

*Harish*

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION  
**SECOND APPEAL NO.581 OF 2014**

Pandurang Sitaram Kene

(Since deceased thr. his Lrs's)

Bharat Pandurang Kene & Ors.

...Appellants/  
Applicants

**Versus**

Balaram Shankar Kene & Ors.

...Respondents

**WITH**

**INTERIM APPLICATION NO.18196 OF 2022**

**IN**

**SECOND APPEAL NO.581 OF 2014**

Narendra Gopal Kene

...Applicants

In the matter between

Pandurang Sitaram Kene

(Since deceased thr. his Lrs's)

Bharat Pandurang Kene & Ors.

...Appellants

**Versus**

Balaram Shankar Kene & Ors.

...Respondents

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Adv. Sanjay S. Patil for the Appellants.

Mr. Kunal Bhanage i/b Mr. Akshay Pawar a/w Mr. Priyanka  
Acharrya for the Respondents.  
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**CORAM : SHARMILA U. DESHMUKH, J.**

**DATE : JANUARY 24, 2024**

**P. C. :**

1. At the outset, learned counsel for the Appellant seeks leave to carry out amendment for bringing on record the legal heirs of deceased

Respondent No. 2. Leave as sought is granted. Amendment to be carried out forthwith.

2. Being dissatisfied with the Judgment dated 21<sup>st</sup> December, 2023 in Regular Civil Appeal No. 39 of 2005 dismissing the Appeal thereby confirming the Judgment of the Trial court dismissing the suit, the original Plaintiffs are before this Court.

3. The facts stated briefly are that Regular Civil suit No. 296 of 1997 was filed by the Plaintiff seeking partition and separate possession of Plaintiff's half share in the suit land described as suit land No.I in the plaint and seeking declaration in respect of properties described as suit land No.II and permanent injunction. The case of the Plaintiff was that the suit land No.I which comprised of 8 landed properties were the ancestral properties of the Plaintiffs and the Defendant and that the Plaintiffs are entitled to claim half share. As regards the properties described as suit land No.II, the same comprised of 11 lands which the Plaintiffs claimed to be their self acquired ownership properties procured by their father from his own income.

4. The pleadings indicate that one Dharma Bendu Kene was the common ancestor of the Plaintiff and Defendant having two sons and three daughters. The Plaintiffs are the legal heirs of Sitaram and the

Defendants are the legal heirs of Shankar. It is pleaded that as regards the suit land No.I, Shankar and Sitaram were the joint owners and were cultivating the suit land No.I as members of undivided Hindu family and that after demise of Shankar, the names of the Defendants are mutated. It was pleaded that after the demise of the Defendant's father, the names of the Defendants was wrongly mutated in respect of suit land No.II which was the self acquired property of Sitaram. It was pleaded that all the 19 lands i.e. suit land No.I and II are wrongly mutated as joint family properties. It was pleaded that the Defendants in order to grab the suit land No.II were pretending to have share in it.

5. The suit came to be resisted by the Defendants. It was contended that both the suit land Nos.I and II were the joint family properties of Shankar and Sitaram. It was pleaded that in 1942 there was partition between Shankar and Sitaram in respect of suit land No.I and II and suit land No. I was allotted to the name of Shankar whereas the jointly purchased suit land No.II was allotted to the name of Sitaram. It was pleaded that at that time there was partition of the dwelling house equally and half portion was allotted to the share of Shankar and half portion to the share of Sitaram. It was contended that the Defendants do not claim any right in suit land No.II.

6. The parties went to trial and the Trial Court negated the issue as

regards the suit land No.I being the ancestral property, and that suit land No.II are the self acquired properties. The Trial court answered in affirmative the issue that the suit properties were earlier partitioned. As regards the issue of the suit being barred by principle of res judicata, the same was answered in the affirmative. After considering the evidence, the Trial Court dismissed the suit.

7. The Plaintiffs filed Special Appeal No. 39 of 2005 against the Judgment of the Trial Court which came to be dismissed with cost.

8. Heard Mr. Patil, learned counsel for the Appellants and Mr. Bhanage, learned counsel for the Respondents.

9. Learned counsel for the Appellants submits that the substantial question of law arising in the present case is whether the bar of res judicata would apply when the earlier suit was filed for injunction and the instant suit is filed for partition and declaration. He would submit that for res judicata to apply, it is necessary that the issue in the subsequent suit is directly and substantially in issue in the former suit between the parties and unless the same is demonstrated the bar of res judicata would not apply. He has taken this Court minutely through the findings of the Trial Court on the issue of res judicata.

10. Considered the submissions and perused the record.

**11.** The admitted position is that, prior to the filing of the instant suit, RCS No. 365 of 1981 and RCS No. 385 of 1986 was filed by the Plaintiff. The certified copies of the Judgment in the suits as well as the judgment of the Appellate Court of those proceedings were produced before the Trial Court. As regards Regular Civil Suit No. 365 of 1981, the suit was filed for injunction against the Defendants in respect of only one land i.e. Survey No. 95, Hissa No. 29-A which came to be dismissed as against which the Appeal also came to be dismissed.

**12.** As regards Regular Civil Suit No. 385 of 1986, the same was filed by the Plaintiff seeking partition and separate possession of land bearing Survey No. 95 Hissa No. 29-A. This suit also came to be dismissed as against which Appeal right up to this Court came to be dismissed. Considering the documentary evidence which has come on record, the submission of learned counsel for the Appellant that the earlier suit was only for injunction cannot be countenanced. RCS No. 385 of 1986 was specifically filed for partition of only one property. In that case, the issue was framed as to whether the land bearing Survey No.95, Hissa No. 29-A is the only joint family property which remained to be partitioned. The issue was framed in view of the contention of the Plaintiff therein that only the suit land remained to be partitioned. In that suit, the contention of the Defendant was the same as in the instant suit that there was a

partition in the year 1942. In the Judgment, there is finding of the first Appellate Court arising out of RCS No. 385 of 1986 that both Plaintiff and Defendant had assessed factum of partition of their properties and had upheld the partition in the year 1942 between the parties in respect of the suit land No. 1 as well as suit land No. 2. That being so, the Trial Court considering the judgment in the previous suit has rightly applied the principle of res judicata as the issue as regards the partition and separate possession of the partition was directly and substantially in issue in the previous suit and was decided.

**13.** It is also required to be noted that in the year 1986, there was a suit for partition filed in respect of only one property. If it was the contention of the Plaintiff that there was no partition and there were other properties other than survey No. 95, Hissa No. 29-A, in the instant case, the bar of Order II Rule 2 of CPC would also apply.

**14.** Having regard to the finding of the Trial Court answering the issue of res judicata based on the judgment and findings in the earlier suit, there is no perversity in the findings of the Trial Court. The Appellate Court has upheld the findings of the Trial Court in view of the specific contentions of the Plaintiff in the earlier suit that there was a partition of all properties except Survey No. 95 and Hissa No. 29A.

**15.** In view of the above, as the documentary evidence has been properly appreciated by the Trial Court and the Appellate Court, no substantial question of law arises in the Second Appeal.

**16.** Appeal stands dismissed.

**17.** In view of dismissal of Second Appeal, nothing survives for consideration in pending Applications, if any, and the same are disposed of as such.

**(SHARMILA U. DESHMUKH, J. )**