



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

933 WRIT PETITION NO. 3126 OF 2024

1. Dhondiram Digambar Demgunde
Age ; 40 years, Occu : Agri/teacher
R/o Gudsur Tq. Udgir Dist. Latur
2. Dinesh S/o Digambar Demgunde
Age : 37 years, Occu: Agri
R/o Gusur Tq. Udgir Dist. Latur. ...Petitioners

VERSUS

1. Namdeo S/o Digambar Demgunde
Age: 30 years, Ocue: Agri,
R/o Gudsur Tig. Udgir Dist. Latur.
2. Digamber S/o Khanderao Gemgunde
Age: 66 years, Occu: Agri/retired
R/o Gudsur Tq. Udgir Dist. Latur
3. Kaushalyabai W/o Digambar Demgunde
Age: 60 years, Occu: Household,
R/o Gudsur Tq. Udgir Dist. Latur
4. Narsabai W/o Baliram Imade
Age: 45 years, Occu: Household,
R/o Gunjegaon Tq. Gangakhed
Dist. Parbhani.
5. Sushila W/o Malha Karle
Age: 43 years, Occu: Household,
R/o Thodga Tq. Ahmedpur
Dist. Latur.
6. Deepali W/o Prabhakar Mane
Age: 32 years, Occu: Household,
R/o Mhadeowadi Tq. Palam Dist. Parbhani.

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Mr. Gopal D. Kale, Advocate for the Petitioners

Mr. P. P. Uttarwar, Advocate for Respondent no.1

Mr. A. A. Phad, Advocate for Respondent no.2

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CORAM : ROHIT W. JOSHI, J.

DATED : 3rd JULY 2025

ORAL JUDGEMENT :-

1. The present petitioners are original defendant nos.5 and 6 in Regular Civil Suit No.494 of 2022 which is a suit for partition and separate possession filed by respondent no.1 who is step brother of the present petitioners. Defendant No.1 in the Civil Suit is father of the parties.

2. There is a house property at Mumbai standing in the name of the father - defendant no.1. The contention of the present petitioners in the written statement filed before the learned Trial Court is that the said house property although standing in the name of the father is in fact purchased from funds of the Joint Hindu Family and the suit is liable to be dismissed on the ground that the said house property is not included as one of the suit properties. The contention in short is that suit for partial partition is not maintainable. It will be pertinent to mention here that as per the plaintiff and the defendant no.1 suit property is self acquired property of defendant no.1.

3. In view of the aforesaid stand taken in the written statement, the petitioners filed an application vide Exhibit-77 *inter alia* praying that an additional issue be framed as to whether defendant no.1 (father) proves that house property at Mumbai is his self acquired property.

4. The learned Trial Court has rejected the application for framing additional issue vide order dated 15.02.2024 observing that the intention behind filing such application was to include the house property in the suit for partition and that if the petitioners (defendant nos.5 and 6) intended to do so they should have invoked appropriate remedy for doing the same.

5. The learned Counsel for the petitioner contends that in view of rival contentions in the plaint and written statement filed by defendant no.1-father on one side and the written statement filed by the present petitioners (defendant nos.5 and 6) on the other side, an issue certainly arises for consideration on this count.

6. Per contra, the learned Advocates for the original plaintiff (respondent no.1 and respondent no.2/defendant no.1) contend that the learned Trial Court has rightly rejected the application having regard to the properties forming subject matter of the suit. Apart from

this, they contend that the burden of proof was sought to be saddled on defendant no.1 which is also not permissible.

7. It is well settled that a suit for partial partition is not maintainable. However, it is also settled that a specific objection is required to be raised by a defendant in a suit for partition that all properties of the family are not included in the suit. Such objection is raised by defendant nos.5 and 4(petitioners) in their written statement before the learned Trial Court. It also needs to be mentioned that it is specific case of plaintiff and defendant no.1 that the house property at Mumbai is a self acquired property of defendant no.1. Although defendant nos.5 and 6 have not filed a counter claim for partition of the property at Mumbai, they have raised objection that the suit is not maintainable because one of the properties is not included in the suit.

8. In the event it is proved that the house property at Mumbai is a Joint Hindu Family Property, the suit will not be maintainable on the ground that all the properties are not included. Defendant nos.5 and 6 are entitled to raise this defense.

9. In view of the above, in my considered opinion, the learned

Trial Court has erred in rejecting the application. It was necessary to frame an issue with respect to nature of house property at Mumbai i.e. whether it is a Joint Hindu Family Property or self acquired property of defendant no.1.

10. The other contention raised by the learned Advocate for respondent nos.1 and 2 is that the burden of proving that house property at Mumbai is a Joint Hindu Family Property cannot be fastened on defendant no.1-father. The question of burden will have to be determined on the basis of rival pleadings. Since the learned Trial Court has not applied its mind on the said aspect it will not be appropriate for a Writ Court to do so for the first time.

11. In view of the above, the petition is partly allowed by directing the learned Trial Court to frame a specific issue as regards status of the house property at Mumbai. The learned Trial Court may independently take a decision as to on whom the burden of proof lies and frame the issue accordingly.

12. Writ petition is disposed of accordingly with no orders as to costs.

[ROHIT W. JOSHI, J.]