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# *IN THE HIGH COURT OF JUDICATURE AT BOMBAY*

## *CIVIL APPELATE JURISDICTION*

*SECOND APPEAL NO.285 OF 2012*
*WITH*
*CIVIL APPLICATION NO.505 OF 2012*

Vilas Maruti Jadhav & Anr. ..Appellants.
V/s.
Sou. Hirabai Shankar Pawar & Ors. ..Respondents.

Mr.Rajiv Patil, Senior Advocate with Mr.Deepak Shinde for the Appellants.

Mr.P.B.Shah for Respondent Nos.1 to 4, 6 and 7.

***Coram : N.M.Jamdar, J.***

***Date : 29 March 2017***

**ORAL ORDER**

By this second appeal, the Appellants-original Defendant Nos.1 and 5 have challenged the Judgment and Order passed by the learned District Judge, Satara. The learned District Judge decreed the suit and directed that the properties in question to be partitioned and Respondents-Plaintiffs be allotted 1/28th share in the property described in Plaint paras 1 and 1B and also granted share in respect of the other properties.

2. Respondents-Plaintiffs, sisters of the Appellants, instituted Regular Civil Suit No.95/1993 for partition and separate possession of the suit properties situated at Wathar Station, District Satara. According to them, the properties were ancestral properties and the Plaintiffs were entitled to partition of the suit properties. The suit was instituted on 12 April 1993, subsequently by way of an amendment on 10 March 2004, Gat No.746 was included, which is the bone of contention between the parties. The learned Civil Judge framed the issues as regards the existence of previous partition; existence of legal necessity in respect of Gat No.559; whether the was a sale deed dated 30 August 1988 is binding on the Plaintiffs as well as Defendant Nos.1, 3 and 4; whether the property Gat No.746 was a joint family property and whether the Respondents-Plaintiffs were entitled to separate share in the suit properties. The learned Civil Judge by Judgment and Decree dated 16 February 2005, after holding that the properties, except Gat No.746, were ancestral properties directed that the parties were entitled to share in suit properties, except Gat No.746. As regards Gat No.746, the learned Civil Judge upheld the contention of the Appellants that it is self acquired property of Appellant No.2-Defendant No.5. Accordingly, the learned Civil Judge did not grant any share in Gat No.746 to the Respondents-Plaintiffs.

3. The Appellants filed Regular Civil Appeal No.167/ 2005

challenging the Judgment and Decree passed by the learned Civil Judge. The Respondents filed Regular Civil Appeal No. 25/007 challenging the said Judgment and Decree. The learned District Judge by Judgment and Order dated 24 August 2011 dismissed the appeal filed by the Appellants and allowed the appeal filed by the present Respondents. The Respondents were held to be entitled to share in Gat No.746 as well. It is against this the present second appeal has been filed.

4. While issuing notice on 17 July 2013 in the Second Appeal the contention of the Appellants that the appeal is restricted only to the property Gat No.746 was recorded, therefore, the issue in the present appeal is restricted to Gat No.746. The main question that arises, therefore, is whether Gat No.746 is self acquired property of the Appellant No.2-Defendant No.5 or is a joint family property.

5. Mr.Rajeev Patil, the learned Senior Advocate for the Appellants, firstly submitted that the learned Civil Judge after considering the evidence elaborately, has recorded a finding that there was no nucleus of the joint family when the suit property was purchased on 1 July 1992. The learned counsel submitted that the learned District Judge without any re-appreciation of evidence, which is expected of the first Appellate Court, has concluded that the Appellant No.2 failed to show independent source of income as she was not employed without noting the stand of Appellant No.2 that

purchase of the suit land was financed primarily with the funds given by her father. The learned counsel submitted that the Respondents-Plaintiffs had themselves admitted that there were various loans that had to be repaid and, therefore, the amount of provident fund stated to have been received was spent towards repayment of the loan. It was also contended that nothing was placed on record by the Respondents that the nucleus existed, without which, the burden could not have been shifted on the Appellants to show their independent source of income. The learned counsel also submitted that Gat No.746 was not included in the Plaint and it was included in the year 2004 much after the evidence of the Plaintiffs was over. It was also contended that 50% of Gat No.746 was sold by Defendant No.5 to which no objection has been taken. The learned counsel for the Respondents supported the order of the District Court and submitted that there is no error in the finding of fact that the Appellants have failed to show their independent source of income.

