

Santosh

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 24 OF 2015
WITH
CIVIL APPLICATION NO. 1031 OF 2009
WITH
CIVIL APPLICATION NO. 809 OF 2012

Ganpati Vithoba Khamkar (deceased) Through
LRs Mahipati Ganpati Khamkar & Ors ...Appellants

Versus

Smt. Anubai Shamrao Shinde (deceased)
Through LRs & Ors ...Respondents

Mr. Pratap Patil, for the Appellants.
Mr. Bhushan Walimbe, i/b Ms. Preeti Walimbe, for Respondent
No.1A and for the Applicant in CA No.809/2012.

CORAM: N. M. Jamdar, J.
DATED: 10 January, 2018

Oral Order :-

1. By this Appeal, the Appellants - the heirs of Defendants nos.6 and 7 have challenged the judgment and order passed by the learned District Judge, Islampur, dated 25 January, 2008 in Regular Civil Appeal No.290 of 1999, whereby the learned District Judge had partly allowed the said Appeal.

2. Kushaba Khamkar had two sons, Vithoba and Dnyanu. Gangubai was the wife of Dnyanu. The Defendants nos.1 and 2, were the daughters of Dnyanu and Gangubai, who were the Appellants in Appeal No.290 of 1999, order passed in which is under challenge. The Defendant's brother Vithoba was Defendant No.7, his son Ganpati was Defendant No.6. The Plaintiff Hanmant was given in adoption by Ganpati to Gangubai. The Appellants are the heirs of Ganpati and the natural brothers of Hanmant.

3. Hanmant filed a Regular Civil Suit No.130 of 1982 in the Court of Civil Judge, Junior Division, Islampur seeking partition of the properties mentioned in Schedule 'A', 'B', 'C', 'D' and 'E'. The Plaintiff sought $\frac{1}{2}$ share in these properties. Dnyanu expired on 7 May, 1952. Gangubai expired on 23 February, 1976. The Civil Judge, by judgment and order dated 28 February, 1994, dismissed the Suit filed by the Plaintiff Hanmant. The Defendants nos.1 and 2, the daughters of Gangubai, had filed a counter-claim seeking share in the suit land mentioned at Schedule 'E'. The Civil Judge granted the counter-claim and held that Defendants Nos.1 and 2 and the Plaintiff had entitled $\frac{1}{6}^{\text{th}}$ share each in the suit land mentioned at Schedule 'E'. The natural brothers of the Plaintiff supported the claim of the Plaintiff for $\frac{1}{2}$ share.

4. Against the order passed by the Civil Judge on 28 February, 1994, two appeals were filed in the District Court, Islampur. Regular Civil Appeal No.286 of 1999 was filed by Hanmant – Plaintiff challenging the dismissal of the Suit and Regular Civil Appeal No.290 of 1999 was filed by Defendants nos.1 and 2 being aggrieved by grant of only $1/6^{\text{th}}$ share each in the suit lands mentioned in Schedule 'E'. The Civil Judge had granted $\frac{1}{2}$ share in Schedule 'E' to Defendants Nos.1 and 2 along with the Plaintiff. By filing Appeal No.290 of 1999 Defendants nos.1 and 2, in the Appeal, sought entire share in the properties listed at Schedule 'E'.

5. The District Judge, by the judgment and order dated 25 January, 2008 dismissed Civil Appeal No.286 of 1999 filed by Plaintiff – Hanmant and partly allowed Regular Civil Appeal No.290 of 1999 filed by Defendants nos.1 and 2. The District Judge held that there was no joint family between Dnyanoba and Vithoba and consequently the Plaintiff had no right to claim partition of the properties of Dnyanoba. The District Judge accepted the contention of Defendants nos.1 and 2 that deceased Gangubai was the complete owner of properties mentioned in Schedule 'E' and thus granted full share in these properties.

6. The Plaintiff – Hanmant has not challenged the judgment and order passed by the District Judge dismissing his Appeal. The present Second Appeal is filed by the heirs of Defendants nos.6 and 7, the natural brothers of the Plaintiff. Broadly it is the contention of the Appellants that Defendants nos.1 and 2 do not have more than ½ share in the properties mentioned at Schedule ‘E’. The learned Counsel for the parties agree that the dispute in this Appeal is centred-round the share of the properties in Schedule ‘E’ and what is the extent of share of the parties in these properties.

