

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

SECOND APPEAL NO. 262 OF 2013

Rashid s/o Nabisab Shaikh

..... APPELLANT

V E R S U S

Mahallingappa Sangramappa Kappikere
& Anr.

..... RESPONDENTS

.....

Mr. P.F.Patni h/f Mr. S.J.Salgare,
Advocate for Appellant.

Mr. Mukul Kulkarni h/f Mr. Satish S.Deshmukh,
Advocate for R.No. 8.

.....

WITH

SECOND APPEAL NO. 175 OF 2016

Mahallingappa Sangramappa Kappikere
& Anr.

..... APPELLANTS

V E R S U S

Prashant Vijaykumar Kappikere
& Anr.

..... RESPONDENTS

.....

Mr. V.S.Bedre, Advocate for Appellants.

Mr. Mr. Satish S.Deshmukh, Advocate for R.No. 4.

.....

CORAM : T.V.NALAWADE, J.

DATE : 10th MARCH, 2016

ORDER :-

. Both the Appeals are filed against the Judgment and Decree of R.C.A. No. 51/2005 which was pending in the Court of the District Judge -1, Udgir, district Latur. This first Appeal was filed by the plaintiff of Spl. Civil Suit No. 52/2001 [old number Spl. Civil Suit 268/1998] which was pending in the Court of the Civil Judge [Sr. Division], Udgir. The Suit was filed for relief of partition and separate possession. The Suit was dismissed by the trial Court but the District Court has allowed the Appeal and has given 1/5th share to the plaintiffs. Defendant Nos. 1 to 4, the members of joint Hindu family and defendant No. 5, the purchaser have challenged the decision of the first appellate Court in these two Appeals. Heard learned counsels for both sides.

2. The Suit was filed in respect of agricultural land G.No. 153 admeasuring 2 H. 85 R. situated at village Bori, Tahsil and district Latur and also in respect of two house Nos. viz. 5.1.623 and 5.1.624 situated within the municipal limits of Udgir Municipal Council.

3. Plaintiff No. 4 Smt. Premlata is the widow of one Vijaykumar and she is the mother of plaintiff Nos. 1 to 3, who were minor on the date of filing of the Suit. Defendant Nos. 1 and 4 are the parents of deceased Vijaykumar. Defendant Nos. 2 and 3 are real brothers of Vijaykumar. Vijaykumar

died on 12/12/1992.

4. It is the case of the plaintiffs that aforesaid house properties are the ancestral properties of defendant No. 1, father of Vijaykumar. It is their case that aforesaid agricultural land was purchased under 2 sale deeds, which were executed in the names of defendant No. 1 [1 H. 21 R.] and defendant Nos. 2 and 3 [2 H. 89 R.], but the consideration was paid by Vijaykumar for purchasing these properties as he was serving in Municipal Council at Udgir. It is contended that the yearly rent of ₹ 50,000/- [Rupees Fifty Thousand] was received from each of the aforesaid 2 house properties and at the time of purchase of agricultural land, plaintiffs and Vijaykumar were living in joint family with defendant Nos. 1 to 4.

5. It is the case of the plaintiffs that after the death of Vijaykumar, plaintiff No. 4 got the job on compassionate ground in Municipal Council at Udgir. It is contended that defendant Nos. 1 to 4 then drove the plaintiffs out of the suit properties. When plaintiffs came to know that the defendants were trying to dispose of the suit properties, Plaintiffs demanded partition of the aforesaid properties, but defendant Nos. 1 to 4 refused to make partition and give share of plaintiffs.

6. It is the case of the plaintiffs that defendant No. 1 then sold 1 H. 21 R. portion of aforesaid agricultural land to defendant No. 5 and on the same day other defendants have agreed to sell some portion to defendant No. 5. It is

their case that as they are entitled to 1/5th share in the suit properties, they have filed the Suit.

