

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

SECOND APPEAL NO. 589 OF 1991
WITH
CIVIL APPLICATION NO. 1072 OF 1992

1. Vivek S/o Vasant Rao Deshmukh,
Age 21 years, Occ: Service,
2. Vasant Rao S/o Rangnath Rao Deshmukh,
Age 59 years, Occ: Pensioner,

Both R/o. S.T. Colony, Station Road,
Jalna.
3. Smt. Radhabai W/o Govindrao Dabhadkar,
Age 57 years, Occ: Household,
R/o. Gawali Pokhari, Tq. & Dist. Jalna.
4. Smt. Vachalabai alias Nanibai
w/o Sonaji Pant Joshi,
Age 62 years, Occ: Household,
R/o. Jyoti Nagar Colony,
Aurangabad.
5. Smt. Premlabai w/o Panditrao Poddar,
Age Major, Occ: Household,
R/o. Deshpande Galli, Majlegaon,
Tq. & Dist. Beed.
6. Smt. Kamalabai w/o Vishnupant Dande,
Age 57 years, Occ: Household,
R/o Mera (BK), Tq. Chikhali,
Dist. Buldhana.

**....Appellants.
(Ori. Deft. Nos. 1 to 6)**

Versus

1. Dr. Govindrao S/o Rangnath Rao Deshmukh,
Deceased through his legal representatives.
- 1.(a) Laxmikant S/o Govindrao Deshmukh,
Age 42 years, Occ: Medical Practitioner,
and Agriculturist, R/o Kumbhar

Pimpalgaon, Tq. Ambad, Dist.Jalna.

- 1.(b) Satish S/o Govindrao Deshmukh,
Age 35 years, Occ:Agriculture,
R/o Kumbhar Pimpalgaon, Tq.Ambad,
Dist. Jalna.
- 1.(c) Smt. Vatsalabai w/o Govindrao Deshmukh,
Age 62 years, Occ:Household,
R/o Kumbhar Pimpalgaon,
Tq. Ambad, Dist.Jalna.
- 1.(d) Smt. Nalinibai w/o Vishwanathrao,
Age 47 years, Occ:Household,
R/o Aurangabad.
- 1.(e) Pravina w/o Prakashrao Rohinkar,
Age 37 years, Occ:Household,
R/o Partur, Dist.Jalna.
- 1.(f) Pratibha w/o Ramchandrarao Joshi,
Age 27 years, Occ: Houehold,
R/o Georai, Tq. Georai, Dist.Beed.
- 1.(g) Rajendra S/o Pramodrao Deshmukh,
Age 24 years, Occ: Nil,
R/o Kumbhar Pimpalgaon, Tq. Ambad,
Dist.Jalna.
- 1.(h) Mahindra S/o Pramodrao Deshmukh,
Age 21 years, Occ : Nil,
R/o Kumbhar Pimpalgaon,
Tq. Ambad, Dist.Jalna.
- 1.(i) Smt. Minaxibai W/o Pramodrao Deshmukh,
Age 44 years, Occ:Household,
R/o Kumbhar Pimpalgaon,
Tq. Ambad, Dist.Jalna.
2. Smt. Vimalabai W/o Balaji Naik,
Age 50 years, Occ: Household,
R/o S.T.Colony, Shanti Nagar,
Railway Station Road, Jalna.

**....Respondents.
(Ori. Plff. Nos. 1(a)
to 1(i) & 2)**

Mr. Jayant Chitnis, Advocate for appellants.

CORAM : T.V. NALAWADE, J.

DATED : 7th October, 2015.

JUDGMENT :

1) The appeal is filed against judgment and decree of Regular Civil Appeal No.189/1984 which was pending in the District Court, Jalna. The appeal in District Court was filed by plaintiffs against judgment and decree of Regular Civil Suit No.158/1982 which was pending in the Court of Civil Judge, Junior Division, Jalna and it was filed for the reliefs of declaration, partition and possession. The suit was partly decreed by the trial Court, but the relief of partition and separate possession of the shares was not given and so the aforesaid appeal was filed in the District Court. That relief is also given by the District Court. Both the sides are heard.

