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

**SECOND APPEAL NO.59 OF 2012
WITH
CIVIL APPLICATION NO.793 OF 2012**

Hirabai w/o Bhanudas Hiwale,
Age: 38 years, Occu: Agriculture,
R/o Wadgaon, Tq. Gangapur,
Dist. Aurangabad

..APPELLANT
(Plaintiff)

VERSUS

1. Waman s/o Shankar Gore,
Age: 40 years, Occu: Agriculture

2. Karbhari Shankar Gore,
Age: 46 years, Occu: Agriculture

3. Tulshiram s/o Bhimji Gore,
Age: 45 years, Occu: Agriculture,

All above r/o Vitkheda,
Tq. Kannad, Dist. Aurangabad

..RESPONDENTS
(Defendants)

Mr V. D. Salunke, Advocate for appellant;
Mr P. F. Patni, Advocate for respondents

CORAM : NITIN W. SAMBRE, J.

DATE : 15th June, 2017

ORDER:

This appeal is by original plaintiff.

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2. The plaintiff filed Regular Civil Suit No.178 of 2006 for declaration that partition deed dated 17th November, 2000 is not binding on her and for delivery of possession of the suit property. The suit property consists of block no.206, ad-measuring 2 acres 8 gunthas and block no.229, ad-measuring 19 gunthas, situated within the local limits of village Vitkheda, Taluka Kannad, Dist. Aurangabad.

3. The plaintiff and defendants have common ancestor i.e. their grandfather by name Shamrao Gore. Said Shamrao had four sons and one daughter. Plaintiff is daughter of Keshav, who died on 4th January, 2001, whereas mother of the plaintiff Laxmibai w/o Keshav died on 4th January, 2003.

4. It is the claim of the plaintiff that the suit property had fallen to the share of her father late Keshav, and defendants had got transferred the suit property in their favour, vide registered partition deed dated 17th November, 2000.

5. So far as defendants to the suit are concerned, defendant no.1 Waman and defendant no.2 Karbhari are sons of deceased Shankar, real brother of deceased Keshav, who was father of the plaintiff; whereas defendant no.3 Tulshiram is son of deceased Bhimaji, who was real brother of father of the plaintiff.

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6. It is claimed by the plaintiff that by virtue of the partition deed, lands to the extent of 1 acre 35 gunthas and 13 gunthas from block no.206 were transferred to defendants no.1 and 2, whereas land to the extent of 19 gunthas from block no.229 was transferred to defendant no.3. It is alleged that the partition deed was executed by impersonation. It is further claimed that plaintiff is sole surviving legal heir of deceased Keshav and Laxmibai, and was entitled for the suit property.

7. Written statement (Exh.12) filed by the defendants reflects following defence :-

All the disputed properties stood transferred to the respondents – defendants, as stated herein above, by virtue of the partition deed dated 17th November, 2000. It is claimed that Girijaba, Shankar and Keshav who were real brothers jointly purchased block no.206 and got partitioned the same. It is claimed that Sakhubai, widow of Girijaba was well looked after by defendant no.1 Waman. As such, she has given 29 gunthas of land to the said defendant. It is also claimed that mother of the plaintiff Laxmibai allotted 29 gunthas land to defendant no.1 Waman and 17 and 13 gunthas, respectively to defendant no.2 Karbhari. It is further claimed that the land which had fallen to the share of the plaintiff was sold by plaintiff to the son of defendant no.2 Karbhari.

It is specifically claimed by defendant no.3 Tulshiram, that Keshav, father of the plaintiff, and Laxmibai were in debt trap because of the loan

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that had been taken by them for marriage of the plaintiff. Amount of Rs.12,000/- was taken from defendant no.2 by showing receipt of consideration of land ad-measuring 19 gunthas from block no.229. It is also claimed by defendant no.1 that he had taken care of deceased Keshav and Laxmibai, parents of the plaintiff, and out of such love and affection, the land was given to the defendants.

