

VPH

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL (St.) No. 21534 OF 2018
WITH
CIVIL APPLICATION No. 1268 OF 2018

Baban Maruti Patil ... Appellant
Vs.
Sajakka Maruti Patil & Ors. ... Respondents

Mr. Bhushan Walimbe, for the Appellant.

CORAM : A. M. DHAVALA, J.
DATE : SEPTEMBER 26, 2018

PC :-

1. Learned advocate for the Appellant undertakes to remove the office objection.

2. Heard the learned advocate for the Appellant. Plaintiff No. 1 Mrs. Sajakka is mother of plaintiff No. 2 Manisha and plaintiff No. 3 Kondubai and defendant No. 1 Baban is adopted son of plaintiff No. 1. The subject matters of the suit are the three agriculture lands of 52 R (Survey No. 63/8), 37R

(Survey No. 71/2), 5R (Survey No. 63/3) and house property City Survey No. 1661 admeasuring 208.9 sq. mtrs., situated at Urun - Islampur. Those belonged to deceased Maruti, husband of plaintiff No. 1 and father of plaintiff Nos. 2 and 3. Maruti died in 1970 and thereafter in 1975 plaintiff No. 1 adopted Baban (defendant No. 1) by a registered adoption deed. She claimed that defendant No. 1 started obstructing her lawful possession over the ancestral land and executed a hollow, bogus and sham registered sale-deed in respect of 2 other lands bearing City Survey No. 1653, 1635. The plaintiffs, therefore, claimed perpetual injunction against defendant No. 1 and alternatively claimed partition and separate possession. The plaintiffs also claimed Rs. 22,000/- out of Rs. 75,000/-, earned by defendant No. 1 by sell of sugarcane, grown in the suit field.

3. Defendant No. 1 Baban resisted the suit. He contended that the suit properties were ancestral properties and his adoption relates back to the date of death of his father. His mother - plaintiff No. 1 herself mutated his name in the revenue

records and he is in joint possession alongwith her in respect of the suit property. He is cultivating sugarcane, jawar and other crops in the suit field. It was plaintiff No. 1 alongwith other two plaintiffs, who sold land City Survey No. 1653, 1635. Defendant No. 1 claimed that his name was recorded in 7-12 extract and he had mortgaged the suit properties. No perpetual injunction can be claimed against him.

4. Other defendants, though served, failed to appear and contest the suit, viz. Regular Civil Suit No. 227 of 1996 filed by the plaintiff.

5. Learned trial court held that the plaintiffs were in lawful possession; defendant No. 1 was obstructing their possession; the suit was not hit by non-inclusion of other properties; the sale-transaction of fields City Survey No. 1653 and City Survey No.1635 were valid; defendant No. 1 has no vested interest in the suit property by way of adoption. Consistent with these findings, he decreed the suit partly with costs and restrained the defendant from obstructing lawful

possession of the plaintiff over the suit properties. Besides, defendant No. 1 was directed to pay Rs.22,000/- to the plaintiffs.

6. This judgment was assailed before the District Court (District Court-1, Islampur) in Regular Civil Appeal No. 51 of 2012 wherein it is held that interest in the suit was vested in the plaintiffs on death of Maruti and it won't divest due to subsequent adoption. Therefore, appeal came to be dismissed with costs.

7. The learned advocate for the Appellant, initially, argued that there is consistent case law of the Apex Court that adoption relates back to the date of death of deceased and there would be joint family of plaintiffs and defendant No. 1 and they would have equal shares. Admittedly, the suit property was ancestral property and defendant No. 1 was put in possession by plaintiff No. 1 alongwith her. Subsequently, he conceded that in view of Full Bench Judgment of this Court in *Kesharbai Gujar Vs. The State of Maharashtra & Ors.*¹ on enactment of

¹ AIR 1981 Bombay 115

Amendment to Hindu Adoption and Maintenance Act (78 of 1956), the position has changed and if a widow and daughter get interest vested in them on the death of common ancestor, it will not be divested by the subsequent adoption.

