

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

**CIVIL REVISION APPLICATION NO. 92 OF 2014**

- 1] Balbhim S/o Ranba Ghodke,  
Age : 67 years, Occu.: Agril.,  
R/o Dhumegaon, Tq. Georai,  
Dist. Beed
  - 2] Dnyanoba S/o Ranba Ghodke,  
Age : 65 years, Occu.: Agril.,  
R/o As above
  - 3] Jijabai W/o Dnyanoba Ghodke,  
Age : 60 years, Occu.: Household,  
R/o As above
  - 4] Sambhaji S/o Dnyanoba Ghodke,  
Age : 22 years, Occu.: Agril.,  
R/o As above
- .. Petitioners

VERSUS

Kasturbai W/o Balbhim Ghodke,  
Age : 60 years, Occu.: Household,  
R/o Dhumegaon, Tq. Georai,  
Dist. Beed

.. Respondent  
(Orig. Plaintiff)

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Mr. Yuvraj S. Choudhari, Advocate for the petitioners  
 Mr. V.P. Sawant, Advocate for the respondent

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**CORAM : M.T. JOSHI, J.**  
**DATE : 09/04/2015**

**ORAL ORDER :**

1. Rule. Rule made returnable forthwith. Heard both sides.

2. Aggrieved by the rejection of the application filed by the present petitioners i.e. original defendant nos.1 and 2 for dismissal of the suit as not maintainable, the present revision application is filed.

3. Respondent no.1-Kasturbai the wife of the present petitioner no.1-Balbhim filed suit for partition and separate possession of the Hindu undivided family property of the present petitioners as well as defendant no.3-Jijabai and defendant no.4-Sambhaji.

4. The material on record would show that the respondent no.1 i.e. the original plaintiff had earlier filed suit for maintenance which was decreed. Now by the present suit, she claims partition in the Hindu undivided family property. In the circumstances, present petitioners filed application at Exhibit 16 for dismissal of the suit by claiming that it was not maintainable during the lifetime of the husband.

5. The learned trial Court heard both sides. It took into consideration the provisions of section 9-A of the Code of Civil Procedure, section 14 of the Hindu Succession Act and held that in the present suit the

plaintiff does not claim the possession of the property but interest as based on the decree passed in the maintenance suit. It was further observed that from the decree, it appears that the suit properties are not in possession of the plaintiff but charge is created under the Hindu Adoption and Maintenance Act and since the plaintiff is not in possession of those properties, it was observed that the suit would be maintainable.

6. Learned counsel for the petitioners relies on the ratio in the case of **"Anand Krishna Tate (since deceased by L.R.s) Vs. Draupadibai Krishna Tate and others"** 2010(4) ALL MR 834, wherein the established principle of law, that during the lifetime of the husband, the wife cannot claim partition, is reiterated.

7. Learned counsel for the respondent - original plaintiff submits that the application filed by the present petitioners did not recite as to under what provision, the same was filed. He further submits that while other defendants have filed the written statements only these specific petitioners had filed the application. He submits that the said plea could have been in the written statement also. According to him,

since the plaintiff is not in possession of the suit property, she can very well claim partition.

8. Having heard both sides, in my view, the learned trial Judge has misdirected himself by taking into consideration the provisions of section 14 of the Hindu Succession Act which were not applicable in the present case, as detailed supra. The suit which is not at all maintainable can be nipped in the bud either under the provisions of section 9-A of the Code of Civil Procedure or even as per the provisions of Order 7 Rule 11 of the Code of Civil Procedure, which in a given case may be a ministerial act not requiring the judicial interference. It appears that though the learned Joint Civil Judge Junior Division, Georai did not frame the issue, decided the issue by hearing merit of the objection.

9. In the result, the following order:-

10. The Civil Revision Application is hereby allowed without any order as to costs.

11. The impugned order dated 25/4/2014 passed by the learned Joint Civil Judge Junior Division, Georai is

hereby set aside. Instead, the application filed by the present petitioners at Exhibit 16 to the Suit (R.C.S. No. 389/2012) is hereby allowed and the Suit (R.C.S. No. 389/2012) is dismissed without any order as to costs.

12. Rule made absolute accordingly.

**[M.T. JOSHI]**  
**JUDGE**

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