

BDP-SPS

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 635 OF 1990**

Shri Rangarao alias Raghunath
Sakharam Shinde (Since deceased
through his legal heirs)

1A) Smt. Usha Ranganath @
Raghunath @ Rangarao Shinde
and Others

..... Appellants.

V/s

Kondi Sakharam Shinde
(Since deceased through
his legal heirs)

1) Rajaram Kondi Shinde
(Since deceased) Through
his following heirs

1A) Sindhutai Rajaram Shinde
and Others

..... Respondents.

**ALONGWITH
SECOND APPEAL NO.349 OF 1990**

1. Rangarao Sakharam Shinde
(since deceased) through his
legal heirs

1A) Smt. Usha Ranganath @ Raghunath
@ Rangarao Shinde and Others

.... Appellants.

V/s

Kondi Sakharam Shinde
(Since deceased) Through his
following heirs

1) Rajaram Kondi Shinde (Since deceased)

Through his following heirs

1A) Sindhutai Rajaram Shinde

and Others

..... Respondents.

Mr. Vishal Kanade a/w Sean Wassooode, Rupesh Mandhare i/b E.A. Sasi for the Appellants in both the above appeals.

Mr. Prabhanjan Gujar for Respondent Nos. 2A to 2D and 3A to 3D in both the above appeals.

CORAM: NITIN W. SAMBRE, J.

DATE: 6th February, 2020

P.C.:-

1] Both these appeals are inter-se between real brothers who are fighting over the immovable properties. Regular Civil Suit No.440 of 1975 was initiated by the Respondent to the appeals seeking declaration that the suit properties are his self acquired properties and he being the owner thereof, is entitled for injunction against the Appellant/Defendant restraining him from causing obstruction to his consistent longstanding possession and enjoyment of the same. The suit properties consist of various Gat Numbers. In the said suit, it is claimed by the Respondent/Defendant that suit properties are neither ancestral properties nor acquired out of joint family earning. Rather, specific contention is, Plaintiff to the said suit i.e. Respondent in the

present appeals has acquired the suit properties from his own individual income and as such, are his self acquired properties. The said suit was initially decreed ex-parte on 15/06/1976 as the Appellant/Defendant failed to appear in spite of service. However, decree was set aside and suit came to be restored on 15/02/1977. The Appellant tendered his Written Statement and having regard to the rival claims through pleadings, issues were framed therein. The suit came to be dismissed vide judgment and order dated 7/12/1985 passed by Joint Civil Judge, Junior Division, Wai.

2] Respondent/Plaintiff feeling aggrieved preferred Regular Civil Appeal No. 56 of 1986. The said appeal came to be allowed vide judgment dated 7/10/1989 and the suit came to be decreed. As a consequence whereof, present Appellant was restrained from interfering or obstructing peaceful possession of the Respondent/Plaintiff to the said suit.

3] Feeling aggrieved, present Appellant preferred Second Appeal No.635 of 1990.

4] Another set of litigation is Regular Civil Suit No. 31 of 1979 preferred on the file of Civil Judge, Junior Division, Wai by the present Appellant for partition and separate possession. According to the Appellant, after death of their father in 1930, Respondent/Defendant to the said suit being elder brother, became Karta of the family and as such, the joint nucleus came into hands of Respondent/Defendant to the said suit. The suit properties were purchased out of earning from joint family properties i.e. out of cultivation of the ancestral properties, that being so has status and colour of ancestral properties. Even if the Appellant was shifted to Bombay and was earning independently, there was no partition between the Appellant and the Respondent and as such, claimed decree for partition and separate possession. The suit claim was resisted by the present Respondent alleging that the suit properties were purchased by him out of his individual income from his hard earnings.

5] Having regard to the rival claim in the said suit, issues were framed and after appreciating the evidence of the respective parties and witnesses, the said suit came to be decreed vide judgment and decree dated 7/12/1985. The present Respondent/Defendant to the

said suit preferred Regular Civil Appeal No. 57 of 1986.

6] The said Appeal questioning the decree for partition came to be allowed by the learned District Judge vide judgment and order dated 21/8/1989.

7] Appellant herein feeling aggrieved, preferred Second Appeal No. 349 of 1990.

