

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

SECOND APPEAL NO. 364 OF 2018

Ravji Ramu Bhuravane (Since deceased) Through LRs. Shankar Ravji Bhuravane & Ors.	...	Appellants
V/s.		
Sanjay Tukaram Bhuravane & Ors.	...	Respondents

- Mr.Sunil G. Karandikar for the Appellants.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 16th JULY, 2018.

P.C. :

- 1] Heard learned counsel for the Appellants.
- 2] This Second Appeal takes an exception to the judgment and decree dated 17/03/2017 passed by the District Judge, Ratnagiri, thereby dismissing Regular Civil Appeal No.26 of 2014 which was preferred against the judgment and decree dated 10/02/2014 passed by the Civil Judge, Junior Division, Deorukh, in Regular Civil Suit No.2 of 2004.
- 3] The said suit was filed by the Respondent Nos.1 to 5 for partition and separation of their share in the suit properties claiming

them to be the ancestral joint family properties. The suit came to be decreed and the Appeal preferred against the same by the present Appellants is also dismissed. Thus, there is concurrent findings of fact, as recorded by the trial Court and the Appellate Court.

4] In this Second Appeal, only two points are raised for consideration. First point is that deceased Sakharam, the grand-father of the Respondents has earlier filed suit bearing Regular Civil Suit No.11 of 1985 for partition and separate possession of the said suit properties. After the death of Sakharam, the said suit came to be abated and therefore, it is submitted that in view of the provisions of Section 12 and Order 22 Rule 9 of the Code of Civil Procedure (*for short, "C.P.C."*), the second suit on the same cause of action or similar such cause of action is not tenable. According to learned counsel for the Appellants, Section 12 of C.P.C. clearly makes a distinction with Section 11 of C.P.C.. It provides that, "*where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of such cause of action in any Court to which this Code applies*".

5] It is submitted that, as per the Order 22 Rule 9 of C.P.C. the original plaintiff i.e. Sakharam in the earlier suit was precluded from bringing the suit for partition in view of the abatement of the suit.

Therefore, the legal heirs are also precluded from bringing the fresh suit for partition on similar such cause of action.

6] In my considered opinion, it would be therefore necessary to consider the provisions of Order-22, Rule 9 of C.P.C., which read as follows:

O.22, R.9 : Effect of abatement or dismissal -

- (1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.*
- (2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal; and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.*
- (3) The provisions of section 5 of the Indian Limitation Act, 1877 (15 of 1877), shall apply to applications under sub-rule (2).*

[Explanation - Nothing in this rule shall be construed as barring, in any later suit, a defence based on the facts which constituted the cause of action in the suit which had abated or had been dismissed under this Order.]

7] Thus, this provision makes it clear that, when the suit is abated or is dismissed under Order 22, then no fresh suit shall be brought “on the same cause of action”. Therefore, it is clear that the preclusion is only in respect of bringing the fresh suit “on the same cause of action”. Here, in the case, as rightly held by both the Courts below that the cause of action has changed. Sakharam has claimed partition in his own right; whereas, the Respondents, herein, though they are legal heirs of Sakharam, they have claimed partition in their own right, after the death of their grand-father, having succeeded to the property. Therefore, the cause of action for the present suit is different than the cause of action on which Sakharam has filed the suit. Therefore, abatement of the suit filed by Sakharam on the cause of action, which was pleaded by him in the said suit will not preclude his legal heirs from filing the suit for partition in respect of separation of their share in the said properties on the cause of action which is claimed by them in the suit i.e. when they demanded the separation of their share, which was refused. Therefore, it is not the same cause of action, nor it can be called as “such” cause of action but it is totally a different cause of action. Therefore, the trial Court and the Appellate Court has rightly held that the present suit is not barred either by the provisions of Section 12 or by the provisions of Order-22, Rule 9 of C.P.C..

8] The second point raised is in respect of one of the suit land bearing Gat No.104. It is submitted that as regards this land, Appellant No.1 Ravji was declared to be the sole owner thereof under the provisions of Section 32G of Bombay Tenancy and Agricultural Lands Act, 1948 (*for short, "BT and AL Act"*); even the Certificate issued under Section 32M of BT and AL Act stands in his name alone. Therefore, the Respondents cannot claim their share therein. In this respect also, both the Courts below have held that, the evidence of Appellant No.1 Ravji shows that, that property is acquired in the name of Ravji for joint family. The Appellants cannot get rid of the said admission. Therefore, it has to be held that the Respondents are having the share in the said property also. Merely because the 32M Certificate stands in the name of the Appellant No.1 Ravji, it will not deprive the Respondents from their share in the suit property, as that property is acquired for joint family.

9] This Second Appeal therefore does not raise any substantial question of law, hence stands dismissed.

[DR.SHALINI PHANSALKAR-JOSHI, J.]