

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***CIVIL APPELLATE JURISDICTION*****SECOND APPEAL NO. 284 OF 2015****ALONGWITH****CIVIL APPLICATION NO.645 OF 2015****Kum.Vaishanavi Vasantao Kokate-Patil & Anr. Appellants****VERSUS****Vasantao Bhimrao Kokate-Patil****(Since deceased) & Ors.****..... Respondents**

Mr.N.M.Wable, i/b. Mr.S.R.Ghanavat for the Appellants.

Mr.N.J.Patil, i/b. Mr.Amey Patil for Respondent nos. 2 to 4.

CORAM : R.D. DHANUKA, J.**DATE : 21st NOVEMBER, 2016****P.C.**

By this appeal filed under section 100 of the Code of Civil Procedure, 1908, the appellants (original plaintiffs) have impugned the judgment and decree dated 3rd May, 2014 passed by the learned Ad-hoc District Judge-1, Sangli dismissing the Regular Civil Appeal No.340 of 2007 filed by the appellants by which the appellants had impugned the part of the judgment and decree dated 30th July, 2007 passed by the learned trial judge insofar as rejection of the suit for partition, possession and injunction in respect of the property bearing Gat No. 569 Shop Gala No.B-4 bearing Gram Panchayat property Nos. 150, 151 and fixed deposits lying in defendant no.18 are concerned. Some of the relevant facts for the purpose of deciding this appeal are as under :-

2. The parties in this order are described as per their original status before the trial court. The appellants herein were the original plaintiffs whereas the

respondents herein were the original defendants.

3. The appellants are related to the defendant nos. 1 to 11. It was the case of the plaintiffs that all the properties which were subject matter of the suit including the land bearing Gat No. 569 Shop Gala No.B-4 bearing Gram Panchayat property Nos. 150, 151 were the joint family properties of the plaintiffs and the defendants. It was the case of the defendant nos. 1 to 11 that all the suit properties were self acquired properties of the defendant no.2 i.e. Bhimrao Chandu Kokate Patil. The plaintiffs accordingly filed a suit for partition, for separate possession and for injunction. The suit was resisted by the defendant nos. 1 to 11 on various grounds. The learned trial judge framed 8 issues for determination. The plaintiffs as well as the defendant nos. 1 to 11 examined the witnesses and led oral and documentary evidence.

4. Insofar as issue as to whether the plaintiffs had proved that the suit properties were Hindu Undivided Family or not, the learned trial judge held that some of the properties were HUF properties. However land bearing Gat No. 569 and Shop Gala No.B-4 bearing Gram Panchayat property Nos. 150, 151 and fixed deposits with defendant no.18 bank were self acquired properties of the defendant no.2 and the plaintiffs had no right of any nature whatsoever therein.

5. Being aggrieved by the said rejection of the plaint partly i.e. in respect of the land bearing Gat No. 569 Shop Gala No.B-4 bearing Gram Panchayat property Nos. 150, 151 and fixed deposits lying in defendant no.18, the plaintiffs filed an appeal (Regular Civil Appeal No.340 of 2007) in the Court of the learned Ad-hoc District Judge-1, Sangli. The learned Ad-hoc District Judge formulated two points for determination. It is held by the first appellate court that there was ample

evidence to prove that defendant no.2 was in service and had purchased immovable properties from the income of his service funds. The first appellate court passed a judgment and decree on 3rd May, 2014 and dismissed the Regular Civil Appeal No.340 of 2007 filed by the plaintiffs. Being aggrieved by the said judgment and decree dated 3rd May, 2014 passed by the first appellate court, the plaintiffs preferred this appeal under section 100 of the Code of Civil Procedure, 1908.

6. Learned counsel for the plaintiffs invited my attention to the portion of the oral evidence led by the defendant no.2 and also another witness viz. Mr.Bhikaji Krishna Patil. It is submitted by the learned counsel that admittedly there were few ancestral properties including the agricultural lands. The respondent no.2 was visiting village in which the said agricultural land was situated for the purpose of collection of amounts generated out of the sale of the crops. He submits that defendant no.2 had admitted in his cross examination that the defendant no.2 and the witness examined by him admitted that the defendant no.2 was collecting the amounts generated from the sell of the crops from the ancestral agricultural land. He submits that it was thus clear that the defendant no.2 had used the said income generated out of the undivided family income in the purchase of the land bearing Gat No. 569, Shop Gala No.B-4 bearing Gram Panchayat property Nos. 150, 151 and deposited the amount in the fixed deposit and thus the plaintiffs also were entitled to share in the said property.