8] Since the properties involved in both the suits are similar and parties are same and issues raised are interlinked, respective Counsel have consented for deciding both these appeals by present common judgment. As such, both these appeals are taken up for final hearing and are disposed of by this common judgment.

9] Mr. Vishal Kanade, learned Counsel for the Appellant submits that the First Appellate Court committed an error apparent on the face of record by holding that Respondent is the sole owner of the suit properties and has erred in holding that properties are independently stood in the name of Respondent to the present appeals. According to

Mr. Kanade, the question of law which warrants consideration is : whether the First Appellate Court has committed an error in disregarding and disrespecting the findings of the Trial Court, particularly when the view expressed by the Trial Court was a possible view? The next question of law in the backdrop of the observations of the First Appellate Court which is sought to be raised by the learned Counsel for the Appellant Mr. Kanade is : whether the First Appellate Court has committed an error in observing that there was no existence of joint family nucleus? Mr. Kanade further urged that the First Appellate Court erred in law in recording finding that the properties cannot be termed as joint family properties, particularly when burden to prove that there was common nucleus was **not** discharged by the Appellant. According to him, burden shifts on the Respondent to prove that even if properties were acquired by him in his individual name, same were not out of the earnings from joint family properties and as such the Appellant is not entitled for the same.

10] While countering the aforesaid submissions, the learned Counsel for the Respondent Mr. Prabhanjan Gujar urged that the First Appellate Court has every duty in law to re-appreciate the pleadings

and evidence of the respective parties and if is of the view that findings recorded by the Trial Court are contrary to the evidence and the pleadings, has an authority to reverse the same and substitute its own findings by appropriate reasons. According to Mr. Gujar, Judgment of the First Appellate Court is passed on certain admissions which are given by the Appellant about he having been shifted to Bombay in 1945 and as such was separate in mess. According to him, common nucleus was never proved by the Appellant as is rightly held by the First Appellate Court, as the Appellant has independent earnings and establishment at Bombay and that being so, according to him, the Appellant has failed to discharge the burden so as to demonstrate that the properties were purchased out of earnings from the joint family properties which become part of the ancestral properties. As such, he has sought dismissal of the appeals.

11] At the outset, considering the blood relations between the parties, Court has requested respective Counsel to sit together and try to settle the matter.

12] Respondent has offered certain part of the suit properties to the

Appellant towards the settlement. However, according to the Appellant, the said offer was too meagre to satisfy the claim of the Appellant. The Appellant insisted that he is entitled to minimum half share in the properties and as such, rejected the offer given by the Respondent. As such, this Court is required to proceed ahead with the hearing of the present appeals.

13] The Trial Court has held in favour of the present Appellant i.e. suit for injunction preferred by the Respondent was dismissed and suit for partition and separate possession was decreed whereas the First Appellate Court reversed the said findings.

14] With the assistance of respective Counsel, this Court has gone through the evidence as is produced on record in the form of compilation by the learned Counsel for the Appellant Mr. Kanade. This Court has extensively heard the respective parties.

15] Since in the suit for partition and possession, it is claimed by the Appellant that the suit properties are having status of ancestral properties and the Respondent was a Karta of Hindu Joint Family, the

Appellant is entitled for half share in the suit properties, this Court has looked into the appreciation of pleadings and evidence by the Trial Court and the First Appellate court.

16] The Trial court while dealing with Suit No.440 of 1975 for injunction preferred by the present Respondent has recorded the issues and findings as under:-

Issues	Findings
1] Does the Plaintiff prove that suit land is his self-acquired property?	No
2] Does Plaintiff prove that partition took place in between Plaintiff and Defendant some 35 years back?	No
3] Does Defendant prove that suit properties were purchased by the Plaintiff with the funds of joint family?	Yes
4] Is Plaintiff entitled for injunction	No

