

BDP-SPS

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.261 OF OF 2016**

Hanmant Mukinda Jagdale and Ors. Appellants.

V/s

Shankar Jagu Jagdale
(Since deceased through
Legal heirs)

1A Ranjana Shankar Jagdale
and Ors. Respondents

Mr. P.S. Dani, Senior Advocate a/w Mr. Nikhil Wadikar i/b Mr. Nandu Pawar for the Appellants.

Mr. Vishwanath S. Talkute for Respondent No.4.

CORAM: NITIN W. SAMBRE, J.

DATE: 6th January, 2020

P.C.:-

1] This appeal is by original Plaintiffs questioning the judgment and decree dated 14/11/2006 passed by the Court of Civil Judge, Junior Division, Vaduj, District Satara confirmed in Regular Civil Appeal No.230 of 2010 (old Regular Civil Appeal No.281 of 2006) decided on 01/08/2015 by the District Judge, Satara.

2] Facts in brief for deciding the issue raised in the appeal are as

under:-

3] Appellants herein are the original Plaintiffs whereas Respondents are Defendants. Common ancestral Rama died on 29/03/1925 who at the relevant time was blessed with two sons viz Jagu who expired on 13/08/1961 and Mukinda who expired on 11/03/1970.

4] A suit came to be filed by the Plaintiffs, claiming relief of partition, separate possession and in the alternative for perpetual injunction. The admitted facts for deciding the appeal are, the relationship between the parties is not in dispute. Plaintiff Nos. 1 to 6 are the legal heirs of deceased Mukinda and Defendant Nos. 1 to 4 are legal heirs of deceased Jagu. It is also not disputed that lands bearing Gat No. 445 (Survey No.166), Gat No.1125 (Survey No.132/2 and 132/4), Gat No.141 (Survey No.125/2, 125/3), Gat No.237 (Survey No.133/2), Gat No.352 (Survey No.93) were the ancestral properties. It is the case of the Plaintiffs that the suit properties which are more particularly described in para 1(i) to (x) consist of agricultural lands and also house properties. According to Plaintiffs, the suit properties being ancestral properties are in possession of the

Defendants/Respondents as per family arrangement entered into and the Defendants/Respondents are trying to alienate the said properties by disregarding the family arrangement. Defendants/Respondents resisted the claim by filing their Written Statement by denying the claim. According to Defendants, partition of the ancestral properties was effected way back, and both deceased Jagu and Mukinda were separate in mess and residence and were independently cultivating their respective shares.

5] Considering the rival pleadings, Trial Court framed issues at Exhibit-116 and given its findings which read thus :-

ISSUES

FINDINGS

- | | |
|---|--------------------|
| 1] Do Plaintiffs prove that the suit properties are joint family properties of plaintiff and defendants? | In the negative |
| 2] Do defendants prove that, there was partition in between father of the plaintiffs i.e. deceased Mukunda and father of defendants i.e. deceased Jagu in the year 1930 as alleged? | In the affirmative |
| 3] Do Plaintiffs prove that after the death of Jagu there was family | |

- | | |
|--|---------------------|
| arrangement between Mukunda and Shankar? | In the negative |
| 4] Do defendants no. 1 & 7 prove that land gat nos.407, 404, 448 and 1131 are self acquired properties of deceased Jagu Jagdale? | In the affirmative |
| 5] Whether the suit is barred by principle of estoppel? | In the affirmative |
| 6] Whether suit is bad for non-joinder of necessary parties? | In the negative |
| 7] Whether the suit is bad for non bringing of the joint family properties into common hotch-pot? | Does not survive |
| 8] Whether the suit is properly valued? | In the affirmative |
| 9] Whether this Court has jurisdiction to try this suit? | In the affirmative |
| 10] Does defendant no.8 prove that he is bonafide purchaser of land gat no.407 for value without notice? | In the affirmative. |
| 11] Does defendant no.10 prove that he is bonafide purchaser of land gat No.141 for value without notice? | In the affirmative |
| 12] Are Plaintiffs entitled for the relief of perpetual injunction? | In the negative |
| 13] Are Plaintiffs entitled for partition and separate possession? If yes, of what properties & what are the shares of parties? | In the negative |

14] Is defendant no.1 alternatively
entitled for equitable relief? In the negative

15] What order and decree ? As per final order.

