



(This order is modified and uploaded vide speaking to the minutes order dated
11.02.2025)

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

906 SECOND APPEAL NO. 351 OF 2014 WITH
CIVIL APPLICATION NO. 5536 OF 2014
IN SA/351/2014 WITH
CIVIL APPLICATION NO. 10067 OF 2024
IN SA/351/2014

Vijaykumar Sangappa BavageAppellant

VERSUS

Vibhawari Rajendra Purvant & othersRespondents

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Mr. N. P. Patil Jamalpurkar, Advocate holding for Mr. Girish Awale,
Advocate for Appellant.

Mr. A. N. Sabnis, Advocate for the Respondents.

CORAM : R. M. JOSHI, J.

DATE : 30th JANUARY, 2025.

PER COURT :

1. This second appeal takes exception to the concurrent findings recorded by the Trial Court in Special Civil Suit No. 109/2004 which are confirmed in Regular Civil Appeal No. 195/2010 by the First Appellate Court.

2. Parties are referred to as Plaintiffs and Defendant for sake of convenience.

3. Plaintiffs are brother and sister interse and Defendant is their paternal uncle. Plaintiffs claim that the suit property was purchased by their father Vaijinathappa and grand father in the year **1962** in the name of Defendant from joint family income. It is further case of Plaintiffs that in the year 1970 partition took place between father of Plaintiffs and Defendant in which suit plot came to be allotted in their father's favour. Father of Plaintiffs died in the year 1985. Amongst these and other averments, the suit for possession of suit plot came to be filed.

4. Defendant appeared before the Trial Court and filed written statement. It is his case that the suit plot is purchased in his name from his independent source of income. He also claims that he filed application before the City Survey Officer and name of Plaintiffs' father got cancelled from the municipal record.

5. Learned Trial Court framed issues. Parties led evidence. Suit came to be decreed. First appeal stood rejected. Hence, this appeal.

6. Learned counsel for Appellant/original Defendant has sought to make submissions on following points :-

(i) That all legal heirs of deceased Vaijinathappa were not joined as party the suit and as such the suit deserves to be dismissed for non-joinder of necessary parties.

(ii) That the Trial Court has wrongly cast burden on the Defendant to prove that the suit property is his self acquired property when there being no evidence led by Plaintiffs at first instance about the property being purchased from joint family income.

(iii) That Plaintiffs had filed suit being Regular Civil Suit No. 662/1992 against the tenant in the suit property for recovery of rent and the said suit is decreed in his favour and hence his right and title in the suit property is settled by decree of Competent Court.

(iv) That Trial Court has not framed issue about oral partition between the parties.

7. As far as grievance of the Appellant about non-framing of issue of oral partition is concerned, it is rightly observed by the First Appellate Court that the parties were fully conscious of all issues including issue of oral partition and have accordingly led evidence in this regard. Once parties are conscious about the issue involved in

the suit and proceed to lead evidence in this regard, later on it is not permissible for the party to make a grievance of non-framing of the specific issue. Pertinently, Defendant went on with the trial even in the absence of specific framing of such issue and led evidence on the said issue. This indicates that there is no substance in the contention of appellant about non-framing of the issue at this stage. Moreover, no prejudice is shown to have been caused to the Defendant.

8. As far as burden allegedly cast upon Defendant to prove that the suit property is his self acquired property is concerned, perusal of evidence as well as findings recorded by the Trial Court confirmed by First Appellate Court indicate that the Plaintiffs led evidence at the first instance to discharge the initial burden on them. Plaintiffs' evidence clearly indicates that their father was employed and was having source of income so also their grand father was having grocery shop to purchase suit property for joint family. As far as this evidence is concerned, the same gets support from the candid admission given by Defendant in his cross-examination. Defendant himself has admitted that his father during his life time was running a grocery shop so also his brother Vaijinathappa was employed as a

Gram Sewak. These admissions of Defendant are contrary to his case that his father and brother had no source of income to purchase suit property.

9. There cannot be any dispute with regard to position of law that though there is presumption of jointness of family, there is no presumption that the property held by any person is a joint family property. The initial burden, therefore, was on the Plaintiffs and the Plaintiffs herein have successfully discharged the same. Thus, the onus shifted upon the Defendant to prove otherwise. His evidence indicates that at the relevant time he was taking education at Pune. As such, as rightly observed by Trial Court that question of he conducting any business in Latur during the same period does not arise. Apart from this, admission in the cross-examination to the effect that his brother was running a hotel in the name and style 'Apsara' supports the case of Plaintiffs. All these admissions of Defendant clearly show that he has failed to discharge the onus which was shifted on him to prove that the suit property is his self acquired property.

10. Apart from this, there is admission given by Defendant in Regular Civil Suit No. 591/1984 filed by Dayanand Shikshan Sanstha in respect of the suit property. Therein, this Defendant filed written statement accepting fact that the suit property stands in the name of his father i.e. father of Plaintiffs. In this regard, it would be material to take note of the admission given by the Defendant. He candidly admits that in Paragraph No. 5 of the said written statement, that the suit property belongs to his brother. No doubt, it was open for the Defendant to explain said admission. However, in further cross-examination he accepts that he has no reason to assign as to why said statement was made. Thus, for want of any explanation, the said admission binds the Defendant.

11. As far as argument with regard to non-joinder of all legal heirs of Vaijinathappa is concerned, first of all there is no specific objection raised to the maintainability of the suit on the ground of non-joinder of necessary parties in the written statement. Secondly, the suit is not for partition of property of Vaijinathappa. In case suit is filed for partition of properties of Vaijinathappa, all his legal heirs were necessary party. The suit is for partition between Vaijinathappa on one side and his brother/Defendant on the other side and since

the branch of Vaijinathappa was represented by his **three** children, there is no impediment for them to prosecute the suit.

12. As far as claim of Defendant about the suit being filed against tenant in suit property is concerned, in the suit under Rent Act, it is sufficient for the Plaintiff to show that he is landlord and being entitle to receive rent. The Court under Rent Act, would not decide title of the subject property, which can be done only by Civil Court. In any case, Plaintiffs or their predecessor, were not party to the said suit being Regular Civil Suit No. 662/1992 and as such any decree passed therein would hae no bearing on decision of this case.

13. In view of above discussion, no substantial question of law is involved in this appeal. Needless to say that on account of dismissal of appeal, interim relief stands vacated.

14. Pending application if any, does not survive and stands disposed of.

(R. M. JOSHI)
Judge