6. Firstly, there must exist a nucleus for purchase of joint family property. Once the factum of nucleus is established, the burden is upon the one who asserts that the property is self acquired. The question, therefore, is whether the finding of the District Court that the nucleus existed can be stated to be perverse. It has come on record that the father of the Appellants and Defendants after his retirement had received an amount of Rs.30,000/- towards the

provident fund in the year 1986. It is the case of the Respondents that this amount coupled with the sale of grocery shop and income generated therefrom financed the purchase Gat No.746. The factum of receipt of the provident fund is not in dispute and neither the sale of the grocery shop. It was sought to be contended on behalf of the Appellants that the amount was received from the provident fund sometime in the year 1986 and the shop had closed in the year 1990 and during this period, the amount, on the own admission of the Plaintiffs was spent on repayment of loan. This submission cannot be accepted once the nucleus was established to be available. It was for the Appellants to demonstrate that it was spent. The only thing that the Appellants-Defendants had placed on record is repayment of loan of Rs.7,000/-. What happened to the other amount which was received from the sale, income of the grocery shop and the provident fund, has not be specified. Appellant No.1-Defendant No.1 is the eldest in the family, who could have easily explained the position. For absence of his evidence, the finding of the District Court that adequate amount existed at the time of purchase of the said property is a possible view on appreciation of evidence.

7. That being the position, the burden shifted on the Appellants to demonstrate their independent source of income. It is the contention of the Appellants that the learned District Judge has discarded the case of the Appellants only on the ground that Appellant No.2 was not employed. However, perusal of the decision

of the District Court would show that the case of the Appellants that she had otherwise independent source of income or that the amount was given to her by the father, has been considered and the learned District Judge has noted that there is no evidence to that effect.

8. Except for the bare words of the Appellants that main part of the amount which financed the purchase of Gat No.746 was given by the father, no cogent material in support of the same has been produced. The 7/12 extracts of the property of the father is placed on record. The father's land admeasures 1 H. 25 Aar. It shows that father of Appellant No.2 has two sons apart Appellant No.2 and the property was also encumbered. The letter of the employer of father of Appellant No.2 in respect of the provident fund is placed on record but there are no details as to the amount, as it is noted in the discussion of both the Courts. This being the position, the conclusion reached by the learned District Judge that the Appellants have failed to show independent source of income cannot be stated as perverse.

9. As pointed out by the learned counsel for the Respondents, Appellant No.1 in his evidence has stated that he was not employed at the relevant time and, therefore, Appellant No.1 could not possibly have an independent source of income. The learned counsel for the Respondents also sought to rely upon a statement in the cross-examination of Appellant No.1 that Gat

No.746 is a joint family property. However, this statement will have to be read in the context of the written statement and the entire evidence of both the Appellants where consistent stand is that Gat No.746 is not a joint family property. Neither any such admission has been relied upon by the learned District Judge.

10. As regards the contention of the learned counsel for the Appellants that the property Gat No.746 was not initially part of the suit is concerned, an adequate explanation has been given by the witness of the Respondents-Plaintiffs. It is stated that purchase of Gat No.746 in the name of Appellant No.2 was by way of consent, so also they paid fifty per cent and it was promised by the Appellants that share in Gat No.746 will be given and, therefore, initially the property was not joined in the suit. Considering the relationship between the parties and the fact that there is consensus as regards the other properties of the joint family property, the theory of the Respondents-Plaintiffs cannot be stated to be impossible one and, therefore, this submission advanced by the learned counsel for the Appellants cannot be accepted.

11. In these circumstances, the finding of the learned District Judge that Gat No.746 is not self-acquired property and the Respondents-Plaintiffs also have share is not perverse. Each piece of evidence has been appreciated by the learned District Judge before coming to this conclusion. It is not possible to re-appreciate the

evidence. No substantial question of law arises. The second appeal is accordingly dismissed. In view of the disposal of the second appeal, the civil application is also disposed of.

12. At this stage, the learned senior counsel for the Appellants seeks continuation of the ad-interim relief granted on 17 July 2013. On 17 July 2013 while issuing notice, it was directed that the proceeding relating to partition, except Gat No.746 to go on and the proceedings were stayed so far as Gat No.746 is concerned. This ad-interim order to continue for a period of eight weeks from today.

*(N.M.Jamdar, J.)*