



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 109 OF 1996

1. Suryakant s/o Shankar
Age : 23 years,
2. Baliram s/o Shankar
Age : 22 years,
3. Uttam s/o Shankar
Age : 21 years,
4. Padminibai w/o Shankar
Age : 47 years,
all Agriculturist and all R/o Gangabet,
Taluka and District Nanded.

... APPELLANTS
(Original Plaintiffs)

VERSUS

Manika s/o Datta
(Died) Through L.Rs.

1. Smt. Rukhminbai Manikrao Sontakke
Age : 70 years, Occ : Household,
2. Smt. Gangabet Manikrao Sontakke
Age : 65 years, Occ : Household,
3. Vinod Manikrao Sontakke,
Age : 30 years, Occ : Agri.,
4. Balaji Manikrao Sontakke
Age : 28 years, Occ : Agri.,
5. Rajkumar Manikrao Sontakke
Age : 25 years, Occ : Agri.,
6. Datta Manikrao Sontakke
Age : 22 years, Occ : Agri.,

7. Santosh Manikrao Sontakke
Age : 18 years, Occ : Agri.,

All above 1 to 7 are R/o Gangabet,
Tq. & Dist. Nanded.

8. Chandrakalabai Gangadhar
Age : 40 years, Occ : Household,
R/o Wanegaon, Tq. & Dist. Nanded.

... **RESPONDENTS**
(Defendant)

Mr. G.N. Chincholkar, Advocate for the Applicants

Mr. B.G. Deshmukh, Advocate for Respondent Nos.1 to 8.

...
CORAM : **ROHIT W. JOSHI, J.**
RESERVED ON : **18th MARCH, 2025**
PRONOUNCED ON: **10th JUNE, 2025**

JUDGMENT :

1. The present second appeal arises out of judgment and decree dated 29.02.1992 passed by the learned Joint Civil Judge, Senior Division, Nanded dismissing suit for partition and separate possession filed by the present appellants, being Regular Civil Suit No.454/1990 as also against judgment and decree dated 12.07.1995 passed by the learned 3rd Additional District Judge, Nanded dismissing Regular Civil Appeal No.132/1992 preferred by the appellants/original plaintiffs against the judgment and decree passed by the learned Trial Court. Parties will be referred as "plaintiffs" and "defendants" in the judgment hereinafter.

2. Plaintiff Nos.1 to 3 are brothers and plaintiff no.4 is their mother. The defendant is paternal uncle of plaintiff nos.1 to 3. The father of the plaintiffs expired in the year 1976. The dispute between the parties pertains to half portion of agricultural land admeasuring 7 acres 4 gunthas out of land bearing Gut No.39 old survey no.23/A total admeasuring 15 acres 35 gunthas situated at Gangabet, Tq. & Dist. Nanded.

3. It is the case of the plaintiffs that in the year 1968, there was partition between their grand father (Datta), father (Shankar) and uncle (Manik), who is defendant herein. The plaintiffs contended that the suit property i.e. half portion of land bearing Gut No.39 admeasuring 15 acres 35 guntha was retained by grandfather Datta for his maintenance during his life time. The grandfather Datta expired in the year 1979. The plaintiffs have therefore filed suit for partition and separate possession, being Regular Civil Suit No.454/1990.

4. The defendants appeared in the matter and opposed the suit contending that land bearing Gut No.39 was partitioned between himself and his brother Shankar, who is predecessor of plaintiffs. He contended that although, the property was so partitioned, it continued to be in the name of their father Datta. The defendants thereafter contended that

Shankar, brother of plaintiffs was suffering from T.B. and for the purpose of his treatment his half share in Gut No.39 was sold during his life time to one Babu Nagorao Thakur, vide sale deed dated 09.05.1973. The defendants then clarified that since the property was standing in the name of father Datta, the sale deed was executed by him, although the sale consideration was made over to Shankar, predecessor of plaintiffs. The defendants raised another contention that earlier the plaintiffs had filed suit for partition and separate possession with respect to the same property, being Regular Civil Suit No.666/1984, which was withdrawn unconditionally, and therefore, subsequent suit filed for the same relief was not maintainable.

5. The learned Trial Court framed issues on which the parties led their respective evidence. After hearing arguments of respective sides, the learned Trial Court has dismissed the suit, vide judgment and decree dated 29.02.1992. The learned Trial Court has held that the suit filed by the plaintiffs was barred by *res-judicata* in view of dismissal of earlier suit filed by them for the very same relief. As regards merits of the matter, the learned Trial Court has referred to the sale deed of the year 1973, in which while mentioning boundaries of the demised property, it was stated that on the northern side of the said property land owned by the defendant was situated. The learned Trial Court has held that the

contents of the sale deed were sufficient to prove the defence of defendants that northern half portion of Gut No.39 was allotted to his share in the partition of the year 1968. In view of the said findings, the suit came to be dismissed.

