

Sequeira

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

***SECOND APPEAL NO. 119 OF 1992
Along with
CIVIL APPLICATION NO. 1111 OF 2010***

Mahadeo Anant Rane,
aged about 47 years, Occupation:
Agriculturist and business,
resident of village Kasai-
Dodamarga, Tal.Sawantwadi,
District : Sindhudurg.

.. Appellant

Vs

1. Balkrishna Dhondurane,
 2. Santosh Dhondurane,
 3. Chandrashekar Dhondurane,
 4. Dilip Dhondurane,
 5. Smt.Sudhabai Dhondurane,
 6. Kum. Lata Dhondurane,
 7. Kum. Alaka Dhondurane,
- Occupation of Respondent Nos.1 to
4 – service, Respondent No.5 to 7
Household, All are residents of
village Kasai-Dodamarga,
Tal.Sawantwadi, District : Sindhudurg. .. Respondents

Mr.Kunal Bhanage, for the Appellant & Applicant.

Mr.M.D.Pokale, for Respondent Nos.1 to 7.

Coram : N.M.Jamdar, J.

Date : 27 April 2017.

Oral Judgment:

The Appellant is the original Plaintiff. Suit bearing No.59 of 1981 was filed by the Appellant for partition and separate possession of the suit properties. The suit was dismissed by the learned Civil Judge. Appeal No.181 of 1985 filed by the Appellant in the District Court, Sindhudurg was dismissed by the learned District Judge by judgment and order dated 12 April 1991. The Appellant has thus challenged the concurrent orders dismissing the Suit and appeal.

2. This being a proceeding for partition it is necessary to understand the genealogy and the *inter se* relation between the parties. The main person in the family was Balkrishna. He had three sons i.e. Anant, Dhondu @ Sonu and Dhananjay. Appellant is the son of deceased Anant. Anant expired in the year 1940. Dhondu (Sonu) expired in the year 1962 and Dhananjay expired in the year 1953 leaving behind him no heirs.

3. The suit was filed in respect of four properties. The properties have been described in the plaint at A, B, C and D. Property A is Survey no.202/A, property B is Survey no.210/2 and 188/2, property C is 202/B, and property D is a house property. All the properties are situated in village Kasai-Dodamarg district Sawantwadi.

4. It was the case of the Appellant that his father was manager of

the joint family. After the grandfather Balkrishna passed away, he purchased property 'C' on 2 July 1936. According to him thereafter Sonu became manager of the joint family and purchased property 'B' in the name of Dhananjay. It was contended that after the demise of Sonu, Plaintiff became manager of the joint family. It was contended that partition took place between the parties and house no.177 and property 'C' was allotted to the Plaintiff and the other properties were given to Defendants. However, the Defendants / Respondents were interfering with his possession and therefore, the suit for declaration of title and perpetual injunction had to be filed. The Respondents filed their written statement and denied that the property was joint family properties. It was denied that Appellant had one half share. The factum of partition was also denied.

5. The learned Civil Judge framed issues as to whether the Plaintiff has proved his one half share in the suit properties and what were the shares of the respective parties. The learned Civil Judge held that there was no evidence that the properties were joint family properties. The father of the Appellant was staying separately in another village for more than a decade. The learned Civil Judge held that there was no nucleus for the joint family property to be acquired and for the properties belonging to Dhananjay. Accordingly, the learned Civil Judge dismissed the suit by judgment and order dated 25 April 1985. An Appeal was filed. In the Appeal the contentions that the property was joint family property was reiterated. The

learned District Judge framed an issue to that effect and answered it against the Appellant. The learned District Judge held that the Appellant did not prove that he had share in the suit property and the Appeal was accordingly dismissed by the learned District Judge, by judgment and order dated 12 April 1991.

6. The Second Appeal was admitted on 2 April 1992 on the substantial question of law and ground no.27 and 28 of the Appeal memo. These grounds relate to the claim of the Appellant regarding the share in the property of deceased Dhananjay and as per provisions of Hindu Succession Act.

7. The Appeal was once dismissed for non-prosecution, thereafter restored and thereafter has been argued by the learned counsel for the parties. I have heard the learned counsel for the parties.

8. The learned counsel for the Appellant submitted : the properties are joint family properties. Oral partition has taken place. There were no sufficient funds for the Defendants to acquire the properties. Finding that there was no nucleus was not correct and the Appellant being minor would not know whether there was any source of funds. There is no discussion about the document of evidence by the appellate Court. Assuming the property was exclusively owned by Dhananjay, after he had died without heirs, the property should have gone to two brothers i.e. including the father of the Appellant and thereafter Courts could have granted share to the

Appellant.

9. The learned counsel for the Respondents submitted: Concurrent finding of fact has been recorded that the properties are not joint family properties. There was no nucleus established and therefore, there was no question of burden being shifted to Respondents. The father of the Plaintiff was staying separately and the theory of oral partition and consequent allotment of properties to the Appellant has not been proved. The Appellant cannot keep clearing their stand and should not be permitted to do so, since the Appellant has dragged the Respondents in a needless litigation.

10. The learned Civil Judge has in the judgment while answering Issue No.2 and 3 has held that property 'C' and house no.177 is the property of Plaintiff alone and thereafter proceeded to dispose of the Suit. The learned counsel for the parties agree that therefore the dispute now relates to the property No.A and B as specified in the plaint.

11. As far as the property No.A is concerned, in the records of this property name of Sonu appears. In the property B name of Dhananjay appears in the Sale deed. In property A, the contention of the Appellant that it was a joint family property and the joint family became deemed purchaser, however, the original landlord executed the property Sale deed on 4 April 1964 in favour of the joint family.

