defendant Nos.1 and 2. In view of this circumstance, it was necessary for the defendant to show that there was partition as contended by them and in the partition this ancestral property had come to the share of Nivrutti. As per the decision given by the trial Court and this Court the defendants failed to discharge this burden. Here only it needs to be observed that due to this kind of defence, the circumstance that copy of sale

deed executed in favour of predecessor in title of the parties long back was accepted in evidence in appeal cannot make much difference and it cannot be said that prejudice is caused to them. Digambar, another successor of Nivrutti has come with a case that the property is in possession of the original defendants and it has gone to their share. The defendants have come with specific case that Nivrutti made partition amongst his sons and Nivrutti gave the suit property to defendant Nos.1 and 2. The trial Court and the appellate Court have come to the conclusion that Nivrutti had one-half share in the suit property and the plaintiffs have one-half share. The share of Nivrutti was represented by the defendants. In view of the aforesaid contentions it cannot be said that Digambar was necessary party to the partition suit. Digambar has admitted that the suit property was in possession of the original defendants and in the partition which had taken place in their branch it has gone to their share.

10) Under section 96 and Order 41 of the CPC appeal can be filed against the decision by party

aggrieved by the decision. The aforesaid circumstances and facts show that Digambar has not lost anything. In any case if he has dispute with original two defendants he can proceed against them as this decree will not be binding on him. No defence of non joinder of necessary party was there in the trial Court and in view of the aforesaid facts it can be said that the non joinder of Digambar does not go to the root of the matter. Thus non joinder of Digambar has not affected the merits of the case and due to that there is no possibility of reversal of the decision. The defences which Digambar wants to take were already taken by the original defendants and they are decided. It can be said that such suit can be decided even in absence of Digambar as party to the suit, in view of the aforesaid circumstances.

11) The suit was filed in the year 1993 and it can be said that due to some administrative and other changes the suit was given number of the year 2010. Digambar and original defendants are residents of the same place. They are from the same branch and there are aforesaid circumstances. It cannot be said that Digambar

had no knowledge about pendency of the suit or the decision of the suit. The suit came to be decided on 21-7-2012 and Digambar filed the application for permission to file appeal on 20-1-2015 i.e. after the decision of the aforesaid two appeals. All these circumstances indicate nothing but the conduct of the original defendants and Digambar. They are making attempt to see that execution of the decree is protracted and the plaintiffs do not get fruits of the decree. This Court holds that it is not possible to review the judgment delivered by the other Hon'ble Judge and it is not possible to grant permission to Digambar to file appeal against the decision of the trial Court.

12) In the result, all the applications stand dismissed.

Sd/-
(T.V. NALAWADE, J.)

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