

SPChauhan

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

SECOND APPEAL NO. 487 OF 2022
WITH
CIVIL APPLICATION NO. 10751 OF 2022

Pandit Laxman Gaikwad and another ... Appellants

Versus

Shivaji Laxman Gaikwad and others ... Respondents

....
Mr. P.G. Tambde – Advocate for Appellants

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CORAM : GAURI GODSE, J.
DATE : 01st February, 2023

PER COURT :

1. This appeal is preferred by defendant nos. 3 and 4 for challenging the concurrent decree for partition and separate possession.
2. By the impugned judgment and decree dated 19th June, 2018, passed by the learned Joint Civil Judge Junior Division, Bhokardan, Regular Civil Suit No. 22 of 2014 was decreed and it is declared that the plaintiff nos. 1 to 3 (respondent nos. 1 to 3) have 1/6th share each and the plaintiff nos. 5 to 7 (respondent nos. 5 to 7) have 1/6th share collectively in the suit property and the defendant nos. 3 and 4 (appellants) have

1/6th share in the suit property. The said decree is confirmed by judgment and decree dated 20th October, 2021, passed by the learned District Judge-2, Jalna, in Regular Civil Appeal No. 121 of 2018. The said Suit was filed by respondent nos. 1 to 7, contending that the suit property is ancestral and joint family property and they have share in it. So far as the status of the suit property is concerned, the trial court held that it was not proved that the suit property was an ancestral and joint family property. Trial court held that the suit property was self acquired property of Laxman i.e. defendant no. 1. Defendant nos. 1 and 2 had admitted the suit claim. Plaintiff nos. 1 to 3 are brothers. Deceased Suman was their sister. Plaintiff nos. 4 is their sister. Plaintiff no. 4 is husband of Suman and plaintiff nos. 5 to 7 are children of Suman and plaintiff no. 4. Defendant no. 1 was father and defendant no. 2 (respondent no. 4) is mother of plaintiff nos. 1 to 3 and deceased Suman. Defendant nos. 3 and 4 are children of defendant no. 1 and his first wife deceased Sugandhabai.

3. Laxman (defendant no. 1) died during the pendency of the suit. Hence, the trial court held that though, the suit property is self acquired property, after demise of defendant no. 1/Laxman, the plaintiff nos. 1 to 3, deceased Suman as well as defendant nos.

3 and 4 being children of Laxman, will have equal share in the suit property. Hence, decreed the suit by granting share to the plaintiffs as well as to the appellants.

4. The trial court also dealt with the contention of the appellants that as there was already a partition effected and that the suit property was given to their share, the plaintiffs were not entitled to claim any share. The said contention of the appellants was negatived by the trial court and the same was confirmed by the first appellate court. The decree of partition and separate possession passed by the trial court was challenged by the defendant nos. 3 and 4. The first appellate court has also examined the contentions of the appellants regarding prior partition. However, the first appellate court has also confirmed the finding of the trial court that suit property was self acquired property of Laxman. Since Laxman expired during the pendency of suit, the succession opened at that point of time and hence, the parties were entitled for share in the suit property being heirs and legal representatives of deceased Laxman. Hence, the first appellate court confirmed the decree of partition and separate possession passed by the trial court.

5. Learned counsel for the appellants submitted that the finding recorded by the trial court and confirmed by the appellate court that the suit property was self acquired property of Laxman needs reconsideration as the suit property was a tenanted property and the certificate under the Tenancy Act was allotted in the name of father of Laxman i.e. Ganpat and hence, the case requires reconsideration by allowing the appellants to place on record the certificate, which was issued in the name of Ganpat. There was neither such case made out in the written statement nor there was any application filed in the first appeal for leading any additional evidence. Such a contention cannot be raised for the first time in the Second Appeal. There was never any application filed for amending pleadings.
6. Both the courts have after examining the pleadings as well as the evidence on record have recorded a finding that the suit property is self acquired property of Laxman. The first appellate court has recorded a finding that there was no dispute with respect to the fact that the property was self acquired property of deceased Laxman. Hence, the request made by the learned counsel for the appellants to consider the copy of some certificate at this stage cannot be considered.

7. The submissions made on behalf of the learned counsel for the appellants are purely on facts and the same do not raise any question of law. After the parties have gone through the entire trial on the basis of the pleadings of the parties some new issue of fact cannot be raised on the basis of oral submissions. There is a finding of fact recorded on appreciation of evidence that the suit property is a self acquired property of Laxman. I do not find that there is any perversity and / or illegality in the reasoning given by both the courts. The second appeal do not involve any substantial question of law.
8. For the reasons stated above, the Second Appeal is dismissed for want of any substantial questions of law. In view of the dismissal of Second Appeal, the Civil Application is dismissed as infructuous.

[GAURI GODSE]
JUDGE