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

CIVIL APPLICATION NO. 816 OF 2010

in

SECOND APPEAL NO. 308 OF 2010

Chandrakant Irappa Danure.

...Applicant/Appellant.

V/s.

Shivshankar Malllikarjun Danure & Ors.

..Respondents.

Mr. A.B. Tajane for the Applicant/Appellant.

Mr. Surel S. Shah a/w. Ms. Gauri Shah for Respondents 1 to 4.

CORAM : N.M. Jamdar, J.

05 July, 2016.

P.C. :-

Heard the learned Counsel for the parties.

2. The Respondents – Plaintiffs filed a Regular Civil Suit No. 20 of 1994 for partition of four properties. The learned Civil Judge, Akkalkot by judgment and order dated 14 August 2000 dismissed the Suit. The learned Civil Judge held that as regard properties 1-C to 1-F, the Respondents – Plaintiffs cannot claim re-opening of partition and claim a share in these properties as partition of these properties had already taken place. As regard the suit

properties 1-A and 1-B, it was the case of the Respondents – Plaintiffs that the mother - Gurusiddhavva and maternal aunt Nilawwa have voluntarily thrown their property, which they inherited from their father in the common stock. The learned Civil Judge came to the conclusion that there was no evidence to show that the properties were thrown in the common stock.

3. An Appeal was filed by the Respondents – Plaintiffs in the District Court. In the District Court the Respondents – Plaintiffs reiterated the theory of blending of properties 1-A and 1-B. The learned District Judge confirmed the finding of the Civil Judge in respect of property 1-C to 1-F and did not grant any share to the Respondent – Plaintiff in respect of these properties. As regard the properties 1-A and 1-B, the learned District Judge held that the Respondents – Plaintiffs had proved that the properties were thrown in common hotch-potch by Gurusiddhavva and Nilawwa.

4. The learned Counsel for the Appellant submitted that there is absolutely no evidence that the properties have blended in the common stock. He relied on the decision of the Apex Court in the case of *Mallesappa Bandeppa Desai and Anr. Vs. Desai Mallappa alias Mallesappa and Anr.* reported in *AIR (1961) SC 1268* and in the case of *Smt. Pushpa Devi Vs. The Commissioner of Income-tax, New Delhi* reported in *AIR (1977) SC 2230* to contend Hindu Female, not being coparcener, cannot blend her

absolute property in the common stock and that high degree of proof is required to demonstrate blending in the common stock.

5. I have considered these submissions. Mere intention to benefit other members of the family by allowing them to use the income is not sufficient to infer blending and blending must be clear and unequivocal. There is no such evidence. Furthermore, it is also laid down by the Apex Court that blending at the hands of the Hindu female, not being a co-parcener is not permissible. The learned Counsel for the Respondent did not dispute these two propositions however, submitted that even otherwise the Respondents – Plaintiffs being the heir of Gurusiddhavva and Nilawwa, is entitled to a share. However, this is not the case by which the Respondents – Plaintiffs have come to the Court. Even in the District Court this stand is not taken. The entire case of the Suit is based on blending of the properties. The learned Counsel for the Respondents submitted that the appeal can be allowed but permission be given to the Respondents – Plaintiffs to institute Suit.

6. In the circumstances, the Appeal could have been disposed of today itself, however, since all the Respondents are not given notice of final disposal, the Appeal is admitted on following question of law :-

- (i) Whether the finding reached by the First Appellate Court as to whether there was blending of properties para 1-A and 1-B in common hotch-potch at the hands

of Hindu female not being co-parcener and consequently, the Respondents – Plaintiffs are entitled to partition and receive share of these properties, is correct in law ?

7. The learned Counsel for the Respondents – Plaintiffs states that the Respondents – Plaintiffs will institute another Suit on the basis that the Respondents – Plaintiffs are heirs of Gurusiddhavva and Nilawwa and seek share in the property. Considering the fact that the present Suit is filed only on the theory of blending in common hotch-potch, it is open to the Respondents – Plaintiffs to institute a Suit on the basis of being a heir and pendency of the present appeal will not come in their way. Such Suit will be decided on its own merits.

8. In view of this statement made by the learned Counsel for the Respondents – Plaintiffs, it is clear that the Respondents – Plaintiffs will not proceed to execute the present decree and will file a separate Suit for getting the share. In the circumstances, no protective order in the Civil Application is necessary as the Respondents – Plaintiffs has made it clear that the Respondents – Plaintiffs will institute a separate Suit for agitating their right and not execute the present decree. The Civil Application therefore need not be kept pending and is accordingly disposed of.

(N.M. Jamdar, J.)