

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

947 SECOND APPEAL NO. 776 OF 2018
WITH
CA/11671/2018
IN
SA/776/2018

DHONDIBA RAVAJI HAZARE
VERSUS
BHIKA RAVJI HAZARE AND ORS.

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Mr. R.A.Tambe, Advocate for appellant.
Mr. V.Y.Bhide, Advocate for R – 1 – Caveator.

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CORAM: VL.ACHLIYA, J.

DATE : 21/09/2018

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ORAL ORDER :

1. Being aggrieved by the concurrent decisions rendered by the courts below, the appellant/original defendant No. 2 has preferred this second appeal u/s 100 of C.P.C.
2. Heard learned counsel for appellant and respondent No. 1/caveator on the limited point of admission of appeal. Perused the Judgments and Orders passed by the Courts below.
3. Learned counsel for the appellant assailed the reasons and findings of the courts below with contention that the courts below have committed gross error in appreciating that in a case instituted seeking Suit for partition with assertion that property to be partitioned is a joint Hindu family property, the initial burden lies on the plaintiff to prove the fact that the property is joint family property and liable for partition. In the event the plaintiff discharges burden, the onus shift

upon the defendants to prove the fact otherwise. It is submitted that the trial Court as well as appellate Court have failed to take into account that the plaintiff has failed to discharge initial burden to prove that suit properties are joint Hindu family properties and liable for partition. It is further submitted that in order to prove that the properties are joint Hindu family properties, it must be established that the properties are purchased with the efforts and funds of joint family or alternatively same has been acquired from the income derived from the ancestral property. It is submitted that in the instant case except G.No. 418, no other property is claimed to be ancestral property possessed by the joint Hindu family. The agricultural field bearing G.Nos. 410 and 115/2 are admittedly purchased in the name of appellant/original defendant No. 2 and property bearing G.No. 420/1 purchased in the name of plaintiff. It is submitted that said properties are self-acquired properties of the plaintiff and defendants and not liable for partition. The plaintiff has failed to prove that the agricultural field bearing G.Nos. 410 and 115/2 were purchased out of income derived from the joint family property or the income derived from agricultural filed G.No. 418. By referring the evidence, learned counsel submits that it has been brought on record that the plaintiff was residing away from the village due to his occupation as shephard. There is absolutely no evidence to show that the agricultural field bearing G.Nos. 410 and 115/2 were purchased out of income of the joint family. In absence of failure to discharge burden by the plaintiff to prove that the suit properties are joint family properties and liable for partition, the Courts below erred in shifting onus upon the appellant/defendant No. 2 to prove that said properties are self-acquired properties of defendant No. 2.

4. On the other hand, learned counsel representing respondent no. 1/original plaintiff has supported the Judgments and orders passed by

the Courts below. Learned counsel submits that there are concurrent decisions rendered by the Courts below. It is submitted that appeal filed by the appellant raises no substantial question of law so as to entertain the second appeal.

5. In order to appreciate the submissions advanced, I have perused the Judgments and orders passed by the Courts below. I have closely scrutinized the reasons and findings recorded by the Courts below in the light of rival pleadings and evidence adduced in the case. The fact is not in dispute that the plaintiff and defendants were constituting the joint family and they were joint in estate immediately before filing of the Suit. The fact is also not in dispute that the joint family of plaintiff and defendants were having agricultural field bearing G.No. 418 as the ancestral property. The plaintiff has stepped into witness box and deposed to prove that the properties in question including the properties purchased in the name of plaintiff and defendant No. 2 are the joint family properties and liable for partition. Both the plaintiff and defendant No. 2 had entered into witness box and deposed as per their respective case. On close scrutiny and analysis of the evidence, the trial Court has reached to the conclusion that the suit properties i.e. agricultural filed bearing G.Nos. 410,418 and 420/1 of Mauje Digras, Taluka Sangamner, District Ahmednagar as well as agricultural field bearing G.No. 115/2 are the joint Hindu family properties and liable for partition. Since the plaintiff and defendants have stepped into witness box and deposed as per their respective case and it is the specific case of defendant No. 2 i.e. appellant that agricultural field bearing G.Nos. 410 and 115/2 are his self-acquired properties. In the facts and circumstances of the case it loses the significance of burden of proof. There is oath against oath. The defendant was bound to prove the fact that said properties were purchased by him out of his own earnings and same are not purchased out of income of joint family. On the contrary,

the plaintiff has categorically stated that the said properties purchased in the name of defendant No. 2 as well as the agricultural field bearing G.No. 420/1 purchased in his name are purchased out of income of joint family.