7. Defendant Nos. 1 to 4 filed Written Statement and contested the Suit. They have admitted their relationship with the plaintiffs. They admitted that the house properties are ancestral properties of defendant No. 1. However, they denied that for aforesaid 2 sale deeds, which were executed in favour of defendant Nos. 1 to 3, consideration was paid by Vijaykumar. They contended that the agricultural land is the self acquired property of defendant Nos. 1 to 3. They admitted that defendant No. 1 has sold 1 H. 21 R. of portion to defendant No. 5. They have contended that defendant Nos. 2 and 3 have agreed to sale 1 H. 64 R. portion to defendant No. 5 and that agreement was made on 21/05/1998. It is contended that under the agreement, they have received consideration from defendant No. 5.

8. Defendant No. 5 filed Written Statement and contested the matter. He has contended that he is bonafide purchaser for value in respect of 1 H. 21 R. portion. He has contended that he had made enquiry before purchasing the property and on the basis of the record, when he found that the property was self-acquired property of defendant No. 1, he purchased it from defendant No. 1.

9. Issues were framed on the basis of aforesaid pleadings. Both sides gave evidence. Trial Court held that the agricultural land was self-acquired property of defendant Nos. 1 to 3 and refused to give relief of partition and separate

possession to the plaintiffs in that property. However, 1/5th share was given in house properties. Trial Court fixed mesne profit of ₹ 6,000/- per annum and decree of the past mesne profit for the period of 3 years was given in favour of the plaintiffs. The District Court has given 1/5th share to the plaintiffs in the agricultural land also by holding that it was joint Hindu family property.

10. The defendants have not disputed that the plaintiffs and Vijaykumar were living in joint family with defendant Nos. 1 to 4. In view of these circumstances and other circumstances that the aforesaid 2 house properties were ancestral properties of defendant No. 1, it was sufficient for the plaintiffs to prove that the agricultural land was purchased from the income of ancestral property. As the decision of the trial Court in respect of 2 house properties is not challenged by defendant Nos. 1 to 5, in the present matter, the cases of rival side can be considered only in respect of remaining property viz. agricultural land.

11. Learned counsel for appellant in Second Appeal No. 262 of 2013, learned counsel for the purchaser, submitted that substantial question of law needs to be formulated on the competency of the District Court to decide the Appeal. He submitted that substantial question of law needs to be formulated in relation to the bar created under the provisions of Benami Transactions (Prohibition) Act (45 of 1988) in view of the nature of the pleadings.

12. In the appeal memo of the present proceeding,

there is mention about the challenge of the pecuniary jurisdiction of the District Court. In addition to that one more point was argued viz. whether the District Judge had jurisdiction to decide the Appeal which was against the decision of the Ad-hoc District Judge, who decided the Suit.

13. On the point of jurisdiction of the District Court, learned counsel for the plaintiffs drew attention of this Court to the provisions of Sections 16 and 17 of the Maharashtra Civil Courts Act. The said provisions run as under :

“ 16. The District Judge may refer to any [Additional District Judge] subordinate to him [any original suits and proceedings of a civil nature] [applications or references under special Acts] and miscellaneous applications.

The [Additional District Judge] shall have jurisdiction to try such suits and to dispose of such applications [or references].

When the [Additional District Judge's]” decrees and orders in such cases are appealable, the appeal shall lie to the District Judge or to the High Court according as the amount or value of the subject matter does not exceed or exceeds [Ten Lakh rupees].

17. An [Additional District Judge]

shall have jurisdiction to try such appeals from the decrees and orders of the subordinate Courts as would lie to the District Judge and as may be referred by him to the [Additional District Judge].

Decrees and orders passed under this section by an [Additional District Judge] shall have the same force and shall be subject to the same rules as regards procedure and appeals as decrees and orders passed by the District Judge .”

