



IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

**SECOND APPEAL NO. 646 OF 2016 WITH
CIVIL APPLICATION NO. 330 OF 2017
IN SA/646/2016**

Vasant Krishnath Kave & others

....Appellants

VERSUS

Shivaji Krishnath Kave & others

.....Respondents

.....

Mr. M. S. Kulkarni, Advocate holding for Mr. P. P. More, Advocate for Appellants.

Mr. S. N. Patil, Advocate for Respondent Nos. 1A to 1D.

CORAM : R. M. JOSHI, J.

DATE : 31st JULY, 2025.

PER COURT :

1. This Second Appeal under Section 100 of Code of Civil Procedure takes exception to the judgment and order dated 08.01.2016 passed in Regular Civil Appeal No. 134/2013 confirming the judgment and order dated 15.04.2011 passed in Regular Civil Suit No. 195/2007 whereby the suit filed by the Plaintiff for seeking partition and separate possession of the suit properties came to be decreed.

2. The parties are referred to as Plaintiff and Defendant for the sake of convenience.

3. The facts which led to filing of this Appeal are narrated in brief as under :-

Plaintiff filed suit bearing Regular Civil Suit No. 195/2007 for partition and separate share in the suit property bearing Survey no. 161 and 4A. Defendants resisted the said suit and claimed previous partition. It is also contended that Plaintiff has sold his share in the suit properties. It is also claimed that one of the joint family properties is acquired and compensation is received and the same must be included in suit properties. Parties adduced evidence. Trial Court decreed the suit by judgment and decree dated 15.04.2011. Appeal filed by the Defendants came to be dismissed. Hence, this Second Appeal.

4. Learned counsel for Appellants/original Defendants submits that for want of inclusion of the properties of the joint family, the suit itself was not maintainable. In order to support this submission, he took aid of the contention of Plaintiff in the plaint with regard to existence of house property belonging to joint family. It is his further submission that in any case, in the written statement, there is a specific plea raised by Defendants with regard to

sale of Survey No. 43 and a portion of joint family property being acquired and compensation being paid and both properties/compensation amount are not included in suit properties. Hence, according to him, the suit for partition itself was not maintainable and resultantly, this amounts to substantial question of law.

5. Learned counsel for Plaintiff resisted the said contention by pointing out that the Plaintiff though has made a mention about house property, he has not claimed any share therein. According to him, so far as contention with regard to the acquisition of portion of the suit property and payment of compensation is concerned, reference is made to the evidence wherein both the sides admit the said fact however, no one claims as to who was paid said compensation. Thus, it is his submission that this question of fact cannot be taken into this Second Appeal. It is also argued that the property allegedly sold by Plaintiff is not proved to be joint family property.

6. There is no dispute about the fact that the parties are related to each other and they formed a joint family. Though the

Defendants have come with a theory of previous partition, the same has not been proved before the Trial Court. The only question, therefore remains for consideration is as to whether the Plaintiff not claiming any share in the house property would dis-entitle him to seek any share in the suit property. A candid answer thereto is to be in negative. The question, therefore, now that would remain to be decided is about the share of Defendants in the house property. Considering the fact that Defendants do not dispute their respective shares and possession in the house property and practically there occurs no need to send the suit back to the Trial Court for decision afresh. As far as sale of Survey No. 43 by Plaintiff is concerned, there is no evidence led by Defendants to hold that this property is joint family property.

7. As far as issue of non-inclusion of portion of property which was acquired and compensation paid is concerned, if it was a case of the Defendants that compensation was received by Plaintiff, then the Defendants would have been justified in stating that all the properties are not included. Perusal of the evidence on record indicates that the parties admitted the said fact of payment of compensation however, they did not claim that compensation was

paid to Plaintiff only or Defendants or to the other side. Thus, this remains a question of fact and not a question of law. For want of substantial question of law, Appeal stands dismissed. Pending application, if any, does not survive and stands disposed of.

(R. M. JOSHI)
Judge

dyb