



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

**SECOND APPEAL NO.730 OF 2022
WITH
CIVIL APPLICATION NO.1000 OF 2021**

1. Shantabai W/O Vinayak Chalak,
Age : 38 years, Occu.: Agriculture,
R/o.: Takalgaon, Tq. Georai,
District Beed

2. Kantabai w/o Damodhar Dhupe,
Age : 34 years, Occu.: Agriculture,
R/o.: Dawargaon, Tq. Ambad,
District : Jalna

.... **APPELLANTS**
(Original Plaintiffs)

VERSUS

1. Sarangdhar s/o Masu Gire,
Age : 60 years, Occu.: Agriculture,
R/o.: Mudhupuri, Tq. Georai,
District : Beed

....(Original Defendant No.1)

2. Ashok s/o Sarangdhar Gire,
Age : 35 years, Occu.: Agriculture,
R/o.: Mudhupuri, Tq. Georai,
District Beed

....(Original Defendant No.2)
(Appellant in RCA No.88/2018)

.... **RESPONDENTS**

.....

Mr. Kishor R. Doke, Advocate for the Appellants.

Mr. E. S. Murge, Advocate for Respondent No.1

Mr. S. S. Jangada h/f Mr. S. S. Deshmukh, Advocate for
Respondent No.2

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CORAM : SANDIPKUMAR C. MORE, J.

DATED : 06/09/2024.

ORDER :

1. With consent of the parties, heard finally at admission stage.
2. The present appeal is directed against the judgment and decree dated 28/08/2019 passed by the learned District Judge, Beed i.e. the learned first appellate court in Regular Civil Appeal No.88 of 2018 under which the learned first appellate court has modified the judgment and decree dated 26/09/2018 passed by the learned Joint Civil Judge (Junior Division), Georai i.e. the learned trial court in Regular Civil Suit No.47 of 2015 by deleting one of the suit properties being not falling under the category of joint family property.

3. Brief facts are as under :

The appellants being the sisters of each other, filed Regular Civil Suit No.47 of 2015 for partition among the suit properties namely 19 R land out of Gat No.50, 66 R land out of Gat No.54 and 83 R land out of Gat No.56, situated at Mudhupuri, Tq. Georai, District Beed, against their father and real brother respectively. They contended that out of the 83 R land of Gat No.56, 42 R land

was purchased by defendant No.1 from the income of joint Hindu family in the name of defendant No.2 – brother and hence it was also a part of joint Hindu family property alongwith other suit properties. They further contended that the defendants on repeatedly asking, denied them share in the aforesaid suit properties and therefore, ultimately they filed the suit for partition.

Defendant No.1-father vide his written statement Exhibit-14, admitted the contents of the plaint and stated that he would not have any objection if the suit is decreed. However, defendant No.2 brother contested the suit by filing written statement Exhibit-27. Though he admitted relationship between the parties and nature of the suit properties except property admeasuring 44 R land out of Gat No.56 and right of water over a well situated in Gat No.54, but claimed that the plaintiffs had relinquished their share in the suit properties as his father had borne expenses of their marriages. He contended that he purchased 44 R land of Gat No.56 from his separate income and therefore, that part of the suit property is not available for partition.

The learned trial court by conducting the trial and framing necessary issues, decreed the suit of the appellants / plaintiffs and declared that the appellants and respondents are having 1/4th share each in the suit properties. Respondent No.2 i.e. original

defendant No.2 had preferred Regular Civil Appeal No.88 of 2018 before the learned first appellate court, wherein the decree passed by the learned trial court, was modified and the land Gat No.56 to the extent of 83 R area was excluded from partition. Hence, this appeal.

4. On perusal of the judgment of the learned trial court it appears that there is no dispute about relationship between the parties and nature of the suit properties excluding the area of 42 R out of Gat No.56. As such, the only substantial question of law involved in this appeal is that “Whether the learned first appellate court has committed an error by excluding the area of Gat No.56 from the partition”?