7. The first contention advanced by the learned Counsel for the Appellants is that since the heirs of Respondent no.5 in Regular Civil Appeal No.290 of 1999 i.e. Respondents nos.5(c), 5(f) and 5(k) were deleted during the Appeal proceedings, the judgment and decree passed by the District Judge in Appeal No.290 of 1999 as against these deleted Respondents has become final. The learned Counsel submitted that there cannot be two different decrees. The learned Counsel relied upon the decisions in: *Parvez Rustom Nekoo Vs. Rustom Ardeshir Nekoo*¹, *Smt. Sheela wd/o Vijay Choudhari & Ors. Vs. Central Bank of India & Ors.*² and *Govind Laxman Jadhav Vs.*

¹ 2003(2) Mh.L.J. 236.

² 1998(4) ALL MR 173.

*Namdeo Balu Jadhav*³. The learned Counsel for the Respondents submitted that neither this fact was urged in the District Court nor the deleted Respondents have raised any objection.

8. Admittedly, this fact is urged for the first time in the Second Appeal. The decision of the learned Division Bench in the case of *Smt. Sheela wd/o Vijay Choudhari* and the learned Single Judge in *Parvez Rustom Nekoo*, would show that in those cases an objection was raised during the proceeding that for the failure on the part of the appellants in not bringing the heirs on record when there was an indivisible decree. The appeal should abate. In both these decisions, the Court held that the failure in such a case, the appeal cannot be proceeded with and would abate as a whole. In the present case, no such contention was advanced by the Appellants during the pendency of the Appeal nor it was brought to the notice of the learned District Judge. In the case of *Govind Laxman Jadhav*, on which strong reliance is placed by the learned Counsel for the Appellant, a Suit was filed for removal of encroachment against two defendants. The trial court decreed the Suit as against both the Defendants and appeal was filed by both the Defendants. During the pendency of the appeal, one of the Defendant expired and his heirs were not brought on the record. The lower

³ 2005(1) Mh.L.J. 8.

Appellate Court allowed the appeal of surviving Appellants against a Second Appeal was filed by the Respondents – original Plaintiffs. In these facts, the learned Single Judge accepted the contention of the original Plaintiff that the appeal of one of the Defendant could not have been allowed as it was indivisible decree. Facts in the case of *Govind Laxman Jadhav* are entirely different than the present case. As far as the Appellants are concerned, an order has been passed against them by the learned District Judge. As stated earlier, the Appellants did not raise any objection whatsoever, neither the deleted Respondents before this Court with a contention that the order passed by the District Judge is not binding upon them. The learned Counsel for the Respondents points out that in the companion appeal filed by the original Plaintiff, two of the concerned were not included by the plaintiff himself. In view of these position, contention advanced by the learned Counsel for the Appellants cannot be accepted.

9. It was then contended by the learned Counsel for the Appellant that the categorical finding of the Civil Judge as against Schedule 'E' properties that they were tenanted properties and subsequently were not owned by Gangubai and Vithoba, has not been considered by the District Judge at all. The learned Counsel relied upon the evidence produced by the parties and assessed by the Civil Judge in the form of entries in

revenue record. The learned Counsel submitted that written statement was filed by the Appellants to the limited to the extent of supporting the case of ½ share of the Plaintiff and the Appellants have no objection to the ½ share as granted by the Trial Court is sustained. The learned Counsel for the Respondents – Defendants nos.1 and 2 submitted that the findings in respect of tenanted land cannot be read in isolation and has to be read along with the findings of both the Courts in respect of all the properties and the existence of the joint family.

