



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

**SECOND APPEAL NO. 379 OF 2025
WITH
CIVIL APPLICATION NO. 10637 OF 2025**

**SUBHASH SURYABHAN THORAT
Versus
SURYABHAN HARI THORAT (DIED) AND ORS**

*** Advocate for the Appellant : Mr. Kunte Sachin D.**

**CORAM : MEHROZ K. PATHAN, J.
DATE : 17th JANUARY 2026**

ORDER :

1. The Appellant has filed the present Appeal, challenging the judgment dated 26.06.2025, whereby the learned First Appellate Court partly allowed the suit bearing RCS No.275/2016 and partly decreed the same by modifying the 1/5th share granted to each of the Defendants and the Plaintiff, extending instead a 1/4th share to each of the family members, namely the Plaintiff and Defendant Nos. 2 to 5.

2. The learned Counsel for the Appellant submitted that the substantial questions of law involved in the present appeal is that whether the learned Appellate Court has failed to consider the fact that there was an oral partition between the Defendants and the Plaintiffs who are the legal heirs of the deceased Defendant No.1 i.e. Suryabhan Thorat.

3. The further substantial question of law involved in the present Appeal, according to the Appellant, is whether the Courts below committed a grave error of law in failing to hold that the suit was not maintainable, as it was a partial partition of the property. As per the judgment in **Govindrao s/o Gangaramji Ajmire v. Dadarao @ Shrawan s/o Gangaramji Ajmire (dead) through LRs. Indrani wd/o Shrawan Ajmire and Ors.**, reported in 2004(4) Mh.L.J. 653, a suit for partition must include the entire family property. Since the plaint did not bring the entire family property into a common hotchpotch, the suit for partition of an isolated property was untenable.

4. To consider the first substantial questions of law, it would be appropriate to refer to the findings of the learned Civil Judge Senior Division pertaining to the Defendant's plea of oral partition. The issue no.2 framed by the learned trial Court is as under :

Whether Defendant No.4 prove that in the year 2006, suit properties have been orally partitioned and the Plaintiff got his share?"

5. The said issue came to be answered by discussing in detail whether any such property was orally partitioned. The learned trial Court has given the finding that the Defendants have failed to lead any evidence to prove that the family had an oral partition of the suit property. Defendant No.4/Subhash had only examined himself on oath and has submitted that he received suit property in the year 2000 as per the compromise arrived at

between Suryabhan and his siblings in the previous civil suit. The learned Civil Court found that Defendant No.4, the present Appellant herein, failed to prove the date on which the alleged oral partition was effected. Defendant No.4 further failed to establish that, pursuant to the oral partition, the parties to the suit acted upon it, or that the names of the parties were mutated in the revenue records of the suit property. It was further observed by the learned trial Court that Defendant No.4 failed to show what share Defendant No.4, Kantabai, had received in the oral partition as contended. Thus, the oral partition was disbelieved and Issue No.2 was answered in the negative.

6. The learned Appellate Court, in its judgment dated 26.06.2025, also observed that Defendant No.4, i.e., the Appellant herein, had not examined any witness who was present at the time of the oral partition. The Appellant did not state any particular date or month when the said oral partition was effected. When the suit was filed, the Appellant had neither pleaded any previous partition nor denied the claim of the Plaintiff. By virtue of such conduct, it was shown that the suit lands were yet to be partitioned equitably by metes and bounds. Similarly, a perusal of the 7/12 extracts revealed that only the name of Defendant No.1 appeared in the column of possession of the suit land, whereas the names of the Plaintiff and Defendant Nos.2 to 5 were not mentioned. This clearly goes to prove that no oral partition had been effected at any time earlier and the Appellate Court also affirmed the findings of trial Court on oral partition.

7. Thus, the learned trial Court as well as the first Appellate Court has given a specific finding of fact that there was no oral partition between the family members of the Defendant No.1 and as such, had given a finding to the issue no.2 in the negative which is upheld by the first Appellate Court. Thus taking into consideration the above findings, the following substantial questions of law which is argued to be involved in the present Appeal i.e. Whether the Lower Appellate Court erred in holding that the oral partition alleged by the Appellant was not proved, despite the evidence presented regarding separate living arrangements and the construction of an RCC house and pipeline, therefore does not arise for consideration in the present appeal.

8. Insofar as the other question of law is concerned, it is true that the judgment in Govindrao s/o Gangaramji Ajmire (supra) speaks about the necessity of including the entire family property in a suit for partition. However, the Appellant failed to raise this ground in the first appeal before the learned Appellate Court after the suit for partition was decreed. The memo of appeal filed before the learned Ad-hoc District Judge-2, Vaijapur, does not contain a single ground regarding non-inclusion of the entire family property for partition. Be that as it may, when the issue of non-inclusion of the entire family property was not framed by the trial Court, Defendant No.4, i.e., the present Appellant herein, did not challenge the framing of issues before the appropriate forum so as to consider the plea of non-inclusion of the entire family property. There was no challenge to the framing of issues

in the appeal, which remained limited only to the ground of oral partition raised by the Appellant in the initial written statement.

9. The learned Counsel for the Appellant submits that the written statement was thereafter amended and specific plea of non-inclusion of the entire family property was raised by the Appellant herein. Be that as it may, the non-framing of an issue by the learned trial Court, and the failure of the Appellant herein to challenge the same, clearly show that the Appellant has waived the said ground and conceded to it. The Plaintiff restricted the partition to the suit property as mentioned in the plaint. While filing an appeal before the First Appellate Court, the Appellant also did not raise any ground regarding non-inclusion of the entire family property. Thus, in the absence of any objections to that effect, the learned Trial Court rightly decreed the suit, granting a 1/5th share to each of the family members, including the Plaintiff and the Defendants, as well as the Appellate Court did not deal with any such ground of non-inclusion of entire family property in its judgment.

10. The learned Appellate Court has rightly dismissed the appeal filed by the Appellant herein, with a further modification of granting a 1/4th share to each of the Plaintiff and Defendant Nos. 3 to 5, in view of the death of Defendant Nos. 1 and 2 during the pendency of the proceedings. The appeal filed by the Appellant herein, therefore, does not involve any substantial question of law falling for consideration of this Court. It is almost a settled law that appeals under Section 100 of the CPC can be

entertained only on a substantial question of law. Thus, in the absence of any substantial question of law falling for consideration of this Court, the Appeal is dismissed with costs.

11. The Civil Application is also disposed of.

**[MEHROZ K. PATHAN]
JUDGE**

Najeeb..