

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

**SECOND APPEAL NO. 966 OF 2012
WITH
CIVIL APPLICATION NO. 1938 OF 2012
WITH
CIVIL APPLICATION NO. 904 OF 2015**

Shri Shivaji Keru Palve & Ors. Appellants

Versus

Shri Bhau Keru Palve & Anr. Respondents

Mr. Vikas J. Takalkar for Appellants.
Mr. Sachin S. Gite for Respondent No.1.

**CORAM : S.C.GUPTE, J.
DATE : 5 JANUARY 2017.**

P.C.

. Heard learned Counsel for the parties.

2. The Second Appeal challenges a decree of partition in the suit filed by Respondent No.1. The Appellants are original Defendant Nos. 2 to 5 to the suit. The suit property consists of seven immovable properties. It is the case of the Appellants that only two properties out of these seven are joint family properties,

whereas the other properties are either self-acquired or coparcenary properties of Appellant No. 2 Gangubai, who is the mother of Appellant Nos.1,3,4,5 and Respondent Nos.1 and 2. Despite service of summons of the suit, Respondent No.2 (original Defendant No.1) did not file any written statement though he appeared before the Trial Court, whereas the Appellants herein (original Defendant Nos.2 to 5) remained absent. The Plaintiff led evidence by examining himself through an affidavit of evidence in lieu of examination-in-chief. The evidence was not contested by any of the Defendants. Respondent No.1 (original Plaintiff) also produced documentary evidence. Based on the oral and documentary evidence produced by Respondent No.1, which remained unchallenged, the Trial Court came to a conclusion that the properties were joint family properties of the Plaintiff and the Defendants and determined their shares in accordance with law.

3. First Appellate Court, on the Appeal of the Appellants herein, came to a conclusion that the Appellants were duly served with the suit summons and failed to either appear or file any written statement. Based on the material before the Court, the First Appellate Court also came to a conclusion that the impugned order of the Trial Court was legal and proper. None of these conclusions gives rise to the need of determination of any question of law in the Second Appeal. The question, 'whether the properties

forming subject matter of the suit are joint family properties of the parties or self-acquired property of any particular party', is a question of fact or, at any rate, is a mixed question of law and fact. No evidence was led by the Appellants herein before the Trial Court or even the First Appellate Court by filing any application under Order 41 Rule 27 of the Code of Civil Procedure. The evidence led by Respondent No.1 went unchallenged. No question of law can said to be arise in the subject matter. Learned Counsel for the Appellants submits across the bar that the Advocate of the Appellants was provided the documentary evidence on the part of the Appellants herein and that he had failed to exercise due care or make an appropriate application under Order 41 Rule 27 of the Code of Civil Procedure. There is a ground raised in the Appeal in this behalf in paragraph 8 of the Memo of the Second Appeal. Even this aspect does not give rise to any substantial question of law.

4. Learned Counsel for the Appellants submits that in pursuance of an order passed by this Court on 10th November 2014, an application under Order 41 Rule 27 of the Code of Civil Procedure is taken out in the present Second Appeal. There is no order passed on this application. Anyway, the fact remains that no application under Order 41 Rule 27 of the Code of Civil Procedure for leading of evidence was taken out before the First

Appellate Court and there is no question of this Court entertaining any such application at this stage in the Second Appeal.

5. There is no case made out for entertaining the appeal. The Second Appeal does not give rise to any substantial question of law. The Second Appeal is accordingly dismissed.

6. In view of the dismissal of the Second Appeal, Civil Application Nos. 904 of 2015 and 1938 of 2012 do not survive and the same are also dismissed. No order as to costs.

(S.C.Gupte, J.)