6] In support of the claim put forth by the Appellants/Plaintiffs,, they have examined Plaintiff No.6 Mathurabai-P.W.1 for herself and as power of attorney holder for Plaintiff Nos. 1 to 5. She supported the suit claim in her examination-in-chief. As far as Defendants are concerned, Defendants have examined D.W.1 – Shankar in support of their defence. As far as Defendant No.8 is concerned who is a purchaser of part of the suit properties examined her husband so as to demonstrate that she is a bonafide purchaser without notice.

7] The learned Trial Court vide judgment impugned dated 14/11/2006 dismissed the suit by observing that Plaintiffs have failed to prove that the suit properties are joint family properties of the Plaintiffs and Defendants. It is further observed by the Trial Court that Defendants have proved partition in between deceased Jagu and Mukinda in 1930 as was set up in defence. The Trial Court also observed that the Plaintiffs have failed to prove that after death of Jagu, there was any family arrangement between Mukinda and

Shankar – Defendant No.1. Affirmative findings are recorded by the Trial Court that land Gat Nos.407, 404, 448 and 1131 are the self acquired properties of deceased Jagu i.e. Defendants' side and in view of purchase of part of the properties from Defendants by the Plaintiffs, suit is barred by principle of estoppel.

8] The First Appellate Court proceeded to re-appreciate the entire evidence in the backdrop of the respective pleadings and affirmed the findings recorded by the Trial Court, as such this second appeal.

9] The learned Senior Counsel for the Appellants would urge that the following questions of law are required to be considered :-

(A) In view of provisions of Section 85A of the Maharashtra Tenancy and Agricultural Lands Act, whether both the Courts below have committed an error in recording finding when expressly its jurisdiction was barred on the issue of Exhibit-46 so also the certificate issued under Section 32M?

(B) If both the Courts below have recorded finding that there already exists partition between the parties to the suit, whether Courts have committed an error in not quantifying the share of each of the parties to the suit?

(C) Whether Courts below have committed an error in not holding that suit properties are the properties of Hindu Undivided Family?

10] So as to substantiate the existence of questions of law, learned Senior Counsel for the Appellants have taken me through the respective pleadings, evidence adduced and the findings recorded.

11] As far as question of law as regards Section 85A of the Tenancy Act is concerned, it is worth to observe here that Sub Divisional Officer in RTS No.2 of 1993 delivered a judgment which is produced at Exhibit-167 so as to demonstrate that Plaintiffs' case of Jagu and Mukinda were residing jointly could be inferred. In addition to above, land Survey Nos. 161 and 162 was never tenanted to deceased Rama

whereas same was admittedly in the name of Jagu as is reflected in the record of rights. The order under Section 32G of the said Act was passed by the Agricultural Lands Tribunal which was produced at Exhibit-140. The said order was passed by the authority in the year 1962 i.e. 3/7/1962. There appears to be another inquiry under Section 32G in relation to land Survey Nos.161 and 162 in 1971 and name of deceased Jagu was recorded in the record of right as tenant, as a consequence of which Defendants/Respondents succeeded to the said properties after death of deceased Jagu being the Class-I heirs under the Hindu Succession Act. This fact of subsequent inquiry in 1971 was suppressed by the Plaintiffs from the Court below. The Court below has proceeded to look into the aspect as to whether order under Section 32G as was relied upon by the Appellants so as to carve out an exception under Section 85A of the Act can be sustained. Even if jurisdiction of the Civil Court is barred in the matter of recording findings on the issue of tenancy, however, Trial Court has rightly relied on the principle of law that Civil Court has every authority to look into whether there was compliance of statutory provisions, judicial procedure and compliance of principles of natural justice. The Trial Court rightly observed that in the inquiry which is reflected in the

Order Exhibit-140, no notice was issued to the Defendants/Respondents and that being so, it rightly discarded the order at Exhibit-140 so as to record finding in favour of the Defendants/Respondents. Support can be drawn from the judgment of this Court in the matter of *Madhav Kesu Khuspe vs. Sundarabai Mugutrao Phadatare since deceased by heirs Krishna Khupse and others* reported in **1978 Mh.L.J. 289**.

12] Similarly, the Appellate Court was sensitive to the aforesaid fact and proceeded to consider the statement of deceased Mukinda which is produced at Exhibit-139 given by him on behalf of Jagu in 32G proceedings under the Bombay Tenancy and Agricultural Lands Act. Mukinda claimed that he was the legal heir of Jagu particularly when Defendants' claim was already recorded by 1971 inquiry. The lower Appellate Court in detail re-appreciated the entire evidence and further went on recording that Exhibit-195 is 32M Certificate issued under B.T. & A.L. Act in the name of Respondent No.1 – Shankar in respect of land Survey Nos. 161 and 162. That being so, the claim put forth by the Appellants that both the Courts below have committed an error by over looking provisions of Section 85A of B.T. & A.L. Act is

without any legal basis and as such the said contention is rejected. This takes me to the next submission of the learned Senior Counsel for the Appellants as to failure to quantify the share of each of the parties, particularly when both the Courts below have recorded finding of already existing partition.