17] The Trial Court while dealing with the said suit for injunction has appreciated that the Respondent/Plaintiff in the said suit has entered into witness box whereas Appellant/Defendant in the said suit

examined himself and other two witnesses viz. Suryakant Balso Pawar i.e. witness No.2 and Shamrao Sopanrao Pisal i.e. witness No.3. The Trial Court thereafter went on appreciating the documents as were produced on record and observed that even though pleaded, Respondent has failed to demonstrate that he was doing some business of grains or milk, as has been claimed. The Trial Court then considered the alleged plea set up by the Respondent about division of Rs 800/- by mother in favour of both the sons some 50 years back and has recorded finding that at relevant time i.e. in 1935 or so, financial condition of the family was very poor and as such said circumstance weighed against the Respondent. The Trial Court then proceeded to appreciate holding of the family, the status of the Respondent in the said suit which is recorded in revenue record of one of the properties, as Manager of the joint family property i.e. in the revenue record of Survey No. 255/2 as is reflected in the Mutation Entry No. 676 and then proceeded to observe that it is out of earning of the said properties, Respondent has acquired properties which get colour of joint family properties as there is common nucleus and as such dismissed the said suit.

18] As far as appeal is concerned, the First Appellate Court vide judgment dated 7/10/1989 has relied on the judgment delivered in Regular Civil Appeal No.57 of 1986 on 21/8/1989 arising out of partition suit. As such, this Court is required to relegate itself to the findings recorded while dealing with the claim in the suit for partition and separate possession by the First Appellate Court while dealing with Regular Civil Appeal No.57 of 1986 preferred by the Respondent, questioning the decree for partition and separate possession. In Regular Civil Suit No.31 of 1979 which was decreed on 7/12/1985, the First Appellate Court vide its impugned judgment dated 21/8/1989 delivered in Regular Civil Appeal No. 57 of 1986 has considered entire pleadings of the parties in both the suits so also nature of evidence brought on record.

19] The contention of the Appellant that he is entitled to partition and separate possession of the suit properties, same being ancestral properties, as they were joint family properties belonging to the Plaintiff and Defendant was duly scrutinized based on the pleadings and the evidence on record. The respective pleadings of the parties were duly re-appreciated by reproducing the contention based on the

same in detail. The First Appellate Court was satisfied with the fact that house property described in para B(1) of the Plaint was admittedly an ancestral property whereas rest of the properties claimed by the Respondent/Plaintiff were his self acquired properties. The First Appellate Court has considered the claim of the Appellant/Defendant that he was working from 1946 as an agriculturist with the Respondent/Plaintiff and his shifting in 1956 to Bombay for taking a job in Singer Company. The First Appellate court has proceeded to consider purchase of the properties by the Respondent under the provisions of Bombay Tenancy and Agricultural Lands Act and also independent purchase by various sale deeds in his favour. The First Appellate Court was also sensitive to the fact of filing of the Civil Suit No. 440 of 1975 for injunction.

20] The First Appellate Court also considered that it is the Appellant who has claimed that the properties are ancestral properties which were purchased out of the income from joint family properties. Hence, the burden was on the Appellant to prove the same and the Appellant had failed to discharge the said burden.

21] Rather, claim of the Appellant that every year he has helped his brother i.e. Respondent in purchase of the properties and also financed the agricultural activity has been held to be not proved from the oral evidence of the Appellant so also his independent witnesses. Rather, circumstances that Appellant has shifted to Bombay and he has established himself in Bombay prima facie demonstrated that the Appellant has severed himself from the properties at Vele i.e. suit properties and has started residing in Bombay having independent source of income while working as Mechanic with Singer Company. The First Appellate Court has been satisfied with the fact that only part of the suit properties i.e. house property can be termed as ancestral property and decreed the suit for partition and possession to that extent only.

22] If we consider the judgment of the First Appellate Court and also that of the Trial Court, what can be noticed is, the Trial Court has proceeded on the basis that burden is on the Respondent to prove that the properties were not ancestral properties, particularly when income from the joint family property i.e. house property was used for purchase of suit properties in which the Appellant has claim. The

Appellant has not explained as to how, from the house property, which is admittedly an ancestral property, income was derived by the Respondent so as to earn suit properties which can be given colour of ancestral properties of both the Plaintiff and Defendant and as to how the Appellant/Plaintiff in the partition suit is entitled for share in the properties. Rather, it was for the Appellant herein to prove that there was enough income from the ancestral properties which was diverted by the Respondent-brother for purchase of suit properties in his name which gets colour of ancestral properties and as such Appellant has share in the same.

