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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 149 OF 1991**

1. Gopal Vishnu Powar,
age 25 years, occu. Education r/o. Shendur,
Taluka Kagal, Dist Kolhapur
2. Ashok Vishnu Powar, age 21 years,
r/o. Shendur, Taluka Kagal, Dist Kolhapur ... Appellants

Versus

1. Sushilabai w/o. Vishnu Powar,
w/o. Vishnu Powar,
Age 44 years, occ. Agri.
r/o. Shendur, Tal. Kagal,
District Kolhapur.
2. Baburao Ambaji Gavandi, age 74 yrs.
Occ. Agri, r/o. Shendur, Tal. Kagal,
Dist. Kolhapur.

Since deceased by his legal heirs :

2(a) Bhimrao Baburao Gavandi,

2(b) Ramchandra Baburao Gavandi

2(c) Smt. Annubai Bapu Methe,
All r/o. At Shendur, Tal. Kagal,
District Kolhapur.

2(d) Smt. Saubai Ganpati Khot,
Since deceased through legal heirs:

2(d)(1) Shivaji Ganpat Khot

2(d)(2) Sambhaji Ganpat Khot
Both adults, Occ. Agriculturist,

residing at Lingnur, Tal. Kagal,
District : Kolhapur.

3. Ananda Krishna Bodake, Age 47 years,
r/o. Shendur, Taluka Kagal, District
Kolhapur.

Since deceased through legal heirs :

- 3(a) Jaising Ananda Bodke,
Age major,
- 3(b) Uday Ananda Bodke,
Age major.
- 3(c) Smt. Banubai Ananda Bodke,
Age adult, All residing at Shendur,
Taluka Kagal, District Kolhapur.

1. Chandar Dattu Kasute, age 32 years,
r/o. Shendur, Taluka Kagal,
District Kolhapur.

Since deceased through legal heirs :

- 4(a) Namdeo Chandar Kasote,
Age adult.
- 4(b) Shashikant Chandar Kasote,
Age adult, residing at Shendur,
Taluka Kagal, Dist. Kolhapur.

2. Pandu Rama Bodake, Age 47 years,
r/o. Shendur, Taluka Kagal,
District : Kolhapur.

... Respondents

Ms. Gauri Godse along with Mr. Rohit Joshi for the appellants.

Mr. R.S. Datar for respondent no. 1.

Mr. P.D. Dalvi for respondent nos. 2(a) to 2(c), 3(a) to 3(c), 4(a), 4(b) and 5.

CORAM : Smt. R.P.SondurBaldota, J.
DATED : February 05, 2015

ORAL JUDGMENT :

1). The Second Appeal arises out of the concurrent findings of the Courts below for refusing the relief of partition. The appellants filed Regular Civil Suit No. 116 of 1977 for partition of the suit properties and for separate possession thereof. The trial Court dismissed the suit by the judgment and decree dated 16th March, 1995 essentially on the ground that the appellants failed to establish that the suit properties are ancestral properties. The appellants carried the decree in appeal to the District Court, Kolhapur vide Regular Civil Appeal No. 154 of 1985. That appeal was dismissed by judgment and order dated 16th February, 1990 confirming the findings of the trial court. Thereupon, the appellants approached this Court by way of Second Appeal. The parties hereinafter will be referred to by their original nomenclature i.e. the appellants as the plaintiffs and the respondents as the defendants.

2. The Appeal had been admitted on the following questions of law framed at ground Nos. 4 and 5 of the memo of appeal.

1. Whether inheritance of any property by a Hindu Male in the capacity as the only legal heir although illegitimate son of a deceased Hindu father, the nature of property to be his ancestral property or self acquired property?

2. Whether the Lower Appellate Court is justified in holding that the deceased Defendant no.1 must have inherited the suit properties from the said Balwant Gujar as his illegitimate son and thus his acquisition of the suit properties is itself doubtful and therefore, the suit properties cannot be said to be his ancestral properties?
3. Brief statement of facts needed for deciding the appeal is as follows :

At the time of filing of the suit of the partition, the plaintiffs were minors and therefore, the suit was filed through their next friend and guardian. The defendants were the father (defendant no. 1), mother (defendant no. 2) and purchasers of the suit properties (defendant nos. 3, 4, 5 and 6). The suit properties described at para-1 of the plaint consist of agricultural lands and a house. At para no. 2 of the plaint, it is stated that defendant no.1 has sold the suit agricultural lands to defendant nos. 3 to 6 by different documents. Part of the agricultural land was sold to defendant no. 3 by registered deed of conveyance dated 23rd May, 1970. Another part was sold to defendants no. 4 and 5 by registered deed of conveyance dated 28th January, 1972. The remaining portion of the land was mortgaged to defendant no. 4 with a right to re-purchase the property. The house property was sold around the same time to defendant no. 6. The suit was filed on 7th November, 1977. Though the transactions between defendant

no. 1 on the one hand and defendant nos. 3 to 6 on the other have been extensively referred to in para no. 2 of the plaint, there is no relief sought in respect of any of the transactions against these defendants. As per the pleadings in the plaint, the suit properties are ancestral properties and that defendant no. 1 has sold the same to defendant nos. 3 to 6 neither for legal necessity nor for the benefit of the family nor in discharge of any loan liability. Therefore, the transactions between original defendant no. 1 and original defendant nos. 3 to 6 do not bind the plaintiffs herein and do not affect their share in the suit properties.

