

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.391 OF 2017

1. Dangal @ Dagadu s/o Daga Koli (Dead)
Through Legal Heirs ;

1A) Chhababai w/o Dangal Koli,
Age 60 years, Occupation Household,

1B) Sanjay s/o Dangal Koli,
Age 38 years, Occupation Labour,

1C) Ravindra s/o Dangal Koli
(Dead) Through Legal Heirs ;

1Ci) Ujwala w/o Ravindra Koli,
Age 25 years, Occupation
Household,

1Cii) Neha d/o Ravindra Koli,
Age 05 years, occupation
Nil,

1Ciii) Nikita d/o Ravindra Koli,
Age 02 years, Occupation
Household,
Through Natural Guardian
Ujwala w/o Ravindra Koli.

All R/o Pilode, Tq. Amalner,
Dist. Jalgaon.

2. Mina d/o Lotan Koli,
Age 40 years, Occupation Household,
R/o Supreme Colony, Kusimba Road,
M.I.D.C., Jalgaon Tq.Dist.Jalgaon.

3. Kalpana d/o Subhash Suryawanshi,
Age 36 years, Occupation Household,
C/o. Subhash s/o Sitaram Suryawanshi,
R/o Building No.9, Room No.6, 272,
Dakshata Nagar, Jalgaon Tq. Dist.
Jalgaon.

4. Aruna d/o Ratan Baviskar,
Age 34 years, Occupation Household,
C/o. Ratilal Baviskar (Koli)
R/o. Khamkheda (Pai, Anade),
Tq. Shirpur Dist. Dhule. ...Appellants.
(Ori.Plff. & Appellants)

VERSUS

1. Devidas s/o Dagadu Sonawane,
Age 65 years, occupation Agriculture,
R/o Jaulake (Dindori) Tq.Dindori
Dist. Nasik.
2. Surekha w/o Amrut Bhamare,
Age 40 years, Occupation Business,
R/o Saraf Bazar, Suvidha Jewellers ,
Amalner Tq. Amalner Dist.Jalgaon.
3. Tukaram Dhondhu Patil,
Age 50 years, Occupation Agriculture,
R/o Pilo0de Tq. Amalner Dist.Jalgaon.
(Dismissed As Per Court's Order
Dated 17-10-2018).
4. Laxmibai w/o Dagadu Badgujar,
Age Major, Occupation Household,
R/o Pilode, Tq. Amalner Dist.
Jalgaon. ...Respondents.
(Resp.No.1 is ori.plff. &
Resp.No.2 to 4 are ori.
Defts. & Respdts.)

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Advocate for Appellants : Mr. P. B. Patil.
Advocate for Respondent No.1 : Mr. G. S. Rane.
Respondents No.2 to 4 served.

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CORAM : SMT.VIBHA KANKANWADI, J.
Date : 26-06-2019.

ORDER :

1. Present appeal has been filed by original defendants

challenging the concurrent Judgment and decree passed in Regular Civil Appeal No.09 of 2012, by learned District Judge -2, Amalner Dist. Jalgaon, dated 15-10-2016, arising out of Judgment and decree passed in Regular Civil Suit No.102 of 2001, passed by 2nd Jt. Civil Judge, Junior Division, Amalner Dist. Jalgaon, dated 03-01-2012, whereby the suit filed by the original plaintiff present respondent No.1 for partition and separate possession came to be partly decreed.

2. The relationship between the parties is not disputed. Original defendant No.1 and plaintiff are the real brothers. Plaintiff had filed the suit for partition of agricultural land bearing Gut No.268 admeasuring 1 H 1 R, southern side half portion of land Gut No.244 admeasuring 1 H 23 R and house properties bearing No.282, 315 and 316 situated at village Mauje Pilode Tq. Amalner Dist. Jalgaon. The suit was decreed holding that the plaintiff and original defendant No.1 Dungal are having half share each in the suit properties. It was directed to be partitioned and separate possession to be handed over the plaintiff. Further declaration was given that the transaction in respect of suit properties between original defendants No.1 and 2 to 4 is not binding on the share of plaintiff. This decree has been confirmed by the First Appellate Court.

3. The learned advocate appearing for the appellants submitted

that, both the Courts below have not considered the evidence properly and the law points have not been considered at all. Defendant No.1 Dungal's heirs, who had later on contested the suit, had come with a case that, there are still more three properties that Gut No.516 and Grampanchayat House No.283 of Mauje Pilode as well as land Gut No.244 out of which two were standing in the name of the defendant and one in the name of plaintiff. The learned Courts below have erred in holding that, Gut No.516 and Grampanchayat House No.283 of Mauje Pilode are the self acquired properties of the plaintiff whereas it has been held that Gut No.244 though it is standing in the name of defendant, is the joint family property. If there was a joint family in existence between plaintiff and Dungal then it ought to have been held that the income derived from the ancestral property was utilized for purchasing the so called self acquired properties. Those self acquired properties have not been brought into the hotch pot so as to partition it. Further both the Courts below have failed to consider that, the partition had already taken place between the parties, and therefore, there is no question of reopening of the same. Therefore substantial question of law are arising in this case.

