



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

SECOND APPEAL NO. 100 OF 2023

Ganesh Malji Gavit and others .. Appellants

Versus

Babu Sonya Gavit and others .. Respondents

Shri Ruchir S. Wani, Advocate for the Appellants.

**CORAM : SHAILESH P. BRAHME, J.
DATE : 18TH SEPTEMBER, 2025.**

FINAL ORDER :

- . Heard learned counsel Mr. Wani for the appellants.
2. Second appeal is emanating from concurrent findings of facts in decreeing the suit and granting decree of partition and possession in land gut No. 10 and 20, which are not joint family properties of the parties.
3. Respondents had filed R.C.S. No. 38 of 2011 for partition, separate possession and injunction against the appellants. It was decreed on 18.08.2017. Being aggrieved R.C.A. No. 30 of 2017 was carried and it ended in dismissal vide judgment dated 21.09.2022.
4. Learned counsel for the appellants submits that lower Appellate Court committed error of jurisdiction in not

considering the alternate defence raised by the appellants, which was having foundation in the written statement and that amounts to substantial question of law. It is further submitted that both the Courts below have committed patent illegality in granting decree of partition, when the plaintiffs-respondents were in possession of 1H 21R from gut No. 10 and the appellants are in possession of part of the suit lands, indicating previous partition amongst the parties. It is further submitted that appellants have taken specific defence that land from gut No. 20 was in possession of the appellants in view of custom in adivasi community regarding allotment of some property to children begotten from first marriage while contracting second marriage, which is overlooked by the Courts below. It is further submitted that partition opened in the year 1965 and suit is filed in the year 2011, which is barred by limitation. The findings of the Courts below are perverse in that regard.

5. The relationship between the parties is not disputed. Sonya is their common ancestor. The appellants are begotten from his first wife. The respondents are begotten from second wife Surijibai. Subject matter is land gut Nos. 10 and 20. Sonya died in 1965 and suit is filed for partition in 2011.

6. In pursuance of the written statement, issue regarding limitation was framed by the Trial Court and point for determination was also framed in the lower Appellate Court. Both the Courts below have recorded concurrent findings in

holding that the suit is within limitation. No material is placed on record to indicate that the respondents were excluded from the enjoyment or share in the suit lands and despite that there was slumber on their part. Merely because parties to the litigation are in possession of few or part of the suit land, would not amount to exclusion as such so as to reckon the period of limitation. I do not find any illegality in the findings recorded by the Courts below.

7. The averments of the plaint and the written statement indicate that there is controversy in respect of possession of the parties over land gut No. 10, meaning thereby balance portion is in possession of the appellants - defendants. The written statement also indicates a defence that appellants are in possession of both the suit lands in entirety. The appellants have taken alternative plea. My attention is adverted to para Nos. 17 and 18 of the judgment of the lower Appellate Court observing that it is impermissible for the appellants to raise alternate pleas. I have my reservations for the observations made by the lower Appellate Court.

8. In the given case, I do not find that alternative defence raised by the appellants, though inconsistent is self exclusive. There is no material on record to show that there was previous partition amongst the parties. It does not matter as to who remained in possession of the suit lands or part of them. Even if the findings in the above referred paragraphs treated to be

incorrect that would not enure to the benefit of the appellants.

9. It is submitted by the learned counsel that the custom prevailing in the adivasi community of allotting few of the properties to the children begotten from first marriage while contracting second marriage is not properly appreciated. I have gone through written statement, but there is no specific defence regarding custom. If defence is raised on the basis of custom, then appellants would be under obligation to prove the custom. Neither there is specific pleading, nor any issue is settled by the Trial Court in that regard. In the second appeal for the first time it is not permissible to consider the submission regarding custom.

10. Both the Courts below have properly appreciated material on record. I do not find any patent illegality or perversity in the impugned judgments. Second appeal is dismissed.

[SHAILESH P. BRAHME J.]

bsb/Sept. 25