

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

Second Appeal No. 0100 of 2019

District : Parbhani

1. Laxmibai wd/o. Ramrao Lode,
Age : 58 years,
Occupation : Agriculture.

2. Somitra w/o. Trimbak Bhalerao,
Age : 38 years,
Occupation : Agriculture.

3. Satwaji s/o. Trimbakrao Bhalerao,
Age : 28 years,
Occupation : Agriculture.

.. Appellants
(Original
defendants)

All 1 to 3 R/o. Village Tad-Limla,
Taluka & Dist. Parbhani.

versus

1. Chandrakalabai w/o. Haribhau
Kadam,
Age : 48 years,
Occupation : Labour,
R/o. Village - Tattu-Jalwa,
Taluka & Dist. Parbhani.

2. Sakhubai w/o. Dattarao Kadam,
Age : 49 years,
Occupation : Labour,
R/o. Village Tad-Limla,
Taluka & Dist. Parbhani.

.. Respondents
(Original
plaintiffs)

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Mr. V.P. Latange, Advocate, for the appellants.

*Mr. Vijay B. Langhe, Advocate, for respondents
no.01 and 02 (caveators).*

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 10TH APRIL 2019

ORAL ORDER :

01. Present appeal has been filed by the original defendants challenging the concurrent findings in Regular Civil Suit No. 02 of 2011 by the learned Civil Judge (Junior Division) [Court No.02], Parbhani, dated 14-03-2013 and in Regular Civil Appeal No. 47 of 2013 by the learned District Judge-1, Parbhani, dated 17-11-2018.

02. Present respondents had filed the suit for partition and separate possession in respect of three agricultural lands namely, Gut No. 118 admeasuring 40 R, Gut No.62 admeasuring 90 R and Gut No. 129 admeasuring 68 R situated at village Tadlimla, Taluka & District Parbhani. Plaintiffs have the real sisters. Defendant no.01 is their step-mother and defendant no.02 is the step-sister. Father of the plaintiffs namely, Ramrao Satwaji Lodhe died on 18-11-2000. Suit properties were belonging to Ramrao Lodhe. Ramrao Lodhe purchased Gut no.118 from one Datta Dange on 15-05-1992. Gut no.62 is in the name of defendant no.02 and it is stated that the suit properties are the joint family and self-acquired properties of their father. It is also contended that taking

disadvantage of the fact that the properties were mutated in the name of defendant, the plaintiffs have been dispossessed. Plaintiffs contend that they have 1/3rd share in the suit property. They had requested the defendants to effect partition on 01-01-2011. However, it was denied and, therefore, the suit for partition and separate possession with consequential relief of injunction was filed. (Parties referred as per their nomenclature before the trial Court).

03. The defendants have resisted their claim by filing their written statement, in which, relationship was admitted. However, it is denied that the suit properties are either ancestral properties or the joint family properties of the father of the plaintiffs. It has been contended that the defendant no.01 had sold Gut no.118 to defendant no.03 on 19-11-2008. Land Gut no.129 was sold by defendant no.01 to defendant no.02 by registered sale deed dated 03-12-2009. Defendants no.02 and 03 were having knowledge about ownership of the plaintiffs over the suit property. It is stated that the plaintiffs have not challenged the sale deed and, therefore, the suit is not tenable. It is also contended that the suit is also hit by the provisions of Bombay Prevention of Fragmentation & Consolidation of Holdings Act.

04. Taking into consideration rival pleadings, issues came to be framed. Parties have led oral as well as documentary evidence. Taking into consideration the evidence on record, learned trial Court has partly decreed the suit. It was held that the plaintiffs no.01 and 02 have 1/4th share each in the suit property i.e. Gut nos.118 and 129. They are entitled to get it separated. It was also stated that the defendants no.01 and 02 have 1/4th share along with the plaintiff. It appears that the suit in respect of partition of land Gut no.62 was dismissed though it is not specifically mentioned in the operative order.

05. The defendants, as aforesaid, approached the District Court in appeal and after hearing both sides, learned first appellate Court has dismissed the appeal. Hence, the defendants have filed this second appeal.

06. Heard learned Advocate Mr. V.P. Latange appearing for the appellants and learned Advocate Mr. V.R. Langhe appearing for respondents no.01 and 02 (caveators). Paper-book of the first appellate Court is made available.

