

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

27 SECOND APPEAL NO. 709 OF 2012
WITH CA/12001/2012 IN SA/709/2012

BHAU @ MARUTI DAMU CHITAL AND ORS
VERSUS
ANKUSH BHAU CHITAL AND ORS

...
Advocate for Appellants : Gaikwad Anil M.
Advocate for Respondents 1 : P.S. Pawar h/f. A.L. Barhate Patil
...

CORAM : T.V. NALAWADE, J.
DATED : 4th April, 2016.

ORDER :

1. The appeal is filed to challenge the judgment and decree of Regular Civil Suit No. 457/2002, which was pending in the Court of Civil Judge, Senior Division, Ahmednagar and also to challenge the judgment and decree of Regular Civil Appeal No. 207/2009, which was pending in District Court, Ahmednagar. The suit was filed by respondent - Ankush Chital, son of Bhau for relief of partition and separate possession and the Courts below have given 1/4th share to the plaintiff in all the suit properties. Heard both the sides.

2. Plaintiff is son of defendant No. 1 and Smt. Chandrabhaga, defendant No. 2, is the wife of defendant No. 1 and mother of plaintiff. Defendant No. 3 - Sou. Manda is real

sister of plaintiff. Defendant No. 4 is the second wife of defendant No. 1 and defendant Nos. 5 to 7 are issues born to second wife. It is contended that other defendants have no concern whatsoever with the family of plaintiff and defendant No. 1 and also with the suit properties. The other defendants did not appear in the suit and ex parte order was made against them.

3. The plaintiff has divided the properties in to three categories. In the first category, there are properties like Survey Nos. 10/2, 10/4 and 11/2/C and it is contended that they are ancestral properties of defendant No. 1. The total area of these three lands is around 58 R. and defendant No. 1 has admitted that these are his ancestral lands.

4. In the second set, there are properties like Survey No. 106/2 and 107/2, the area of these two lands is around two and half Acres and they were purchased in the year 1970 under registered sale deed for consideration of Rs. 1000/-, but the purchaser was shown as mother of defendant No. 1. It is the case of plaintiff that these properties were purchased from the income aforesaid ancestral and joint family properties, though it was purchased in the name of mother of defendant No. 1.

5. In the third set of properties, there are lands like Survey Nos. 10/5, 10/1, 11/2/B. 50% portion of these properties was purchased under sale deed dated 18.2.1991 and the remaining portion was purchased in the year 1992 and total area of these three lands is around 60 R. These properties were purchased for consideration of around Rs. 45,000/-. It is the case of plaintiff that the third set of properties was also purchased from the income of aforesaid joint family and ancestral properties.

6. Plaintiff contended that during lifetime of his mother, defendant No. 1 married with defendant No. 4 - Venubai and so, that marriage is illegal and due to that Venubai or her issues cannot get any share in the aforesaid properties.

7. Defendant No. 1 and other defendants contested the matter. These defendants contended that the properties from the second group, properties purchased in the name of mother of defendant No. 1 were purchased by the defendant No. 1 from his salary income. It is contended that at the relevant time, defendant No. 1 was working in military on technical side and from that income, he purchased the two properties. It is the case

of defendant No. 1 that the properties from third group, purchased in the years 1991 and 1992 are also self-acquired properties as they were purchased from salary income.

8. Defendant Nos. 2 and 3, mother and sister of plaintiff, supported his case. It appears that maintenance proceeding was filed in the year 1981 by defendant No. 2 against defendant No. 1 and maintenance order was made against defendant No. 1 in the said proceeding and enhancement of maintenance was also claimed. It appears that defendant No. 1 had disputed the paternity of defendant No. 3 by contending that within few months of birth of plaintiff, defendant No. 2 had left his company and plaintiff was brought up by defendant No. 1 and his mother. He contended that when defendant No. 2 was not cohabiting with him, defendant No. 3 was born to defendant No. 2. However, in the previous proceeding and in the present proceeding, no evidence was given by defendant No. 1 to prove that defendant No. 3 is not his daughter when he admits that his relationship with defendant No. 2 is still in existence.

