IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

SECOND APPEAL NO.252 OF 2016

Daulatrao s/o Meghaji Bhandare
and ors. **... Appellants**

-vs-

Tularam s/o Meghaji Bhandare
and ors. **... Respondents.**

Shri M. B. Agasti, Advocate for appellants.
Shri Y. R. Sonkusare, Advocate for respondent No.1.
Shri S. P. Hedaoo, Advocate for respondent Nos.2 to 4.

CORAM : A.S.CHANDURKAR, J.
DATE : February 13, 2018

P.C.

The original defendant Nos.1 to 3 have filed this second appeal being aggrieved by the judgment of the appellate Court decreeing the suit for partition and separate possession.

2. It is the case of the original plaintiff-respondent No.1 that their father Meghaji was the owner of field Survey No.36/1 which came to be sold in the year 1979. After selling that land, Survey No.110/1 came to be purchased in the year 1985. The plaintiff sought partition of that property along with the residential house. In defence a stand was taken that said Meghaji in the year 2000 had executed a Will in favour of his grandson and therefore by

virtue of that Will the plaintiff was not entitled for partition. The trial Court partly decreed the suit and directed partition of the residential house. In the appeal filed by the original plaintiff, partition of the landed property in addition was also directed.

3. Shri M. B. Agasti, learned counsel for the appellants submitted that the Will executed by Meghaji was brought on record but the trial Court failed to take the same into consideration. As it was the stand of the plaintiff that said Will was not binding on him, the initial burden was on plaintiff to disprove the same. The Courts were not justified in ignoring the Will especially when it was duly registered. He therefore submitted that no decree for partition could have been passed in respect of the properties which were the subject matter of the Will. In that regard he placed reliance on the decision in ***Gurdev Kaur and ors. vs. Kaki and ors. (2007) 1 SCC 546.***

4. Shri Y. R. Sonkusre, learned counsel for respondent No.1 supported the impugned judgment. According to him as the appellants were the propounders of the Will the initial burden to prove the same was on them. That burden was not discharged and therefore partition of the suit property has been rightly directed.

5. I have heard the learned counsel for the parties. The evidence on

record indicates that the ancestral land being Survey No.36/1 was sold on 05/06/1979. Thereafter the other properties came to be purchased from the funds received after selling that land. Though it was the case of defendant Nos.1 to 3 that Meghaji has executed a Will in favour of his grandson, there was no evidence brought on record by the said defendants. As they were relying upon that Will the initial burden was on said defendants to prove its due execution. However same was not done. Mere fact that the Will was duly registered would not dispense the requirement of proving the Will as contemplated by provisions of Section 63 of the Evidence Act. Both the Courts have therefore rightly discarded that Will. The decision relied upon by the learned counsel for the appellants as regards giving due weightage to the registered document and the intention of the testator cannot be applied in the present facts.

6. Once it is found that the suit property was purchased through the proceeds of sale of Survey No.36/1 no fault can be found with the decree for partition. In that view of the matter, the second appeal does not give rise to any substantial question of law. The same is therefore dismissed. No costs.

JUDGE

Asmita