



IN THE HIGH COURT OF JUDICATURE AT BOMBAY BENCH
AT AURANGABAD

SECOND APPEAL NO. 314 OF 2023
WITH
CIVIL APPLICATION NO. 7618 OF 2023
IN SA/314/2023

SHOBHA PANDITRAO SALVE @ KUSUM SHANKAR BAGUL
DEAD DELETED AS PER COURT ORDER AND OTHERS

VERSUS

DHANRAJ PANDIT SALVE

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Advocate for Appellants : Mr. Mayure Pramod C.
Advocate for Respondent No.1/Caveator : Mr. Mohit S. Shah.

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CORAM : SHAILESH P. BRAHME, J.
DATE : 22.09.2025

FINAL ORDER :-

1. Heard both sides.
2. Second appeal is preferred against concurrent findings of facts in decreeing the suit of respondent No.1 for partition allotting 1/5th share in the suit house and possession. The decree of the Trial Court is confirmed by Lower Appellate Court. The defendants are before this Court as appellants.
3. Respondent No.1 is original plaintiff who had filed Special Civil Suit No.177 of 1996 for partition and possession. It is contended that he is begotten from Pandit and defendant No.1 Indubai, from first marriage. His father Pandit performed second marriage with defendant No.2 Shobha @ Kusum.

Defendant Nos.3 to 5 are born out of the said wed lock. Defendant No.1 Indubai is his biological mother who is stated to have filed Special Civil Suit No.60 of 1980 for declaration and possession. It was dismissed. He claimed share in the joint family property i.e. CTS.No.4090/1, situated at Dhule.

4. Appellants contested the suit on the ground that it is barred by limitation. The suit is not maintainable due to dismissal of earlier Special Civil Suit No.60 of 1980 by implication of res-judicata. It is further contended that present suit is not maintainable under Order II Rule 2.

5. Parties adduced oral evidence. By judgment and decree dated 19.11.1998, suit was decreed partly awarding 1/5th share to the respondent/plaintiff. The defendants carried Regular Civil Appeal No.144 of 2012 unsuccessfully. Respondents had filed Special Civil Suit No.60 of 1980 for declaration and possession against present appellant No.1 only. It was contested on merits. Thereafter, it was dismissed on 21.12.1982. The decree was not challenged further. Respondent No.1 is stated to have attained age of majority in the year 1984. The respondents filed present suit on 06.05.1989.

6. Pandit, husband of appellant No.1 and father of respondent No.1 died on 20.02.1979. Respondents were residing separately. They had filed Special Civil Suit No.60 of 1980 for declaration that they are heirs of deceased Pandit and for possession of the suit house. It was contested by appellant/Shobha who claimed to be legally wedded wife of Pandit. It was not the suit for partition and possession. It was held that the subject matter was joint family properties. The then plaintiffs were not held entitled to have joint possession. Other appellants were not parties in the suit. The suit was dismissed vide judgment dated 21.12.1982 on merits. Respondent No.1 was minor when suit was dismissed.

7. A plea of res-judicata was raised in the written statement and issue to that effect was framed by the Trial Court. It was held that suit was barred under Section 11 of CPC. Lower Appellate Court formulated point No.6 for res-judicata and held that present suit is maintainable. The inconsistent finding of res-judicata have been pressed into service to constitute substantial questions of law.

8. Earlier Special Civil Suit No.60 of 1980 was filed for declaration of status and possession against appellant No.1 only whereas present suit is filed for partition and possession

against all the appellants including respondent No.2 Indubai, the biological mother. Only subject matter is same but the parties, relief claimed and the issues decided are completely different. The Lower Appellate Court rightly held that suit is not barred by res-judicata. I am unable to accept the submissions of the learned counsel Mr. Mayure for the appellants.

9. Learned counsel Mr. Mayure would further submit that present suit is barred by Order II Rule 2 of CPC. Earlier civil suit was filed for declaration of the status and possession immediately after death of Pandit. Respondent No.1 Dhanraj was minor. The suit was prosecuted by respondent No.2 Indubai. There was no cause of action for claiming partition. When Indubai failed to protect the interest of respondent No.1, after attaining majority respondent No.1 was denied his right in the joint family property, he was required to file present suit for partition. It cannot be said that the cause of action for partition was available and relief of partition could have been claimed in Special Civil Suit No.60 of 1980. I find no substance in the submissions of learned counsel Mr. Mayure that suit is barred by Order II Rule 2 of CPC.

10. The next submission canvassed by learned counsel Mr. Mayure is 'limitation'. Both Courts below dealt with plea of limitation by assigning reasons. Both the Courts below held that suit is not barred by limitation. Present suit is filed on 06.05.1989. It is recorded that respondent No.1 attained age of majority in the year 1984. The limitation for filing suit for partition did not commence after decree passed in Special Civil suit No.60 of 1980. When respondent No.1 is excluded and the exclusion is known to him would a starting point of limitation. It has come on record the date of birth of respondent No.1 Dhanraj is 01.06.1966. His biological mother was unable to protect his interest and the present appellants excluded him from the joint family benefits would constitute cause of action. Both the Courts below have rightly recorded that suit is within limitation.

11. Learned counsel Mr. Mayure vehemently submitted that the suit filed by respondent No.1 is not maintainable because his paternity was challenged. Especially, after dissolution of marriage, there was no access between his biological parents since 1963. Trial Court framed issue No.1 to that effect and it was answered in his favour. Lower Appellate Court also held that he is son of deceased Pandit. My attention is adverted to

the judgment of the Trial Court. It has been categorically recorded that respondent/Shobhabai had filed application under Section 372 of Indian Succession Act soliciting succession certificate and the present respondents were opponents in that application. It is averred in the application that respondent No.1 is son of respondent No.2.

12. My attention is adverted to examination-in-chief of respondent No.1 stating that he is son born out of wed lock of Pandit with Indubai. The cross-examination of D.W.3 Prashant shows that birth certificate of respondent No.1 was found in the suit house which is indicative of the fact that respondent No.1 is concerned with the family. Both the Courts below have rightly recorded the findings that respondent No.1 is son of Pandit.

13. Learned counsel for the appellants has relied on the judgment of *Dadu Dayalu Mahasabha, Japur (Trust) Vs. Mahant Ram Niwas and another ; [2008 (4) Civil LJ 730]* to buttress that suit is barred by res-judicata. The principles of res-judicata are explained by Hon'ble Apex Court which cannot be doubted but the appellants have failed to make out a case to attract Section 11. Further reliance is placed on the judgment of *Gajanan R. Salvi Vs. Satish Shankar Gupte and others ;*

[2005 (1) Mh.L.J. 966]. The facts are distinguishable from the case at hand. I have already observed that Order II Rule 2 is not attracted in the present case.

14. Trial Court granted 1/5th share to the plaintiff in the suit house. Subsequently, appellant No.1 Shobhabai as well as respondent No.2 Indubai are no more. Appellant Nos.2 to 4 and respondent No.1 are the only surviving heirs of deceased Pandit. They would inherit the suit house in equal share. Therefore, decree passed by the Trial Court needs modification to the extent that the surviving heirs are entitled to 1/4th share.

- (i) Second appeal is dismissed.
- (ii) The judgment and decree passed by the Trial Court stands modified to the extent that appellant Nos.2 to 4 and the respondent shall get 1/4th share each in the suit house.
- (iii) No order as to costs.
- (iv) In view of disposal of second appeal, pending civil application does not survive. Civil application as such is disposed of.

(SHAILESH P. BRAHME, J.)

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