8. Pursuant to the pleadings of the parties, the Trial Court framed issues at Exh.13 and recorded findings against them as under :-

Sr. No.	ISSUES	FINDINGS
1.	Whether the plaintiff proves her ownership in the suit lands ?	In the affirmative
2.	Whether the plaintiff proves that, on 17.11.2000, the defendants got executed false and fabricated partition deed of suit lands ?	In the negative
3.	Whether the plaintiff proves that, the defendants encroached in the suit lands of the plaintiff ?	In the affirmative
3-A.	Whether the suit is within limitation ?	In the affirmative
4.	Whether the plaintiff is entitled for possession from the defendants ?	In the affirmative
5.	Whether plaintiff is entitled for mesne profits from the defendants ?	In the affirmative
6.	Whether the plaintiff is entitled for declaration about partition deed dated 17.11.2000 ?	In the affirmative
7.	Whether the defendants are entitled for compensatory costs of Rs.3000/- from the plaintiff ?	In the negative
8.	What order and decree	As per final order

9. The learned Trial Court observed that though the plaintiff has proved her ownership to the suit properties, still she was unable to demonstrate

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that the defendants got executed false and fabricated partition deed. The Trial Court decreed the suit of the plaintiff for possession and directed inquiry into mesne profits. A declaration was given about partition deed dated 17th November, 2000, being not binding on plaintiff.

10. While decreeing the suit, the Trial Court had taken into account evidence of plaintiff at Exh.18, her husband Bhanudas (P.W.2) at Exh.29 and evidence of D.W.1 Waman at Exh.36, D.W.2 Tulshiram at Exh.47 and D.W.3 Gorakh Rajaram, an attesting witness to partition deed, at Exh.51.

11. The Trial Court, vide judgment and decree dated 7th May, 2000 directed the defendants to deliver vacant possession of the suit land to the plaintiff, as also declared that partition deed dated 17th November, 2000 is not binding upon the plaintiff, with further directions to conduct inquiry into mesne profits.

12. Aggrieved by the aforesaid judgment and decree, defendants preferred Regular Civil Appeal No.167 of 2010. Learned Principal District Judge, Aurangabad, while deciding the appeal framed points for determination and recorded findings thereon, as under :-

Sr. No.	POINTS	FINDINGS
1.	What was the nature of the suit lands ?	Block no.206-joint family property. Block no.229-ancestral property.
2.	Whether the deceased Keshav transferred the suit lands to the appellants ?	Yes, as regards the land block no.206. No, as regards the land block no.229.

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3.	Whether the respondent has established her title to the suit lands ?	Yes, as regards 19 R of land out of block no.299 only.
4.	Whether the suit is within limitation ?	Yes
5.	Whether the respondent is entitled to recover possession of the suit lands ?	Yes, that of 19 R of land out of block no.229 only.
6.	Whether the impugned judgment and decree call for any interference ?	Yes, partly
7.	What order ?	Appeal is partly allowed.

13. The lower appellate court partly allowed the appeal, set aside the observations made by Trial Court in relation to block no.206, with further declaration that partition deed dated 17th November, 2000, to the extent of land ad measuring 19 gunthas out of block no.229 is not binding on the plaintiff. It further directed that appellant no.3 i.e. defendant no.3 shall deliver possession of 19 gunthas land, out of block no.229, to the plaintiff.

14. Feeling aggrieved by this finding recorded by the lower appellate court, the present second appeal by original plaintiff.

15. Mr Salunke, learned Counsel appearing on behalf of the appellant would urge that the appeal needs consideration on following grounds :-

- (a) Once the partition deed is held to be not binding on the plaintiff, carving out exception to the extent of land block no.206 to be not binding on the plaintiff, is not sustainable in law.
- (b) The lower appellate court committed an error by appreciating evidence contrary to the record.

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- (c) Against the findings recorded by the Trial Court and lower appellate court, since no counter appeal was preferred by the defendants, negative findings recorded by the Trial Court and confirmed by the lower appellate court should have weighed in favour of the appellants in its entirety.

16. According to Mr Salunke, as such the second appeal needs to be allowed.

17. Learned Counsel appearing on behalf of respondents supported the judgment and decree and pointed out that issue no.2 framed at Exh.13 about execution of false and fabricated partition deed dated 17th November, 2000 was answered against the plaintiff, against which no appeal was preferred by the present appellants-defendants. According to him, once such finding has attained finality before the lower appellate court since not questioned before it, this Court should restrict itself only to the extent of appreciation of the law *qua* negative findings recorded against the appellants. He sought dismissal of the appeal.

