

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

4 SECOND APPEAL NO. 16 OF 2011

**KISHAN MADHAV @ MAHADU SHENDE
(DIED) LRS NAGNATH KISHAN SHENDE
AND ORS**

VERSUS

**NARAYAN MAHADU SHENDE
AND ORS**

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Mr. M.M.Patil (Beedkar), Advocate for Appellants.
Mr. A.M.Gaikwad, Advocate for R -1-A to 1-D,
2-A to 2-E, 6.

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CORAM : T.V.NALAWADE, J.

DATE : 9th JUNE, 2016

ORDER :-

. The Appeal is filed to challenge the Judgment and Decree of R.C.S. No. 180/1975 which was pending in the Court of the Civil Judge [Jr.Division], Ashti and also to challenge the Judgment and Decree of R.C.A. No. 33/1998 which was pending in the Court of the Principal District

Judge, Beed. The Suit filed by the present appellants for relief of declaration of ownership of one agricultural land and for relief of perpetual injunction against the present respondents is dismissed by the Courts below. Heard Both sides.

2. The Suit was filed in respect of $\frac{1}{2}$ portion of S.No. 68 situated at village Jalgaon, Tahsil Ashti, district Beed. The total area of this land is 11 Acres 39 gunthas. It is the case of the plaintiff that the suit property was purchased for the consideration of ₹ 9,000/- [Rupees Nine Thousand] by him and his real brother Bala, defendant No. 3, from one Parasram. It is contended that 6 strips of the land were prepared after purchasing the land and 3 strips were given to Bala and 3 strips remain with the plaintiff. It is contended that from the self earning, the plaintiff and Bala had purchased the property and so the other defendants, 4 brothers of plaintiff, have no right in the suit property. It is contended that the plaintiff and Bala had spent for digging well in the land and this well belongs to the plaintiff and Bala only. As the other brothers are claiming right, the Suit of aforesaid nature was filed.

3. Defendant Nos. 1 and 2 filed Written Statement and contested the matter. They denied that the property S.No. 68 belongs to plaintiff and Bala only. They contended that all the 6 brothers were living in joint Hindu family and the land was initially with Parasram and other tenant. Parasram is close relative of plaintiff and he is made defendant No. 6. It is contended that to avoid the dispute and litigation, help of Parasram was taken and the land was first purchased from the owner in the name of Parasram and then the land was purchased in the name of plaintiff and Bala. It is contended that the names of brothers of plaintiff and Bala are not mentioned as purchasers as they were out of station for some time and due to their absence, the property was shown to be purchased in the names of plaintiff and Bala. They contended that partition had not taken place amongst these brothers and so each brother has $1/6^{\text{th}}$ share in the suit property. It is contended that till the year 1971, all the brothers were cultivating the land jointly, but after that 6 strips were prepared and they started cultivating their respective shares separately. It is contended that bandhs are created between the shares and so the plaintiff has no right to take injunction in respect of the shares of the defendants. It is contended that some of the defendants have sold some

portion of their share and these transactions are not challenged by the plaintiff.

4. Bala, defendant No. 3, adopted the Written Statement filed by defendant Nos. 1 and 2. Defendant No. 6 Parasram had initially filed Written Statement in support of the case of the defendants. He had given evidence also in support of their case but after remand of the matter by the first appellate Court, he gave evidence in support of the case of the plaintiff.

5. Issues were framed on the basis of the aforesaid pleadings and both sides gave evidence. Both the Courts below have held that the property was purchased in the name of plaintiff and Bala for the joint Hindu family consisting of 6 brothers. It is further held that partition took place after this purchase and 6 strips which are in existence belong to 6 brothers and they are enjoying their shares separately.