6. In my view, the reasons and findings recorded by the Courts below are quite consistent with the pleadings and evidence on record and can not be termed as perverse. The Courts below have recorded concurrent findings of fact on the issue as to whether the properties in question are joint family properties or not. There is no perversity in the Judgments rendered by the Courts below. The appeal raises no substantial question of law to be determined in second appeal.

7. In the case of *Gurdev Kaur and others V/s Kaki and others reported in (2007) 1 Supreme Court Cases 546* the Apex Court has considered the purport of Section 100 of C.P.C. in the light of amended Act of C.P.C. of 1976. It is held that by virtue of amended Act of 1976, the scope of Section 100 of C.P.C. has been drastically curtailed and narrowed down. Only in a case where substantial questions of law are involved and those questions have been clearly formulated in the memorandum of appeal, the High Courts are not expected to invoke its jurisdiction u/s 100 of C.P.C. to entertain the Second Appeal. It is further held that at the time of admission of second appeal, it is the boundand duty and obligation of High Court to formulate substantial questions of law and then only to proceed with the case to decide those questions of law. It is further observed that the scope of interference of High Court in second appeal is limited and not extend to interfere with the concurrent findings of fact. It is observed that the legislative intent in limiting the scope of exercise of powers u/s 100 of C.P.C. is clear and unambiguous and the legislature never intended second appeal to become “third trial on facts”. It has been ruled that the concurrent

findings of facts can not be interfered in exercise of appellate jurisdiction u/s 100 of C.P.C. The soundness of findings on facts recorded by the Courts below can not be tested and decided in second appeal. After taking the survey of decisions rendered by the Apex Court post amended Act of 1976, the Apex Court has observed in para Nos. 70 to 72 as under :

“ 70. Now, after 1976 Amendment, the scope of Section 100 has been drastically curtailed and narrowed down. The High Courts would have jurisdiction of interfering under Section 100 C.P.C. only in a case where substantial questions of law are involved and those questions have been clearly formulated in the memorandum of appeal. At the time of admission of the second appeal, it is the bounden duty and obligation of the High Court to formulate substantial questions of law and then only the High Court is permitted to proceed with the case to decide those questions of law. The language used in the amended section specifically incorporates the words as "substantial question of law" which is indicative of the legislative intention. It must be clearly understood that the legislative intention was very clear that legislature never wanted second appeal to become "third trial on facts" or "one more dice in the gamble". The effect of the amendment mainly, according to the amended section, was:

(i) The High Court would be justified in admitting the second appeal only when a substantial question of law is involved;

(ii) The substantial question of law to precisely state such question;

(iii) A duty has been cast on the High Court to formulate substantial question of law before hearing the appeal;

(iv) Another part of the Section is that the appeal shall be heard only on that question.

71. The fact that, in a series of cases, this Court was compelled to interfere was because the true legislative intendment and scope of Section 100 C.P.C.

have neither been appreciated nor applied. A class of judges while administering law honestly believe that, if they are satisfied that, in any second appeal brought before them evidence has been grossly misappreciated either by the lower appellate court or by both the courts below, it is their duty to interfere, because they seem to feel that a decree following upon a gross misappreciation of evidence involves injustice and it is the duty of the High Court to redress such injustice. We would like to reiterate that the justice has to be administered in accordance with law.

72. When Section 100 C.P.C. is critically examined then, according to the legislative mandate, the interference by the High Court is permissible only in cases involving substantial questions of law.

8. Thus, considering the overall facts of the case and reaching to the conclusion that the appeal raises no substantial questions of law, I am not inclined to entertain the appeal.

9. Accordingly, the appeal is dismissed. C.A.No. 11671 of 2018 stands disposed of in terms of disposal of appeal.

[V.L.ACHLIYA]
JUDGE