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SA 50 OF 2019-1.odt

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
SECOND APPEAL NO. 50 OF 2019**

- 1] Babasaheb S/o. Tukaram Padar,
Age 65 years Occ. Agri.
- 2] Balasaheb s/o. Babasaheb Solanke,
Age 46, Occ. Agri.
- 3] Bhagwan S/o. Babasaheb Solanke,
Age 42, Occ. Agri.

All R/o. Chincholi, Tq. Partur, Dist. Jalna.

.. APPELLANTS

VERSUS

- 1] Ashamati Uddhav Shinde
Age 45 years, Occ. Agril
R/o. Bhadali, Tq. Ghansawangi,
Dist. Jalna.
- 2] Shivaji S/o. Sahebrao Padar
Age 40 years, Occ. Agri.
R/o. Chincholi, Tq. Partur,
Dist. Jalna,
A/o. R/o. Nerwadi, Tq. Selu,
Dist. Parbhani.

.. RESPONDENTS.

Mr. G.V. Wani, Advocate h/f. Mr. S.S. Randive, Advocate for appellants
Mr. A.B. Kharosekar, Advocate for respondent No.1.

**CORAM :S.G. CHAPALGAONKAR, J.
DATE : 28 NOVEMBER, 2024.**

J U D G M E N T :-

1. The appellants/ original defendant Nos. 2 to 4, impugn the

judgment and decree dated 7.9.2018 passed by District Judge, Jalna in R.C.A. No. 186 of 2012, by which the judgment and decree dated 24.4.2012 passed by Civil Judge (J.D.), Partur in R.C.S. No. 25 of 2005 has been confirmed.

2. For the sake of convenience, parties would be referred as per their original status.

3. Respondent No.1/original plaintiff filed Regular Civil Suit No. 25 of 2005 contending that she is daughter of Sahebrao Rambhau Padar, begotten from his first wife – Jankabai. After death of Jankabai, her father Sahebrao contracted second marriage. Defendant No.1 is the son born from second wife of Sahebrao. Sahebrao died in the year 1978. He was owner of Lands in Survey Nos. 16 and 17, which were consolidated in a Single Gat No. 51 admeasuring 8 Acres. The State of Maharashtra implemented Lower-Dudhana Project and acquired 60R land from Gat No.51. The compensation of Rs. 75,000/- received against acquisition has been grabbed by defendant No.1. Even after acquisition of land, 2 Hectare 70R land left over by Sahebrao is available. Previously, while plaintiff was minor, R.C.S No. 145 of 1987 was filed on behalf of minor plaintiff through next friend. However, it was dismissed in default. The second suit was instituted by plaintiff against defendant No.1 seeking injunction against Special Land Acquisition Officer from disbursing the compensation amount of 60R acquired land and also for relief of partition. However, said suit was dismissed in default. The defendant No.1 was intending to alienate the suit land without the consent of the plaintiff or without handing over half share to her. As such, plaintiff instituted suit on the basis of cause of action dated

10.3.2005, seeking relief of partition and separate possession.

4. The defendant No.1 filed written statement and refuted claim of the plaintiffs, contending that the suit land is separately owned and possessed by defendant No.1 Shivaji. 60R land has been acquired by State Government and remaining land has been sold to Balasaheb Solanke for marriage expenses of the plaintiff. Further, defendant No.1 had incurred loan. Hence, balance of land has been sold to purchasers i.e. Defendant Nos. 3 and 4. It is further pleaded that previous suits i.e. R.C.S No. 145 of 1987 and 188 of 1999 filed by plaintiff are dismissed for want of prosecution. As such, present suit is not maintainable.

5. The trial court as well as the appellate court upheld the contention of the plaintiff that the suit property is ancestral joint family property of the plaintiff and defendants. Therefore, plaintiff is entitled for partition of her $\frac{1}{2}$ share. Both the courts rejected the defence as regards to the bar of suit under the principle of Res-judicata. Consequently, granted a decree for partition and separate possession to the extent of $\frac{1}{2}$ share of the plaintiff in the suit property.

6. Mr. G.V. Wani, learned advocate appearing for the appellants/Purchasers would submit that the appellants are bonafide purchasers for value. The trial court has not framed any issue on this point, nor the appellate court considered this aspect while dismissing the appeal. He would further submit that suit filed by the plaintiff is barred since previous suits, in respect of the same property, have been dismissed for want of prosecution. He would therefore urge that the appellate court failed to exercise jurisdiction under Order 41 Rule 31 of C.P.C.

while not framing appropriate issues/points for consideration. Further, courts have wrongly recorded a finding on the issue of bar of subsequent suit having suffered dismissal of earlier suits for want of prosecution.

