

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL No. 1055 OF 2012

Vana Ramchandra Patil

...Appellant

Versus

Hirabai Rajendra Deshmukh & Anr.

...Respondents

.....

Ms. Prachi Khandge a/w. Ms. Pamela Dalal Tanya Barwal i/b. M.P. Vashi & Associates for the Appellant.

Ms.Gauri Godse a/w. Mr. Rohit Joshi for the Respondents.

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CORAM: **MRS.MRIDULA BHATKAR, J.**
DATE : **MAY 03, 2018**

P.C.:

1. This Second Appeal is directed against the judgment and order dated 8th August, 2012 passed by the learned Ad-hoc District Judge -1, Kalyan allowing Civil Appeal No. 32 of 2011 and thereby setting aside the judgment and decree dated 6th April, 2009 passed by the learned Joint Civil Judge, Junior Division, Ulhasnagar in Regular Civil Suit No. 216 of 2002. The First Appellate Court decreed the Regular Civil Suit No. 216 of 2002 and declared that respondent no.1/ original plaintiff has 1/4th share in the suit property

i.e., Block No. A-160/319 and defendant no.1 i.e., the appellant, has 1/2 share and defendant no.2 i.e., respondent no.2, has 1/4th share in the suit property.

2. The facts of the case in brief as follows:

The original plaintiff has filed a suit for partition, declaration and injunction against the defendants in respect of the suit property. Both the parties are referred to as per their original status. The original plaintiff is a daughter of the real brother of defendant no.1 and she is a real sister of defendant no.2. It is the case of the plaintiff that since 1960, her deceased father Shri Nathu R. Patil was serving in Police Department as a Police Constable. In the year 1963, defendant no. 1 had left the native place and came to Ulhasnagar. It is submitted that the family was a Joint Hindu Family consisting of the deceased father of the plaintiff, defendant no.1 and their mother. In the year 1968, the Government had auctioned several blocks in Ulhasnagar. The deceased father of the plaintiff decided to purchase Block No A-160/319 admeasuring 234 sq. yards for consideration of Rs. 2700/- . The said block was purchased by contribution of the mother, defendant no.1 and the deceased father of the plaintiff. It was the Joint Family Property. However, the suit property was purchased in

the name of defendant no. 1 being a younger son, who was 22 years old at the relevant time. The grandmother of the original plaintiff, who was residing at native place, looked after the agriculture land of the family and used to visit and stay at the suit property. Similarly, the deceased father of the original plaintiff also used to stay at the suit property. In the year 1970, the deceased father of the original plaintiff and defendant no.1 had some family arrangement, and had constructed more rooms and started residing separately, as certain portion of the room was in dilapidated condition. Till then, they were residing jointly. It is the case of the original plaintiff that around in the year 1980, defendant no.1 has become greedy. In the year 1996, defendant no.1 made an application to the Ulhasnagar Municipal Corporation for removing the name of the plaintiff's father from the records. On 14th March, 2002, the father of the original plaintiff expired. After the death of the plaintiff's father, defendant no.1 became very aggressive and greedy and demanded the possession of the entire suit property. So, the original plaintiff has filed a Regular Civil Suit No. 112 of 2002 for permanent injunction against defendant no.1 and thereafter, she has filed a Regular Civil Suit No. 216 of 2002 for partition and separate possession of her share in the ancestral property against the defendants. The said suit was

contested by the defendants. Defendant no.2, who is a real sister of the original plaintiff, has supported defendant no.1 by filing written statement, but she did not lead any evidence before the Trial Court. Defendant no. 1 contested the said suit by filing written statement and he took defence that it is not a Joint Hindu Family Property, but it is a self-acquired property. In the written statement, defendant no.1 has stated that the suit property was purchased in his name and he alone had paid the amount of the suit property. Defendant no.1 has further stated that he allowed his brother Nathu R. Patil, i.e., the plaintiff's father, to stay in the suit property after his retirement. Neither the original plaintiff nor the deceased father of the original plaintiff has any right in the suit property. Both the parties led oral as well as documentary evidence in support of their case. After considering all the documents, the learned Civil Judge, Junior Division, Ulhasnagar decided both the suits by a common judgment and order dated 6th April, 2009. The learned Judge of the Trial Court has dismissed the Regular Civil Suit No. 216 of 2002, which is filed for partition by the original plaintiff and decreed the Regular Civil Suit No. 112 of 2002 by granting injunction in favour of the original plaintiff that she is not to be dispossessed from the suit property without following due process of law. Being aggrieved by the said judgment

and order, the original plaintiff has filed Regular Civil Appeal No. 32 of 2011 against the original defendants. The original defendants appeared in the Appeal and contested the said Appeal. However, the said Appeal was allowed and Regular Civil Suit No. 216 of 2002 was decreed. Hence, this Second Appeal.

3. The learned Counsel for the appellant submits that the First Appellate Court has committed error in not considering the judgment of the Trial Court of dismissing the suit for partition. The First Appellate Court has not taken into account the defence of the appellant that there was no evidence to prove that the suit property was purchased out of nucleus. She further submits that the First Appellate Court ought to have appreciated the fact that the suit property was purchased by the appellant when he was earning and staying at Ulhasnagar. The burden was on the original plaintiff to prove that the suit property is a Joint Family Property. She further submits that the First Appellate Court has erred in holding presumption in respect of the Joint Family Property in favour of the original plaintiff. The Trial Court has committed error in holding that there is nucleus and presumed that it is a Joint Family Property by not taking into account the principle of law.

