

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

2 SECOND APPEAL NO.166 OF 2018
WITH CA/2802/2018 IN SA/166/2018

RAMRAO VITTHALRAO NISALE AND ANOTHER
VERSUS
RAJENDRA VITTHALRAO NISALE AND OTHERS

Mr. R. D. Biradar, Advocate for the appellants
Mr. D. V. Tele, Advocate for respondents No. 1 and 2.

CORAM : S. M. GAVHANE, J.
DATED : 09.12.2019

PER COURT :-

. The appellants-original defendants No. 1 and 2 have preferred this Second Appeal aggrieved by the judgment and decree dated 12/01/2018 passed by the Principal District Judge, Latur in Regular Civil Appeal No. 134 of 2015 dismissing the said appeal confirming the judgment and decree dated 22/07/2015 passed by 2nd Jt. Civil Judge Junior Division, Ausa in Regular Civil Suit No. 86 of 2009 thereby declaring that the plaintiffs and defendants No. 1 to 6 are entitled to partition and separate possession of 1/8 share each in the suit properties with

direction to make enquiry in to mesne profits of the suit property as per Order 20, Rule 12 of the Civil Procedure Code.

2. By order dated 07/03/2018 notice was issued to the respondents, returnable on 18/04/2018 and till the said date effect of the impugned judgment and decree under appeal was directed to be stayed to the extent of delivery of possession observing that following substantial questions of law are involved in this appeal as per the submission of the learned counsel for the appellants. Those are thus;

"I. Whether the suit is maintainable without bringing the entire joint family property into common hotchpotch?

II. Whether the first appellate court has discarded the counter claim of the appellants/original defendants when the same has been accepted by the trial court and recorded findings to issue no. 6 after considering the counter claim?"

3. Respondents No. 1 and 2-original plaintiffs had filed aforesaid suit against the present

appellants and respondents No. 3 to 6 for partition and separate possession of their share in the suit properties described in the plaint paragraph No. 1 and those properties are particularly agricultural lands i.e. 2 H 63 Are out of survey No. 151/A/1, land survey No. 151/A(1) admeasuring 6 H 65 R with potkharaba 14 R total 6 H 79 R and ancestral house property No. 785 i.e. ancestral house grampanchayat naumna No. 787 all situated at village Nagarsoga, Tq. AUSA contending that these are the joint family properties of the parties to the suit. The plaintiffs had contended that they have given up their share in one dilapidated house which was damaged in the earthquake. The plaintiffs had claimed partition by metes and bounds and one half share in the suit properties.

4. Appellants alongwith original defendants No. 3 to 6 filed written statement (Exhibit 24) and without disputing the nature of suit properties as joint family properties they have contended that suit

is bad for non inclusion of properties of Hindu Undivided Family i.e. house property situated at Nagarsoga bearing grampanchayat No. 787, agricultural land at village Nalegaon bearing Gat No. 679/3 area 1 H 25 Are in the name of wife of plaintiff No. 1, house property at village Nalegaon purchased in the name of wife of plaintiff No. 1 vide sale deed bearing No. 1419/2002 dated 04/04/2002 and open plot at AUSA bearing survey No. 164 plot No. 72 area 15.24 x 9.14 sq.mt from the source of joint family income in the year 2000-07. They have also contended that when father Vitthal Nisale was suffering from ailment all the expenses were incurred by the defendant No. 1 and it was to the tune of Rs. 1,50,000/-. According to them plaintiffs are liable to pay said expenses. Therefore, for distribution of said expenses to the extent of Rs. 1,00,000/- they have made counter claim and paid court fees of Rs. 2780/- as stated in the written statement-cum-counter claim dated 27/07/2009.

5. Considering the evidence on affidavit

adduced on behalf of the plaintiffs as well as defendants the trial Court decreeing the suit on 22/07/2015 declared the shares of the parties as referred earlier and also gave directions to make enquiry into the mesene profits of the suit property. The trial Court on the issue No. 2 whether suit is not maintainable on account of non inclusion of necessary properties? and on the issue No. 6 whether defendants are entitled to relief claimed by way of counter claim, recorded negative finding and answered both these issues against the defendants. Aggrieved by the said decree passed by the trial Court present appellants/defendants No. 1 and 2 filed Regular Civil Appeal No. 134 of 2015 and the first appellate Court dismissed the said appeal confirming the decree passed by the trial Court by judgment and order dated 12/01/2018. The learned appellate Court on the point No. 2 whether the suit is maintainable as all the properties are not included in the suit? and on the point No. 6 whether the defendants are entitled to claim counter claim? recorded affirmative and

negative findings respectively. Thus, both trial Court as well as the appellate Court have recorded the concurrent findings of fact that the suit is not bad for non inclusion of joint family properties as per the case of the defendants and that the defendants are not entitled to claim relief claimed in the counter claim regarding distribution of expenses incurred by the defendant No. 1 towards the treatment of Vitthal Nisale founder member of the family.

