



IN THE HIGH COURT OF JUDICATURE AT BOMBAY BENCH
AT AURANGABAD

SECOND APPEAL NO.501 OF 2023
WITH CIVIL APPLICATION NO.12261 OF 2022
IN SA/501/2023
WITH CIVIL APPLICATION NO.6282 OF 2024
IN SA/501/2023

1. Maroti S/o Baliram Shete,
Age : 80 years, Occupation : Agri.,

2. Balwant S/o Maroti Shete,
Age : 38 years, Occupation : Agri.,
Both R/o Bhaveshwar Nagar,
Near Chouphala, Nanded.

... **Appellants**
(Orig. Defendants)

Versus

1. Sow. Lalita @ Laxmi w/o Havappa Katte.
Age: 40 Years. Occ: Household,
R/o: Bhaveshwarnagar, Near Chouphala,
Nanded.

2. Sow. Sulochana w/o Gangadhar Gokhande,
Age: 35 Years, Occ: Household,
R/o: Bhaveshwarnagar, Near Chouphala,
Nanded.

3. Sow. Sugandha w/o Balaji Solapure,
Age: 32 Years, Occ: Household,
R/o: Bhaveshwarnagar, Near Chouphala,
Nanded.

4. Sow. Mahananda w/o Dnyaneshwar Devpuje,
Age: 30 Years, Occ: Household,
R/o: Bhaveshwarnagar. Near Chouphala,
Nanded.

5. Sow. Tara w/o Sainath Kurkhade,
Age: 28 Years, Occ: Household,
R/o: Sillod, Tq. Sillod,
Dist. Aurangabad.

... **Respondents**
(Orig. Plaintiffs)

...
Advocate for Appellants : Ms. A. S. Jadhav.
Advocate for Respondents : Mr. A. I. Deshmukh.
...

CORAM : SHAILESH P. BRAHME, J.
DATE : 21.08.2025

JUDGMENT :-

1. Heard both sides.
2. Appellants/original defendants have filed present second appeal challenging judgment and decree dated 15.03.2022 passed in Regular Civil Appeal No.32 of 2018 granting decree of partition and possession.
3. Appellants have pressed into service substantial questions of law which are reflected in order dated 12.03.2025 passed earlier. In pursuance of that, learned counsel for the appellants has made submissions and prayed for admission of the second appeal.
4. Appellant No.1 Maroti has five daughters and a son Balwant, who are party to the litigation. His daughters are original plaintiffs. Himself and his son Balwant are original defendants. Respondents/daughters instituted Regular Civil Suit No.323 of 2017 for partition and separate possession in

respect of seven agricultural lands against the appellants. It is contented that they formed undivided joint Hindu family and suit lands are ancestral properties in which they have share.

5. Despite service of summons, both the appellants remained absent before the Trial Court. Neither did they file written statement nor contest the suit. The suit was directed to be proceeded ex-parte. Considering the affidavits in lieu of examination-in-chief of respondent Nos.1 to 4, 7/12 extract of the suit lands and holding certificate Trial Court proceeded with the matter on merits. Though suit was uncontested, after examining material on record it was held that respondents failed to prove that suit lands are ancestral properties. It was dismissed vide judgment dated 05.01.2018.

6. Being aggrieved by the decree of the Trial Court, respondents preferred Regular Civil Appeal No.32 of 2018. Appellants appeared before the Appellate Court and submitted say at Exh.18 and written notes of argument at Exh.37. Appeal was allowed partly. The decree of the Trial Court was reversed. All the members of the family were granted 1/7th share. But decree of injunction was refused. Against that, present second appeal is preferred.

7. Learned counsel Ms. Jadhav submits that Lower Appellate Court did not take into account say at Exh.18 in which, it has been elaborately demonstrated as to how the suit lands are self acquired properties of the appellants. It is submitted that though appellants did not contest the suit, the revenue record produced on record was disclosing name of appellant No.1. As against that, there was no material to show that properties are ancestral properties. It is further submitted that suit filed by the respondents was not maintainable because earlier Regular Civil Suit No.21 of 2017 was filed and it was dismissed.

