

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

SECOND APPEAL NO. 596 OF 2016

Shivaji Kashiram Jamdar (Since deceased) Through LRs. & Ors.	...	Appellants
V/s.		
Punja Kashiram Jamdar & Ors.	...	Respondents

- Mr.Nitin Ashok Mulye for the Appellants.
- None for the Respondents.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 10th JULY, 2018.

P.C. :

1] Heard learned counsel for the Appellants.

2] This Second Appeal takes an exception to the judgment and decree dated 19/03/2016 passed by the District Judge-2, Niphad, in Regular Civil Appeal No.51 of 2006.

3] The said appeal was preferred against the judgment and decree dated 03/04/2006 passed by the Civil Judge, Junior Division, Chandwad, in Regular Civil Suit No.62 of 1993.

4] The said suit was preferred by the Appellant - Shivaji Kashiram Jamdar, since deceased, for partition of his half share in the suit land situated at village Harsul, Taluka Chandwad, District Nashik.

5] According to learned counsel for the Appellants, the suit property was originally belonging to his great grandfather, namely, Nana Shripat. After the death of Nana Shripat, his sons namely, Yesu, Deoram, and Bhavrao succeeded to the property. After the death of all those three brothers, their legal heirs i.e. Appellant Shivaji and the Respondents, succeeded to the joint property. In addition to the property situated at village Harsul, there were other ancestral joint family properties at village Ahirkhede. According to the Appellant, the properties at Ahirkhede were partitioned by metes and bounds long back and at the time of partition, it was decided that the property at Harsul will remain joint. However, in the year 1991, the Respondent No.1 has with an intention to usurp the shares of the Appellant in the property at Harsul, got mutated his name thereto, by mutation entry No.249, without the consent of the Appellant. Therefore, the Appellant demanded the partition of his share in the said property, by issuing a notice dated 19/01/1993. As the Respondents failed to comply therewith, the Appellant filed the suit for partition and separate possession of his share in the suit property at Harsul.

6] This suit came to be resisted by the Respondent No.1 contending *inter-alia* that the partition of all the joint family properties, whether situated at Ahirkhede or at Harsul, had taken place about 15-20 years back by mutual consent of the parties. In the said partition, the land bearing Gat No.203 of village Ahirkhede came to the share of the Appellant; whereas the suit land situate at Harsul came to the share of the Respondent No.1. It is submitted that with the consent of the Appellant, the joint application was made to the Tahsildar for entering the name of the Respondent No.1 to the suit land at Harsul. Accordingly, the mutation entry No.249 is carried out. Therefore, there is no substance in the contention of the Appellant that the said property is yet to be partitioned.

7] Respondent No.2 has also resisted the suit contending *inter-alia* that in the family partition the suit property came to the share of Respondent No.1 and it is purchased by Respondent No.2 by way of 'conditional sale-deed' dated 13/03/1962, which was later on confirmed. Since then, Respondent No.2 is in possession of the said property.

8] Remaining Respondents i.e. Respondent Nos.3 to 14, however, did not appear in the suit before the trial Court and the suit

is proceeded ex-parte against them.

9] After appreciating the evidence on record, the trial Court was pleased to dismiss the suit on two counts, viz., *the joint family properties are already partitioned; and even if, it is held that, the joint family properties are not partitioned at present, the suit for partition is barred by limitation.*

10] When the Appellant challenged this judgment of the trial Court before District Court, Niphad, the First Appellate Court also, confirmed the findings of the trial Court and dismissed the appeal.

11] While challenging this concurrent judgment and decree of both the Courts below, the submission of learned counsel for the Appellants is that both the Courts below have not appreciated the evidence on record properly. It is submitted that, by mutation entry alone there cannot be a partition of the property by metes and bounds. Secondly, it is submitted that, both the Courts below have not correctly considered the legal position that there can be a partial partition. Both the Courts have refused to place reliance on the same. Even as regards the issue of limitation, it is submitted that both the Courts below have committed an error in law and hence, this case according to him, needs to be considered in the Second Appeal.

12] At the outset itself, it has to be stated that all the submissions advanced by learned counsel for the Appellant are mostly relating to only the questions of fact in respect of appreciation of evidence on record, which is laid by both the parties. No question of law, much less, the substantial question of law, is raised in this Second Appeal. The law is well settled that in the Second Appeal this Court cannot reopen the entire case and appreciate the evidence on record, converting itself to “third Court of fact finding”. First Appeal is the last forum for the fact finding. Moreover, the findings of the facts in the present case are concurrent, therefore the scope of the Second Appeal has become not only circumscribed but as good nil.

13] Even otherwise also, the very case put up by the Appellant if considered, it is apparent that the Appellant has failed to substantiate the same. Both the trial Court and the Appellate Court had rightly considered that, when already the partition has taken place in respect of the joint family property situated at Ahirkhede, then the burden was upon the Appellant to show that why this property at Harsul was kept joint and why it was also not partitioned? The Appellant has failed to discharge this burden though it was the specific case of Respondent No.1 that the partition of all the joint family properties had taken place and in that partition the land

bearing No.203 of village Ahirkhede went to the share of the Appellant, whereas the suit land came to his share. The Appellate Court has also considered the fact that the Appellant has not come before the Court with the requisite details as to which land he has received in the partial partition and whether that Gat Number is having less area and therefore, the reason for him to claim share in the land at Ahirkhede. This evidence was relevant to decide whether the partition by metes and bounds had taken place and it was equitable. If the Appellant is claiming the case of partial partition, then he has to substantiate the same. However, the Appellant has failed to do so.

14] Moreover, this mutation entry No.249 was made way back in the year 1991 and the said mutation entry shows that the application to enter the name of the Respondent No.1 to the land at Harsul was made jointly. There is nothing on record to challenge the legality of the said mutation entry. The Appellant has also not challenged the same before the Revenue Authorities. Moreover, both the Courts had also considered the fact that in Regular Civil Suit No.62 of 1993 it was specifically stated that the suit land was received in partition by Respondent No.1 and it was in his possession on the basis of the decree passed in Regular Civil Suit No.62 of 1993, the sale-

deed is also executed in favour of Respondent No.2. Therefore, there is ample evidence on record proving that the suit property at Harsul was also the subject matter of partition. In such situation, the trial Court and the Appellate Court had rightly held that the Appellant has failed to prove that the suit land still continues to be joint family property. Moreover, if by virtue of the mutation entry No.249, the name of the Appellant was deleted or excluded before 15 to 20 years, then as held by both the Courts below the suit filed in the year 1993, is also barred by limitation.

15] The finding and appreciation of the evidence done by the both the Courts below therefore being concurrent and based on evidence and sound legal position and no substantial question of law being raised in the Second Appeal, the Second Appeal stands dismissed.

[DR.SHALINI PHANSALKAR-JOSHI, J.]