This contention cannot be accepted. Merely because there exists a joint family, the presumption does not arise that the properties are joint family properties. For such a presumption to arise a nucleus for purchase of the properties needs to be established. Once there is a sufficient nucleus from which the properties could be acquired, the burden could shift on those who assert that the properties is a self-acquired property. Both the Courts have rendered a categorical factual finding that there existed no such nucleus from which the properties could be purchased. The property admittedly is in the name of father of the Defendant-Sonu, as a tenant. The deed of 7 April 1964 is also in the name of Sonu. Merely because the Appellant was a minor, the burden of proof exists of nucleus cannot be dispensed with in the present case as nothing is shown that, there were any efforts made to find out the existence of nucleus and inspite of best efforts that Appellant failed in obtaining such evidence or could not examine any elder person. The learned Civil Judge took note of the properties that existed to come to the conclusion that they did not give rise to any sufficient nucleus for the purchase. That being the position, property A which stood in the name of Sonu and property B which stood in the name of Dhananjay, without any evidence of these properties being thrown in common hotch potch, partition could not have been sought. Nothing has been shown to discredit the finding of fact rendered by both the Courts that these two properties, which stood in the name of Sonu and Dhananjay, were not joint family properties. That being the position the

argument of the learned counsel for the Appellant that the properties were joint family properties cannot be accepted. There is no perversity in the findings of both the Courts. As far as the documents sought to be relied upon by the Appellant are concerned, learned counsel for the Respondent pointed out that there is no pleading in support of any of these documents. The learned District Judge has taken note of this position that there is no factual foundation for any of these documents. How these documents will lead to the conclusion that the properties are joint family properties or that there was a nucleus, is also not explained by the learned counsel for the Appellant.

12. The learned counsel for the Appellant then submitted that assuming the properties were self-acquired properties of Dhananjay, after the death of Dhananjay the property should have devolved on his brothers i.e. the father of the Appellant and a share should have been given to the Appellant. He submitted that this is a question of law that has been framed by the Court. It is the case of the Respondent that properties have been purchased by Sonu in the name of Dhananjay.

13. Firstly, what is the case of the Appellant in the plaint will have to be seen. The Appellant in the plaint as well as in the oral evidence on oath has deposed that the property is a joint family property. There is no concession or even an alternate case that the properties are self-acquired properties of Dhananjay. If a stand is sought to be

taken now in Second Appeal, an alternate stand atleast could have been taken but the same is not found either in the plaint or in the oral evidence. When the learned Civil Judge recorded a finding that no share in the property of Dhananjay could have been given to the Appellant in the First Appeal, atleast an amendment could have been sought. In the entire appeal memo the theory of the parties being a joint family property has been reiterated. The discussion in the judgment of the First Appeal also shows that the entire thrust was on the fact that the property is a joint family property and upon oral partition on oath the properties are continuously claiming as joint family properties, alternate theory is merely an oral argument of the advocate. After the finding of fact has been confirmed by both the Courts, in Second Appeal that the present argument is sought to be advanced.

14. The learned counsel for the Appellant had sought to rely upon Order 41 Rule 2 and Order 41 Rule 33 of the Code of Civil Procedure. The learned counsel submitted that as Order 41 Rule 2 states that the ground need not be specifically taken in an appeal and the particular argument can always be advanced. He also submitted that under Order 41 Rule 33, the Appellate Court has ample powers. The question is whether such latitude should be extended to the Appellant. The Appellant has throughout contended that the property is joint family property. If the property of Dhananjay which admittedly stood in his name was a self-acquired property a

simplicitor Suit should have been filed seeking share in that property after demise of Dhananjay. This course of action was available to the Appellant at the inception.

15. The Apex Court in various decisions has stressed upon the need to come to the Court with clear and candid case and the court proceeding is not for taking chances. The Appellant, on oath insisted that the properties were joint family properties, in the trial Court. The same stand in the pleadings continued in the first appeal. The Appellant, in fact claimed that he had become manager after the death of Sonu and as manager of a joint family he was entitled to deal with the property. He has made a statement that he was 15 – 16 years old in the year 1971 and he became manager after death of Sonu in the year 1962. It is impossible to believe this assertion as the Appellant was only 5 to 6 years old. This only shows the length he has gone to claim the properties. For a substantial question of law to arise the case must be pleaded in the courts below. Had the Appellant sought an alternate prayer in the plaint or stated so in the evidence, the Court could permit the Appellant to argue this point. The argument of the learned counsel for the Appellant that the general issue framed by the trial Court would include this issue, cannot be accepted. Once having not taken this ground in the appeal memo of the first appeal, it can be presumed that the Appellant is deemed to have abandoned this line of argument as the Appellant only chose to proceed on the basis that the properties are joint family properties.

16. The tendency of taking varying stands as the litigation goes along needs to be curbed. If encouraged it will lead to institution of fraudulent suits. After contesting a particular factual position and engaging all the family members in the litigation for decades, having reached the end of the road, in oral arguments a relief is sought on a position which always existed. Nothing stopped the Appellant to simply ask for a share in the property of Dhananjay, accepting it as a self-acquired property, at the outset. It was then not necessary to embroil the entire family in the litigation for almost 36 years.

17. Having held thus, the question of law framed it will have to be answered against the Appellant. No other question arises for consideration. Second Appeal is accordingly dismissed. In view of the above, Civil Application stands disposed of.

(N.M.Jamdar, J.)