

JPP

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

***SECOND APPEAL NO. 567 OF 2014
with
CIVIL APPLICATION NO. 1389 OF 2014***

Mr. Dhanyakumar Jingonda Patil
Age about 60 yr., Occ. Agriculture,
R/o. Village Inam Dhamani, Taluka – Miraj,
District – Sangli. ... Appellant/Applicant.

V/s.

1. Mr. Aniket Ramesh Malvade,
Age 23 years, Occ. Education,
R/o. Inam Dhamani, Taluka – Miraj,
District – Sangli.

2. Mr. Annasaheb Jingonda Patil
Occ. Agriculture,
R/o. Inam Dhamani, Taluka – Miraj
District – Sangli. ... Respondents.

Mr. P.M. Arjunwadkar for the Appellant/Applicant.

Mr. Chetan Patil for the Respondents.

CORAM : N.M. Jamdar, J.

DATE : 12 January, 2018.

Oral Judgment :-

This Second Appeal is filed by the Original Defendant No.2 challenging the judgment and order passed by the District Judge, Sangli dated 6 September 2014, partly allowing the Appeal and declaring that the Respondent No.1 – Original Plaintiff and Respondent No.2 – Defendant No.1 have 1/3rd share in the suit property and that the parties shall be put in separate possession of their share in the suit land. The learned Civil Judge declining the relief of injunction in favour of Respondent No.1 – Plaintiff, was confirmed by the learned District Judge. The Plaintiff filed a Regular Civil Suit No. 191 of 2009 in the Court of Civil Judge, Senior Division, Sangli, seeking various reliefs. The Plaintiff sought an order of injunction on the ground that the Plaintiff was in possession of the suit property and in the alternative, that the Plaintiff is entitled 1/3rd share in the suit property.

2. The Appellant and the Respondent No.2 are brothers. They are Defendant Nos.2 and Defendant No.1 respectively in the suit filed by the Respondent No.1 – Plaintiff. For the sake of convenience, the parties are referred to by their original nomenclature in the suit.

3. The suit property is Gat No. 590, admeasuring 2 hectares and 39 Ares, is situated at Village Inam Dhamani, District – Sangli.

In the plaint, the Plaintiff asserted that this property was originally owned by Anubai Patil, mother of Defendant Nos.1 and 2. These defendants had one more brother i.e. Rajgonda. On 15 July 1994 Anubai expired and her Will, which she had executed on 2 February 1992 came into effect. By way of this Will, Anubai had bequeathed $\frac{1}{3}$ rd share to her three sons as Rajgonda. Defendant No.1 and Defendant No.2. Anubai had five daughters. However, in the Will she did not give any shares to the daughters. According to the Plaintiff, after the Will was executed, three brothers acted on the said Will and got their names recorded in the revenue record and started their independent cultivation in the property. It was the case of the Plaintiff that Rajgonda was in need of some money and he sold his share to the Plaintiff on 14 May 2007 for Rs.4,15,000/- and on that date Rajgonda handed over possession of the property to the Plaintiff. The Plaintiff subsequently got their name entered into the revenue record. According to the Plaintiff, inspite of the fact that they had become owner, the Defendants stand to obstruct his possession by threatening him and not allowing him to plough the land. On these averments, the Plaintiff filed the suit on 10 June 2009.

4. The Defendants filed their written statements and contested the suit. The Defendant Nos. 1 and 2 contended that though the Will dated 2 February 1990 came into effect after 15 July 1994, the parties did not act upon the same and the possession of the

Defendants and Rajgonda was still joint and the Will has never come into existence. It was contended that the Plaintiff was not in possession and therefore, is not entitled for relief of injunction. It was also contended that five sisters were not joined as party Defendants in the suit and in their absence no alternate relief sought for or partition of the property cannot be sought. On these another grounds, the Defendants sought dismissal of the suit.

