

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**941 SECOND APPEAL NO.215 OF 2022
WITH CA/6568/2022 IN SA/215/2022**

SITARAM DIGAMBER GODASE AND ANR
VERSUS
NAGNATH DIGAMBER GODASE AND ORS

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Advocate for Appellants : Mr. Hande Avinash D.

CORAM : MANGESH S. PATIL, J.
DATE : 26.04.2022.

PER COURT :

This is a second appeal by the original defendant Nos. 3 and 4 being aggrieved and dissatisfied by concurrent findings of the courts below holding that the suit property is joint family property of the parties to the suit and directing partition and separate possession of 1/7th share to each of these siblings.

2. Learned advocate Mr. Hande for the appellants would submit that in fact the respondent No. 6 who was added as defendant No. 6 in the suit subsequently had purchased the suit property from the respondent No. 2 Umakant. She had filed Special Civil Suit No 84/1999 seeking declaration of her title. In that suit the respondent No. 1 who is the plaintiff herein and some of the other respondents had filed consenting written statement. She had prayed for partition of the suit property. The suit was dismissed on merits and the decision would operate as *res judicata* in respect of the present claim of the respondent No. 1.

3. Mr. Hande would further submit that even issue regarding the partition being claimed to be partial partition, one of the ancestral property having been omitted was raised. Issue regarding non joinder of sisters was

also raised. Both the courts below have grossly erred in appreciating the facts, circumstances and evidence giving rise to substantial questions of law. The second appeal be admitted.

4. I have carefully considered the submissions and perused the judgments of the courts below.

5 There is no dispute about the fact that the suit property was purchased by the common ancestor Digambar. He had five sons and two daughters. All of them are parties to the suit. Once having found that the suit property was purchased by the father who died intestate, there cannot be any escape from the conclusion that each of these seven siblings would succeed to the suit property simultaneously and would get 1/7th share each.

6. The issue regarding *res judicata* being agitated has been answered by the courts below in negative. It was a suit filed by a purchaser to whom the respondent No. 2 Umakant had sold the suit property. She was claiming declaration of her title and had also claimed partition. Admittedly, her suit was dismissed. Even it was concluded that she did not derive any right, title or interest in the suit property and the sale-deed in her favour was null and void.

7. Assuming for the sake of arguments that the respondent No. 1 and some of the other respondents had filed a consenting written statement in that suit, even according to appellants, they had consented for effecting partition of the suit property. Besides, the courts below have also noted that the sisters respondent Nos. 4 and 5 were not parties to that suit. If such is the state of affairs, no exception can be taken to the conclusions drawn by the courts below refusing to conclude that the decision in that suit would operate as a *res judicata* against the respondent No. 1's claim for partition and separate possession.

8. As far as non inclusion of all the joint family properties, the trial court

has emphatically, for the sound reasons noted that the plea of the appellants was as vague as it could be. They had not disclosed or given particulars of the properties which according to them ought to have been included. Even the appellant No. 1 Sitaram during his testimony admitted that except the suit property there was no other ancestral property of the family. In view of such state of evidence, the conclusion drawn by the courts below holding that the suit was not hit by principle of partial partition is indeed unassailable.

9. Though the respondent Nos. 5 and 6 were not initially added as parties to the suit and issue regarding their non joinder was raised, admittedly, they were subsequently added in the array of defendants and even the defect stood cured.

10. Resultantly, since the suit property is the joint family property of the parties to the suit, each one having an equal share, the conclusion drawn by the courts below cannot be legally assailed. No substantial question of law arises.

11. The Second Appeal is dismissed.

12. Pending Civil Application is disposed of.

(MANGESH S. PATIL, J.)

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