4. The learned Counsel for respondent no.1/ original plaintiff relies on the judgment passed by the First Appellate Court. She submits that the First Appellate Court has rightly appreciated the point of nucleus. The original plaintiff has tendered evidence not only on the point of existence of Joint Hindu Family, but on the point of Joint Hindu Family Property. She further submits that sufficient and requisite evidence on the point of purchase of the suit property out of the funds of the Joint Hindu Family Property and also purchase of the suit property with an understanding that it is a Joint Hindu Family Property has been brought before the Trial Court. She further submits that the Trial Court has in fact lost the site of this evidence and not properly considered the evidence, erroneously dismissed the suit for partition. She relies on the judgment of the Supreme Court in the case of ***D.S.Lakshmaiah and another Versus Balasubramanyam and Another*** reported in ***(2003) 10 SCC 310*** on the point of nucleus, shifting of burden and presumption especially in respect of Joint Hindu Family Property.

5. Heard submissions.

6. In the case of ***D.S.Lakshmaiah and another*** (*supra*), the father and son were contesting parties. The Supreme Court while dealing with the issue of partition has referred the judgment of the Privy Council in the case of [***Appalaswami v. Suryanarayanamurti & Ors.***](#) reported in ***AIR 1947 PC 189*** wherein the Privy Council has dealt with the similar issue of partition. The suit for partition filed against the father by the minor sons from the first marriage, wherein the father claimed the properties in question were his self- acquired properties and denied that the plaintiffs had any right to seek partition. In paragraph 9 of the said judgment, the Privy Council held as under:

“.... the Hindu law upon this aspect of the case is well settled. Proof of the existence of a joint family does not lead to the presumption that property held by any member of the family is joint, and the burden rests upon anyone asserting that any item of property is joint to establish the fact. But where it is established that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property in question may have been acquired, the burden shifts to the party alleging self-acquisition to establish affirmatively that the property

was acquired without the aid of the joint family property....”

7. The only point is raised by way of substantial question of law is about nucleus. Whether the suit property is a form of a Joint Hindu Family Property? In the civil case, it all depends on what type of evidence is produced by the parties. I have gone through the documents and the judgments passed by both the Courts. The Trial Court has framed issue no. 1 in respect of proving the suit property is a Joint Family Property and answered it in the negative. The First Appellate Court has framed issue no.1 on the point that whether the appellant/ original plaintiff proves that the original plaintiff has 1/4th share in the suit property and has also framed second issue as to whether respondent no. 1/ defendant no.1 proves that the suit property is his self -acquired property. Thus, the First Appellate Court has framed issue on the point whether the suit property is a Joint Family Property or not, which is worded differently, but means same. The First Appellate Court has saddled the initial burden on the appellant/ original plaintiff to show whether she has 1/4th share in the suit property. After going through the judgment of the Trial Court, it appears that the First Appellate Court has dealt with the evidence

produced before the Trial Court and the First Appellate Court on the point of nucleus. The relevant circumstances have brought on record to establish that in the year 1968, when the suit property was purchased by all the family members i.e., mother, defendant no.1 so also the plaintiff's father have contributed in purchasing the suit property. The fact of purchase of the suit property in the year 1968 for total consideration of Rs. 2700/- in the name of defendant no.1 is not disputed. The Sanad is at Exhibit 89. The only fact whether the purchase of the suit property in the name of defendant no.1 was a family arrangement mutually agreed by all the parties or not. The First Appellate Court has also considered the factor that after 1970, the deceased father of the plaintiff started residing separately on the suit plot and constructed more rooms and some portion of that structure was let out by the father of the plaintiff. The deceased father of the plaintiff has also constructed one temple in the premises. The First Appellate Court has rightly held that these circumstances show that the suit property was enjoyed by both the brothers having equal right and defendant no.1 did not object for a long period till 1996. In the year 1996-97, defendant no.1 had applied for correction of the name in the record. The admission has been given by defendant no. 1 that the appellant used to visit at

native place for agricultural purpose. The family was having a joint agriculture income and it was joint family nucleus. Moreover, there were two agricultural lands, which were in the joint name of the parties and those lands were sold by the deceased father of the plaintiff and defendant no.1 in the year 1983 and the income was used for the purpose of construction of the rooms. The reasoning given by the First Appellate Court is found very logical and correct. Similarly, after considering the evidence tendered by the plaintiff on the point of nucleus and discussing the same, holding it in favour of the plaintiff is correct.

8. The First Appellate Court has discussed second issue whether defendant no.1 has proved that suit property is a self-acquired property or not. Thus, it is not the case that the First Appellate Court has put initial burden on defendant no.1. The First Appellate Court after considering the age of defendant no.1 and his income at the relevant time i.e., in the year 1967, has rightly held that no evidence is brought in respect of the income by defendant no.1. Thus, substantial question which is formed by the learned Counsel for the appellant cannot be accepted and framed, as the First Appellate Court has dealt with this question of law on the basis of the evidence,

facts and circumstances, which were brought before the Court by both the parties. In the result, Second Appeal is hereby dismissed.

9. The learned Counsel for the appellant submits that the judgment and order dated 8th August, 2012 was not stayed. No execution proceedings are filed by respondent no.1/ original plaintiff and no stay is granted, pending Second Appeals since 2012.

(MRIDULA BHATKAR, J.)