IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.701 OF 2012

Mr. Shivaji Vishnu Kate .... Appellant

Vs.

Mr. Murlidhar Sambhaji Kate & Ors. .... Respondents

Mr. J.S. Kapre, Advocate for the Appellant.
Mr. Ravi Shinde, Advocate for Respondents no.1, 2A, 3 and 4.

Coram : Smt. R.P. SondurBaldota, J.
Date : 30th January, 2015.

P.C.

1 The appellant, who is original defendant no.1 has approached this court against concurrent findings of the courts below for decreeing the suit for partition. The suit properties include agricultural land at Gat no.386, that stands in the name of the appellant. He has resisted partition only in respect of that property.

2 The plaintiff to the suit had alleged that Gat No.386 was purchased in the name of the appellant by selling ancestral land at Survey No.14/1 and from income of the joint family. The appellant admits sale of Survey no.14/1 but disputes that the consideration

received was used for purchase of Gat No.386. According to him, the land was purchased with the funds made available to him by his father-in-law, Laxman Shinde. It is alleged that the father-in-law, in fact, wanted to purchase the land in the name of the appellant's wife, but the wife insisted that it be purchased in the name of the appellant. Original defendants no.2 to 6 also admitted the joint nature of all the properties except gat no. 386. According to them, after sale of the joint family property at survey No.14/1 in the year 1970, the sale-proceeds had been distributed amongst the family members. The plaint alleged certain unauthorised constructions by these defendants, which was denied by them. These defendants, however, did not challenge the decree of the partition. The challenge was only by the appellant herein.

3 The consideration for purchase of the land at Gat No.386 as mentioned in the sale-deed is of Rs.20,000/-. It is the evidence of the plaintiff that the property at survey No.14/1 was sold by Sambhaji, their predecessor in the year 1969 for Rs.16,000/-, which amount was used towards part consideration and the balance amount of Rs.4,000/- was paid by their predecessor, out of loan taken by him for digging a well in the joint property. Though the agreement of sale had been executed in the year 1969, the sale-deed could be executed only on 30th November, 1973, after receiving permission of the concerned authority for sale of the property.

4 The recital of the sale-deed substantiates the claim of the plaintiffs. It states that part of the sale consideration of Rs.16,000/- was paid to vendors in the year 1969 and the balance of Rs.4,000/- was paid at the time execution of sale-deed on 30^{th} November, 1973. Sambhaji had obtained loan of Rs.7,000/- from the Land Development Bank, Vadgaon Maval for construction of well by mortgaging S.No. 150/2 admeasuring 7A 8½ gunthas and two instalments, each of Rs.3500/- had been received by him on 30/4/1970 and 24/2/1971 i.e. prior to the execution of sale deed of the suit land in the year 1973.

5 Though, it is the claim of the appellant and other defendants that the sale-proceeds of survey No.14/1 had been distributed amongst the co-sharers, there is no evidence produced in support of the claim. As regards the payment of price of the land at Gat No.386, the evidence of the appellant is that it was paid by his father-in-law, Laxman Shinde. The appellant has examined his brother-in-law (DW-4) in support of his claim that the father-in-law had provided the amount of consideration to him. DW-4 deposed that his father provided Rs.13,500/- to the appellant for purchasing the suit property. Thus, the corroboration of deposition of the appellant by DW-4 as regards the payment of consideration for the land at Gat No.386 is only to the extent of Rs.13,500/-. In that case, there ought to have been evidence as regards the source for the remaining amount of Rs.6,500/- paid to the vendors. The appellant had produced the documents at Exhibit 160 as the evidence of the payment from his

father-in-law. Exhibit 160 mentions that the father-in-law had arranged for a sum of Rs.13,500/- out of : (i) the retirement benefits from Paisa Fund Glass Factory, (ii) by sale of land and (iii) by sale of ornaments in the house. This would mean that the financial position of the father-in-law was not at all sound. Undisputedly, he was working as a mere labourer in the glass factory. In the circumstances, it has been rightly appreciated by the trial court that no prudent man would believe that a labourer who had retired from service would handover not only the entire retirement benefits to his son-in-law but also sell his land and gold ornaments for purchase of property for the daughter. In any case, the amount of Rs.13,500/- was not sufficient to purchase the land at gat No.386. On this evidence, the trial court found that the money for purchase of the property at gat No.386 had in fact come from sale of joint family property and from the amount of loan taken by Sambhaji for beneficial enjoyment of the joint family property. The finding drawn is completely supported by the evidence on record. The lower appellate court has confirmed the finding.

6 Mr. Kapre, the learned advocate for the appellant submits that it was necessary for the original plaintiffs to bring sufficient evidence before the court of existence of nucleus for purchase of the property at gat No.385. In the absence of the evidence for establishing availability of nucleus or income from the joint family property, the land at Gat no.386 could not have been held to be joint family property. Mr. Kapre relies upon decision of the Apex Court in D.S.

Lakshmaiah and another vs. L. Balasubramanyam and another, reported in A.I.R. 2003, Supreme Court, page 3800 (1), wherein the Apex Court has held that there is no presumption of a property being joint family property only on account of existence of a joint Hindu family. The one who asserts has to prove that the property is a joint family property. If, however, the person so asserting proves that there was nucleus with which the joint family property could be acquired, there would be presumption of the property being joint and the onus would shift on the person who claims it to be self-acquired property to prove that he purchased the property with his own funds and not out of joint family nucleus that was available. Mr. Kapre submits that it is not even averred by the plaintiffs that there was income available from the joint family properties forming nucleus.

7 The admitted fact of sale of the joint family property at survey no.14/1 and absence of evidence to establish that the proceeds from the sale of that property had been distributed amongst the family members coupled with evidence as regards loan taken by Sambhaji from Land Development Bank established the existence of nucleus. As a consequence, the land at Gat no.386 has to be presumed to be the joint family property and the onus shifted upon the appellant to establish that it was his self-acquired property. As already seen above, the appellant has failed to establish that he has purchased the suit property with his independent means. In the circumstances, there is no substance in the challenge to the orders of the courts below. There

is also no substantial question of law arising for consideration of this court. The Second Appeal is dismissed.

(Smt. R.P. SondurBaldota, J.)