07. It has been vehemently submitted on behalf

of the appellants, that the plaintiffs had come with a case that Gut nos.118 and 129 are the self-acquired ancestral properties of the father of the plaintiffs. In fact, as regards Gut no.118 is concerned, it was purchased by the father of the plaintiffs. However, as regards Gut no.129 is concerned, it has been purchased by the defendant no.01 out of her own income. Intentionally, the plaintiffs have not pleaded as to how land Gut no.129 was acquired. Both the Courts below have unnecessarily cast burden on defendant no.01 to prove that it is her self-acquired property. The burden ought to have been on the plaintiffs to prove the acquisition of land Gut no.129, then only they can have share in the same. Therefore, definitely, the substantial question of law is arising. The plaintiffs had also not come with a case that there was a Benami transaction in the name of defendant no.01. Putting wrong burden on defendant no.01 had led to the perversity requiring admission of the second appeal.

08. Per contra, learned Advocate appearing for the respondents - original plaintiffs supported the reasons given by both the Courts below. It was also submitted that since defendant no.01 had no independent source of income, obvious conclusion was that the suit property was purchased by the

father of the plaintiffs and, therefore, plaintiffs have been granted share in the same.

09. At the outset, it can be said that unless substantial question of law is shown, the second appeal cannot be admitted. As regards the factual aspects are concerned, relationship is admitted to the defendants. Now, much stress has been laid on the pleading in the plaint, in which, it is stated that the suit property was the self-acquired ancestral property of father of the plaintiffs. Here, the rule of law is required to be considered that the pleadings from the rural area are required to be liberally construed. What the plaintiffs intended to say is required to be seen. It appears that the plaintiffs intended to say that it is a self-acquired property of their father. But then they wanted to say that for them, it is ancestral property. Taking into consideration the pleadings in the plaint, we are also required to consider as to what contentions have been raised in the written statement while answering the specific pleadings in the plaint. The said statement in respect of property being self-acquired ancestral property of the father of the plaintiffs is made in para 07 of the plaint and while answering that paragraph in para 08 of the written statement, the defendants have only denied that the suit properties are the

ancestral properties and, therefore, the plaintiffs cannot claim 1/3rd share in the same. In para 04 of the written statement also, simply it is stated that neither Gut no.118 nor Gut no.129 are the ancestral properties. Perusal of the entire written statement would show that no specific pleading is taken up stating that Gut no.129 is the self-acquired property of the defendant no.01 i.e. purchase out of her own income.

10. Reading of Order VIII Rule 02 of the Code of Civil Procedure, 1908, which deal with "New facts must be specifically pleaded", it provides, *"The defendant must raise by his pleading all matters which show the suit not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the plaint, as, for instance, fraud, limitation, release, payment, performance, or facts showing illegality."* That means, if a special defence is to be raised, then the defendant must specifically lead it.

11. As aforesaid, the defendant no.01 has not come with a specific story that Gut no.129 was purchased out of her own income. Not doubt, it was for the plaintiff to elaborate as to how the land Gut no.129 is the self-acquired property of their

father. But then, when a specific defence is intended to be raised by defendant no.01, there ought to have been specific pleading to that effect and mere denial, that too, of a statement that the properties are ancestral, is not sufficient. In other words, there is no specific denial of the fact by the defendants no.01 and 02, that Gut no.129 is the self-acquired property of the father of the plaintiffs. Merely because the sale deed stands in the name of defendant no.01, she will not be the owner of the property excluding the husband who was definitely residing with her at that time. Further, it cannot be said that the transaction would be a Benami transaction because the relationship between Ramrao and defendant no.01 would be husband and wife.

12. It was tried to be submitted on behalf of the appellants, that the learned trial Court went beyond the pleadings of the plaintiffs in holding that the father of the plaintiffs might have purchased Gut no.129 out of his income in the name of defendant no.01. It is to be noted that when except the bare words of the defendant no.01, without any evidence, as to how much amount she was getting and since when she was earning, the inference that has been drawn by the learned trial Court appears to be justified. As regards, since

when the defendant no.01 was working and what income she was getting, was definitely within her own knowledge and, therefore, she ought to have pleaded and proved the same. Taking into consideration this aspect, both the Courts below were justified in coming to the conclusion that Gut nos.118 and 129 were the self-acquired properties of Ramrao and, therefore, the calculation of share is also proper. No substantial question of law is arising.

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

(Smt. Vibha Kankanwadi)
JUDGE

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