

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 755 OF 2011

1. Sambhaji Shankar Nikam and Ors.Appellants
: V/S :
1. Shankar Ganpat Nikam and Ors.Respondents

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Mr. Ravi Kadam, Advocate for the appellants.

Mr. V.S. Talkute, Advocate for respondents no.1 to 3.

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Coram :- Smt. R.P. SondurBaldota, J.

6th January, 2015.

P.C. :-

1). The appellant is the original plaintiff in a suit for partition filed by him against his parents, step-mother, step brother and a family member who is the co-sharer in respect of one of the suit properties, seeking partition of agricultural lands as also the houses. The father, the step-mother and the step-brother contested the suit disputing nature of three of the properties as ancestral properties capable of partition. The properties were land at Gat no.650, Gat no.275 and house property described at para-1(c) of the plaint. The land at Gat no.650 was

originally standing in the name of grandfather of appellant no.1 and gifted by him to the step-brother of appellant no.1. The land at Gat no.275 stands in the name of the father, having purchased by him in the year 1966. The house property described at para-1(c) was claimed by the step-mother of appellant no.1 contending that it was purchased by her out of the streedhan by sale of her gold ornaments. The trial Court accepted the defence in respect of the property at Gat no.650 and the house property but rejected the claim of the father of exclusive title to the land at Gat no.275 and decreed the suit granting partition of the remaining properties.

2). Being aggrieved by the judgment and decree of the trial Court, the father, the step-mother and the step-brother of appellant no.1 preferred Regular Civil Appeal to the District Court being Regular Civil Appeal No. 36 of 2005. By the judgment and order dated 7th September, 2011 the District Court decided the appeal modifying the decree of the trial Court. It accepted the claim of the father in respect of the property at Gat no.275 and permitted partition in respect of the remaining properties. Thus, the claim of appellant no.1 for partition was dismissed in respect of Gat no.650, Gat no.275 and the house property described at para-1(c) of the plaint.

3). Mr. Kadam, learned Advocate appearing for the appellants

states that, though appellant no.1 had not challenged the findings of the trial Court by filing either a cross-appeal or cross-objections, it was necessary for the lower appellate Court to consider the challenge by appellant no.1 to the findings in respect of Gat no.650 and the house property described at para-1(c) of the plaint. Relying upon the decision of the Apex Court in the case of **Ravinder Kumar Sharma v. State of Assam and Others, reported in AIR 1999 Supreme Court 3571**, he submits that filing of cross-objections against an adverse finding is not obligatory and is optional. A respondent to the appeal, can, without filing cross-objections attack an adverse findings upon which the decree in part has been passed against him.

4). Perusal of the order of the lower appellate Court, shows that it has refused to consider the objection of appellant no.1 to the findings adverse to him from the judgment and decree of the trial Court on the ground that, he had not preferred an appeal or cross-objections to challenge the same. It is therefore necessary to consider, whether there is any substance in the challenge by the appellants to the findings of the trial Court in respect of the property at Gat no.650 and the house property described at para-1(c) of the plaint and the findings of the lower appellate Court in respect of the property at Gat no.275.

5). As regards the property at Gat no.650, the trial Court has

noted that the property had been purchased by the grandfather of appellant no.1 in the year 1951 for the consideration of Rs.600/-. He was serving in the police department. It was contended on behalf of appellant no.1 before the trial Court that, the father of appellant no.1 in his evidence, had admitted that the salary received by the grandfather was not sufficient and after meeting the expenses of the family, no amount remained in his hands out of the salary. The trial Court found that the admission given by the father of the sufficiency of the salary of grandfather, was a stray admission and it was also vague. On the basis of such admission, it was not possible to infer that, the amount of salary received by the grandfather was not sufficient for the entire family. The trial Court, also considered the evidence of the father that the amount received by him from cultivation of the land, was not given to the grandfather. The father was the only son of the grandfather and the grandfather used to reside at the place of his work. With these background of facts, the trial Court held that, it can be safely stated that the grandfather had such source of income to save and collect the amount of consideration for purchase of the property in question. This finding of the trial Court is borne out by the record and is a probable view of the matter.

6). As regards the house property described at para-1(c) of the

plaint, the stepmother of appellant no.1 had examined herself. She had given details of the transaction of purchase of the house property. It was purchased in the year 1976 for consideration of Rs.1,000/-. She deposed that, she had sold an ornament known as “bormal” weighing 2.5 tolas to, one Baburao Gandhi to raise the funds for purchase of the property. The trial Court found that, the oral evidence of the step-mother in respect of disposal of the ornaments for purchasing the property is sufficient looking to the small quantity of the consideration. This view taken by the trial Court is also a probable view of the matter and does not require any disturbance.

7). For the reasons stated above, there is no infirmity whatsoever with the findings of the trial Court as regards the agricultural land at Gat no.650 and the house property described in para-1(c) of the plaint.

8). Coming to the property at Gat no.275, which has been excluded from partition by the lower Appellate court, the father had claimed the same to be his independent property having purchased the same by registered sale-deed in the year 1966. An attempt was made on the part of appellant no.1 for the first time, during the course of recording of evidence to establish that the consideration paid for the property came out of the income of joint family property and that the

father did not have sufficient separate income. The trial Court, had accepted the contention of appellant no.1 holding that the evidence of the father as regards his independent income was very weak and that the fact that the joint family property admeasures about 15-16 acres would indicate that there was sufficient income therefrom to raise funds for acquisition of a property. This, according to the trial Court indicated existence of nucleus of the joint family and acquisition of the property in the name of the father from the nucleus. The lower Appellate Court, at para-18 of its judgment and order deals in following terms with the pleadings and evidence of the parties.

“Important thing is that plaintiff has nowhere pleaded that sufficient joint family property nucleus was available with defendant no.1 and out of joint family income, defendant no.1 purchased Gat No. 275 as joint family property. In absence of such pleading, plaintiff cannot prove that Gat No.275 was purchased out of joint family property income. Otherwise also as per law settled by Apex Court, in above cited authorities, when defendants have denied that Gat No.275 is joint family property, then initial burden lies on plaintiff to prove that Gat No.275 is joint family property. If plaintiff can prove that sufficient joint family property nucleus from the income of joint family property, was available with the defendant No.1 in the year 1966, only then the onus will shift on defendant No.1 to prove the self-acquisition of Gat No.275 out of his separate income. In other words, when Gat No.275 is purchased under registered sale deed (exh.81), in the name of defendant No.1, unless availability of sufficient income from joint family property, is proved by plaintiff, Gat No.275 will be treated as separate property of defendant No.1. If plaintiff cannot establish availability of sufficient joint family property nucleus, then the above discussed admissions pointed out by Shri.

Kenjale, advocate for respondent No.1- plaintiff, cannot be considered to hold that Gat No.275 is joint family property.”

The above view taken by the lower appellate Court is a correct and probable view of the matter. The trial Court had infact not considered any of the details as regards the property at Gat no.275. Therefore, this view also does not require any disturbance.

9). Thus, it is seen that the findings of the Courts below are probable findings and based on the material on record. There is no substantial question of law arising for consideration of the Court. Hence, the Second Appeal is dismissed.

(SMT. R.P. SONDURBALDOTA, J)