5. The learned counsel for the appellants pointed out that the learned trial court has observed that respondent No.2 – brother himself had admitted in Regular Civil Suit No.337 of 2008 that all the suit properties involved in this suit, are belonging to joint Hindu family. It is to be noted that the said suit was filed by respondent No.2-brother against his parents namely present respondent No.1 and mother- Kesarbai. Moreover, the record shows that defendant No.2-brother though contended that part of

Gat No.56 to the extent of 44 R area is his self-acquired property, but he miserably failed to prove his separate source of income for purchasing the said area. As such, on such failure it cannot be held that defendant No.2-brother had in fact purchased the said area of Gat No.56 from his own separate income. On the contrary, by his admission in his earlier suit for partition against his parents he is now estopped to contend that part of Gat No.56 is his separate property.

6. The learned first appellate court by ignoring the said fact, has wrongly excluded the total 83 R area out of Gat No.56 from partition despite having come to the conclusion that 44 R land out of Gat No.56 was purchased by defendant No.2-brother out of his separate income.

7. It is significant to note that the learned counsel for the appellants / plaintiffs has relied on following judgments.

A) *Adivappa and others vs. Bhimappa and another, AIR 2017 SC 4465;*

B) *Mudigowda Gowdappa Sankh and others vs. Ramchandra Revgowda Sankh (dead) by his legal representatives and another, AIR 1969 SC 1076 and*

C) *Jagdish Singh vs. Natthu Singh, AIR 1992 SC 1604.*

8. Sum and substance of first two judgments is that the burden lies upon member of joint family who after admitting existence of joint joint family asserts that some properties out of entire lot of ancestral properties are his self-acquired property and that it is only after the possession of an adequate nucleus is shown that the onus shifts on the person who claims the property as self-acquired property without any aid from the family estate. In the instant case, the nature of the suit properties being an ancestral properties is already admitted by respondent No.2- brother except the area of 44 R out Gat No.56. Though it is claimed as separate property of respondent No.2-brother, but there is no iota of evidence to that effect. On the contrary, he himself had admitted in his own suit that the area of Gat No.56 which is a part of the suit properties is a joint family property. Though the sale deed of the said portion is in his name, but he could not establish his independent source of income and as such he could not discharge the burden. Therefore, the observation in the case of ***Kaushik Premkumar Mishra vs. Kanji Ravaria @ Kanji and another, 2024(3) R.C.R.(Civil) 582*** relied upon by the learned counsel for respondent No.2, that a registered document carries with its presumption of correctness

unless proved otherwise as per Section 114 of the Evidence Act, is of no help for respondent No.2. In second judgment in the case of ***Sita Ram Bhau Patil vs. Ramchandra Nago Patil (dead) by LRs. and others, 1977 SCC 1712*** relied upon by the learned counsel for respondent No.2-brother that admission to be used against party who has made, it can be done only after giving an opportunity to the said party to clear up the point of ambiguity or dispute. However, no such opportunity is required here because respondent No.2-brother in proceeding filed by him, had admitted before the court that Gat No.56 to the extent of 83 R land was joint family property. Hence, this judgment also is of no help to the respondent No.2-brother.

9. Thus, considering all these aspects it is evident that the learned first appellate court has definitely erred in excluding the area of Gat No.56 out of the suit properties from partition which needs to be set aside. Therefore, the substantial question of law is thus, answered. Resultantly, second appeal is hereby allowed and the judgment and decree dated 28/08/2019 passed by the learned first appellate court in Regular Civil Appeal No.88 of 2018 is hereby set aside and the judgment and decree dated 26/09/2018 passed

by the learned trial court in Regular Civil Suit No.47 of 2015 is hereby restored and confirmed.

10. The second appeal alongwith Civil Application No.1000 of 2021 stand disposed of accordingly.

(SANDIPKUMAR C. MORE, J.)

VS Maind/-