6. Today, this second appeal filed under Section 100 of the Code of Civil Procedure is fixed for admission. It is settled law that before admitting the appeal the appellants have to show what substantial questions of law is involved in the appeal. As referred earlier as per the submissions of the learned counsel for the appellants/defendants No. 1 and 2 two substantial questions of law referred earlier in paragraph 2 (supra) are involved in the present appeal and therefore this appeal needs to be

admitted.

7. Mr. Biradar, learned counsel for the appellants submitted that mainly three properties referred earlier while referring the case of defendants and at the cost of repetition agricultural land at village Nalegaon bearing Gat No. 679/3 admeasuring 1 H 25 Are in the name of wife of plaintiff No. 1, one house property at village Nalegaon purchased vide sale deed bearing No. 1419/2002 dated 04/04/2002 in the name of wife of plaintiff No. 1 and open plot at AUSA bearing survey No. 164 plot No. 72 area 15.24 x 9.14 sq.mt. in the name of wife of plaintiff No. 2 are although joint family properties are not included in the suit and therefore suit is bad for non inclusion of these properties, but the trial Court as well as the appellate Court have not properly considered the said aspect and hence substantial question of law in this respect as referred earlier as suggested by him is arising in this appeal for consideration of this

Court. Learned counsel for the appellants submitted that the trial Court observed that property plot No. 72 is joint family property. Learned counsel also submitted that since the above said properties are joint family properties but as they are not included in the suit matter needs to be remanded to the trial Court for fresh hearing setting aside the judgment and orders of both the Courts below. Learned counsel fairly conceded that counter claim made by the defendants is not entertainable.

8. To support his submission to remand the matter to the trial Court learned counsel has relied upon the decision in the case of ***Govindrao s/o Gangaramji Ajmire Vs. Dadarao @ Shrawan s/o Gangaramji Ajmire*** reported in ***2004 BCI 82***. As per the facts of the said case suit was filed for partition and separate possession of immovable property. The defendant resisted suit contending that the suit for partial partition of the properties is not maintainable. So also, the defendant had contended

that there was no partition at all of any of the properties belonging to the joint family and that the entire joint family property has not been brought into the common hotchpotch and therefore the suit was bad. The trial Court dismissed the suit. Appeal filed by the original plaintiffs aggrieved by the dismissal of suit was also dismissed by the District Court and in the second appeal in paragraph No. 20 of the said judgment it was observed thus;

"20. The appellate Court also considered this aspect of the matter and rightly held that the suit is not maintainable without bringing entire joint family house property into common hotchpotch. Consequently, the appellate Court dismissed the appeal. It would be quite clear that the suit house is not the only property owned by the joint family and having regard to the joint family house property situated at Pimpalkhuta and Amravati, it is apparent that the suit for partition of the suit house only would not be maintainable and even if it is held that the plaintiff has half share in the suit house, the partition of the same would not be equitable and just. Since all the properties were not included in the suit and the two brothers i.e. plaintiff and defendant are claiming their rights and shares in the house properties left by Gangaram, ends of justice would be met

if the case is remanded to the trial Court. The joint house property owned by the two brothers will also be included in the suit and will be dealt with in such a manner as the Court may consider, consistent with justice equity and good conscience. If the plaintiff declines to have partition of entire joint house properties, the suit will stand dismissed with costs throughout. The plaintiff is permitted to implead the necessary parties and also to include the entire joint family house property in this suit. In the result, the case is remitted to the trial Judge for decision in accordance with law in the light of the observations mentioned above in this judgment and the impugned order is set aside and the appeal is allowed to the extent indicated above with no costs in the circumstances."

