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

**SECOND APPEAL NO.187 OF 2017
WITH
CIVIL APPLICATION NO.1330 OF 2016
WITH
CIVIL APPLICATION NO.314 OF 2016**

Mohan Eknath Choudhari (Deceased)

Through his heirs and LRs.

1A. Smt. Keshar Mohan Choudhari and Ors.

... Appellants

Vs.

Sudhamati Trimbak Choudhari and Ors.

... Respondents

Mr. Sharad Tanaji Bhosale for the Applicant/Appellants.

Mr. Tushar Sonawane i/b. Mr. Prashant S. Hagare for the Respondent No.1.

**CORAM : SMT. SADHANA S. JADHAV, J.
DATE : 7th JANUARY 2020.**

P.C.:

1 The learned counsel shall carry out amendment in the cause title forthwith.

2 The appellant herein impugns the judgment and order passed by the District Court, Solapur in Regular Civil Appeal No.147 of 2007 thereby confirming the judgment and order passed by the Civil Judge, Senior Division, Barshi in R.C.S. No.422 No.1993 vide judgment and decree dated 23rd April 2001. The appellant happens to be defendant no.2 in R.C.S. No.422 of 1993. The said suit was also filed for partition and

possession. It is pertinent to note that the said suit was decreed in faour of Subhadrabai. She was declared to be entitled to 9/56th share of the joint property. It is pertinent to note that Trimbak i.e. the deceased husband of the present plaintiff was not granted any specific share. It is the contention of the present appellant that there was a partition earlier and that Trimbak was allotted Survey No.443 and that he has sold his share during the pendency of the execution proceedings and hence, he was not entitled to any share. The records would indicate that prior to 1979 there was no partition between the parties/ coparceners i.e. the precise reason why Subhadrabai was constrained to file a suit for partition and possession. It is nobody's case that Survey No.443 was included in R.C.S. No.221/1979. The learned counsel submits that in view of the fact, that Trimbak had sold off his share during the darkhast proceedings, he would not be entitled to any property by way of partition and possession and therefore, the suit was not maintainable. At the time of institution of R.C.S. No.422/1993, block No.443 was not a part of the joint family property. It was the specific contention of the plaintiff that Survey No.443 was sold to Mahadeo Bhaurao Choudhari to satisfy the loan of the joint family property.

3 That, according to the learned counsel, the substantial question of law is that all the properties of the joint family properties were not included in the suit claim and therefore, the findings recorded by both

the Courts below are against the records and in view of the judgment and order passed in R.C.S. No.221/1979 the claim of the plaintiff would be hit by the principle of *res judicata*. The issue framed is as follows :-

- "(e) Whether both the courts below failed and ought to have framed issue of "*res judicata*" as earlier defendant No.4 has filed R.C.S. No.221 of 1979 for same purpose wherein husband of plaintiff was one of the defendant and in the said suit husband of plaintiff admitted in his written statement that there was partition between the parties after the death of Eknath Choudhari?
- (f) Whether the courts below ought to have not concluded that Gat.No.443 was sold by husband i.e. Trimbak to Mahadeo Choudhari for paying debt of joint family and ought to have concluded that Trimbak has sold his share allotted to him in earlier partition took place after the death of Eknath Choudhari?"

4 That the sale deed executed by Trimbak in favour of Mahadeo Choudhari is not binding upon them. The appellate Court has considered all these aspects in respect of the principle of *res judicata* and non-inclusion of Gat No.443 in paragraph nos.14 and 15 of the judgment. In fact, the plaintiff in R.C.S. No.422 of 1993 was not a party to R.C.S. No.221/1979 as she was claiming the right of partition and possession through her husband Trimbak who had expired prior to filing of the present suit.

5 Defendant no.4 had examined one Ranganath S. Gaikwad at Exh.42 who had specifically admitted that no partition was effected between

the plaintiff's husband and defendant no.4's husband and that Gat No.443 was sold when it was the property of the joint family. It is therefore clear that Gat No.443 had not gone to Trimbak as his exclusive share in the joint family property.

6 The learned counsel has further placed reliance upon the revenue entries in the nature of 7/12 extracts and the mutation entries. The probative value of which would be only for the purpose of demarcating lands and for further determining the revenue to be paid towards the said property i.e. for fiscal purposes. It is settled position of law that revenue records by itself would not confer a better title on the holder of the property.