14. Aforesaid Section 16 shows that when Suit is assigned to the District Judge including Ad-hoc District Judge by Principal District Judge, the Judge of the District Court to whom the matter is assigned, decides the Suit as a Court of original jurisdiction. So, in view of such provision, the Appeal against such decision lies either to the District Court or to the High Court on the basis of the valuation of the subject matter of the Suit. In view of these provisions, there is no force in the contention made by the learned counsel for the appellant that the District Judge who decided the Appeal could not have decided the Appeal as the original matter was decided by the Ad-hoc District Judge. He submitted that the District Judge and Ad-hoc District Judge are of equal rank and as the Ad-hoc District Judge can not be called as subordinate court of the District Judge, the District Judge has no power to decide the Appeal. This submission is not

acceptable in view of the aforesaid provisions. On this point, one case reported as 1984 Mh.L.J. 34 [Madhavi Madhukar Kulkarni Vs. Madhukar Ramchandra Kulkarni] was cited by the learned counsel for the appellant. The facts of this reported case were altogether different. The decision was given in Hindu Marriage Proceeding by the Judge of District Court. In view of the provisions made with regard to the Courts which can decide the marriage petition and as initial power is with the District Court, it was held that the Appeal will not lie to the District Court and it will lie to the High Court. In this state, Hindu Marriage Petition work is assigned to the Civil Judge [Sr. Division] and the powers are delegated. In view of these circumstances, the aforesaid observations were made.

15. On the point of pecuniary jurisdiction of the District Court, other point which was argued by the learned counsel for the appellant, it can be said that first appeal was decided by the District Court in the year 2013. At that time, pecuniary jurisdiction of the District Court in respect of first appeal was ₹ 10 Lakh. In the trial Court, plaintiffs had shown valuation of the Suit as ₹ 12,61,425/-. The value of the property was mentioned as under :

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|------|---|
| [i] | For setting aside the sale
deed [executed by deft. No. 1] - ₹ 1.10 Lakh
[consideration
of the sale deed] |
| [ii] | For mesne profit - ₹ 4.5 Lakh |

- | | | |
|-------|---|--------------|
| [iii] | Value of 2 house properties
as per market value | - ₹ 7 Lakh |
| [iv] | Value of land on the basis of
land revenue for the purpose of
partition and separate possession | - ₹ 1,425/-. |

16. The plaintiffs were claiming 1/5th share and not the entire property in the Suit and so they were liable to pay court fee only on 1/5th value of the aforesaid properties. Accordingly the court fee was paid on only 1/5th share. The Suit was filed for partition of agricultural land and as it is proved that plaintiffs have 1/5th share, there was no necessity to claim declaration in respect of the sale deed, much less the entire sale deed. Further, only 1/5th share was claimed in 2 houses and so for pecuniary jurisdiction purpose, only 1/5th value of 2 houses need to be considered. Mesne profit of 3 years period, past mesne profit, was claimed and it was contended that the total income of the property per annum was ₹ 1.5 Lakh. In that income also, plaintiffs had claimed only 1/5th share and so the court fee was to be paid of ₹ 90,000/-. This Court has no hesitation to hold that both, for the purpose of court fee and jurisdiction, the value of the suit was less than ₹ 10 Lakh. It is the job of the court to ascertain the value of the Suit for the purpose of pecuniary jurisdiction whatever may be the case of the plaintiff or the defendant.

17. Learned counsel for the plaintiffs drew attention of this court to the provision of Section 21 (2) of the Code of

Civil Procedure. He submitted that the objection in respect of pecuniary jurisdiction ought to have been taken at the stage of first Appeal itself and as such objection was not taken, it can not be taken in the Second Appeal. This submission needs to be accepted in view of the aforesaid provision of Code of Civil Procedure. Thus, no substantial question of law as such is involved on the point of competence or pecuniary jurisdiction of the District Court in the Appeal which was filed by the original plaintiff.

18. On the second point, the bar of the provisions of the Benami Transactions (Prohibition) Act (45 of 1988), it can be said that the relevant provisions are the provisions of Section 4 (3) (a), which runs as under :

“ 4. (3) Nothing in this section shall apply,

(a) Where the person in whose name the property is held is a coparcener in a Hindu undivided family and the property is held for the benefit of the coparceners in the family .”

