

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

SECOND APPEAL NO.511 OF 2017
WITH CA/9979/2017 IN SA/511/2017

JAISHREE SANJAY KALYANE AND ANOTHER
VERSUS
KAILAS GANPATI KALYANE AND OTHERS

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Advocate for Appellants : Mr. S. N. Janakwade
Advocate for Respondents : Mr. V. V. Bhavthankar

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CORAM : R.M. JOSHI, J

DATE : APRIL 21, 2023

PER COURT :

1. This appeal is filed under Section 100 of the CPC taking exception to the judgment and decree dated 15.11.2016 passed in R.C.A. No. 37/2011 whereby the suit filed by the Plaintiffs was decreed and the judgment and decree dated 22.03.2011 passed in R.C.S. No. 90/2009 of dismissal of the suit is reversed.

2. Plaintiffs filed suit being R.C.S. No. 90/2009 for partition and separate possession of the land bearing Gut No. 267 to the extent of 2H 22R situated at Mugat, Tq. Mudkhed, Dist. Nanded. It is the case of the Plaintiff No. 1 that she is legally wedded wife of the Defendant No. 1 and Plaintiff No. 2 is her daughter. It is alleged that the Plaintiff No. 1's husband did not

treat her well and deserted her and that he was not maintaining them. Suit is filed with specific pleadings that Gut No. 267 is a joint family property and that there is not partition taken place in respect of the same.

3. Defendants appeared in the suit and by filing written statement have opposed the contention of Plaintiffs. It is specifically stated therein that the Plaintiffs are owner of Gut No. 266 and that he has no right to seek any share in the suit property i.e., Gut No. 267. Defendants did not take up plea that the Plaintiffs have not included all the properties of the joint family in the suit.

4. Learned Counsel for the Defendants submitted that the Trial Court was justified in dismissing the suit with the findings if there was no previous partition then why Gut No. 266 is not included in the suit, so also other properties of joint family. According to him, the First Appellate Court has committed error in decreeing the suit without considering the material evidence on record.

5. Learned Counsel for the Plaintiffs supported the impugned judgment and decree passed by the First Appellate Court.

6. Plaintiffs have specifically pleaded that there was no partition in respect of Gut No. 267 and partition and share in the properties is sought. The defendants in the written statement never contended before the trial Court that apart from Gut No. 267 other properties are all joint family properties and these properties are not included in the suit properties. Though, there was no such written statement filed on record the trial Court has considered the evidence led by the Defendants and on that basis it was held that Gut No. 266 is not included in the suit property and therefore, the case of Plaintiff was rejected on the ground that all the properties of joint family are not included therein. This finding is clearly erroneous as Defendants have never claimed in the written statement that any other property of joint family exists and the same is not included therein. The entire purpose of filing written statement to that extent with specific plea is to enable Plaintiffs to

bring on record the other properties if any of the joint family. In absence of any such plea it was not open for the trial Court to dismiss the suit. The First Appellate Court has rightly appreciated the pleadings of the parties in particular the written statement of defendant. Once there is no pleading to that effect, no amount of evidence led by the defendant with regard to Gut No. 266 is of any consequence.

7. The Appellants/Original Defendants have failed to show any perversity in finding recorded by the First Appellate Court. There is no substantial question of law involved in this second appeal. Hence, appeal stands dismissed with cost.

(R.M. JOSHI, J.)

Malani