9. On the other hand Mr. Tele, learned counsel appearing for respondents No. 1 and 2-original plaintiffs submitted that in the plaint itself the plaintiffs have contended that they are not claiming partition and separate possession of their share in the grampanchayat house namuna No. 787 i.e. house No. 785 which has been destroyed or demolished in the earthquake and therefore it cannot be said that suit is bad for non inclusion of said property as

submitted by the other side. As regards the remaining three properties i.e. agricultural land Gat No. 679/3, one house property purchased vide sale deed on 04/04/2002 and one open plot at AUSA bearing survey No. 164 plot No. 72 the learned counsel submitted that the first two properties are in the name of wife of plaintiff No. 1 and plot No. 72 is in the name of wife of plaintiff No. 2 and therefore they are their self acquired properties and even absolute properties as per Section 14 of the Hindu Succession Act and these properties cannot be said to be joint family properties. Learned counsel submitted that burden to prove that these properties are joint family properties and liable to partition lies on the defendants who are claiming that these are joint family properties. But the defendants have adduced no evidence to show the same and therefore both the Courts have recorded concurrent findings of the fact that these properties are not joint family properties and not liable to partition and answered the relevant points/issues in the negative and according to

learned counsel when both the Courts below have recorded concurrent findings of fact that above said three properties are not joint family properties this Court in the second appeal under Section 100 of the Civil Procedure Code unless finds that substantial question of law is involved cannot entertain and admit the appeal. It is submitted that in such a situation this Court cannot exercise power under section 100 of the Code of Civil Procedure and interfere with the decree passed by the trial Court which is confirmed and maintained by the appellate Court. Learned counsel for the plaintiffs, respondents No. 1 and 2 to substantiate his aforesaid submissions relied upon following decisions:

(A) In the case of *Marabasappa (D) By L.Rs. And Ors V. Ningappa (D) by L.Rs. and Ors* reported in *2011 AIR SCW 6059*, lands were claimed to be joint family properties by plaintiffs. The trial Court placed burden on the defendant to prove that said lands were part of sale acquired property and not joint

family property. It was held that it was not proper when there was no affirmative proof of anything contrary. It was further held that there is no presumption of joint family property and there must be some strong evidence in favour of same.

(B) In *S. Subramanian Versus S. Ramasamy and others*, (2019)6 SCC 46, while considering the aspect of maintainability of second appeal under Section 100 of the Code of Civil Procedure it was held that second appeal would be maintainable only on substantial question of law. It does lie on question of facts or law. Existence of substantial question of law is essential for exercise of jurisdiction under Section 100 of Code of Civil Procedure. Substantial question of law can be said to have arisen (a) where material or relevant evidence is not considered which, if considered, would

have led to an opposite conclusion, and (b) where finding has been arrived at by appellate court by placing reliance on inadmissible evidence, which if it was omitted, an opposite conclusion was possible. On these grounds, interference with findings of fact is permissible under Section 100 of Code of Civil Procedure. It was further held that while deciding second appeal, High Court is not required to reappreciate evidence on record and come to its own conclusion. Findings of facts recorded by lower courts cannot be set aside when such findings are on appreciation of evidence. First appellate court is final court on findings of fact. In the said case on facts there were no substantial questions of law involved in the matter and questions formulated by High Court were questions of law or facts but not substantial questions of law. High Court reappreciated entire

evidence as if it was deciding first appeal. It was held that it was impermissible for High Court to interfere with concurrent findings of fact recorded by lower courts that there was no blending of properties with ancestral properties. Procedure adopted by High Court while deciding second appeal was held beyond scope of Section 100 of Code of Civil Procedure. Thus, judgment passed by High Court was set aside and judgments and decrees passed by lower courts were restored.

(C) In *Dagadabai (dead) by Legal Representatives Versus Abbas Alias Gulab Rustum Pinjari*, (2017)13 SCC 705 while considering the scope of interference in the second appeal under Section 100 of Civil Procedure Code, it was held that High Court cannot interfere in second appeal when such concurrent findings of facts were neither

opposed to pleadings, evidence or any provisions of law.

(D) In *Santosh Hazari Versus Purushottam Tiwari (Deceased) by Lrs, (2001) 3 SCC 179*

in paragraph No. 9, it was observed thus:

"9. The High Court cannot proceed to hear a second appeal without formulating the substantial question of law involved in the appeal and if it does so it acts illegally and in abnegation or abdication of the duty cast on Court. The existence of substantial question of law is the sine qua non for the exercise of the jurisdiction under the amended Section 100 of the Code. (See *Kshitish Chandra Purkait V. Santosh Kumar Purkait, Panchugopal Barua V. Umesh Chandra Goswami and Kondiba Dagadu Kadam V. Savitribai Sopan Gujar*)."

