

Second Appeal No.398 of 1999

Versus

-

Shri. D.R. Shelke, Advocate, for appellant.

With

Second Appeal No.479 of 1999

* Padmavati W/o Manikrao Kadam,
Age 30 years,
Occupation : Household,
R/o Akoli, Taluka Vasmatnagar,
District Parbhani
At present R/o Unchegaon,
Taluka Hadgaon, District Nanded. .. **Appellant.**

Versus

- 1) Tulshiram s/o Tukaram Kadam,
Age 65 years,
Occupation : Agriculture,
R/o Akoli, Taluka Vasmatnagar,
District Parbhani.
- 2) Samindrabai w/o Tulshiram Kadam,
Age 60 years,
Occupation: Agriculture
R/o Akoli, Taluka Vasmatnagar,
District Parbhani.
- 3) Prasad S/o Tulshiram Kadam,
Age 30 years,
Occupation: Agriculture
R/o Akoli, Taluka Vasmatnagar,
District Parbhani.
- 4) Vithal s/o Tulshiram Kadam,
Age 19 years, Minor,
Occupation: Agriculture
R/o Akoli, Taluka Vasmatnagar,
District Parbhani. .. **Respondents.**

Shri. S.S. Choudhari, Advocate, for appellant.

Shri. D.R. Shelke, Advocate, for respondent Nos.1 to 4.

CORAM: T.V. NALAWADE, J.

DATE : 13th JUNE 2016.

JUDGMENT:

1) Both the appeals are filed against the judgment and decree of Regular Civil Appeal No.15/1993 which was pending in the Court of the learned Additional District Judge Parbhani. The suit filed by Padmavati, widow of son of Tulsiram Kadam for relief of partition was decreed in her favour by the trial Court. This decision was challenged by filing aforesaid appeal in District Court by the defendants. The appeal is partly allowed by the District Court. Share of the plaintiff is reduced to make it 1/10th in the two properties and the suit in respect of remaining three suit properties is dismissed by the District Court. Both the sides are heard.

2) Defendant No.1 Tulsiram is husband of defendant No.2 Samindrabai. Defendant Nos.3 and 4 are his sons and he had one more son by name Manikrao.

There was some dispute between Manikrao and the plaintiff and the plaintiff was deserted by Manikrao. Proceeding for maintenance was filed by the plaintiff against Manikrao and then Manikrao died. As the widow of Manikrao, plaintiff demanded to hand over share of Manikrao to her by effecting partition but the defendants refused to do so and so the suit was filed.

3) The suit was filed in respect of five agricultural lands like Gat No.154, admeasuring 1 hectare 40 R which is having one well and which is situated at Akoli, Tahsil Basmathnagar; Gat No.193 admeasuring 1 hectare 21 R (1/4th share of the plaintiff and the defendants in the property) situated at Akoli. Gat No.258 admeasuring 6 hectares 24 R (plaintiff and defendant having 1/4th share) situated at Akoli, land Gat No.70 admeasuring 1 hectare 41 R situated at Phata, and Gat No.78 admeasuring 5 hectares 80 R (1/2 portion belongs to plaintiff and defendants) situated at Phata. The plaintiff had contended that she has 1/4th share in the aforesaid properties and she had prayed for relief of partition, possession and *mesne profit*.

4) The defendants filed joint written statement. They admitted the relationship. They contended that during lifetime of Manikrao, Tulsiram, father, had effected partition and Manikrao had accepted Rs.15,000/- in lieu of his share in the ancestral properties and he had relinquished his share in those properties.

5) Defendant No.1 contended that only two properties like Gat No.258 and Gat No.78 mentioned in the plaint are the ancestral properties of defendant No.1 and remaining three properties were purchased by him from his independent income. It is his case that the income from the ancestral property was not sufficient for livelihood and so he was doing the business of sale and purchase of cattle and food grains. It is contended that from the profit made in the business he purchased the remaining three properties and so they are his self acquired properties and they cannot be partitioned.

6) Issues were framed on the basis of the above pleadings. Both the sides gave evidence. The trial Court had held that there was nucleus which was giving

sufficient income and the remaining three properties were purchased from the income received from the ancestral proprieties. The trial Court considered the circumstance like one property was purchased in the name of Manikrao when Manikrao was minor and one property was purchased by defendant No.1 and his two brothers and on the date of the suit this property was with defendant No.1 Tulsiram. The trial Court inferred that in the partition amongst Tulsiram and his brothers this property had come to the share of Tulsiram and so all the properties are the joint Hindu family properties. 1/5th share was given by the trial Court in all the properties. The first appellate Court has held that the aforesaid three properties are self acquired property of the defendant No.1 and the suit is dismissed in respect of the three properties. The share of the plaintiff is reduced to make it 1/10th by the first appellate Court by effecting notional partition and then giving share to the defendant No.2, mother of Manikrao in the share of Manikrao as Manikrao died during her lifetime.

7) This Court admitted the appeals by order dated 9-9-2002 by holding that two substantial questions of law are involved like (1) what is the nature of the property; and (2) whether the plaintiff has share in the property.

