

dgm

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 784 OF 2007

WITH

CIVIL APPLICATION NO.1096 OF 2007

Shivajirao Ishwarlal Jagtap, since deceased
by legal heirs 1b Shri Udaysingh Shivajirao
Jagtap, since deceased through heirs:

- 1 Ushal Udaysingh Jagtap
- 2 Deepak Udaysingh Jagtap
- 3 Viraj Udaysingh Jagtap
- 4 Ravi Udaysingh Jagtap

.... Appellants
(Org.heirs of Deft.Nos.1i to 1iv)

vs

- 1 Laxmidevi Anantrao Jagtap
- 2 Truptindra Anantrao Jagtap
- 3 Malprabha Vijay Salakhe
- 4 Charushila V. Patil
- 5 Kumudani V. Patil
- 6 Nalini V. Amrute
- 7 Shalini S. Jadhav
- 8 Sujata P. Sawant
- 9 Kalpana V Kadam
(Nos. 7 to 9 deleted as per
Court order on 22.1.2009)
- 10 Veerdhaval Ramchandra Jagtap
- 11 Manik Laxmanrao Chavan
- 12 Gangubai Shankarrao Patil, since
deceased through legal heirs:
- 12(a) Mr. Vijay S. Patil
- 12(b) Mr. Shashikant S. Patil
- 12(c) Mr. Pratap S. Patil
- 12(d) Smt. Vijayadevi Jamdar
- 12(e) Nirmladevi Hawaldar

.... Respondents

(Nos. 1 to 3-orig. Plaintiff
Nos. 1 to 3, Respondent
Nos. 4 to 9-orig.Deft.1.d to 1.i,
Res.Nos. 1 to 12-orig. Deft 2 to 4)

13 Smt. Vijaymala Sambhaji Jagtap Respondent No.13-
orig. Deft No.1a

Mr. C. G. Gavnekar with Mr. G.S. Hiranandani for the Appellants.
Mr. G.S. Godbole i/by Mr. D.S. Patil for respondents 1 to 3.

CORAM: ANOOP V. MOHTA, J.

RESERVED ON : November 11, 2013

PRONOUNCED ON : November 29, 2013

JUDGMENT:

The Appellants/original heirs of Defendant No.1 have challenged judgment and decree dated 2 March 2007 passed by the Principal District Judge, Pune, thereby allowed the Appeal and set aside judgment and decree dated 30 September 1983 passed by the Court of IIIrd Joint Civil Judge, Senior Division, Pune.

2 The trial Judge by accepting the preliminary issue, dismissed the Suit principally on the ground of “res judicata”, “estoppel” and “limitation” under Order 2 Rule 2 of Code of Civil Procedure (CPC). The Appellant Court, however, reversed the same

and permitted/directed the trial Court to give opportunity to both the parties to lead evidence and expedited the matter. The previous Special Civil Suit No.51/1964 was for partition filed by Hanumantrao against the Defendants and Plaintiffs in the said suit. The present suit properties were included in the earlier suit for partition. The Appeal was preferred against the order of partition. Admittedly Hanumantrao and Shivajirao signed the consent terms in Appeal No.1964 of 1966. The finding of the trial Court that Hanumantrao proved the said family of Shivajirao, Ramchandra, Anantrao and Gangubai left the suit property by Balkrishna and Indirabai and the same was maintained. Shivajinagar therefore represented the branch of Ishwarrao in the previous Suit as well as in the First Appeal. The dispute with regard to the partition of the property left by Balkrishna who died issue-less among his heirs. Pirajirao, Santaram and his legal heirs were not joined as parties to the previous Suit though Santaram was real brother of Balkrishna. Heirs of Pirajirao are not joined as parties in the present Suit. Shivajirao represented the branch of Ishwarrao in the litigation initiated by Hanumantrao. The earlier Suit, therefore, was for partition among the legal heirs of Balkrishna and not among the legal heirs of Ishwarrao. Anantrao or Ramchandra, therefore, though not claimed partition and separate

possession of their respective shares in the previous Suit that itself is not sufficient to disentitle them to claim the partition and/or file the Suit for the same. The issue of self-acquired property by Shivajirao was decided against and/or Balkrishna. The exclusive ownership of Balkrishna, therefore, ultimately accepted. That issue attained finality. The partition, therefore, now claimed by the Plaintiff being legal heirs, in my view, also just cannot be dismissed at this stage in such fashion without giving opportunity to the Plaintiff.

3 The amicable settlement, even if any, as recorded, was not by and between all the parties. It was principally between Hanumantrao and Shivajirao. All other heirs and/or related parties, therefore, cannot be prevented from filing separate Suit for the partition of the decided rights/partitioned property. The aspect of Limitation Act is also wrongly decided.

4 So far as Order 2, Rule of CPC is concerned, the learned Appellate Court is right in holding that unless there was partition mentioned the brothers of Balkrishna, the properties left by Balkrishna, there was no question of Plaintiff Anantrao claiming his share in the property as he was not competent at the relevant time to

raise such claim. There was no question of omission and/or intentional relinquishment of any claim by Anantrao. The principle of res judicata and/or estoppel and/or order 2 Rule 2 of CPC, in the present facts and circumstances, is unsustainable. The Appellate Court, therefore, right in relying upon *Prithvichand Ramchand Sablok v. S. Y. Shinde*, reported in **AIR 1993 SC 1292**.

5 For the above reason, the Appeal from Order is dismissed so also the application. No costs.

6 The learned counsel appearing for the Appellant seeks stay of this order and continuation of the interim order already passed in the matter. As the interim order has been in force since 2007, the same is continued for a further period of twelve weeks from today.

(ANOOP V. MOHTA, J.)