23] The evidence on record rather demonstrates that the Appellant at no point of time discharged the burden of proving the same. His admission that he had shifted to Bombay and that he had independent source of income was rightly considered to infer that the Appellant was separate in mess. It was for the Appellant to demonstrate that there was a common nucleus from his own pleadings and the evidence, which he had failed to. His both witnesses who were examined so as to establish the financial help extended by the Appellant to the Respondent/Defendant in purchase of the suit

properties or in increasing the agricultural income, had not proved the same as testimony of these witnesses was found to be unreliable. But for a statement that the amount was paid, there was no iota of any other evidence so as to infer that the Appellant had helped the Respondent in purchase of the suit properties or had strengthened and supported cultivation of the lands by extending financial help.

24] In the aforesaid backdrop, the claim of Mr. Kanade, learned Counsel for the Appellant that the First Appellate Court has committed an error in not respecting the findings of the Trial Court cannot be accepted. Rather, the First Appellate Court is duty bound to re-appreciate the pleadings and the evidence and if it is found that the view expressed by the Trial Court is not in tune with the pleadings and evidence, has every authority in law to reverse the said findings which appears to have been done in the case in hand by the First Appellate Court. The Appellate Court has also observed that the Appellant had failed to discharge his burden to prove the common nucleus and earnings from the ancestral properties to purchase the suit properties. As such, Appellant had every right to claim partition of the properties.

25] In the backdrop of aforesaid observations, reliance placed by Mr. Kanade on the judgment of this Court in the matter of *Govinda Raoji Katole vs. Ganpati Tukaramji Khanke deceased through LRs. Shantabai wd/o Ganpati Khanke and others* reported in **2001 (4) Mh.L.J. 836** will be of hardly any support. Para 15 of the said judgment reads thus:

“15. The Appellate Court has jurisdiction to reverse or affirm the findings of trial Court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the Appellate Court must, therefore reflect its conscious application of mind, and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the Appellate Court. While writing a judgment of reversal the Appellate Court must remain conscious of two principles. Firstly, the findings of fact based on conflicting evidence arrived at by the trial Court must weigh with the Appellate Court, more so when the findings are based on oral evidence recorded by the same presiding Judge, who authors the judgment. Secondly, while reversing a finding of fact the Appellate Court must come into close quarters with the reasonings assigned by the trial Court and then assign its own reasons for

arriving at a different finding. This would satisfy the Court hearing a further appeal that the first Appellate Court had discharged the duty expected of it.”

26] In para 29 of the aforesaid judgment, while dealing with the scope of Section 100 of the Civil Procedure Code i.e. second appellate jurisdiction, my attention is invited to the powers of the High Court to set aside the concurrent findings, particularly when the courts below have failed to consider important evidence having direct bearing over the disputed issue and the error with highest magnitude that gives birth to substantial question of law. As far as case in hand is concerned, this Court has already observed that there is no error of law noticed in the judgment of the lower Appellate Court as the same is in tune with the statutory powers.

27] As far as the reliance placed by Mr. Kanade on the judgment of the Apex Court in the matter of *Adivappa and Others vs. Bhimappa and another* reported in (2017) 9 SCC 586 is concerned, the said judgment will also be of hardly any assistance as the Respondent has never admitted existence of jointness in the family properties. Similar appears to be a case in the matter of *D.S. Lakshmaiah and Another vs.*

L. Balasubramanyam and Another, reported in **(2003) 10 SCC 310**.

The Appellate Court as well as this Court has already held that Appellant has failed to establish nucleus and that being so, it cannot be held that Respondent has brought the properties earned out of his earning in common hotchpotch.

28] Rather, an adamant approach on the part of the Appellant in not accepting the offer of settlement given by the Respondent speaks of the Appellant not interested in settling the matter. The Appellant himself has been independently established in Bombay almost 45 years before the suit was brought in 1975. Respondent is still cultivating the lands which were bought by him out of his independent income from the cultivation of disputed properties.

29] In view of above no fault could be noticed with the impugned judgment delivered by the First Appellate Court. Both these second appeals stand dismissed as no substantial question of law is involved in the same.

(NITIN W. SAMBRE, J.)