

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

**26 SECOND APPEAL NO. 607 OF 2012
WITH
CA/10124/2012
IN
SA/607/2012**

RAMNATHAPPA GOPINATHAPPA HINGMIRE

VERSUS

MANGALABAI RAMLING PIMPLE AND ORS

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Mr. S.P.Brahme, Advocate for Appellant.

Mrs. P.V.Langhe h/f Mr. N.D.Zinzurde Patil,
Advocate for R – 1 & 3.

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CORAM : T.V.NALAWADE, J.

DATE : 13th JUNE, 2016

ORDER :-

. The Appeal is filed against the Judgment and Decree of R.C.S. No. 404/2004 which was pending in the Court of the Civil Judge [Jr.Division], Aurangabad and also against the Judgment and decree of R.C.A. No. 123/2008 which was pending in the District Court, Aurangabad. The Suit filed by the plaintiff Mangalabai for relief of partition is decreed in her favour by the trial Court. 1/12th share is given to her in ancestral property of her father and 1/4th share is

given in self-acquired property of her father by the trial Court and this decision is confirmed by the first appellate Court. Original defendant No. 1, brother of the plaintiff, had challenged the decision. Heard learned counsel for the appellant.

2. It is the case of the plaintiff that her father Gopinath owned and possessed 8 Acres 11 gunthas land from Block No. 79 situated at Nakshatrawadi, Tahsil and district Aurangabad and it was his ancestral property. It is contended that plaintiff's father purchased 3 Acres land from same Block number from his separate income and portion of 3 Acres was his self-acquired property at the time of his death. It is her contention that Gopinath was in Govt. service and from the salary income, he purchased 3 Acres portion under registered sale deed. Gopinath died on 22/10/1994.

3. Defendant Nos. 1 and 2 are real brothers of plaintiff and it is contended by the plaintiff that after the death of the father, some portions are sold by defendant Nos. 1 and 2 to third parties to deprive her right to get the share in the property. With the aforesaid contentions, she had prayed for relief of partition and separate possession of her share in the suit property.

4. Defendant Nos. 1 and 2 contested the Suit by filing joint Written Statement. Defendant No. 3, sister of plaintiff, did not appear in the Suit to contest the matter. Relationship is not disputed by the defendants. They disputed that 3 Acres portion was self-acquired property of

Gopinath. They contended that defendant Nos. 1 and 2 had also contributed for purchasing 3 Acres portion.

5. On the basis of aforesaid contentions, issues were framed. Both sides gave evidence. The trial Court held that 3 Acres portion was purchased from the salary income by the deceased and it was his self-acquired property. In view of this finding, equal share was given to the plaintiff in the said 3 Acres portion. By effecting notional partition in the ancestral property, $1/12^{\text{th}}$ share is given to the plaintiff.

6. The defendants have not disputed that Gopinath was having 8 Acres 11 gunthas portion as ancestral property with him and they are not disputing that 3 Acres portion was purchased under registered sale deed by Gopinath in his name, though they have contended that they had also contributed by making some payment of price. In view of such defence and as there is no specific defence that there was sufficient income from the nucleus, there was no alternative before the Courts below than to draw inference that 3 Acres portion was self-acquired property of Gopinath. During cross examination, plaintiff showed ignorance as to who had contributed for purchasing 3 Acres portion. There is no specific case of defendant Nos. 1 and 2 that they were making some income and they had savings from which they had contributed for purchasing the property. The Courts below held that the defendant Nos. 1 and 2 failed to prove that they had contributed in purchasing 3 Acres portion and this finding is on the basis of appreciation of oral evidence. Re-appreciation of the evidence is not possible in the present

matter and there is strong circumstance against the defendants that the sale deed was executed only in the name of Gopinath and admittedly he was working in Govt. department as Peon. His income was definitely more than the income, if at all defendant Nos. 1 and 2 were making at the relevant time. There is no dispute over the extent of share given to the plaintiff and to others by the Courts below.

7. The learned counsel for the appellant argued much on the circumstance that in the year 2003, 1 Acre 20 R. portion was sold by defendant Nos. 1 and 2 and 20 R. portion was sold on 17/02/2004 and that was done prior to filing of the Suit, but the purchasers are not made parties to the Suit. The learned counsel argued that the Suit was bad for non joinder of necessary parties. This contention is not at all acceptable. The defendant Nos. 1 and 2 did not come with the specific case of legal necessity. The trial Court has not given decree against the said purchasers and observed that the portion sold can be allotted to the share of the defendant Nos. 1 and 2 who had sold that portion. Such decree could have been made even if the purchasers were present to contest the Suit. Further, the plaintiff is getting only 1/12th share in ancestral property and 1/4th share in other property and Suit was filed in respect of the area of 11 Acres 19 gunthas. Thus, in respect of remaining portion, equitable partition is possible. It appears that 64 R. portion was sold by defendant Nos. 1 and 2 during pendency of the Suit. If such transaction was made, that property can be considered for partition purpose as the doctrine of '*lis pendense*' is applicable in respect of that portion. Thus, no substantial question of

law as such is involved in the matter.

8. In the result, Second Appeal stands dismissed. In view of dismissal of Second Appeal, Civil Application No. 10124 of 2012 does not survive and stands disposed of.

[T.V.NALAWADE, J.]

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