

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

SECOND APPEAL NO.740 OF 2008

Nivruti Dhondi Wagh (Since deceased through his LRs) Tukaram Nivruti Wagh	.. Appellant
Vs.	
Narayan Dhondi Wagh (Since deceased through LRs) 1a. Rajaramb Narayan Wagh & Ors.	.. Respondents

....

Mr.P.B. Shah, Advocate for the Appellant.
Mr.Kirankumar J. Phadke, Advocate for the Respondents.

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CORAM : RAVI K. DESHPANDE, J.

DATED : JUNE 24, 2015.

P.C. :

Both the Courts below dismissed the suit for partition and separate possession. The trial Court recorded the finding that the previous partition has been proved. The Appellate Court records the finding that the plaintiffs have failed to establish that the suit property is the ancestral/joint family property. In plaint, specific averments are made with respect to the tenanted property. There is no issue framed on this aspect by the Courts below.

2 Admit on the following substantial question of law:

Whether the findings recorded by the Courts below are based on the pleadings and the evidence available on record ?

3 By consent of learned counsel appearing for the parties the matter is taken up for final hearing forthwith, as the matter pertains to the year 2008.

4 After going through the judgment of the trial Court, it is found that though a finding is recorded in respect of previous partition between the parties, but there is no such date of partition mentioned nor any admissible relevant evidence if available on record is considered. The trial Court proceeds on the footing that it was an ancestral property and hence the theory of partition is accepted, whereas the Appellate Court records the finding that it was not the ancestral property of the plaintiffs and defendants. The findings recorded by both the Courts below are not in conformity with the pleadings and the evidence brought on record. Necessary issues have also not been framed. Hence, the substantial question of law framed is answered in the affirmative and the Second Appeal is allowed.

5 The judgment and order passed by the trial Court in Regular Civil Suit No.72 of 1967 on 19th June, 1998 as has been confirmed by the Appellate Court in Regular Civil Appeal No.309

of 1998, are hereby quashed and set aside. The matter is remanded back to the trial Court for decision afresh in the light of the observations made by this Court.

6 Parties to appear before the trial Court on 27th July, 2015.

7 The trial Court to decide the same within a period of eight months from the date of first appearance of the parties.

(RAVI K. DESHPANDE, J.)