

JPP

***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION***

***SECOND APPEAL NO. 456 OF 2013
WITH
CIVIL APPLICATION NO. 222 OF 2006
WITH
CIVIL APPLICATION NO 423 OF 2013***

Tukaram Kedari Chougale (Kalbhor)
since deceased Smt. Paravati
Shrirang Kalbhor (Chougale) & Ors. ... Appellants/Applicants.

V/s.

Dattu Tukaram Kalbhor and Ors. ... Respondents.

Mr. Umesh Mankapure for the Appellants/Applicants.
Mr. Ganesh Jadhav for the Respondent 1-A to 1-D.

CORAM : N.M. JAMDAR, J.

DATE : 31 MARCH, 2016.

ORAL ORDER :-

By this Appeal, the Appellants challenge the Judgment and Decree passed by the District Judge, Satara in Regular Civil Appeal No. 350 of 2000, partly decreeing the Suit as under :-

“1. Appeal is partly allowed with an order as to the costs. Judgment and decree of the trial Court is hereby set aside.

2. *Suit filed by plaintiff stands partly decree as under :*

A. It is hereby declared that plaintiff Dattu, defendant No.4 Balwant and defendant No.5 – Vithabai have 10/126th share each and defendant No.9 – Anusaya has 1/126th share in all the suit lands described in Para 1A, 1B and 1C of the plaint; except in the lands gat Nos. 438-A and 347. Share defendant No.5 Vithabai has died during pendency of the suit, her share shall be allotted to plaintiff, defendant No.4 and defendant No.9 equally.

B. Suit for partition in respect of house properties described in Para 2 of the plaint is dismissed.

C. The partition of landed properties shall be effected by the collector of the District in accordance with the law.

D. There shall be no order as to the costs of the suit.

3. *Decree be drawn accordingly.”*

2. The Suit was filed by the Respondents – Plaintiffs seeking partition and separate possession of the Plaintiffs share in the joint family, from the Defendant Nos. 1 to 6. The learned Civil Judge, Karad framed issues as regards the the nature of the property. The Appellants claimed right in respect of three properties i.e. Serial No. 6 in Para 1a of the plaint, para 1c and Serial No.1,2,3 in para 1b, as self-acquired properties. As regard properties at Serial Nos.1,2,3 in para 1b, it was the case of the

Appellants that it was received by Defendant No.2 by a valid gift deed dated 16 January 1964 from his uncle Dnyanu Chougale. The learned Civil Judge did not accept the case of the Plaintiff neither accepted the claim of the Appellants that they had right in the aforesaid properties being self-acquired properties and dismissed the suit, by order dated 26 November 1996. Appeal was filed by the Original Plaintiff in the District Court, Satara. The Appellants did not file any Appeal against the rejection of their claim of the properties in question being self-acquired properties. The learned District Judge held that Gat Nos. 347 and 36 were self-acquired properties and granted 1½ share of Dnyanu. Thereafter, the Appeal was accordingly partly allowed by order dated 21 February 2005. Thereafter, the present Appeal has been filed.

3. The learned Counsel for the Appellant submitted that as regard the issue as to whether Defendant No.5 Vithabai was legally wedded wife of Defendant No.1 Tukaram and whether the Plaintiff and Defendant Nos. 4 and 9 are their legitimate son and daughter it is not being pressed as the finding to that effect by the Appellate Court is correct. The learned Counsel however submitted that as regard properties Gat Nos.439, 344 and 33, the learned District Judge has erred in not taking into consideration that these properties were self-acquired properties since there was a certificate under Section 32 M of the Bombay Tenancy and Agricultural Lands Act, 1948 in favour of Dnyanu.

4. I have considered these submissions. Firstly there is no arguments advanced to that effect before the learned District Judge. This is so because the learned Civil Judge has categorically rejected this contention of the Appellants based on the gift deed by answering the issue in negative and the Appellants did not file any cross-objection as regard the same neither they argued this point. It is also pointed out by the learned Counsel for the Respondents - Plaintiffs that the 32 M Certificates were not in the name of the Appellants but in the name of Dnyanu and it is claimed by the Appellant through a gift deed from Dnyanu. Therefore, it is not a question merely of 32 M Certificate but of the gift deed. The gift deed mentions that there was half share is of Tukaram in the property. This would clearly show that it is a question of assessment of evidence. This argument is not made before the District Court neither taken in the Memo of the present Appeal and is made across the bar. It is not possible to consider an argument which requires consideration of factual aspect for the first time in Second Appeal that too across the bar. Wherever the Appellants had produced cogent evidence to show that a property is self-acquired, the learned District Judge has taken that into consideration and has passed appropriate order.

5. Considering this position, it is clear that no question of law arises. The Second Appeal is accordingly dismissed.

6. In view of the dismissal of the Second Appeal, Civil Applications do not survive and are disposed of accordingly.

(N.M. JAMDAR, J.)