5. Thereafter, the Defendant No.1 filed an another additional statement on 3 November 2011. In this written statement he contended that in earlier joint written statement filed was signed by him without reading the written statement completely and therefore, he was dis-associating himself from the earlier written statement. By this additional written statement, Defendant No.1 supported the case of the Plaintiff.

6. The parties led oral and documentary evidence. The Will executed by Anubai was brought on record. The Plaintiff examined himself Rajgonda, his vendor, and the computer centre owner who produced copy of map and the scribe of the Will. The Defendant No.2 examined himself. He produced various documents relating to the possession of the suit property, such as electricity bills, revenue records and assessment bills. Defendant No.2 also examined the neighbours to demonstrate that the Plaintiff is not in possession of the suit property. The Suit was tried by the

learned Civil Judge, Junior Division, Sangli. The learned Civil Judge framed issues as regard the claim of the Plaintiff for exclusive possession of the suit property and whether the Plaintiff had become owner on the basis of sale deed. Issues were also framed that all properties are brought in common hotchpotch; whether the Plaintiff has proved the obstruction in the hands of Defendants; whether the suit is bad for non-joinder of parties; and whether the Plaintiff is entitled for permanent injunction and/or partition and separate possession as prayed. The learned Civil Judge, after considering the evidence on record, concluded that the Plaintiff failed to prove his exclusive possession and therefore, was not entitled for permanent injunction. The learned Civil Judge held that since the sisters were not joined to the suit, the suit was bad for non-joinder of necessary parties and the Plaintiff was not entitled to the partition and separate possession. The learned Civil Judge, by judgment and order dated 19 March 2012 dismissed the suit.

7. The Plaintiff filed a Regular Civil Appeal No. 211 of 2012 in the District Court, Sangli. The District Judge confirmed the finding of the Civil Judge that the Plaintiff failed to prove his possession over the suit property and that there was any obstruction by the Defendants. Accordingly, the District Judge refused the relief of perpetual injunction. The District Judge, however, held that Gat No. 509 was self-acquired property of Anubai which she had validly bequeathed to her three sons, and one of the son i.e. Rajgonda, by a

registered sale deed on 14 May 2007 had sold his share to the Plaintiff. The District Judge held that since this position was established from record, the alternate prayer sought by the Plaintiff for separate possession to be put in the share of Rajgonda, had to be granted. The District Judge, by judgment and order dated 6 September 2014 partly allowed the appeal and declared that the Plaintiff and Defendant have 1/3rd share in the suit property as described in paragraph 1 of the plaint, and directed that the property be partitioned by metes and bounds. Being aggrieved, the Appellant – Original Defendant No.2 has filed the present Appeal.

8. The Second Appeal was admitted on 24 November 2014 on the following substantial questions of law :-

“(i) Whether the learned Judge of the appellate court ought to have appreciated that decree for partition and separate possession cannot be passed in the absence of Rajgonda being a necessary party to the suit ?

“(ii) Whether the Respondent original Plaintiff is entitled to partition and separate possession of the suit property on the basis of sale deed dated 14/05/2007 executed by Shri Rajgonda Patil, brother of the Appellant ?”

9. The Appellant was directed to file paper-book within one year, failing which it was directed that the Appeal shall stand dismissed without further reference to the Court. It appears that the paper-book was not filed and the Second Appeal came to be dismissed. Civil Application No. 567 of 2014 was taken out by the Appellant for restoration. On 1 December 2016, it was stated by the Applicant that due to inadvertence the paper-book was not filed and prayed for restoration of the Second Appeal. At the time of hearing of the Civil Application, the Appellant pointed out to the learned Single Judge R.D. Dhanuka, J. that the Executing Court, on 15 November 2016 had appointed a Court Commissioner who put the Respondents in possession of the property. The learned Single Judge found that the Court Commissioner had acted beyond his powers and directed the Respondents to hand over the possession of the suit property to the Executing Court within 48 hours and enquiry against the Court Commissioner was directed. It is informed that the Respondents handed over possession to the Executing Court as directed by the Single Judge. The Second Appeal was restored.