10. The present Appeal is not filed by the original Plaintiff. Original Plaintiff came with a case of existence of joint family between Dnyanoba and Vithoba and both the Courts have concurrently held that there existed no joint family. According to the learned Counsel for the Appellant this findings will have to be restricted only to property Schedule 'A' and 'D' and not Schedule 'E'. If the genealogy is considered, Appellants are claiming through Vithoba and the Defendants nos.1 and 2 are claiming through Dnyanoba. Since the finding of existence of joint family is against the Plaintiff, then as far as properties 'A' and 'D' are concerned there is no question of grant of any shares. Therefore the foundation upon which the Plaintiff has based his case was not accepted by both the Courts. In the Written Statement filed by the Appellants, at the outset they have stated that they have no objection for grant of share to the

Plaintiff. The Appellants therefore had not put up any independent case than the case of the Plaintiff and had supported the Plaintiff. It is in this context the question of share in property Schedule 'E' will have to be considered.

11. The Civil Judge discussed the aspect of properties in Schedule 'E' in the paragraphs 25 to 27 of the judgment. The learned Counsel for the parties have read and re-read these passages. Reference in this discussion is to three properties, one is survey no.312/1, 312/2 and gat no.58. The learned Civil Judge has considered revenue record in respect of these three properties. As regard survey no.391/1 is concerned, a finding is recorded that these tenanted land were re-granted in the name of Gangubai by order in ALT/II/Borgaon-61. It is sought to be contended that the re-grant in the name of Gangubai is for gat no.58 alone. Such specific stand has not been taken in the written statement by the Appellants neither it is the case of the Plaintiff. The parties must be held to their pleadings. The Plaintiff and the Appellants had come to the Court with a contention that Gangubai did not have sole right in respect of these properties. The statement as regard gat no.58 that it is re-granted in the name of Gangubai alone, is falsified. It is in this Court that the Appellants have tried to separate their stands. Even in respect of Survey no.312/1 and 312/2, the learned Counsel for the Appellants has sought to rely on the evidence of

the Plaintiff where he has stated that they were re-granted in the name of Gangubai and Vithoba. The question is, what is the status of gat no.1062 which is included in the Schedule 'E'. The learned Counsel for the Respondents have drawn my attention to the finding of the learned Civil Judge wherein the learned Civil Judge has connected gat no.1062 to survey no.312/1 and 312/2 observing that these lands might have been numbered as gat no.1062. There is, however, no categorical finding as regard the re-grant in respect of the very same property in favor of both Gangubai and Vithoba. There is a casual observation that the tenants have paid the occupancy price and lands have been re-granted in their name. On the other hand, the Plaintiff has stated that gat nos.1406, 1068 and 58 were purchased under the Tenancy Act and after purchase of the lands and after the death of Dnyanoba, that is Gangubai, who was in possession thereof.

12. If the Suit for partition is brought on the basis that there was a joint family property between Vithoba and Dnyanoba, the properties of Vithoba were not included for the purpose of partition. The District Judge held that there was no such joint family between these two brothers. Nothing is shown as to how this finding is erroneous, except contending that it is restricted only to properties 'A' and 'D'. Once finding is recorded that there is no joint family between the brothers and one branch is

claiming to have joint ownership in respect of some of the properties, then their right will have to be clearly established.

13. As regards other two gat numbers in Schedule 'E', there is no categorical finding that though the re-grant was in the name of both Gangubai and Vithoba. By placing reliance on certain stray observations of the Civil Judge, a contention sought to be advanced in regard $\frac{1}{2}$ share in these properties. The District Judge held that there exists no joint family between two brothers examining the status of property in Schedule 'E' with that perspective and having found that there was no cogent evidence that they were jointly accepted the claim of Defendants nos. 1 and 2. The Appellants, who simply filed one page written statement at the inception of the proceedings supporting the original – Plaintiff, have changed their stand as the litigation proceeded.

14. The conclusion of the District Judge that Gangubai was the sole owner of the property in Schedule 'E'. It cannot be said that there was no perversity committed by the learned District Judge. No cogent material is shown to overturn this fact or finding of fact and come to conclusion on these properties were jointly owned. In these circumstances, no question of law arises for consideration.

15. The Second Appeal is accordingly dismissed.

16. In view of dismissal of the Second Appeal, the Civil Applications do not survive and are disposed of accordingly.

[N. M. JAMDAR, J.]