

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

**SECOND APPEAL NO. 133 OF 2012
WITH
CIVIL APPLICATION NO. 2067 OF 2012**

1. Pandurang s/o Vishwanath Kapare,
Age: 58 years, Occu: Agri.,
R/o Samangaon, Tq. Shevgaon,
District Ahmednagar
2. Hirabai w/o Pandurang Kapare,
Age: 53 years, Occu: Agri.,
R/o Samangaon, Tq. Shevgaon,
District Ahmednagar. ...Appellants.

versus

1. Ramnath s/o Vishwanath Kapare,
Age: 72 years, Occu: Agri.,
R/o Samangaon, Tq. Shevgaon,
District Ahmednagar.
2. Ginyandeo @ Dnyandeo s/o Vishwanath
Kapare, Age: 77 years, Occu: Agri.,
R/o Samangaon, Tq. Shevgaon,
District Ahmednagar.
3. Rukhminibai w/o Laxman Kapare,
Age: 63 years, Occu: Agri.,
R/o Samangaon, Tq. Shevgaon,
District Ahmednagar.
4. Bhagwan s/o Vishwanath Kapare,
Age: 52 years, Occu: Agri.,
R/o Samangaon, Tq. Shevgaon,
District Ahmednagar.
5. Ravindra Dnyandeo Kapare,
Age: 37 years, Occu: Agri.,
R/o Samangaon, Tq. Shevgaon,
District Ahmednaga.
6. Chandrabhagabai w/o Radhakishan
Udage, Age: 62 years, Occu: Agri.,
R/o Susare, Tq. Pathardi,
District Ahmednagar.

7. Radhabai w/o Raosaheb Deore,
Age: 54 years, Occu: Agri.,
R/o Koradgaon, Tq. Pathardi,
District Ahmednagar. ...Respondents

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Mr. N. K. Kakade, Advocate for appellants.
Mr. Y. V. Kakade, Advocate for respondent No. 1.
Mr. N. S. Jaju, Advocate for respondent No. 2 & 5.
Mr. L. B. Palod, Advocate for respondent No. 3,4,6,7.

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CORAM : N.W. SAMBRE, J.

DATED : 28TH JANUARY, 2015

PER COURT :

. Mr. Kakade, learned Counsel for the appellants-defendants has questioned the judgment and decree dated 22/12/2005 passed in Regular Civil Suit No. 64 of 2003, a suit for partition and separate possession, which decree was upheld in Regular Civil Appeal No. 30 of 2006 by the judgment and order passed by the District Judge-7, Ahmednagar on 17/08/2011.

2. Mr. Kakade, learned Counsel for the appellants-defendants has sought to raise legal ground as regards whether the suit i.e. Regular Civil Suit No. 64 of 2003 for the purpose of partition is tenable or not, when earlier R.C.S. No. 45 of 1974 for partition and separate possession, was already compromised and execution

proceedings out of the same vide Regular Darkhast No. 02 of 2000 was pending.

2. In support of his contention, he has invited my attention to the issue No. 5 raised in R.C.S. No. 64 of 2003 and answered by learned trial Court, so also the point which fell for consideration before learned lower appellate Court i.e. Point No. 4 whether the suit is maintainable. Issue No. 4 and 5 framed by learned trial Court reads thus:-

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|---|-----|------|
| 4. Whether suit is bad for Non joinder of necessary parties | --- | No. |
| 5. Whether suit is maintainable in present form by virtue of Reg. Darkhast No. 2/2002 ? | --- | Yes. |

3. He submits that, as already suit for partition was decreed vide compromise decree dated 07/02/1974, the second suit i.e. R.C.S. No. 64 of 2003 was not tenable and both the Courts below have committed an error by entertaining second suit for partition i.e. R.C.S. No. 64 of 2003.

4. The parties are in agreement that the decree in R.C.S. No. 45 of 1974 is already executed.

5. So far as above referred ground raised by learned

Counsel for the appellants is concerned, it is required to be noted that the plaintiff in the present suit claimed that Vishwnath and Kondabai were his parents. In R.C.S. No. 64 of 2003, which is for partition and separate possession, admittedly the property of which partition is sought is not part and parcel of earlier R.C.S. No. 45 of 1974. In view of the same, both the Courts below have concurrently held that the second suit was very much tenable as properties in the present suit i.e. R.C.S. No.64 of 2003 and R.C..S. No. 45 of 1974 are altogether different.

6. In view of above observations, in my opinion, no substantial question of law is involved in the present second appeal, which is against the concurrent findings. Second Appeal fails, same stands dismissed.

7. In view of dismissal of second appeal, civil application does not survive, same stands disposed of.

[N.W. SAMBRE, J.]