

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

**SECOND APPEAL NO. 564 OF 2018
WITH
CIVIL APPLICATION NO. 1300 OF 2018
IN
SECOND APPEAL NO. 564 OF 2018**

Ramchandra Dhondiba PatilAPPELLANT
V/S
Baburao Dhondiba Patil & Ors.RESPONDENTS

Mr. Shrishailya S. Deshmukh for the appellant.
Ms. Jaya Bagwe a/w. Adv. Anchita Nair for respondent no. 1

CORAM : NITIN W. SAMBRE, J.

DATED : 14th NOVEMBER, 2022

P.C.:

1. Heard Mr. Deshmukh, learned counsel for the appellant/original defendant no. 1. The challenge in the appeal is to the judgment delivered by First Appellate Court whereby the suit claim for partition and separate possession came to be decreed thereby granting share to the extent of 9/42nd in the suit property described in plaint para 1A.

2. The contentions of Mr. Deshmukh, learned counsel for the appellant are, the evidence of the defendant no. 4-Hirubai mother of the parties to the suit recorded in the earlier suit for injunction being RCS No. 1162 of 2001 i.e. Exhibit-124 is ignored by the

Appellate Court in absence of any legal reason.

3. His further contentions are, the existence of oral partition is justified based on the mutation effected in the revenue records, which the Appellate Court has failed to appreciate and as such, there is error of judgment.

4. Learned counsel for the respondents, would support the judgment impugned.

5. I have appreciated the said submissions.

6. The parties hereto are claiming through common ancestor - Dhondiba who was married to Hirubai.

7. After the death of the Dhondiba, the appellant-Karta approached the revenue authorities and applied for recording names of each of the legal heirs of Dhondiba. Accordingly 1/4th share recorded in the name of each of the legal heirs of Dhondiba.

8. Forming the same to be the basis and the admission given by the defendant no. 4-Hirubai, mother of the parties to the suit in RCS No. 1162 of 2001, the claim is sought to be substantiated.

9. As far as the cross-examination of the defendant no. 4 in RCS No. 1162 of 2001 is concerned, though the same was relied on by the appellant, however, it was expected of the appellant to confront about the said cross-examination with the witnesses

including that of Hirubai, which he has failed to. The law contemplates that if the evidence recorded in other proceedings is to be relied on, then such evidence is required to be produced and confronted with.

10. In that view of the matter, reliance placed by the appellant on the evidence/cross examination of the defendant no. 4-Hirubai recorded in RCS No. 1162 of 2001 even it is produced, is of hardly any significance and cannot be taken into account in the present proceedings for want of putting it to the witnesses.

11. As regards, theory of oral partition is concerned, admittedly appellant was the Karta of the family. After the death of Dhondiba, the common ancestor, the appellant approached the revenue authorities and recorded names of legal heirs of Dhondiba stating therein that there are 1/4th share to each of them. However, the said recording of the names in the revenue entry in the capacity of the legal heirs of deceased-Dhondiba cannot be termed as proven fact of oral partition unless such partition is effected by metes and bounds which was based on agreed partition. Apart from above, the properties A1, A2 and A11 were never subjected to the partition. The appellant-Karta came out with plea of acquisition of the part of the suit property to be self

acquired, for which onus is on the appellant to prove the same, which he has failed to.

12. In this background, the view expressed by the First Appellate Court appears to be quite just and proper and after appreciation of entire pleading, evidence on record.

13. In this background, second appeal sans any question of law. The same fails and stands dismissed.

14. Pending applications also stands disposed of.

(NITIN W. SAMBRE, J.)