18. Considered rival submissions.

19. It is required to be noted that the partition deed was proved by recording evidence of defendants no.1 and 3 and also an attesting witness Gorakh, who was examined at Exh.51.

20. The plaintiff, on her own, had failed to demonstrate as to how the partition deed was executed by practicing fraud or by impersonation.

21. It is an admitted position on record that land gat no.229 was ancestral property and by mutation entry no.147 (Exh.64), the same was equally partitioned between sons of deceased Shamrao i.e. the grandfather of the parties to the suit. Such partition was effected in 1991. The ownership of Keshav, to the extent of 0.31 R land out of gat no.229 was also admitted. The Trial Court then proceeded to consider severity of jointness of the family and observed that after demise of Girijaba and Shankar, 0.29 R land was allotted to the respective share of defendants.

22. So far as land gat no.206 is concerned, the Trial Court proceeded to record finding that land ad measuring 2 acres 8 gunthas therefrom is not an ancestral property of Keshav and as such, the submission that the land was allotted in favour of Keshav was held to be not established. The Court then proceeded to record that since land gat no.229, ad measuring 0.31 gunthas and land gat no.206 ad measuring 2 acres 8 gunthas were owned by late Girijaba, Shankar had no concern with the same. Exh.40 partition deed was also relied upon for recording a finding, and the validity of the same was gone into. The Court then proceeded to observe that by virtue of status of land being fallen to the share of Keshav, plaintiff has established her right to property and then noted that defendant no.3 has failed to demonstrate payment of Rs.12,000/- towards consideration of 19 gunthas land.

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23. The lower appellate court, upon re-appreciation of evidence, has inferred that block no.206 is a joint family property and block no.229 was ancestral property. The lower appellate court proceeded to record finding that land block no.206, which is joint family property, was legally transferred to the defendants and not block no.229, which was ancestral property. It is further observed that present appellant has established title to the property block no.229, to the extent of 19 R land and further ordered possession of the suit property in favour of the appellant.

24. So as to demonstrate that land block no.206 for which the claim is raised by the appellant in the present appeal, support is sought to be drawn from the judgment of the Trial Court so as to demonstrate that, it being ancestral property and though the present appellant is the only surviving legal heir of deceased Laxmibai and Keshav; parents of the plaintiff, yet it is in categorical terms established by the defendants and their witness Gorakh that the said property is an ancestral property and Keshav was not exclusive owner of the said property being karta. The lower appellate court observed that the partition deed Exh.40 which was a registered document was executed by Keshav voluntarily. From the evidence, it was further inferred that deceased Keshav, father of the plaintiff as karta and residing with defendants no.1 and 2 being member of joint family, it is defendants no.1 and 2 who had pre-existing right by virtue of their status as members of joint family property over the ancestral property block no.206.

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25. In view aforesaid, I hardly see any evidence or material in the pleadings to infer incompetency of Keshav in partitioning the ancestral property land block no.206. Land ad measuring 1 acre 35 gunthas was transferred to defendant no.1, whereas 13 gunthas to defendant no.2 out of block no.206 and as such, the Courts below have rightly held that the said property was ancestral property and was subjected to the partition vide Exh.40, which was duly proved.

26. Apart from above, the transfer of the land by the appellant-plaintiff which had come to her share though was pleaded, still nothing was brought on record by the appellant by denying the same that she had not received the property after death of her parents as her share from the ancestral properties.

27. In the wake of above, failure on the part of the present appellant to demonstrate that land gat no.206 was not an ancestral property but was self-acquired or joint family property of Keshav prompts this Court to endorse the view expressed by the learned lower appellate court. I hardly see any substance in the appeal so as to call for any interference. Thus, the appeal fails and stands dismissed.

28. In view of dismissal of the appeal, Civil Application No.793 of 2012 does not survive and stands disposed of accordingly.

(NITIN W. SAMBRE, J.)

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