

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.33 OF 2017
WITH
CIVIL APPLICATION NO.562 OF 2017
IN/SA/33/2017

- 1 Revan Tukaram Dhumal,
 Age 69 yrs., Occ. Agri.,
 - 2 Bhanudas Dagdu Bagal,
 Age 66 yrs., Occ. Agri.,
- Both are r/o Kolkanadi,
Tq. Ambejogai, Dist. Beed.

... Appellants.

... **Versus** ...

- 1 Gangadhar Dagdu Bagal,
 Age 68 yrs., Occ. Agri.,
 - 2 Dharmraj Devaji Bagal,
 Age 34 yrs., Occ. Agri.,
 - 3 Mahaling Ganpati Bagal,
 Age 36 yrs., Occ. Agri.,
- All are r/o Kolkanadi,
Tq. Ambejogai, Dist. Beed.
- 4 Rajabhau Raghunath Dhumal,
 Age 46 yrs., Occ. Agri.,
 - 5 Balaji Raghunath Dhumal,
 Age 42 yrs., Occ. Agri.,

Respondent Nos.4 and 5 are
R/o Masla, Tq. & Dist. Latur.

... **Respondents.**

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Mr. G.S. Patil, Advocate for the appellants

Mr. Anand Chawre, Advocate for the respondent Nos.1 and 3

Mr. R.D. Biradar, Advocate for the respondent Nos.2 and 5 - absent

Mr. H.P. Jadhav, Advocate for the respondent No.4 - absent

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CORAM : SMT. VIBHA KANKANWADI, J.

RESERVED ON : 04th SEPTEMBER, 2019

PRONOUNCED ON : 22nd OCTOBER, 2019

JUDGMENT :

1 Present appeal has been filed by the original defendant Nos.4 and 1 challenging the concurrent Judgment and Decree passed in Regular Civil Appeal No.382/2012 by learned District Judge-6, Latur dated 14.12.2016, thereby dismissing their appeal challenging the Judgment and Decree passed in Regular Civil Suit No.804/2006 by Extra Joint Civil Judge Senior Division, Latur dated 26.09.2012.

2 Present respondent No.1 is the original plaintiff, who had filed the said suit for partition and separate possession in respect of land bearing

Gat No.4 admeasuring 01H 62R situated at village Masla, Tq. Latur. He had come with a case that it was purchased in the name of defendant No.1, by their father, out of the joint family income. Plaintiff, defendant No.1 are the real brothers and they had two more brothers by name Devaji and Ganpati, whose heirs are also added as defendants. Their father had effected partition in respect of other properties in the year 1990, situated at village Kolkanadi, Tq. Ambajogai, however, no partition was effected in respect of the suit property. It was enjoyed by plaintiff and defendants jointly. Devaji expired in the year 1995 and Ganpati expired in 2000. Even after their death, all the defendants and plaintiff were enjoying the property, however, then plaintiff demanded equitable partition in respect of the suit land, however, defendant No.1 in collusion with defendant Nos.2 and 3 was in haste to dispose of the suit land, therefore, it prompted the plaintiff to file suit for partition.

3 Defendant Nos.2 and 3 filed written statement-cum-counter claim admitting the relationship and admitting the claim of the plaintiff, so also, it was contended that their 1/4th share each be separated.

4 Defendant Nos.1 and 4 filed their joint written statement and denied the fact that the suit property was joint family property. It was contended, that it is self acquired property of defendant No.1, who had

alienated the same to defendant No.4 for a consideration of Rs.2,27,000/- on 22.01.2007, which was not liked by the plaintiff. It is stated that one Raghunath Dhumal had filed R.C.S. No.270/2006 against defendant Nos.1 and 4. However, at the instigation of said Raghunath the plaintiff has filed the suit for partition.

5 The defendant Nos.5 and 6 also filed written statement and denied all the averments in the plaint. Defendant Nos.5 and 6 are the sons of Raghunath, who had filed R.C.S. No.570/2006 against defendant Nos.1 and 4.