6. Learned counsel for the appellant/plaintiff submitted that there is no presumption that the joint Hindu family holds and possesses joint property and when the sale deed was executed only in the names of plaintiff and Bala, it

was not open to the Courts below to draw inference that the property was purchased for joint Hindu family. It was also submitted that the report of the Cadestral Surveyor and the map prepared by him could not have been used in evidence, as the surveyor was not examined. In support of this contention, reliance was placed on the cases reported as (2011) 9 Supreme Court Cases – 451 [Marabasappa (dead) by L.Rs. & Ors. Vs. Ningappa (dead) by L.Rs. & Ors.], 2004 (1) Mh.L.J. - 278 [Bombay High Court] [Ramchandra s/o Bhikaji Jagtap Vs. Dudharam Langruji Padvekar dead thr. L.Rs. Bulkabai Padvekar & Ors.] and 2006 (6) Mh.L.J. - 759 [Khatunbi wd/o Mohammad Sayeed & Ors. Vs. Aminabai w/o Mohammad Sabir].

The first case is on the proposition that the joint Hindu family does not necessarily possess joint property and it is up to the party who contends that property standing in the name of one member of the joint Hindu family belongs to all to prove it. There is no dispute over this proposition. However, admittedly when real brothers were living in joint Hindu family and there was some property as nucleus, then it is open to them to prove that the income from the nucleus was sufficient for purchasing new property for joint Hindu family. In the second case, the High Court has observed that the

private map prepared even by the District Inspector of Land Records or Tahsil Officer, who are Govt. surveyors, can not be used straight-way if they are prepared for private purpose. There is no dispute over this proposition. In the present matter, the report was only to be considered to ascertain that there were 6 strips in existence. In the pleadings, it is admitted by the plaintiff that there are 6 strips. There is no plausible explanation as to why 6 strips were prepared when plaintiff and Bala had purchased the property and each was entitled to $\frac{1}{2}$ share. Other case is on the requirement laid down under Order XLI Rule 31 and Section 96 of the Code of Civil Procedure. It is laid down that the compliance of these provisions is mandatory and the appellate Court must also formulate points for determination. There is no dispute over this proposition.

7. In the present matter, only 2 points were involved viz. the case of plaintiff that he is absolute owner of $\frac{1}{2}$ portion and that he is in possession of $\frac{1}{2}$ portion. In view of these contentions, the first appellate Court has considered the points viz. whether the findings of the trial Court on aforesaid points are based on the evidence. It is true that specific points were not formulated, but the reasonings shows

that these 2 points are considered by the first appellate Court also.

8. Following are the important circumstances of the present matter on the basis of which inference can be drawn.

[i] The property, S.No. 68, was initially owned by third party and from that party defendant No. 6 Parasram, who is close relative of the plaintiff, purchased the property and immediately sold the property to the plaintiff and Bala. It is the case of the defendants that no consideration was paid to Parasram as the consideration was paid for purchasing the property from the owner in the name of Parasram when the sale deed was executed in the name of Parasram. This case of defendants was admitted by Parasram and he had given evidence on oath also in support of such case, though subsequently he gave evidence in favour of the plaintiff. The trial Court and the first appellate Court have not believed Parasram in respect of his evidence given subsequent in time, after remand of the matter. The circumstance that Parasram, the vendor, who is close relative of plaintiff, had admitted the aforesaid case of the defendants, is considered by the Courts below and there is nothing wrong in that.

- [ii] It is not disputed that there are 6 strips prepared in S.No. 68 and between every 2 strips there are bandhs showing that the strips are created. There is no convincing evidence with the plaintiff to explain the circumstance. The defendants and plaintiff had also made transactions in respect of the strips separately and the copies of sale deeds are on record.
- [iii] Bala, the brother, who was entitled to $\frac{1}{2}$ share, has supported the case of plaintiff and his admission is against his own interest as he has lost his right to get $\frac{1}{2}$ share in the property under sale deed.
- [iv] There is no record with the plaintiff to show that he had independently done anything on the suit property like taking well and the sale deed itself shows that prior to the date of purchase, the well was in existence in the land.
- [v] Others were treating all these brothers as members of joint Hindu family and the Suits and criminal cases are filed against them with that presumption.

9. So far as oral evidence is concerned, it can be said that there is word against word. Civil Suits are required to be decided on preponderance of probabilities. On the

aforesaid circumstances, the Courts below have held that the case of the defendants is more probable in nature. It is finding on fact and there are concurrent findings. In view of these circumstances, this Court holds that no substantial question of law as such is involved in the matter.

10. In the result, Second Appeal stands dismissed.

[T.V.NALAWADE, J.]