

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

**915 SECOND APPEAL NO.86 OF 2021
WITH
CIVIL APPLICATION NO.2191 OF 2021**

**KALAWATI PANDURANG KOKATE AND OTHERS
VERSUS
RUKMIN BHIMA GAIKWAD AND ANOTHER**

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Mr. A.S. More, Advocate for appellants
Mr. V.D. Salunke, Advocate for the respondent No.1

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**CORAM : SMT. VIBHA KANKANWADI, J.
DATE : 22nd OCTOBER, 2021**

ORDER :

1 Present appeal has been filed by the original defendant Nos.3 to 6 to challenge the Judgment and Decree passed by the First Appellate Court.

2 Present respondent No.1 is the original plaintiff, who had filed Regular Civil Suit No.284 before Civil Judge Junior Division, Paranda, Dist. Osmanabad for partition and separate possession. It came to be dismissed on 19.12.2009. Original plaintiff preferred Regular Civil Appeal No.41/2017, which was allowed by learned Adhoc District judge-1, Bhoom, Dist.

Osmanabad on 21.01.2020. Hence, this Second Appeal.

3 Heard learned Advocate Mr. A.S. More for appellants and learned Advocate Mr. V.D. Salunke for the respondent No.1.

4 What is emerging from the pleadings is that the plaintiff is the daughter of defendant Nos.1 and 2, whereas the defendant Nos.4, 5 and 6 are the sons and daughter respectively of defendant Nos.1 and 3. In other words, the defendant No.1 is stated to have two wives i.e. defendant No.2 and defendant No.3. According to the pleadings of the plaintiff herself, the agricultural lands standing in the name of defendant No.1 at Paranda were the joint family properties of plaintiff and defendants, as is taken by the Trial Court as well as First Appellate Court, however, if the pleading is taken, which is in vernacular, it says, “ वरील दावा मिळकती या वादी व प्रतिवादी कं.1, 4 ते 6 च्या वडिलार्जित हिंदू एकत्र कुटुंबाच्या असून ”. Thus, as per the pleadings they are the ancestral Joint Hindu Family properties, which is in fact, a wrong concept under the Hindu Law. They can be either ancestral properties or the Joint Hindu Family properties. There is difference between these two properties.

5 It is also coming on record that there was an earlier suit between the defendants *inter se*, that is, Regular Civil Suit No.102/2005, to which she was not party, but the said suit was disposed of by compromise.

6 With the above said pleadings when the plaintiff prayed for separation of her share, the suit went on. It was resisted by defendants by filing written statement, who had denied that the suit properties are ancestral, Joint Family properties and the defendant No.1 is Karta. They had pleaded that the suit land Sy.No.87/2B area admeasuirng 03 H 70 R and Sy.No.86/B admeasuring 01 H 39 R were purchased by defendant No.1 from Keru Kshirsagar and, therefore, those properties are his self acquired properties. There was partition, in view of the compromise decree, in Regular Civil Suit No.102/2005. Plaintiff had knowledge about the said proceedings and even her mother i.e. defendant No.2 was party to the same. Whatever was allotted to the mother was taken by her jointly for herself and the plaintiff.

7 Learned Advocate for the appellants submitted that the Trial Court held that the plaintiff and the defendants are the members of Joint Family and it was held that the suit lands are not co-parcenary joint family properties. It was held that the lands are self acquired properties of the defendant No.1 and it was held that the plaintiff is not entitled to the share in the property, in view of compromise decree. Per contra, the First Appellate Court held that the suit properties are the joint family properties of plaintiff and defendant No.1. It was in converse held that the suit properties are not

the self acquired properties of the defendant No.1. There was no partition between the defendants *inter se* and the decree is not binding on the plaintiff. It was then held that she has 6/15th share. It was submitted that the First Appellate Court went wrong in appreciating the evidence and only on the basis of the 7/12 extracts and even from the alleged admission in Regular Civil Suit No.102/2005 that the defendants were stating that the suit properties are the Joint Hindu Family properties, a wrong decision has been given. Neither the plaintiff's mother nor her father had ever raised the contention before the competent Court dealing with Regular Civil Suit No.102/2005 that plaintiff was necessary party to the suit. The apportionment of the share is also wrong and, therefore, the Second Appeal deserves to be admitted.

8 Per contra, the learned Advocate appearing for the respondent No.1-plaintiff submitted that no substantial question of law is arising in this case, in view of the fact that the appreciation of the evidence, which was made wrongly and illegally by the Trial Court, was corrected by the First Appellate Court, it need not be interfered with. Reliance has been placed on **Kirpa Ram (Deceased) Through Legal Representatives and Others vs. Surendra Deo Gaur and Others, 2020 SCC OnLine SC 935** to submit that if this Court comes to the conclusion that no substantial question of law is

arising, then such Second Appeal need not be admitted and can be disposed of at the admission stage itself. He further submitted that the detailed reasons given by the First Appellate Court to come to conclusion that how the property cannot be termed as “self acquired” is elaborate enough. Though the land appeared to have been purchased by defendant No.1 from Dhondiba, who was the brother of the defendant No.1, it was not brought on record that defendant Nos.4 to 6 had contributed to the amount of consideration. In fact, the present defendant Nos.4 to 6 were not even born in 1970 and 1971 when the properties were purchased. Therefore, the appeal deserves to be dismissed.

