

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

Second Appeal No. 0232 of 2016

District : Latur

Gurunath s/o. Budhappa Karande,
Age : 50 years,
Occupation : Agriculture,
R/o. Hadoli, Taluka Chakur,
District Latur.

.. Appellant
(Original
defendant)

versus

1. Gajanan s/o. Gurunath Karande,
Age 22 years,
Occupation : Agriculture.
2. Shardabai w/o. Gurunath Karande,
Age 45 years,
Occupation : Household.

Both R/o. Hadoli,
Taluka Chakur,
District Latur,
at present
R/o. Kamjawalga,
Taluka Mukhed,
Dist. Nanded.

.. Respondents
(Original
plaintiffs)

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*Mr. Chandrakant V. Thombre, Advocate, for
the appellant.*

*Mr. Anil S. Shivpuje, Advocate, for respondent
no.01 (caveator)[Absent].*

Respondent no.02 served (Absent).

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 27TH JUNE 2019

ORAL ORDER :

Heard learned Advocate appearing for the appellant.

02. Appellant is the original defendant who intends to challenge the concurrent judgment and decree passed in Regular Civil Appeal No. 144 of 2010, decided by learned District Judge-1, Latur, on 30th October 2015, wherein the judgment and decree passed in Regular Civil Suit No. 43 of 2004 (Old RCS No. 429 of 2000) decided by learned Civil Judge (Junior Division), Chakur, District Latur, dated 10-06-2010 was challenged. Present respondents had filed the said suit for partition and separate possession. The said suit was decreed and the appeal filed by the present appellant was dismissed. *[Parties are referred as per their nomenclature before the trial Court.]*

03. It is not in dispute, that original plaintiff no.02 and defendant are the husband and wife and plaintiff no.01 is their son.

04. Plaintiffs had come with a case, that there was a joint Hindu family of plaintiffs and defendant. Agricultural lands bearing Gut nos.29/1, 29/2 and 30/2 situated at village Hadoli,

Taluka Chakur, are joint Hindu family properties of the plaintiffs and defendant. Defendant has performed second marriage with one Vanmalabai at 11.00 a.m. on 12-12-1993. Thereafter, he has driven plaintiff no.02 out of the house prior to the Diwali festival of 1993 along with plaintiff no.01. Since then, plaintiffs are residing with the parents of plaintiff no.02 at Kamjalga, Taluka Mukhed, District Nanded. Thereafter, there were civil as well as criminal proceedings between plaintiff no.02 and defendant. Plaintiffs claimed their 2/3rd share from suit properties on 25-08-2000 which was refused by the defendant and, therefore, they filed suit.

05. Defendant filed written statement and denied that the suit properties are the joint Hindu family properties of plaintiff and himself. He has stated that he has purchased those properties from one Gangaram Apparao Karande from his separate income. It was also stated that Gut no.30/2 admeasuring 01 hectare is acquired by Government of Maharashtra for bunding. It is denied that he has performed second marriage and then has driven plaintiff no.02 out of the house.

06. Taking into consideration the rival contentions, issues came to be framed. Plaintiffs

have led oral as well as documentary evidence on record. Defendant has examined his power of attorney and one more witness.

07. It has been submitted on behalf of the appellant, that both the Courts below have not considered the evidence properly; so also, the law point is not considered. Defendant had come with a specific case, that the suit properties are his self acquired properties and in order to prove the same, he has examined his power of attorney as well as one more witness. Merely on the basis of 7/12 extract, learned trial Court had come to the conclusion that those properties are the joint Hindu family properties of plaintiffs and defendant. Further, the first appellate Court has not considered the judgment passed by this Court in Second Appeal No.695 of 2006 wherein it was held that the suit property is self acquired property of the defendant. When the properties were self acquired properties of the defendant, they were not partible between plaintiffs and defendant. Therefore, substantial question of law is arising in this matter.

08. Though respondent no.01 had filed caveat through Advocate, learned Advocate for him is absent. He was absent on the earlier occasions

also. Further, though respondent no.02 is served, she is absent.

09. The first and the foremost point that is required to be considered is that whether the present appellant has shown any substantial question of law, as contemplated under Section 100 of the Code of Civil Procedure, 1908, to take cognizance of the second appeal. Since showing substantial question of law is *sine qua non* for entertaining second appeal, the submissions are required to be considered from that angle. Here, apart from the oral evidence of plaintiff no.02 and her witness Khushal Targude and witness Vishwambhar Trimbakrao, she had produced 7/12 extracts and mutation entries in order to support her contention, that the suit properties are the joint Hindu family properties of plaintiffs and defendant. Defendant himself has not entered into witness box but then has examined his power of attorney who does not appear to be directly related. Further, as per his contention in written statement, he had purchased all the suit properties from one Gangaram Karande from his own separate income. He has not produced those sale deeds on record. The documentary evidence which has been produced by the plaintiff, show that the suit properties came to the share of defendant in

partition between defendant and his brother but then when plaintiff no.01's son is born then definitely the properties would change its nature. When the defendant has specifically contended that he had purchased those properties out of his separate income, then this fact was specifically within his knowledge and the burden to prove the same was on him under Section 106 of the Indian Evidence Act. In order to discharge the said burden or onus, he should have entered into witness box and ought to have given the details. There was no reason for the defendant to avoid the witness box. Under such circumstance, the inference drawn by both the Courts below is correct.

10. As regards the judgment in Second Appeal No. 695 of 2006 is concerned, which was produced before the first appellate Court, it has been rightly observed by the learned Judge, that the plaintiffs were not parties to R.C.S. No. 13 of 1994 which was filed by one Sau. Trivenabai for partition and separate possession. In the said second appeal, judgment and decree passed in R.C.S. No. 13 of 1994 and R.C.A. No. 97 of 2002 was under challenge. Therefore, it cannot be stated that those observations would be binding on the plaintiffs herein. When the defendant had failed to prove that the suit properties were his separate

or self acquired properties, then the plaintiffs had share in those properties, the suit has been rightly decreed and the appeal has been rightly dismissed by the Courts below. No substantial question of law is arising in this case.

11. In the light of above, the second appeal is disposed of as '**not admitted**'.

(Smt. Vibha Kankanwadi)
JUDGE

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