7. It is submitted by the learned counsel for the plaintiffs that the learned District Judge who dismissed the appeal filed by the plaintiffs has not dealt with the oral and documentary evidence led by both the parties and has not dealt with and appreciated the oral and documentary evidence led by the parties in the

impugned judgment and decree and on that ground alone the impugned judgment and decree passed by the first appellate court deserves to be set aside. It is submitted by the learned counsel for the plaintiffs that the first appellate court has rendered various findings in the impugned judgment and decree which were not even subject matter of the suit.

8. Mr. Patil, learned counsel for the defendant nos. 2 to 4 on the other hand invited my attention to the oral evidence of the defendant no. 2 and his witness and would submit that in the oral evidence, both the witnesses had categorically deposed that the aforesaid suit properties were self acquired properties of the defendant no. 2 and were not HUF properties. He submits that even if there were joint HUF properties, since defendant no. 2 had not used any income out of the HUF properties in acquiring the aforesaid properties and the plaintiffs had failed to prove the nucleus, the two courts below were right in rejecting this plea of the plaintiffs. He submits that the onus was on the plaintiffs to prove that those properties were HUF properties of the defendant no. 2.

9. A perusal of the impugned judgment and decree passed by the learned trial judge indicates that the learned trial judge has dealt with all the issues and more particularly issue nos. 2 and 3 in great detail and after considering the oral and documentary evidence has held that the aforesaid properties were purchased by the defendant no. 2 out of his own funds. He was employed when those two properties were purchased. It is also held that the plaintiffs had failed to prove that those properties were HUF properties.

10. Insofar as judgment and decree passed by the first appellate court is concerned, a perusal of the said judgment indicates that the first appellate court

also in paragraphs 8 to 11 has held that there were ample evidence to prove that the defendant no.2 was in service and had purchased immoveable properties from the income of his service funds. It is held that merely because there was an ancestral property at native village, that would not mean that the nucleus was proved. It is held that to prove the nucleus, the plaintiffs ought to have prove that the product, crops were sold in the market and the sale proceeds thereof were used to purchase new property by the defendant no.2.

11. It is held that here was no such evidence on record. The first appellate court has held that there was no substance in the submission of the plaintiffs that the income from the ancestral property was used for the purchase of the new property. The first appellate court accordingly upheld the findings on this issue rendered by the learned trial judge.

12. With the assistance of the learned counsel appearing for both the parties, I have perused the oral evidence led by the defendant no.2, the witnesses examined by him and also the evidence of the plaintiff. A perusal of the oral evidence of the defendant no.2 and his witness clearly indicates that in the examination in chief, he had categorically deposed that the aforesaid properties were self acquired properties of the defendant no.2 which deposition was not shaken in the cross examination of those two witnesses. I am not inclined to accept the submission of the learned counsel for the plaintiffs that in the cross examination of those two witnesses, they have admitted that the aforesaid properties were purchased out of the income generated from the crops on the ancestral agricultural property. In my view the submission made by the learned counsel for the plaintiffs is contrary to the evidence on record.

13. In my view the onus to prove that the aforesaid properties were HUF properties was on the plaintiffs who failed to prove though had led oral evidence that the aforesaid properties were HUF properties. In my view even though there were ancestral properties including the agricultural land in respect of which the defendant no.2 had collected the amount generated out of the sale of crops, that itself does not conclusively prove that the income from the HUF properties was used for the purpose of purchasing the aforesaid properties and thus those properties were alleged to be HUF properties. The plaintiffs have failed to prove nucleus as rightly held by both the courts below.

14. Insofar as submission of the learned counsel for the plaintiffs that the first appellate court has not dealt with and appreciated the oral and documentary evidence led by both the parties in the impugned judgment and decree is concerned, a perusal of the impugned judgment and decree passed by the first appellate court indicates that the first appellate court has considered the oral and documentary evidence led by the parties. In my view since the first appellate court has confirmed the findings rendered by the learned trial judge, the first appellate court was not required to refer to each and every part of the oral evidence in the impugned judgment and decree. There is thus no substance in this submission of the learned counsel for the plaintiffs.

15. Insofar as submission of the learned counsel for the plaintiffs that the first appellate court has rendered findings on various issues which were not subject matter of the appeal is concerned, this submission of the learned counsel is also devoid of merits and is rejected.

16. In my view the findings of fact rendered by the two courts below being

concurrent and not being perverse, cannot be interfered with by this court in this appeal filed under section 100 of the Code of Civil Procedure, 1908. The appeal is devoid of merits. No substantial questions of law arises in this appeal. I, therefore, pass the following order :-

- (a) Second Appeal No. 284 of 2015 is dismissed. No order as to costs.
- (b) In view of dismissal of the second appeal, Civil Application No.645 of 2015 does not survive and is accordingly dismissed. No order as to costs.

(R.D.DHANUKA, J.)