2) The suit was filed by one Govindrao and his sister Vimlabai. One Bhagwantrao was brother of plaintiffs. Defendant No.2 is brother of plaintiffs and defendant Nos. 3 to 6 are sisters of plaintiffs. Defendant No.1 is son of defendant No.2. It is the case of plaintiffs that Bhagwantrao died without leaving behind any issue or widow. It is contended that the suit house, the

property bearing house No.3876/3131 situated at Jalna was the self acquired property of Bhagwantrao and so, plaintiffs and other brothers and sisters of Bhagwantrao are entitled to get equal share in this property.

3) It is the case plaintiffs that behind their back, defendant No.2 got entered the name of defendant No.1 in the record of rights of the suit property and the defendants are now claiming that the property belongs to them and that defendant No.1 was given in adoption to Bhagwantrao by defendant No.2.

4) Defendant Nos. 1 and 2 filed written statements and contested the matter. They did not dispute the relationship of Bhagwantrao with plaintiffs and defendants. They also did not dispute that the suit property was standing in the name of Bhagwantrao, but they denied that it was self acquired property of Bhagwantrao. It was contended that defendant No.2 had spent amount of Rs. 25,000/- for making construction on the plot and so the property was not of absolute ownership of Bhagwantrao. It is contended that during the last days of Bhagwantrao, defendant Nos. 1 and 2 were living with him and Bhagwantrao was treating defendant No.1 as his son. It is contended that due to such relationship, the property was

entered in the record of rights in the name of defendant No.1.

5) The defendant Nos. 1 and 2 contended that the parties own some agricultural lands and one plot which are joint family properties and they need to be included in the suit for partition. They contended that as the properties are not included, the suit is not tenable. Alternatively, the defendants contended that they were in possession of the suit property for more than twelve years and so they had become owners by adverse possession.

6) Issues were framed and both the sides gave evidence. The trial Court gave finding that suit property was self acquired property of Bhagwantrao. The trial Court did not give relief of partition and separate possession by holding that it was necessary for the plaintiffs to claim relief in respect of properties which are said to be joint family properties by the defendant Nos.1 and 2. No evidence was given for proving the ownership by adverse possession by defendant Nos. 1 and 2. The first appellate Court has held that as the suit property was self acquired property of Bhagwantrao, there was no need of claiming relief of partition in respect of others so called joint Hindu family properties.

7) When the appeal was admitted by this Court (Other Hon'ble Judge) on 21/02/1992, no substantial questions of law were formulated. The learned counsel for the appellants was allowed to argue on following grounds and he was told that this Court will presume that these points are there for consideration in Second Appeal as substantial questions of law.

- (i) Whether the suit was bad for non inclusion of other so called joint Hindu family properties ?
- (ii) Whether the will (xerox copy) which defendant Nos. 1 and 2 want to produce in the second appeal can be considered in the second appeal ?
- (iii) Whether the Courts below have committed error in holding that suit property was self acquired property of Bhagwantrao ?

8) At the outset, it needs to be mentioned here that the trial Court had given finding that the suit property was self acquired property of Bhagwantrao, but as this decision was not challenged by the present appellants, defendant Nos. 1 and 2, they can not challenge this finding in second appeal. The said finding has become final.

9) The defendant Nos. 1 and 2 want to take the defence in Second Appeal that the property was bequeathed by the Bhagwantrao in their favour. Even, in the civil application filed for permission to produce the evidence, there are no particulars and the contentions about the custody, where the document was lying and about the reasons why that document could not be produced in the two Courts below. On the other hand, evidence on the record shows that the defendant No. 2 had filed application for mutation in the record of rights in favour of defendant No.1 and there was no reference of existence of such will or adoption or anything by which defendant No.1 could have claimed absolute ownership over the suit property. It needs to be observed that the tactics like attempt to produce such document, which is apparently not admissible and which has no basis, are played only to delay the execution of decree. Defendant Nos. 1 and 2 are in possession and so they are now playing such tactics. Even the power under Order 41, Rule 27 of Civil Procedure Code is discretionary power. This Court holds that such point can not be raised in second appeal and so the said application needs to be dismissed.

10) The first appellate Court has rightly held that as the suit property was self acquired property of Bhagwantrao, there

was no need to file suit for general partition of all the so called joint Hindu family properties. The Hindu Law in this regard is very settled. Thus, the Courts below have not committed error on the findings given by them in favour of plaintiffs. In the result, all the points are answered against appellants.

11) In the result, appeal and civil application stand dismissed.

[T.V. NALAWADE, J.]

SSC/