8. It is submitted that respondents suppressed material facts from the Courts below. Appellants should have been given opportunity. It was a fit case to remand the matter to the Trial Court. In the absence of any tangible evidence indicating the properties are ancestral, the suit is liable to be dismissed. My attention is adverted to the documents produced along with civil application, revenue record.

9. Learned counsel for the respondents supports judgment passed by the Lower Appellate Court. He would submit that say at Exh.18 filed before the Lower Appellate Court cannot be taken into consideration. Appellants failed to avail the remedy

for setting aside ex-parte order. There is no perversity or illegality in the impugned judgment.

10. I have considered rival submissions of the parties. The suit was decided ex-parte because appellants did not cause appearance before the Trial Court. There was no written statement and no cross-examinations of the witnesses was conducted. No attempts are made by the appellants to set aside ex-parte order. For the first time, in Lower Appellate Court appellants appeared and filed say at Exh.18 raising various pleas challenging the pleadings of the respondents.

11. The appellants had opportunity to contest the suit but they were the fence sitters and taking chances. When matter went to Appellate court, say was filed at Exh.18 which cannot be treated to be pleadings. Their written submissions are also not in the form of the pleadings. It is impermissible for the Lower Appellate Court as well as this Court to look into the pleas raised by appellants vide Exh.18. Those are outside of the purview of Order VIII of CPC. For the first time in the second Appeal, those pleadings cannot be pressed into service which were not raised before the trial Court and tested during the course of trial. The attempt of the appellants to show that

suit lands are self acquired properties or present suit is not maintainable are futile and liable to be discarded.

12. It reveals from record that the Trial Court did not accept the pleadings of respondents/plaintiffs as a gospel truth though there was no contest. The respondents/appellants were called upon to lead evidence. Accordingly, they filed affidavits in lieu of examination-in-chief which are five in number from Exh.11 to 15. No cross-examination was conducted. 7/12 extracts at Exh.16 to 21 are taken into account which were bearing name of appellant No.1. Thereafter, Trial Court found that respondents/plaintiffs failed to prove that suit lands are ancestral properties.

13. Lower Appellate Court rightly considered the evidence led by the plaintiffs. By drawing adverse inference against the appellants it is held that a case is made out for partition. The view taken by the Court is reasonable and plausible. I do not find any perversity in it.

14. The revenue record shows name of appellant No.1 in respect of couple of suit lands. Appellant No.1 is the father of remaining parties. If he comes up with a theory of self acquired properties then burden was upon him to contest the matter

and to plead and lead evidence to that effect which he failed to do. The suit lands do not become self acquired properties merely because his name is mutated in record of rights.

15. Being father and eldest member, appellants' name is appearing in the record. In the absence of any other rebuttal evidence only inference which is possible to be drawn is that suit lands are ancestral properties and there was no partition. I find that substantial questions of law pressed into service by the appellants have no merit.

16. Reliance is placed on judgment of Division Bench of Madhya Pradesh High Court in case of ***Nagar Palika Nigam, Gwalior, Through Commissioner Vs. Motilal***. In that case, Corporation was the defendant in a suit for perpetual injunction. No written statement was filed by Corporation. Suit was directed to be proceeded ex-parte and on the next date it was decreed. Against that ex-parte decree, appeal was preferred before the Division Bench. In those context the observations are made. In the case at hand, facts are distinguishable. The ratio laid down therein is not applicable to the present case.

17. In the case at hand, suit was directed to be proceeded ex-parte vide order dated 19.09.2017. Thereafter, application Exh.5 was heard. Roznama of the Trial Court shows that matter was adjourned from 28.09.2017 to 15.12.2017 for six times. Thereafter, suit was dismissed on 05.01.2018. The Lower Appellate Court by reasoned order allowed appeal granting shares to the plaintiffs as well as defendants. I do not find that any case is made out to cause interference.

18. Second appeal is dismissed.

19. In view of disposal of second appeal, pending civil applications do not survive. Civil applications as such are disposed of.

(SHAILESH P. BRAHME, J.)

...

vmk/-