4. Per contra, the learned advocate appearing for respondent No.1 supported the reasons given by both the Courts below.

5. At the outset it is pertinent to note that, there are concurrent findings in this case, and therefore, this Court would be slow in interfering with the said Judgment and decree. As per the law laid down by Hon'ble Supreme Court in catena of decisions, the jurisdiction of the High Court to entertain Second Appeal under Section 100 of Code of Civil Procedure, after the 1976 amendment, is confirmed only when the Second Appeal involves as a substantial question of law. The existence of 'a substantial question of law' is a *sine qua non* for the exercise of the jurisdiction under Section 100 of the Code of Civil Procedure.

6. A reliance can be placed on decision in *Ishwar Dass Jain (Dead Through LRS. Versus Sohan Lal (Dead) By LRS.*, reported in (2000) 1 Supreme Court Cases 434, in which it was laid down,

“Under Section 100 CPC, after the 1976 amendment, it is essential for the High Court to formulate a substantial question of law and it is not permissible to reverse the judgment of the first appellate court without doing so. There are two situations in which interference with findings of fact is permissible. The first one is when material or relevant evidence is not considered which, if considered, would have led to an opposite conclusion. The second situation in which interference with findings of fact is permissible is where a finding has been arrived at by the appellate court by placing reliance on inadmissible evidence which if it was omitted, an opposite conclusion was possible. In either of the above

situations, a substantial question of law can arise.”

Therefore, it is now required to be seen, whether any substantial question of law can be raised by the appellant taking into consideration the facts as well as evidence that has been adduced.

7. Therefore, taking into consideration the observations in the above said case and also on the decision in *Kondiba Dagadu Kadam Versus Savitkibai Sopan Gujar*, reported in (1999) 3 SCC 722, wherein it has been held that,

“In a second appeal under Section 100 of CPC, the High Court cannot substitute its own opinion for that of the First Appellate Court, unless it finds that the conclusions drawn by the lower Court were erroneous being :

- (i) Contrary to the mandatory provisions of the applicable law ;
OR
- (ii) Contrary to the law as pronounced by the Apex Court.
OR
- (iii) Based on inadmissible evidence or no evidence.

Further it is observed in the said case that, if First Appellate Court has exercised its discretion in a judicial manner, its decision cannot be recorded as suffering from an error either of law or of procedure requiring interference in second appeal. Therefore, it is now required to be seen as to whether the appellants have raised any such point which would allow this Court to frame substantial question of law.

8. When the plaintiff had come with a case that only two agricultural lands and three house properties described in paras No.1 and 2 of the plaint were ancestral properties, and the defendants had come with a case that there was already a partition thereby accepting the fact that originally those properties were the ancestral or joint Hindu family properties. The onus then shifted on the defendants to prove that, there was a partition in respect of suit properties. No cogent evidence has been led in that respect. Neither the specific date or approximate month and year or any documentary evidence supporting the fact of partition has been adduced. Under such circumstance both the Courts were justified in holding that the suit properties are the joint Hindu family properties which have not been yet partitioned. Merely because one of the property stood in the name of defendants, that does not mean that it is their self acquired property. If it would have been the self acquired property of the defendants, the defendants ought to have produce the sale deed or any other such document to show the source of income of the defendants to purchase the said land. It can be seen that, as regards the other two properties for which defence has been raised, Gut No.516 and Grampanchayat House No.283 are concerned, plaintiff has led evidence to show that they are the self acquired properties. He has stated that, he was in service in Khopali Paper Mill since 1967, thereafter he had joined Hindustan Aeronautic

Limited Company in 1971, and then he has retired in the year 2004. He has also examined P.W.2 Rakesh Suresh Kothawade working with Hindustan Aeronautic Limited Company, Nashik who had brought the office record of the plaintiff to prove the pay slips. Thus it can be said that, there was evidence led by the plaintiff to prove that he had independent source of income other than if at all there was from the joint family property to acquire properties. Therefore, both the Courts below have rightly held that, those two properties are the self acquired properties of plaintiff. It was absolutely not necessary for the plaintiff to bring those properties into the hotch pot. Admittedly there were only two shares in the property, and therefore, there is no question of calculation of share. Under such circumstance there is absolutely no scope to frame any substantial question of law. No interference is required in the Judgment and decree passed by both the Courts below. Under such circumstance the second appeal stands dismissed as not admitted.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.