9 At the outset, it can be now said that though the defendant No.1 was party to the suit, it can be seen that he expired during the pendency of the appeal and, therefore, it is also now required to be seen, as to whether the First Appellate Court has taken a proper approach. It is to be noted that the pleadings, especially the plaint, written statement and the evidence fails to give the year when defendant No.1 got married to defendant Nos.2 and 3. Though it is accepted that defendant No.2 is first wife and the defendant No.3 is second wife, there ought to have been an endeavour to bring on record when they got married to defendant No.1. But, if we consider the age of defendant No.3 as ‘45’ in the year 2005, she would have been born

somewhere around 1960 and, therefore, even if we consider that she would have married at the age of 18, definitely, the said second marriage would not have been legal. The evidence on record does not spell that there was legal divorce between defendant Nos.1 and 2, prior to the marriage between defendant Nos.1 and 3. What appears, therefore, from this kind of pleading is that the defendant Nos.4 to 6 would become illegitimate children. The question then arise, as to whether they could have had any right in the properties, which the First Appellate Court is saying that they are ancestral or joint family properties. Certainly, the first fact is required to be considered, as to whether the suit property was ancestral or joint family property or it was self acquired. The second point that requires to be considered that even after considering the relationship the First Appellate Court has allotted $1/15^{\text{th}}$ share each to defendant Nos.4 to 6, that is, in all $3/15^{\text{th}}$ share in common. Whereas, the plaintiff and defendant No.2 are held to have $6/15^{\text{th}}$ share each in the suit properties. In **Revansiddappa and another vs. Mallikarjun and others, 2011 (11) SCC 1**, reference has been made to the Larger Bench of the Hon'ble Supreme Court on the point of right to property for children born out of void marriage. If defendant Nos.4 to 6 were not at all entitled to get any share from the suit property, then whether by virtue of that compromise decree any right could have been said to be created in their favour, is also a question involved and, therefore, case is made out to admit the appeal, which

may not be strictly in view of the points raised by the appellants, but it is in the interest of the plaintiff also to admit it and wait decision till the reference is decided by the Hon'ble Supreme Court. The chances of decision in favour of the legitimate children also cannot be ruled out. Any way, the First Appellate Court has held that the plaintiff is having 6/15th share. Another fact, that is, also required to be considered that what would be the effect of death of defendant No.1 during the pendency of the appeal as his share in the property is also required to be distributed and whether the calculation made by the First Appellate Court that the defendant Nos.4 to 6 each are having 1/15th share is also required to be re-considered. Hence, the Second Appeal deserves admission.

10 Second Appeal stands admitted. Following are the substantial questions of law.

1 Whether the suit properties were the self acquired properties of defendant No.1 ?

2 Whether defendant Nos.4 to 6 have right and share in the suit properties, in view of the fact that they are the children of the second wife of deceased Pandurang ?

3 What is the effect of decree in Regular Civil Suit No.102/2005 on the parties ?

4 What are the shares of the parties in the suit properties ?

11 Issue notice to the respondents. Learned Advocate Mr. V.D. Salunke waives notice for respondent No.1. Notice of respondent No.3 is made returnable on 18.01.2022.

12 Call Record and Proceedings.

13 Civil Application No.2191 of 2021 has been filed for stay to the execution of the impugned decree. By order dated 23.02.2021, this Court had granted interim order, measurement was directed to be allowed to go on, however, process of actual handing over of possession in view of the decree was stayed. It deserves to be continued till the final hearing and disposal of the case. Learned Advocate appearing for respondent No.1 prayed that the right of the plaintiff to the extent of her share may be protected and the other property may be kept intact. In other words, he prayed for demarcation of the 6/15th share and keeping the rest of the property as it is. In view of the fact that certainly she is going to get share and also the fact that if at all the reference is answered in favour of the plaintiff, then her share would get increase. It is to be noted that we will have to consider the other angle in the matter also and if the reference before the Supreme Court goes against the plaintiff, then the question will arise, as to whether being sons and daughter

of original defendant No.1, whether the defendant Nos.4 to 6 would get equal share in the suit properties. If they were to get equal share, then the share of the plaintiff would reduce and, therefore, it is now necessary to keep the position as it is, the measurement can go on, however, actual handing over of possession needs to be stayed. Accordingly, it is stayed till the final decision of the Second Appeal. Civil Application accordingly stands disposed of.

(Smt. Vibha Kankanwadi, J.)

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