

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

**SECOND APPEAL (ST) NO. 3995 OF 2020
WITH
INTERIM APPLICATION NO. 2712 OF 2020
WITH
INTERIM APPLICATION NO. 2713 OF 2020
IN
SECOND APPEAL (ST) NO. 3995 OF 2020**

Shivaji Bababsaheb Mane (since Decd. Thr. Lrs)
Laxmi Shivaji Mane & Ors. ...Appellants.

Versus

Suresh Babasaheb Mane & Ors. ...Respondents

Mr. Vishwajeet S. Kapse for the appellants.
Mr. R. V. Bansode for the respondent no. 1

CORAM : NITIN W. SAMBRE, J.

DATED : 11th NOVEMBER, 2022

P.C.:

1. By consent, application for condonation of delay is allowed.
2. This second appeal is by the original defendants to a suit for partition and separate possession taken out by the respondent/plaintiff being RCS No. 93 of 2003. The suit was decreed by the order of the Joint Civil Judge, Junior Division, Phaltan on 08/09/2011 wherein it is held that the plaintiff has 1/6 share in the suit property. The Appellate Court dismissed the appeal preferred by the appellants. As such, this second appeal

against the current findings.

3. Mr. Kapse, learned counsel appearing for the appellants would urge that the earlier suit preferred by the respondents/plaintiffs being RCS No. 35 of 1990 was dismissed in default wherein similar relief of partition was claimed. As such, according to him, the second suit is not maintainable. His further contentions are, in 1982 there was an oral partition which lead to the carrying out of mutation entry pursuant to the request made by the father of the rival parties. As such, in 1982 there was an oral partition which was duly acted upon and as such, the present suit for partition is not maintainable.

4. His further contentions are, in 1984 the respondents/plaintiffs have purchased the properties which are not subject matter of the present suit for partition, even though such properties were purchased from the earnings of the joint family.

5. Mr. Bansode, learned counsel for the respondents, would support the judgments of both the Courts below as according to him, the earlier suit for partition being RCS No. 35 of 1990 was dismissed in default wherein the rights of the parties were not adjudicated. He would further urge that since the relief claimed is

that of for partition, the suit in question is very much maintainable as rights of the parties to their share and entitlement was not adjudicated earlier. Apart from the above, his contentions are the theory of oral partition was not established by the appellants by discharging their burden. He would further claim that as far as the purchase of the property in 1984 is concerned, there is independent sale deed executed in favour of the respondents/plaintiffs. That being so, the said property is rightly held to be purchased by the respondents/plaintiffs out of their own earnings.

6. I have appreciated the above contentions.

7. As far as the issue as regards the dismissal of earlier suit being RCS No. 35 of 1990 is concerned, it is appellants own pleading that the said suit was dismissed in default wherein the plea was for partition. Rightly so pointed out by learned counsel for the respondents that the rival claims in said suit were not adjudicated on merits. Apart from the above, the relief claimed in the present suit is that for partition and as such the status of parties is that of co-plaintiffs.

8. It appears that the appellants have not contested the said issue seriously and as such, neither the issue before the Trial

Court nor the point to that effect was framed and considered by the Courts below. As such, it cannot be said that the second suit at the behest of the respondents for relief of partition is not maintainable.

9. The next contentions of Mr. Kapse as regards to the oral partition of 1982 is concerned, my attention is invited to the mutation entry effected in favour of the defendant nos. 3 & 4 pursuant to the request made by the father of the rival parties. The fact remains that the said mutation entries were of 1982, when the father of respondent/plaintiff was alive. The respondents/plaintiffs thereafter appears to have purchased other properties in 1984 in their name during the life time of his father.

10. Once the appellants have come out with the theory of oral partition based on the mutation entries, it is for the appellants to prove the same which they have failed to. Just because mutation entries were carried out in 1982 that by itself will not lead to conclusion of partition by mets and bounds. Rather appellant has failed to demonstrate the same.

11. The purchase of the properties which are adjacent to the suit properties by the respondents/plaintiffs in 1984 by itself will not give the same colour of ancestral properties, as the claim putforth

by the appellants that those properties are to be brought into common hotchpotch has to be proved by the appellants by discharging initial burden, which also they have failed to.

12. As such, there is no involvement of substantial question of law in the appeal which is preferred against the concurrent findings.

13. The appeal as such fails and stand dismissed. Pending applications also stands disposed of.

(NITIN W. SAMBRE, J.)