19. In the present matter, as relationship is not disputed and it is also not disputed that there were 2 houses, which were ancestral properties, yielding sufficient income, the burden was on the defendants to show that they had separate source of income. As there was ancestral property and it is the case of the plaintiffs that the agricultural land is

also joint Hindu family property, in view of the aforesaid provisions, it can not be said that the claim of the plaintiffs was barred by the Benami Transactions Act. Though plaintiff Premlata had claimed that it was the property purchased from the consideration paid by her husband, she was not denying that her husband was living with defendant Nos. 1 to 4 and she had claimed only 1/5th share in the agricultural land. Thus, there is no force in the second point and no substantial question of law as such is involved. On this point, reliance is placed by the learned counsel for the appellant on the case reported in *AIR 1998 Supreme Court – 310 [Smt. Rebti Devi Vs. Ram Dutta & Anr.]*. In that case, relationship was different and so it was held that the prohibition of Section 4 of the aforesaid Act was applicable.

20. On merits, it can be said that more than sufficient material was there before the trial Court to hold on preponderance of probabilities that the agricultural land was purchased from the income of the ancestral property. Admittedly, Vijaykumar was working in Municipal Council, but the defendants were not gainfully employed. As Vijaykumar was living with the defendants, it needs to be presumed that he was spending for the defendants. There is no specific case of defendant Nos. 1 to 3 that they had separate source of income, though for the first time in the evidence they tried to contend that they were running brick kiln business. Prior to purchase of agricultural land, they had no land for doing such business and so it was necessary for them to produce the record, at least lease document of land where brick kiln could have been started. Further, for

such business, licence of revenue authorities needs to be obtained and there is no such record with the defendants. There is no record of any kind of such business. In view of the circumstances, the District Court has rightly held that the defendants have failed to prove that they had separate source of income and from that they had purchased agricultural land.

21. In the evidence, defendants have admitted that they were getting rent of ₹ 50,000/- from one building and rent of ₹ 6,000/- per month was received in respect of six rooms where shops were situated. Further, one witness Subhash examined by the plaintiffs has given evidence that the deceased Vijaykumar was involved in the negotiations, which took place at the time of purchase of the agricultural land and he was present on that day in the office of the Sub Registrar. The deceased was elder brother and he was working as Clerks in the local body. There are many restrictions on the employees of such local body as they are public servants, for purchasing the property. In view of these circumstances, not much can be made out due to the circumstance that the property was not purchased in the name of Vijaykumar. He was admittedly living with the defendants, there was nucleus and so the burden was on the defendants to prove that it is their self-acquired property. In view of these circumstances, this Court holds that the first appellate court has not committed any error in holding that the agricultural land is also joint hindu family property.

22. For considering the rights of defendant No. 5, the

District Court has considered the material produced by defendant No. 5. The evidence shows that he did not give public notice before purchasing the property from defendant No. 1 and he did not try to ascertain as to whether defendant No. 1 had sons and they were living together when the property was purchased in the name of defendant No. 1. The circumstance that all the 3 defendants tried to dispose of the property, create the probability that they were bent upon to deprive the plaintiffs of their right in the suit properties. Thus, the purchaser also can not be protected and equitable partition needs to be effected.

23. On the point of burden of proof, reliance is placed on the case reported in 2013 (2) Mh.L.HJ. - 268 [Suman Vishnu Pathak & Ors. Vs. Usha w/o Prabhakar Rao Koparkar & Ors.]. Ratio laid down is :

“ Even when there is Hindu undivided family, but the property is in the name of a coparcener, presumption is that it is his self-acquired property unless it is shown that it is acquired with the aid of nucleus of the joint family property. ”

There is no dispute over this proposition.

24. One case reported as AIR 1971 Supreme Court - 2228 [Pandurang Mahadeo Kavade (dead) by his legal representative & Ors. Vs. Annaji Balwant Bokil & Ors.] was cited by the learned counsel for the appellant, which is

also on the point of burden of proof. The facts and circumstances of the reported case were different and so the observations can not be used in the present case in support of the case of defendant No. 5.

25. The decision of the District Court is on the basis of the aforesaid material. No substantial question of law as such is involved in the matter and so the following order.

26. Both Second Appeals are dismissed. In view of dismissal of Second Appeals, Civil Applications also stand disposed of.

[T.V.NALAWADE, J.]