10. As against this order, the Respondent No.1 filed Petitions for Special Leave to Appeal (C) Nos. 2560-2651/2017. The Special Leave Petitions were disposed of by the Supreme Court on 3 February 2017, requesting the High Court to decide the Second Appeal in a time bound programme. In view of the order passed by

the Apex Court, the Second Appeal is taken up for hearing on priority basis.

11. The Plaintiff had filed the suit primarily for two reliefs. One for perpetual injunction. Second for partition and separate possession of the 1/3rd share in the property. The Civil Judge and the District Judge did not grant the relief of perpetual injunction and the Plaintiff has not challenged this order by filing any Appeal. Therefore, as regard the issue of perpetual injunction is concerned, that stand concluded against the Plaintiff. Therefore, in this Second Appeal only the issue of 1/3rd share of the Plaintiff and consequential possession thereof is for adjudication. The learned Counsel for the parties have therefore addressed the Court on this aspect of the matter.

12. The Civil Judge had refused to grant the relief of partition and handing over separate share to the Plaintiff primarily on the ground that the suit property being a joint family property, the sisters of the Defendants had to be joined, without which partition could not be sought. Therefore, essentially, on the non-joinder of necessary parties that the Civil Judge refused to grant any relief in favour of the Plaintiff. The District Judge, in the Appeal, held that the suit property that is Gat No.590 was not a joint family property and a self-acquired property of Anubai and that being so, there was no question of joining the sisters as party to the suit and there was no

non-joinder.

13. In view of the above conclusions of the Civil Judge and the District Judge, the learned Counsel for the parties have rightly concentrated on the factum of nature of Gat No.590 i.e. the suit property. It is the contention of the Appellants that the suit property being a joint family property and the burden being upon the Plaintiff to show otherwise, the suit was rightly held to be not maintainable for non-joinder of necessary parties, while the learned Counsel for the Respondents – Plaintiffs supported the conclusion that the property is self-acquired property. The question of law i.e. framed at the time of the admission of the Appeal is also based on the decision as to whether the suit property can be treated as self-acquired or joint family property.

14. The discussion on this aspect has to be prefixed with a basic position that whether a property is a joint family property or a self-acquired property is not a pure question of law and there must exist a factual foundation in that regard. Admittedly, the Plaintiff is a stranger to the family of the Appellant. Thereafter, when the Plaintiff filed a suit, in the plaint the Plaintiff made basic averments regarding ownership of Anubai. The Plaintiff referred to the Will of Anubai dated 2 February 1990. The will was registered with the authorities. As per the Will three sons of Anubai were granted 1/3rd share including Rajgonda, the vendor of the property. The Plaintiff

also placed on record that after the Will, the names of the three brothers were entered into in the revenue record and thereafter, the Plaintiff purchased the property on 14 May 2007 by paying an amount of Rs.4,15,000/- by a registered sale deed. Thus, the Plaintiff, a stranger to the family of the Appellant ascertained the title of his vendor by considering the entries in his favour and the revenue record based on Will executed by Anubai. The Will, which will be referred to in detail later on, mentioned that the property was owned by Anubai. Since the Plaintiff was being deprived of his share even after purchase, a suit was filed for injunction as well as securing his share. Therefore, to oppose such a prayer made by a stranger purchaser, the burden was upon the Appellant and the other Defendants to demonstrate that the property was a joint family property. Once the Plaintiff had relied upon the Will which asserted that the property was held by Anubai and entries were made in the revenue record, it was upon the Defendants to establish that the property was a joint family property as what the status of the property was within the knowledge of the Defendants being the family members. It is in this context that the pleadings and evidence of the Defendants will have to be seen.