6 Taking into consideration the rival contentions, issues were framed. Parties have led oral as well as documentary evidence on record. After perusing the evidence, it was held that the suit property is the joint family property of plaintiff and defendant Nos.1 to 3. Each one of them has $1/4^{\text{th}}$ share and therefore, the suit was decreed, so also, the counter claim filed by the defendant Nos.2 and 3 was decreed. Defendant No.1 was directed to hand over the possession of $1/4^{\text{th}}$ share in the suit property to plaintiff as well as defendant Nos.2 and 3, the alienation by defendant No.1 in favour of defendant No.4 was directed to be adjusted in the share of defendant No.1.

7 As aforesaid, the original defendant Nos.1 and 4 challenged the said Judgment and Decree in Regular Civil Appeal No.382/2012 and after hearing both sides the learned First Appellate Court has dismissed the appeal. Hence, the present Second Appeal.

8 Heard learned Advocate Mr. G.S. Patil for the appellants and learned Advocate Mr. Anand Chawre for the respondent Nos.1 and 3.

9 It has been vehemently submitted on behalf of the appellants that both the Courts below have failed to consider, that the suit property was the self acquired property of defendant No.1. Further, when the plaintiffs had come with a case, that it was a joint family property, then two daughters of deceased Dagdu i.e. father of the plaintiff and defendant No.1, were not added as a party to the proceedings and therefore, the suit ought to have been dismissed for non joinder of necessary parties. The partition deed was not exhibited by the learned Trial Court. Further, the suit was also barred under Order 2 Rule 2 of the Code of Civil Procedure. It was not considered by both the Courts below, that plaintiff had not given any cogent reasons, as to why the suit property was only left out at the time of partition. Effect of previous partition was not considered, and therefore, substantial questions of law are arising in this case.

10 Per contra, the learned Advocate appearing for the respondent Nos.1 and 3 supported the reasons given by both the Courts below and it was contended that defendant No.1 has not produced and adduced proper evidence to show that the property was purchased from his separate income. When the amount of consideration was generated from the joint family income, then definitely plaintiff as well as his brothers had share in the suit property.

11 At the outset, it is to be noted that the plaintiff as well as defendant Nos.2 and 3 had come with a case that the suit property is the 'joint family property', which was purchased out of the joint family income. Though as per the contention of the defendant Nos.1 and 4, the suit was bad for non joinder of necessary parties, yet, when no issue to that effect was framed by the learned Trial Court, it was not got framed by filing an appropriate application when the suit was before the Trial Court. The contention was raised in the appeal memo, however, it is to be noted that there is no evidence adduced by the appellants to show that those daughters are the members of the joint family of plaintiff, defendant No.1, Devaji and Ganpati. Those daughters might have been married long back, during life time of their father and under such circumstance, they cannot be said to be the members of the joint family consisting of plaintiff and his brothers. Those

daughters were not necessary parties to the suit and since such defence ought to have been taken at the trial stage and it was not properly taken, now, it cannot be a part of substantial question of law. The appellant had every opportunity to get that issue framed and adjudicated by the same Court, which has not been done.

12 The perusal of the reasons given by both the Courts below would clarify, that though defendant No.1 examined himself, he has not adduced evidence to show that in the year 1967 when the property was purchased he had separate income. In fact, he had not included the said suit land in the suit previously filed. Evidence was not tried to be brought on record that prior to 1990 all the brothers had separate sources of income. Rather, it has been admitted that there was partition of the suit properties, which were situated at village Kolkanadi and those properties at Kolkanadi was partitioned by Dagdu amongst plaintiff and his brothers. Therefore, both the Courts have rightly held that till 1990 all the brothers were joint and when the suit property was purchased in the year 1967, the preponderance of probability show that it was purchased out of joint family income. Both the Courts have considered all the aspects involved in the matter. The evidence has been properly appreciated, so also, the law point involved. Under such circumstance, no substantial question of law contemplated under Section 100

of the Code of Civil Procedure is arising, requiring admission of the said matter. Hence, the Second Appeal is hereby disposed of as “**Not admitted**”. Pending Civil Application stands disposed of.

(Smt. Vibha Kankanwadi, J.)

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