

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

SECOND APPEAL NO.72 OF 2017

(Smt. Methibai Dagdu Rathod
 VS.
 Totibai Charansingh Rathod)

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Office notes, Office Memoranda of
 Coram, appearances, Court's orders
 or directions and Registrar's orders.

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Court's or Judge's Orders

CORAM : V.M. DESHPANDE, J.
DATE : 29th NOVEMBER, 2017.

Heard Shri R.R. Rathod, learned Counsel for the appellant and Shri S.A. Kalbande, learned Counsel for the respondent.

The present appeal is filed by the original defendant. Respondent herein is the original plaintiff in the suit. The appellant filed a suit for partition and separate possession. The suit was registered as R.C.S. No.62/2008. It is to be noted here that her earlier suit bearing R.C.S. No.62/2007 was dismissed in default. The said suit was not decided on merits.

The suit, which gives rises to the present second appeal, was contested by the present appellant by filing written statement [Exh.11]. As per the written statement, plaintiff and defendant are sisters. Their common ancestral Harlal was having

self-acquired properties i.e. house situated at Mouza Lakh (Rayaji) and one agricultural field bearing Survey No.249, area admeasuring 1 hectare and 65 ares at the said village. The fact that these two aforesaid properties of Harlal were the self-acquired properties, is not in dispute. According to the appellant, Harlal, prior to his death, executed a will on 06/01/1989. The said will is a registered document. Harlal expired on 15/09/1989. By the said instrument, Harlal bequeathed his entire self acquired properties in favour of the present appellant. It is, therefore, pleaded by the appellant before the Court below that she alone has right to hold the aforesaid two properties on the basis of various issues were framed. The learned trial Court recorded a finding that the present appellant, who has said will in her favour, has utterly failed to prove the said will, inasmuch as no attesting witness was examined by the present appellant. Not only that, the will on the basis of which the present appellant was claiming exclusive right was not also admitted in evidence. The learned Judge of the trial Court also recorded a finding that since there is no will after the death of Harlal, both the plaintiff and the defendant will have half share in the

same. However, the suit was dismissed since the earlier suit filed in the year 2007 was dismissed for want of prosecution.

The original plaintiff, therefore, preferred an appeal before the appellate Court and questioned the wisdom of the learned Judge of the trial Court in dismissing the suit on the ground that since her earlier suit was dismissed in default, second suit is not maintainable. It is to be noted here that, though the learned trial Court has recorded a specific finding against the present appellant that the plaintiff is also having half share in view of the fact that the appellant has failed to prove will for the reasons best known to the present appellant, no second appeal was filed against such findings given by the learned trial Court in favour of the plaintiff.

The learned lower appellate Court found that the provisions of Rule 9 of Order 9 of the Code of Civil Procedure cannot be made applicable in respect of the suit for partition, since the cause of action is continuous one. The learned Counsel for the respondent in that behalf has placed reliance in a reported case of **Himachal Pradesh High Court** in **Asha Sharma and others vs. Amar Nath and**

others - (AIR 2003 HIMACHAL PRADESH 32) in that behalf.

Since, the earlier suit was dismissed for want of prosecution and the prayers made in the said suit and the prayers made in the suit, which gives rise to the present second appeal, are different. Further, the decision in earlier suit cannot operate as a *res judicata* against the plaintiff, since issues were not decided on merits. The learned lower appellate Court, in my view, has considered this aspect correctly. The present second appeal does not involve any substantial question of law.

Consequently, the appeal must fail and is dismissed.

JUDGE

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