8. He argued two points, viz. (a) there was joint possession of the plaintiffs and defendant No. 1, and plaintiffs cannot dispossess defendant No. 1 without following due process of law; (b) plaintiff No. 1 had approached the revenue authority and mutated name of defendant No. 1 alongwith her in the revenue record, and thereby she has put the suit properties in the name of joint family. She has also admitted that the suit properties were ancestral properties and she had claimed partition and separate possession. In the light of these facts, both the courts below have passed the judgment against defendant No. 1.

9. It is not disputed that the subsequent adoption of 1975 will not divest the plaintiffs of their shares receivable by them on the death of common ancestor Maruti in 1970.

Therefore, initial defence of defendant No. 1 no more survives. As far as joint possession is concerned, defendant No. 1 is adopted son of plaintiff No. 1. If he is residing with her, his name is shown in revenue record alongwith her, but he cannot be said to be in joint possession with plaintiffs. As held in *Maria Margarida Sequeria Fernandes and Ors. v. Erasmo Jack de Sequeria (Dead) through L.Rs.*², even long standing possession of relative, servant or agent is no possession in the eyes of law and by such long standing possession, he does not get any right. The true owner can claim injunction against such person and he gets no protection. In this situation, the order of perpetual injunction passed by both the courts below against defendant No. 1 is not contrary to the provisions of law and cannot be interfered with. No substantial question is in raised in this regard.

10. The learned advocate for the Appellant relying on the mutation entry effected by plaintiff No. 1 argued that plaintiff No. 1 on her own, transferred her property in the name

² (2012) 3 SCALE 550 : 2012 AIR SCW 2162 : AIR 2012 SC 1727

of joint family of herself and defendant No. 1 and she had also claimed partition by saying that suit properties were ancestral properties. It is no doubt true that properties were shown to be ancestral, but on the death of Maruti, plaintiff Nos. 1, 2 and 3 got $1/3^{\text{rd}}$ shares each, which became their self-acquired properties. The properties no more remained ancestral properties. The argument that the said properties were transferred by plaintiff No. 1 to the joint family, has no substance as the said case has not been pleaded at all. As held in *Sayed Muhammed Mashur Kunhi Koya Thangal vs. Badagara Jumayath Palli Dharas Committee and Ors.*³ and *Shivaji Balaram Haibatti vs. Avinash Maruthi Pawar*⁴ no substantial question of law can be framed in absence of any pleadings.

11. The submissions made by the learned advocate for the Appellant herein for the first time are substantially different in nature from the right claimed by defendant No. 1 on the basis

³ (2004) 7 SCC 708

⁴ (2018) 11 SCC 652

of adoption. In the absence of specific pleadings and opportunity for the party to lead evidence, such plea cannot be entertained for the first time in this second appeal. Thus, no substantial question of law can be framed and the second appeal deserves to be dismissed in *limine*.

12. However, it is on record that defendant No. 1 Baban was in joint possession and was cultivating the lands. In the circumstances, if there is a standing crop, he should be permitted to take away the same subject to paying 50% of the price of the produce to the land owner, plaintiff No. 1. Hence, the following order.

ORDER

- (i) The second appeal is dismissed in *limine*.
- (ii) However, defendant No. 1 is permitted to look after the existing standing crop and harvest the same only this year, subject to condition that he shall pay 50% of the income derived from sale of such produce to the land owner – plaintiff No. 1. He shall file an undertaking to the effect for enjoying the benefit of this order till the harvest of presently standing crop

only.

- (iii) If defendant No. 1 files a suit for partition, it shall be decided on its own merits. The parties are at liberty to take appropriate defences.
- (iv) Pending civil application filed in this second appeal does not survive and is accordingly disposed of.

Sd/-
[A. M. DHAVALA, J.]

Vinayak Halemth