7 In view of the above discussion, all the four issues are answered in the negative.

8 The learned counsel for the appellant has placed reliance upon the judgment of this Court in the case of Govindrao s/o Gangaramji Ajmire Vs. Dadarao @ Shrawan s/ Gangaramji Ajmire (dead) LRs. Indrani wd/o Shrawan Ajmire¹, where this Court has held that suit for partial partition of the properties is not maintainable. In any case, only those properties which are joint family properties and in possession of the members of the joint family on the date of institution of the suit or in the alternative which is

1 2004(4) Mh. L.J. 653

already been parted with could be adjusted in the final decree however, since the defendant had not filed a counter-claim or a separate suit claiming that the sale deed between Trimbak and Mahadeo are not binding upon him. The same cannot be considered at the stage of hearing of the second appeal.

9 At this stage, it will be pertinent to address the issue of '*Res Judicata*'. The issue of *res judicata* is not applicable in the present case for the following reason:

"*Res judicata*" as defined in the Black's Law Dictionary (Eight Edition) is :-

"The issue that has been definitively settled by judicial decision."

The three essential elements are :

- (i) An earlier decision on the issue;
- (ii) A final judgment on the merits;
- (iii) Involvement of the same parties or parties in privity with the original parties."

10 The learned counsel has harped upon, the suit being barred by the principle of *res judicata* and at the cost of reiteration has mentioned that partition had already taken place during the lifetime of Trimbak and Gat No.443 was allowed in the year 1978. The partition was effected by metes and bounds and mutation entry No.152 is taken on record and sanctioned in

the year 1979. Thereafter, the said property was sold by Trimbak i.e. the deceased husband of the plaintiff and the plaintiff had filed Execution Petition bearing No.422 of 1993. The Court cannot be oblivious of the fact that in the present case the suit was filed in the year 1993. In fact, partition is not proved. The suit properties as mentioned in the plaint are 485, 144, 148, 146, 152 and 483. The block No.443 was sold by Trimbak and the other defendants for the repayment of loan of joint family. It is pertinent to note that the Court has specifically recorded a finding as follows :-

"From the perusal of decree in R.C.S. No.221/1979 it appears that no share was allotted to Trimbak who was defendant no.1 in that suit. So it is clear that by decree in R.C.S. No.221/79 no property was claimed to present plaintiff. By the said decree only share was allotted to defendant No.4 and thereafter she filed regular darkhast no.130/1983 for the possession of her share. Defendant No.4 is the original plaintiff in R.C.S. No.221/1979".

11 Defendant no.4 Subhadrabai had relinquished her right in block no.443. It is in these circumstances that the doctrine of res judicata would not apply.

12 In the case of Escorts Farms Ltd. previously known as M/s. Escorts Farms (Ram Garh) Ltd. Vs. The Commissioner, Kumaon Division, Nainital, U.P. and Ors. reported in Appeal (Civil) No.1584 of 1998, the Hon'ble the Apex Court had observed as follows :-

"..... The literal meaning of res is 'everything that may form

an object of rights and includes an object, subject-matter or status' and res judicata literally means: a matter adjudged; a thing judicially acted upon or decided: a thing or matter settled by judgment. Section 11 of CPC engrafts this doctrine with a purpose that 'a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action."

13 It is the contention of the learned counsel for the appellant that since the entire suit property was not included the suit for partition and possession was not maintainable more particularly, exclusion of Gat No.443.

14 In fact, on the date of filing of the said Gat No.443 was not a joint family property since it was sold prior to filing of the suit.

15 Order II Rule 2 of the Civil Procedure Code, 1908 reads as follows :-

"2. Suit to include the whole claim. - (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim. - Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

3."

16 Firstly, the said property was not joint family property of the family and secondly, it could have been safely stated that the plaintiff had relinquished her claim under Order II Rule 2 of CPC.

17 In the case of State of Maharashtra Vs. National Construction Company reported in AIR (1996) SC 2367, the Apex Court had held as follows :

“the test for determining whether Order II, rule 2 would apply in a particular situation is, "whether the claim in the new suit is in fact founded upon cause of action distinct from that which was the foundation for the former suit". If the answer is in the affirmative, the rule will not apply.

18 In view of the above discussion and the fact that there are concurrent findings by the Courts below, the second appeal being devoid of any merits stands dismissed. Needless to say that execution of the decree passed on 23rd April 2001 stands expedited. Civil Application No.1330 of 2016 is allowed.

(SMT. SADHANA S. JADHAV, J.)