10. I have carefully considered the submissions made by the learned counsel appearing for the parties. So also, I have perused the judgments of both the Courts below and the copies of plaint, written statement-cum-counter claim, reply filed by

original plaintiffs to the counter claim and the copies of evidence on affidavit adduced by both the parties.

11. As regards the substantial question of law in respect of counter claim is concerned on perusal of Exhibit 24 it is seen that defendants have paid court fees of Rs. 2780/- in respect of distribution of liability of Rs. 1,00,000/- i.e. the expenses incurred for the treatment of father of the plaintiffs. It appears that both the courts below have held that the defendants are not entitled to relief claimed under the counter claim. Learned counsel for the plaintiffs submitted that defendants have not paid proper court fees as regards the claim in the alleged joint family properties which are not included in the plaint. As referred earlier learned counsel for the appellants fairly conceded that counter claim is not entertainable. The counter appears to be not in proper form. Considering above all circumstances, I find that no substantial

question of law as proposed by appellants/defendant Nos. 1 and 2's counsel as regards counter claim is involved in the instant appeal.

12. As regards the second proposed substantial question of law as per the submissions of learned counsel for the appellants regarding maintainability of suit without bringing the entire joint family properties into the common hotchpotch is concerned it appears that to discharge the said burden defendants have adduced evidence in the form of affidavit of defendant No. 1 Ramrao and witnesses Vyankat Dhondiba Pawar and Dilip Rangrao Suryawanshi. It appears that witnesses Dilip Suryawanshi and Vyankat Pawar have been mainly examined to substantiate the contention of the defendants that the defendant No. 1 incurred expenses of treatment of his father Vitthal and these witnesses had given certain amounts to the defendant No. 1. These witnesses are not on the point as to whether three properties referred earlier are joint family properties as per the case of the

defendants. It appears from paragraph No. 4 of affidavit of the defendant No. 1 Ramrao that land gut No./survey No. 679, house at Nalegaon and plot No. 72 in survey No. 164 of Ausa are properties purchased from the joint family income. Out of these properties admittedly first two properties are in the name of wife of plaintiff No. 1 and plot No. 72 is admittedly in the name of wife of plaintiff No. 2. Referring the above evidence the trial Court observed that except the words defendants have not produced evidence to show that above said three properties are joint family properties and thus, held that suit is not bad for non inclusion of said properties. The appellate Court did not disturb the said finding of the trial Court. Thus, both the Courts below have recorded concurrent findings of fact that the above said three properties are not joint family properties so as to say that suit is bad for non inclusion of said properties. Therefore, I do not find that substantial question of law as suggested by the learned counsel for the appellants referred earlier regarding

maintainability of suit without bringing all the joint family properties into the common hotchpotch is arising in the instant appeal. Another aspect to be noted is that when there is a concurrent findings of the facts as referred earlier in respect of both the proposed substantial questions of law based on proper appreciation of evidence it is not fit case to admit the appeal in the light of recent decision of the Hon'ble Apex Court in the case of ***S. Subramanian*** (Supra). On perusal of the judgments of both the Courts below I find no error either in law or of procedure to interfere with the said decisions.

13. When on proper appreciation of the evidence both the Courts below of the fact finding concluded that suit is not bad for non inclusion of three properties referred earlier as per the case of the defendants and when it appears that defendants have not proved that said properties are joint family properties there is no reason either to admit the appeal or to remand the matter to the trial Court as

submitted by the learned counsel for the appellants relying upon the decision of this Court in the case of *Govindrao s/o Gangaramji Ajmire* (Supra).

14. For the foregoing reasons, I find that both the Courts below have on proper appreciation of evidence held that respondents No. 1 and 2 plaintiffs are entitled to partition and separate possession of their share in the suit property as decreed. There is no error in recording said finding by both the Courts. Therefore, it is not fit case to admit the appeal. As a result the appeal is dismissed. No costs. In view of the dismissal of the appeal Civil Application No. 2802 of 2018 does not survive and the same is disposed of.

[S. M. GAVHANE, J.]