7. Having considered the submissions advanced by learned advocates appearing for respective parties and after going through the reasoning adopted by courts below, it is apparent that the suit property was owned by Sahebrao Padar. Plaintiff Ashamati and defendant No.1 – Shivaji are heirs left by him. There is nothing on record to show that there was previous partition either by metes and bounds or under the decree of competent court of civil jurisdiction. Admittedly, 60R land out of 8 Acres from Gat No.51 has been acquired by Government and defendant Shivaji has received the compensation. There is no serious challenge to the fact that suit property is joint family property of plaintiff and defendant No.1. The appellants/original defendant Nos. 2 to 4 have purchased suit property from defendant No.1 during pendency of the suit. As such, they are purchasers pendente-lite, having simply adopted the written statement filed by defendant No.1, contending that suit lands have been alienated to meet out the expenses of marriage of plaintiff or to clear the debts. However, there is no iota of evidence in support of such contention.

8. In absence of independent written statement of defendant Nos. 2 to 4, there was no reason to frame the issue as to whether they were bonafide purchasers of the suit property, pertinently when, defendants Nos. 2 to 4 are purchasers pendente-lite, they cannot raise any defence. Both the courts have concurrently endorsed that defendant Nos. 2 to 4/purchasers are acting in collusion with the defendant No.1,

with intention to oust the claim of the plaintiff. The appellate court has rightly held that purchasers would be bound by the decree that would be passed against defendant No.1. No perversity can be discernible in the aforesaid finding recorded by the courts below.

9. Next contention advanced on behalf of appellants is that, in view of the dismissal of the previous suits bearing R.C.S. No. 145 of 1987 and 187 of 1999, the present suit is not maintainable in view of the bar under Order 9 rule 8 and 9 of C.P.C. Pertinently previous suit was filed for partition through next friend when the plaintiff was minor. Even the subsequent suit, i.e. R.C.S. No. 187 of 1999 was filed for partition and separate possession but the same was dismissed for want of prosecution. There is no adjudication on merit. In the present case, plaintiff is seeking relief of partition and separate possession. Therefore, unless there is severance of the joint family property, the dismissal of previous suit for want of prosecution would not create any bar for institution of fresh suit. It is trite that the cause of action for filing partition suit would be recurring as long as joint family property remains with the family. The provisions of Order 9 Rule 8 is based on the principles of “estoppel”. However, when law recognize continuous right to seek partition of joint property, even if the previous suit for partition is dismissed for default, under Order 9 Rule 8 of C.P.C. subsequent suit cannot be barred. In this context, reference can be given to the judgment of this Court in the case of *Smt. Ashabai Rambhau Awachat vs. Madhusudan Rajaram Chourasiya reported in (2017) 5 M.L.J. 588*, relying upon the law laid down by the Supreme Court in the case of Suraj *Rattan Thirani Vs. Aamabad Tea Company Ltd, AIR 1965 SC 295*, has observed in para. No.9 as under :-

“9. In any event, it is well settled that the cause of action for a suit for partition is a continuing cause of action. In *Suraj Rattan* (supra) it has been held that where a partition suit is dismissed for default it does not bar a subsequent suit as even after dismissal of the former suit, the jointness continues and there is a continuing cause of action. The entire house property having continued to remain joint after dismissal of the earlier suit for partition on 24-11-1970 and the cause of action for the present suit having arisen subsequently which was also distinct from the earlier cause of action, there is no manner of doubt that the bar as prescribed by provisions of Order IX Rule 9 of the Code for filing the subsequent suit is not at all attracted.

The appellate Court fell into error when it is held that the present suit was barred under provisions of Order IX Rule 9 of the Code. As noted above, the cause of action for filing the present suit was distinct from the cause of action for filing the earlier suit and the subsequent suit was only with regard to one of the joint family properties that came to be purchased by the predecessor of the appellants. In that backdrop, suit for partition was maintainable. On that count said finding recorded by the appellate Court cannot be sustained. The substantial question of law is answered by holding that the dismissal of the earlier suit for partition would not bar the subsequent suit for partition under provisions of Order IX Rule 9 of the Code.”

10. In view of aforesaid exposition of law, there is no merit in the contention of the appellant that dismissal of previous suits instituted by plaintiff would bar present suit.

11. Consequently, no substantial question of law arises in this appeal for consideration.

Second Appeal stands dismissed. Civil application, if any, stands disposed of.

[S.G. CHAPALGAONKAR, J]

grt/-