15. The Appellant – Defendant No.2 and Defendant No.1 initially filed a joint written statement. Their stand in the written statement as against assertion of the Plaintiff regarding nature of the suit property, is immaterial. In paragraph 11 of the written statement

the Defendant stated that it is for the Plaintiff to show that the property was owned by Anubai. There was no categorical denial and equally a positive assertion based on any material that the property was a joint family property and not exclusively owned by Anubai.

16. The learned Counsel for the Appellant contended that neither in the plaint or in the Will, a specific phrase of “self-acquired” has contra-distinguished from “joint” has been used. The learned Counsel for the Respondents on the other hand submitted that the case of the Defendants as can be seen from the written statement is not that the property is a joint family property and the foundation of defence is that even though Will was executed, it was never acted upon.

17. As stated earlier, it was for the Defendants to assert positively and to bring material on record to show that the property was joint family property. Thereafter, Defendant No.1 filed a separate written statement and dis-associated himself from the written statement filed by the Appellant. In this written statement, it was stated by Defendant No.1 that the property was owned by Anubai and it was bequeathed to her sons by the Will. The District Judge had not given much importance to this subsequent written statement on the ground that no leave was sought by the Defendant No.1 to file an additional written statement.

18. Defendant No.2 examined himself. In the cross-examination, Defendant No.2 admitted that on 2 February 1990 his mother Anubai executed a Will. He admitted that the property Gat No.590 was given by his mother only to her sons and not to the daughters. He also admitted that an application was made to the Revenue Authorities for entering their names by the three sons as per the Will and that a mutation entry was made bearing No.1101. He also admitted that in the year 1994-95 the sisters made an application to oppose the mutation entry, however, when the statement was made as statements were recorded, the sisters accepted the Will and permitted the names should be entered. The Defendant No.2 also stated that the contents of the Will are correct and that the sisters did not make any complaint till date or file any proceedings to get their names in the record to get their shares in the suit property.

19. The vendor of the Plaintiff Rajgonda also stepped in the witness box. He asserted that the suit property was owned by Anubai and she was the sole owner thereof. Rajgonda was subjected to cross-examination. However, this assertion made by Rajgonda was not successfully dislodged in the cross-examination. Therefore, out of three brothers, who have received the properties by way of Will of Anubai, only Defendant No.2 is contesting the proceedings.

20. The Will executed by Anubai was produced on record and the learned Counsel for the parties have taken through the Will. As stated earlier, there is no dispute whatsoever between the parties that a Will was executed by Anubai on 2 February 1990. In this Will Anubai has clearly stated that the property Gat No. 590 is of her ownership and the properties mentioned in the Will, Gat No. 590 and the house and the shares in the society are of her ownership. She has given reasons in the Will as to why she was not leaving any share to the daughters from these properties stating that she and her husband had got the daughters married as per the custom, with expending large sums of money and therefore she had not intention to give any share in the property, which was in her name. Bare reading of the Will shows that the suit property was Anubai's own property. There is no reference whatsoever that the property, which she bequeathed, was a joint family property. If it was a joint family property, the Will would be concluded in an entirely different form and language. The contention of the learned Counsel for the Appellant that the specific words "self-acquired" is missing from the Will, cannot be accepted. Reading the Will in its totality, Anubai has clearly described the property as her own.

21. All parties including the Defendant No.2 accepted the fact that the property was owned by Anubai. Had it been a joint family property and described in such manner by Anubai as her own,

the three sons and the five daughters would not accepted the Will. But their conduct demonstrates that they accepted the Will.

22. The Will was executed in the year 1990. When an application was made for making an entry in the Revenue Record some time in the year 1994, the daughters intially raised an objection however, in their statement they accepted the Will. Thereafter, the suit property was sold to the Plaintiff in the year 2007 and the suit was filed in the year 2009. From the year 1994, till date the sisters have made no grievance whatsoever in respect of the Will and the transaction in favour of the Plaintiffs. All the members of the family either expressly or by their conduct accepted the fact that the property was owned by Anubai alone.