8) This Court allowed the learned counsel for the original defendants to argue on one more point viz. whether the defendant No.1 has proved that the three suit properties viz. Gat Nos.154, 193 & 70 are the self acquired property of the defendant No.1.

9) The evidence of the plaintiff shows that her marriage took place after the purchase of the three disputed properties and so she has no personal knowledge regarding the said transactions. Much was argued on this circumstance by the learned counsel for the original defendants. Though this circumstance is there, there are other circumstances leading to inference in favour of the plaintiff and those circumstances are not explained. The total area of the two properties which are admittedly ancestral like Gat No.258 and Gat No.78 is 4.46 hectares (1 hectare 56 R of Gat No.258 and 2 hectares 90 R of Gat No.78). It is the case of the plaintiff that there is facility of

irrigation to the land Gat No.258 of canal and so it is giving good income. She had claimed mesne profit of Rs.20,000/- by contending that sufficient income is received from the agricultural lands. 7/12 extract of Gat No.258 is at Exhibit 42 and it shows that Tulsiram had taken sugarcane crop in 60 R portion and the other sharers of this Gat had also taken sugarcane crop in some portion of the land. There is entry on the 7/12 extract of the facility of irrigation due to Government canal. The 7/12 extract at Exhibit 9 of Gat No.78 shows that the crops like hybrid, toor were taken in this land.

10) The lands were with defendant No.1 and admittedly he was cultivating these lands personally. He has given evidence that before 17 to 18 years he had purchased the three disputed lands out of his income from the business of selling and purchasing cattle and Jowar. He has deposed that the income from the agriculture was not enough but he was getting handsome income from the business. Thus the evidence given is very vague regarding the income which he was receiving from the aforesaid two ancestral lands.

11) Copy of sale deed in respect of the other land is at Exhibit 64 and it shows that the land Survey No.57/B which is having area of 3 acres was purchased by Tulsiram and his two brothers in the year 1971. There is nothing with the defendant No.1 to show that he had paid some consideration for getting this entire property for his family from his two brothers. Thus, inference was possible that in the partition which had taken place amongst Tulsiram and his brothers this property had come to the share of Tulsiram. Present Gat number of this land is 193 and it is standing in the name of defendant No.1. There is no explanation whatsoever with defendant No.1 in respect of this circumstance and it can be said that this land was also with defendant No.1 and the income received from this property was also the income of the joint Hindu family.

12) Gat No.70 admeasuring 1 hectare 40 R was purchased in the name of Manikrao when he was aged about 16 years for the consideration of Rs.3500/- in the year 1977. Thus burden was heavy on the defendant No.1 to prove that he had separate source of income and from

that income he had purchased the three disputed properties. It is already observed that the evidence on this point is very vague. Though in the cross examination he contended that he was getting income of Rs.4000/- to 5000/- from the land, considering the area of the land, this evidence is not believable. When one deals in cattle and food grains, he is required to obtain licences from many authorities. There is no such record with defendant No.1. In ordinary course such transactions are made in writing and the dealer maintains the accounts. There is not a single document with the defendant No.1 to prove that he was doing such business at the relevant time. Defendant No.1 examined one Balasaheb, who is husband of the sister of defendant No.1 in support of his case. His evidence is also very vague. He has simply stated in the evidence that defendant No.1 was doing such business for many years and from the income of that business he purchased the remaining three properties. Both, the defendant No.1 and his witness were disbelieved by the trial Court. There was no room to the first appellate Court to interfere in the finding given by the trial Court on this point as it was based on the appreciation of the oral

evidence done by the trial Court and there was no record in support of this contention.

13) In view of the aforesaid material and the circumstances, there was no other alternative before the trial Court than to hold that all the suit properties were joint Hindu family properties and the plaintiff is entitled to get share in all the properties.

14) Learned counsel for the original defendants placed reliance on two reported cases - (1) **AIR 1954 SC 379 (Srinivas Krishnarao Kango v. Narayan Devji Kango)** and (2) **(2011) 9 SCC 451 (Marabasappa v. Ningappa)**. The learned counsel for the defendants submits that though there is presumption of jointness of Hindu family, there is no presumption that the joint Hindu family owns joint Hindu family property. There is no dispute over the proposition. When the plaintiff proves that there was nucleus for the joint Hindu family from which sufficient income could have been derived, the burden shifts on the defendant who is contending that some property is his self acquired property. As the defendant failed to discharge

this burden, the trial Court held that all the properties are the joint Hindu family properties. The first appellate Court has committed error in dismissing the suit in respect of the aforesaid three properties. However, the first appellate Court has correctly held that the plaintiff has 1/10th share. The above points are answered accordingly.

15) In the result, Second Appeal No.479 of 1999 is allowed. The judgment and decree of the first appellate Court by which the suit was dismissed in respect of three properties is hereby set aside. The judgment of the trial Court is modified for declaring and giving 1/10th share of the plaintiff in all the properties. Remaining part of the judgment and decree of the trial Court is hereby confirmed.

16) Second Appeal No.398 of 1999 is hereby dismissed. Decree is to be prepared accordingly.

Sd/-
(T.V. NALAWADE, J.)

rs1