

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

**SECOND APPEAL NO.338 OF 2021**  
**WITH CA/8505/2021 IN SA/338/2021**

**SAU. SAROJA W/O SURESH GURME AND OTHERS**  
**VERSUS**  
**SAU. JANAKABAI W/O BABURAO PICHAR AND OTHERS**

...  
Mr. V. D. Gunale, Advocate for appellants.

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**CORAM : SMT. VIBHA KANKANWADI, J.**

**DATE : 20.10.2021**

**ORDER :-**

. Present appeal has been filed by original defendant Nos.5 to 7 to challenge the concurrent judgment and decree of the Courts below. Present respondent Nos.1 and 2 had filed Regular Civil Suit No.166 of 2009 before learned Civil Judge Senior Division, Nilanga, Dist. Latur for partition and separate possession. The said suit came to be decreed on 15.10.2013. It was held that the plaintiffs have 1/6th share in the suit property, whereas the defendants were having 4/6<sup>th</sup> share in the suit property. Precepts were directed to be sent for effecting partition. The present appellants then challenged the said judgment and decree by filing Regular Civil Appeal No.129 of 2013. It was dismissed by learned District Judge-1, Nilanga, Dist. Latur on 17.02.2020. Hence, this second

appeal.

2. Heard learned Advocate Mr. V. D. Gunale for the appellants.

3. In view of *Ashok Rangnath Magar Vs. Shrikant Govindrao Sangvikar*, [2015 Mh.L.J. Online (S.C.) 140 :: (2015) 16 SCC 763], we are not required to wait till the respondents are served in order to see whether second appeal is giving rise to any substantial questions of law. If the appellants are successful in pointing out substantial question of law as contemplated under Section 100 of the Code of Civil Procedure, then only the second appeal is liable to be admitted.

4. It can be seen from the genealogy that has been given in the appeal memo as well as in the judgment of the Lower Court that the relationship between the parties is admitted. Plaintiffs are the daughters of one Govind Gopal Gurme. Deceased Prakash, who is the predecessor of the defendants, was the brother of plaintiffs. It is also admitted that the suit properties, which are situated in village Ganeshwadi and Kambalga are the ancestral properties of the plaintiffs and defendants. Taking into consideration the rival contentions, though at one place, it was held that the plaintiffs have failed to prove that Gut No.168 has been purchased out of the income of sell of ancestral property, yet taking into consideration the cross-examination of the defendant's witness, it

has been held that defendants have failed to prove that, that property i.e. Gut No.168 is the self acquired property of deceased Prakash. In the year 1982 i.e. on 23.03.1982, land Gut No.168 was purchased in the name of defendant No.1, who was admittedly minor. His mother has been shown to be the guardian. Further, it has been held that the defendants have failed to prove that these properties have been purchased out of the money given by maternal grandfather of defendant No.1. These findings cannot be disputed as they are the proper assessments of the facts. Thus, when all the properties have been shown to be the joint family properties, definitely, the plaintiffs will have share in the same.

5. The defendants then come with the case that the plaintiffs have relinquished their share in the suit lands, however, both the Courts below have correctly held that the defendants have failed to prove it because no positive evidence has been adduced. Mere statement will not be sufficient. Further, it also appears that one Regular Civil Suit No.375 of 2009 was decreed in favour of defendants. In fact, it was a compromise decree. That suit was filed by defendant Nos.5 to 7 against defendant No.1. Admittedly, plaintiffs were not party to the said suit. Under such circumstance, it cannot be said that the said compromise decree is binding on the plaintiffs. Same is the case with another suit

i.e. Regular Civil Suit No.116 of 2010, which was filed by defendant No.4 against rest of the defendants before learned Civil Judge Junior Division, Renapur, Dist. Latur. It was also a compromise decree and in the said suit, defendant No.4 was declared to be the owner of land Gut No.168. Again, when plaintiffs were not party to that suit also, those decrees are not binding on the plaintiffs.

6. The plaintiffs, thus, were entitled to get share in the suit properties. Now, they have not come with any appeal and, therefore, the allocation of share granted by the Courts below will have to be taken into consideration. No substantial question of law as contemplated under Section 100 of the Code of Civil Procedure is arising in this case requiring admission of the second appeal and, therefore, second appeal stands dismissed at the threshold.

7. In view of dismissal of second appeal, Civil Application No.8505 of 2021 stands disposed of.

**[SMT. VIBHA KANKANWADI, J.]**

scm