23. Faced with this state of evidence, the District Judge had to decide whether the view taken by the Civil Judge that the suit was not maintainable for non-joinder of parties, was correct. The foundation of the reasoning of the Civil Judge was that the suit property was a joint family property or self-acquired. This being the crux of the matter, the criticism of the learned Counsel for the Appellant that the learned District Judge by himself undertook the task of ascertaining the nature of the property is not justified. The District Judge, as a first appellate court, not only had the power, but also a duty to examine this crux of the matter.

24. The District Judge took note of the language of the Will dated 2 February 1990. The conduct of the sisters of the Defendants and the oral evidence of the parties and upon that the basis of the same concluded that the suit property was owned by Anubai alone. The question to be decided in this Appeal whether this finding reached by the learned District Judge can be termed as perverse or that there is any relevant piece of evidence which has been omitted from consideration or any incorrect inference in law have been drawn. As stated earlier, the Plaintiff being stranger to the family of the Defendants relied upon an admitted Will executed by Anubai which clearly stipulated that the property was owned by Anubai and it is based on this Will and subsequent sale deed that the Plaintiffs sought is share. If the Defendant No.2 wanted to defeat this right of the Plaintiff it was for the Defendant No.2 to demonstrate that the property was joint family property and the stipulations in the Will was incorrect. Not only the Defendant No.2 did not produce any cogent evidence whatsoever, but accepted the contents of the Will.

25. Therefore, if the District Judge considered this position on record, it cannot be said that there is any error in the conclusion drawn by the District Judge that the property owned by Anubai was validly bequeathed to Rajgonda, vendor of the Plaintiff who validly conveyed it to the Plaintiff. Once the finding that the suit property

was owned by Anubai alone, then she was competent to bequeath the same as her own property, which she did. Therefore, the suit property, not being a joint family property, there was no question of non-joinder of parties for not joining the sisters of the Defendants. The District Judge was thus right in reversing the finding of the Civil Judge.

26. The learned Counsel for the Appellant submitted that the Plaintiff has not prayed for possession of the suit property and therefore, the District Judge could not have directed possession be given to the Plaintiff. The learned Counsel for the Respondent submitted that prayer for possession was an alternate prayer of the Plaintiff. In the plaint the Plaintiff has stated that he was in joint possession and sought injunction and with an alternate prayer that is not to be granted, then exclusive possession be granted. There is a specific prayer of the Plaintiff in the alternative that 1/3rd share in the suit property as per the sale deed be granted to the Plaintiff. The Plaintiff has also paid the requisite court fees for the purpose of seeking this relief. Once the District Judge came to the conclusion that the Plaintiff was entitled to 1/3rd share in the suit property as per the sale deed, then the District Judge was not in error in granting possession of the separate share. The District Judge has also directed that while effecting partition that as far as possible and practicable, the lands sold by Rajgonda be allotted to the share of the Plaintiff by

adequately compensating the other share holders, if necessary. In these circumstances, it cannot be held that the District Judge was in error in directing possession of the suit property.

27. Considering this position, the questions of law that have been framed at the time of admission of the Appeal will have to be answered against the Appellant. Though the question of law (i) refers to only non-joinder of Rajgonda, the contention was also regarding the sisters of the Defendant No.1. Since the suit property was not a joint family property. The answer to question of law (ii) depends on the answer to question of law (i). Since the suit property was owned by Anubai and validly transferred to Rajgonda, the questions of law also has to be answered in favour of the Respondent – Plaintiff.

28. In these circumstances, since both these questions of law framed are answered against the Appellant - the Defendant No.2, the Second Appeal deserves to be dismissed and is accordingly, dismissed. No order as to costs.

29. To specific query to the learned Counsel for the Appellant, the learned Counsel for the Appellant stated that as on today he has no instructions whether the Appellants are intending to challenge the order passed today. If the Respondents are proceeding

to execute the impugned judgment and order, they will give four weeks advance notice to the Appellant.

(N.M. Jamdar, J.)