9. Issues were framed on the basis of aforesaid pleadings. The Courts below have held that there was nucleus,

ancestral property and as there is no specific evidence from the side of defendant No. 1 to show that he had separate and sufficient source of income, he has not proved that the properties from group 2 and 3 were purchased by him from his own income. The relationship between plaintiff and defendant No. 1 as father and son is considered as one of the circumstance to presume that they were living in joint family and from the income of joint family, properties were purchased. It is held that at the time of second transaction, plaintiff was major and there is evidence to show that he was making income. One witness examined by defendant, who is son of sister of defendant No. 1, has given evidence that he also helped plaintiff and defendant No. 1 when the properties were purchased in the year 1991 and 1992 by giving some amount. His evidence is believed by the Courts below.

10. It can be said that at the time of purchase of group 2 lands in the year 1970, defendant No. 1 was in service in military. However, no evidence is given on his exact income in the year 1970 and on the savings which he had made or he could have made from the salary income. On the other hand, the pleading of the defendant No. 1 show that his mother was living at native place where the properties are situated and she was

taking care of plaintiff. The consideration shown for the transaction of 1970 is Rs. 1000/- and the family was having atleast 60 Gunta land. If defendant No. 1 wanted to purchase the properties from his income, he would have purchased the properties in his own name but that did not happen and this circumstance is considered by the Courts below against defendant No. 1.

11. When the properties from group 3 were purchased, there was sufficient land with the family as there were ancestral lands and there were lands purchased in the year 1970 and so, there was area of more than four Acres. The evidence shows that plaintiff was also major when the properties were purchased in the year 1991 and 1992. Plaintiff has given evidence that he was also working at the relevant time and he was contributing to the expenses of family. This evidence and evidence of close relative of defendant No. 1 is there to show that these properties were purchased from the joint family income. It needs to be kept in mind that it is not disputed that in maintenance proceeding filed by defendant No. 2 in the year 1991 maintenance was granted in her favour and also in favour of defendant No. 3 and so, the defendant No. 1 was required to pay the amount to them from his salary income. In view of these circumstances and the fact

that plaintiff and defendant No. 1 were living in joint family, burden was heavy on the defendant No. 1 to prove that he had sufficient source of income which was separate from the aforesaid income from agriculture. The learned counsel for appellants submitted that the following substantial question of law can be formulated on the point, "Whether there was sufficient income from the ancestral and joint family properties for purchasing the properties in the year 1991 and 1992 ?" This submission is not at all acceptable in view of the facts and circumstances of the present case. The Trial Court and the First Appellate Court have considered the aforesaid material. The findings given by the Courts below are findings on facts and they are concurrent.

12. The learned counsel for appellants submitted that the entitlement of issues from second wife to get share in the aforesaid properties need to be decided and as in the case reported as **2011 (11) SCC 1 [Ravanasiddappa & anr. Vs. Mallikarjun & ors.]**, the Apex Court has referred this point to larger bench, present matter need to be kept pending till the larger bench gives decision. This proposition is not acceptable. It is settled law that the illegitimate children, the children born out of void or voidable marriage, are entitled to get share in the

property of their father but they cannot claim inheritance in the ancestral property of their father. On this point, there is case reported as **(2003) 1 Supreme Court Cases 730 [Jinia Keotin and ors. Vs. Kumar Sitaram Manjhi and ors.]**. This Court has also considered the point involved under section 16 (3) of Hindu Marriage Act, 1955 in the case reported as **2007 (3) Mh.L.J. 813 [Maruti Rau Mane and ors. Vs. Shrikant Maruti Mane and ors.]** and has taken similar view. In view of this position of law, this Court holds that there is no possibility of interference in the decisions given by the Courts below. In the result, the appeal stands dismissed. Civil Application is disposed of.

[T.V. NALAWADE, J.]

SSC/