4. Defendant no. 1, father though served with the writ of summons, did not appear before the court. Defendant no. 2 mother appeared and filed written statement supporting the claim of the plaintiffs. The contest in the suit was really between defendant nos. 3 to 6 and the plaintiffs. These defendants amongst several other contentions, contended that the suit properties were not ancestral properties and that they were separate properties of defendant no. 1. In the alternative, he had in his capacity as 'karta' of the family, sold the portion of the suit property to these defendants. Defendant no. 3 also refers to proceedings of maintenance filed by defendant no.2 against defendant 1 and the findings of the court that the suit property is an independent property of defendant no. 1. The other defendants no. 4 and 5, in the alternate claimed that, the property had been

sold by defendant no. 1 for discharging the loan liability of the family and for appropriate legal necessity. The written statement of defendant no. 6 runs on the same lines. Further, all the defendants alleged that, the suit filed by the appellants was a collusive suit.

5. The Courts below held that, the plaintiffs have failed to establish that the suit properties were ancestral properties. Since this finding completely non-suited the plaintiffs, the other issues though framed were not discussed.

6. Ms. Godse, the learned Advocate for the plaintiffs submits that, the concurrent findings of the courts below are perverse, in as much as, the same are in total disregard of the admission on the part of the defendants that the properties were ancestral properties. She submits that, if it was the case of the defendants that the suit properties are independent properties of defendant no. 1, they ought to have established the same independently. She also argues that, these defendants had failed to establish that the sale of the properties was for legal necessity.

7. The essence of questions of law framed for consideration in this appeal is, whether the suit property is an ancestral property capable of being partitioned in the court proceedings. As already noted, the pleadings of the plaintiffs is limited to saying that the suit property is an ancestral property. The evidence led on behalf of the plaintiffs was that of Tukaram Rama Patil,

whereas, defendants no. 3 to 6 examined defendant no. 4. Tukaram Patil was the next friend through whom the plaintiffs had filed the suit. He deposed that the suit properties originally belonged to one Balwant Gujar and that the mother of defendant no.1 was the mistress of Balwant Gujar. Defendant no.1 was the son of Balwant Gujar and as such defendant no.1 inherited the suit properties from Balwant Gujar. The Courts below found that, apart from the word of the next friend, there was nothing to show that defendant no.1 Vishnu Powar was the son of Balwant Gujar. In such circumstance, the intrinsic value of the word of the witness needs to be of high caliber. Besides, the allegation of the plaintiffs that defendant no.1 is the illegitimate son of Balwant Gujar is a serious allegation. It casts aspersions on the character of Balwant Gujar, as well as, the mother of defendant no.1. Therefore, the evidence on such allegation must necessarily be very strong. The witness is the maternal uncle of the plaintiffs. Admittedly, since more than 7 to 8 years prior to the deposition, he had not maintained contacts either with defendant no.1 father or with defendant no.2 mother. He stated that, Balwant Gujar had expired even before his birth. In that case, there was no question of the witness having personal knowledge as regards the relation between Balwant Gujar and mother of defendant no.1. Consequently, his evidence on this aspect must be rejected. Further, the cross-examination of the witness shows that he has ignored some of the facts and is ignorant of some other facts. The witness stated that, he had

been helping defendant no.2 in the litigation she had with defendant no.1. According to him, the litigation went on for 15 to 16 years. But he claimed that, he did not know that defendant no.1 has a wife by name Shashikala and a son by name, Sanjay. These persons were not impleaded to the suit for partition. It was his evidence that, the suit properties were the only properties of defendant no.1. However, he admitted in his cross-examination that, he was not aware of the property at Survey No.11/1 at Ujjaiwadi owned by defendant no.1 which was under litigation. The evidence of this witness, which is the only evidence, is thus, seen to be weak evidence. The Courts below, discarded the evidence of the plaintiffs to hold that there is nothing to show that the suit property had been inherited by defendant no.1 from Balwant Gujar. The Appellate Court has further supported the finding on the basis of the revenue records produced by the parties. The record shows that defendant no.1 had in fact forced himself upon two properties and occupied the same illegally.

8. Mr. Dalvi, the learned Counsel appearing for the respondents, relying upon the decision of the Division Bench of this court in **Jamarathbee and others Vs. Pralhad Dattatraya Dadpe and Ors. AIR 1978 BOMBAY 229** submits that in the circumstances, the property can hardly be said to be ancestral property in the hands of respondent no 1. He submits that, the only category of property to be treated as ancestral property according to the Hindu Law is the property which is inherited by the father from his paternal

ancestors. In the absence of the evidence that defendant no. 1 is the son of Balwant, there can be no question of property being described as the ancestral property in which the appellants could get right by birth.

9. The evidence on record, substantiates the findings of the Courts below as the correct findings in law and the same cannot be interfered with by this court in the second appeal proceedings. The submission advanced on behalf of the appellants that the issues framed in the suit were defective and there ought to have a specific issue that the suit property was separate property of defendant no. 1, cannot be accepted. The issue framed by the Court was, whether the suit property is an ancestral property. This issue would enfold within itself, the question whether the suit property was a separate property of defendant no.1. Therefore, there is no substance in this submission. The Second Appeal is therefore, dismissed.

(Smt. R.P. SondurBaldota,J)