6. As stated above, the plaintiffs preferred First Appeal, being Regular Civil Appeal No.132/1992, which also came to be dismissed. The learned First Appellate Court has held that the suit filed by the plaintiffs was hit by Order XXIII Rule 1 of the Code of Civil Procedure, in view of unconditional withdrawal of earlier suit filed for the same relief. As regards merits of the matter, the learned First Appellate Court has concurred with the learned Trial Court to hold that the sale deed executed by Datta indicated that Gut No.39 was partitioned between the brothers and northern half share was allotted to the share of the defendants.

7. Being aggrieved by the said concurrent decrees the present second appeal is preferred. The second appeal came to be admitted on 13.08.1997 on the following substantial questions of law :-

"A) The lower appellate Court has failed to exercise properly the appellate jurisdiction under Order 41 of Civil Procedure Code.

B) The trial court erred in law in raising issue No.4-A about Resjudicata, inasmuch as the defendant has not raised the said plea in his written statement, and no evidence was led on that point."

8. As regards first substantial question of law, perusal of judgment delivered by the learned First Appellate Court will demonstrate that the learned First Appellate Court has framed proper points for determination that arose for consideration in appeal. The learned Court has recorded reasons on each point. As regards the maintainability of the suit also the learned First Appellate Court has considered legal provisions to arrive at conclusion that the suit was not maintainable (although conclusion is incorrect).

9. As regards merits of the matter, having perused the judgment delivered by the learned First Appellate Court, it is noticed that all the points have been answered upon reappreciation of evidence as is expected of a First Appellate Court. The learned First Appellate Court has properly dealt with the matter as a final court of facts. The manner in which the learned First Appellate Court has dealt with the matter indicates that the learned First Appellate Court has conducted the matter

properly dealing with all contentions and answering the same by reasoned judgment. The findings of fact with respect to partition of the year 1968 appear to have been recorded on appreciation of evidence. The learned First Appellate Court has referred to the sale deed in which description of the property sold in the year 1973 is given and on the basis of the said sale deed, the defence of defendants is accepted. The learned First Appellate Court has also dealt with the pleadings and evidence of the plaintiffs and has recorded proper findings of fact on the aspect of partition of the year 1968 holding that the suit property was allotted to share of defendant in the said partition. In this regard the learned First Appellate Court has also referred to deposition of plaintiff no.1 - Suryakant, who has stated that the sale deed of the year 1973 was executed by the grandfather Datta with the consent of his father Shankar. He does not say that consent of his uncle/defendant was also taken by the grandfather. On this basis, learned First Appellate Court has held that the said statement also lends credence to the case of defendant that in the partition of the year 1968, the suit property i.e. northern half of Gut No.39 was allotted to the share of the defendant and southern half was allotted to Shankar and that the suit property was not retained by the father for his maintenance. The learned First Appellate Court has recorded proper findings of fact. The learned First Appellate Court discharged duties properly dealing with the pleadings and evidence on

record. The first substantial question of law is, therefore, answered against the appellants/plaintiffs and in favour of the respondents/defendants.

10. As regards the second substantial question of law, the first suit for partition i.e. Regular Civil Suit No.666/1984 was not decided on merits, and therefore, Section 11 of the Civil Procedure Code will not be applicable. The learned First Appellate Court is right in holding that the subsequent suit is not barred by *res-judicata*. The finding of the learned Trial Court that the subsequent suit was barred by *res-judicata* is incorrect. The learned First Appellate Court has however placed reliance on Order XXIII Rule 1(4)(b) to hold that since the earlier suit was withdrawn unconditionally and without reserving any liberty to file a fresh suit, subsequent suit was not maintainable in view of the said provision. The said finding by the learned First Appellate Court is legally untenable. It is well settled that provisions of Order XXIII Rule 1 and Order IX Rule 9 of the Code of Civil Procedure are not applicable to partition suits and even if suit for partition is unconditionally withdrawn without obtaining leave to file fresh suit, a subsequent suit for partition is maintainable. The second substantial question of law is, therefore, answered in favour of the appellants and against the respondent.

11. However, in view of the findings recorded by both the Courts that the defendant has established that the suit property had fallen to his share in the partition of the year 1968 and in view of satisfaction of this Court that the said findings do not warrant any interference having regard to jurisdiction under Section 100 of the Code of Civil Procedure, the second appeal is dismissed.

12. Civil Application, if any, stands disposed of.

[ROHIT W. JOSHI]
JUDGE

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