

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.8697 OF 2014
(Dr.Sonyabapu s/o Bhagchand Gondkar Vs. Jagannath s/o
Bhagchand Gondkar and others)

Mr.A.R.Vaidya, Advocate for the petitioner.
Mr.V.S.Bedre, Advocate for the respondents.

(CORAM : Ravindra V.Ghuge, J.)
DATE : 12/10/2018

PER COURT :

1. This petition is on the board. Notices are yet to be issued to the LR's of respondent No.1. I have heard this petition on its merits by the consent of the learned Advocate for the petitioner and Mr.Bedre on behalf of the served respondents.

2. I find that a very short issue is involved in this matter and this petition is pending for 4 years in view of the ex-parte ad-interim order passed by this Court on 29/09/2014.

3. The contention of the petitioner/plaintiff is that though he has contended that there was no partition earlier with reference to the joint family property, the defendants have come forward with the contention that the joint family property had earlier been subjected to a division/partition. The plaintiff, therefore, suggested two issues by placing the burden upon the defendant vide application Exh.43

which reads as under :-

- “1. Does defendants proves that there was previous partition and plaintiff relinquished his share of suit property ?*
- 2. Does defendants proved that they are become owner of property by adverse possession ?”*

4. The Trial Court has already framed the issues on 11/11/2013

which read as under :

- “1. Does the plaintiff prove that the suit property is the joint family property of defendants and himself and same is yet to be partitioned by metes and bounds ?*
- 2. Is the plaintiff entitled to the relief of partition and separate possession of the suit property ? If yes, what is his share ?*
- 3. Is the plaintiff entitled to the relief of perpetual injunction as sought ?*
- 4. Is the plaintiff entitled to future mesne profits ?*
- 5. What order and decree ?”*

5. It is settled law that issues are to be cast by considering the pleadings of the parties, the record available and attending circumstances. As the plaintiff has put forth the case that the joint family property needs to be partitioned and it is yet to be partitioned by metes and bounds, the Trial Court has placed the onus and the burden on the plaintiff to prove that the suit property is a joint family property between the parties and it is yet to be partitioned.

6. The petitioner/plaintiff desires that the Trial Court should frame one more issue as to whether the defendants prove that there was an earlier partition or agreement allotting certain shares to the litigating sides.

7. In my view, the Trial Court has rightly held that if the plaintiff can prove that the property was never partitioned earlier, it would obviously dislodge the defendants from their averment of an earlier partition. To consider this case from another angle, the defendants will endeavour to establish on the basis of their written statement that there was a partition earlier or an agreement to share the property. This aspect would be considered by the Trial Court within the framework of law and upon considering the rival pleadings and the evidence of the parties, the Trial Court would decide whether the joint family property was ever partitioned earlier and if not, would then decide the shares of the litigating sides and proceed to partition the said property.

8. In view of the above, I do not find that the impugned order could be termed as being perverse or erroneous.

9. This petition is, therefore, dismissed.

10. It is, however, made clear that the observations of the Trial Court in the impugned order and of this Court pertain to the issue as to whether new issues need to be cast. The Trial Court would therefore decide the suit after considering the merits of the pleadings and evidence of the parties.

11. Upon considering the pendency of the suit and the age of the parties, most of whom are senior citizens, the Trial Court would endeavour to decide Spl.C.S.No.64/2012 as expeditiously as possible and in any case on or before 31/08/2019.

(Ravindra V.Ghuge, J.)