13] If the submissions in support of aforesaid questions of law canvassed by the learned Senior Counsel for the Appellants are appreciated, it was never the case of the Appellants that they wanted to get their share quantified. Rather, Trial Court so also the lower Appellate Court have in detail appreciated the entire documentary evidence instead of relying on the oral evidence of respective parties and recorded findings as to how the properties flowed in favour of respective parties through Mutation Entries/record of rights after the death of common ancestor Rama. The oldest document such as letter written by mother of deceased Jagu and Mukinda, to Jagu about arrest of Mukinda in a theft case, recovery of stolen articles from Mukinda, admitted fact that Jagu was serving in Bombay and had independent source of income, has been specifically established through documentary evidence. The entire revenue record and the old

document referred to above in relation to arrest of Mukinda, letter written by mother of deceased Jagu and Mukinda to Jagu about forgiving Mukinda in the case of theft and his objectionable behaviour, purchase of the land by the Plaintiffs from the Defendants, the respective possession of the parties over properties and construction of houses by the respective parties prevailed over both the Courts below to record a finding that already partition was existed and could be inferred from the available record of rights.

14] In the aforesaid backdrop, considering the position of law as regards status of the joint family properties, discharge of burden by the Defendants through documentary evidence about existence of partition has prompted the Courts below to dismiss the suit claim and rightly so.

The Court cannot be oblivious to the legal position that partition is a severance of joint status and to constitute partition, there has to be definite and unequivocal indication of the intention of the member of joint family to separate themselves from the family and enjoy the shares and severance. Such intention of the Mukinda so also the

concerned Defendant No.1 can be inferred from the record of rights. The record of rights rather demonstrates that there was demarcation of share as is reflected in the revenue record. Defendants/Respondents through their evidence have established that Gat Nos. 407, 404, 448 and 1131 are self acquired properties of deceased Jagu and same were acquired after partition was effected between Jagu and Mukinda. Both the Courts below have given cogent reasons for discarding evidence of witnesses of both sides i.e. Plaintiffs and Defendant Nos. 1 to 4 and have considered documentary evidence so as to analyse rival claims of the parties. There are affirmative findings recorded by both the courts below that in 1930 or so there was partition effected between Jagu and Mukinda. Both the Courts below have dealt with each of the properties individually/separately relying on documentary evidence in support of recording finding as to its status i.e. whether it is a joint family property or self acquired property. The claim put forth by Appellants/Plaintiffs that there was family arrangement in the year 1974 and 1975 or therebefore was not at all established. Rather, oral admissions are given by the witness of the Plaintiffs viz Mathurabai that there were revenue entries in favour of Jagu and Mukinda to the extent of 8 ana share excluding Gat

No.445. The other documentary evidence i.e. Exhibit-203, seizure of gold ornaments by the police from Mukinda bearing date 10/2/1936, summons issued to Mukinda by police dated 13/2/1936 and a letter dated 10/2/1936 written by Chandra to deceased Jagu, have proved the case of Defendants/Respondents of existence of partition.

15] The Apex Court in the matter of *Santosh Hazari vs Purushottam Tiwari deceased by LRs.* reported in **2001 (2) Mh.L.J. 786** has observed that it is open for the High Court to hear the second appeal both on the question of fact and law. In case, if judgment of the First Appellate Court reflects conscious application of mind and records findings supported by reasons on all the issues arising along with contentions put forth and while doing so the First Appellate Court respects the findings of fact based on conflicting evidence arrived at by Trial Court then in the second appeal, High Court requires to be slow in causing interference. In the case in hand, what can be noticed is, based on conflicting evidence, Trial Court has recorded the findings against Appellants/Plaintiffs while dealing with their claim for partition and injunction. The First Appellate Court re-appreciated the entire evidence and instead of dwelling upon oral evidence, has

proceeded to decide the First Appeal by respecting the findings of the Trial Court by appreciating the entire documentary evidence. As such, both the judgments of the Courts below are in tune with the position of law. It is not the case of the Appellants that any important piece of evidence is refused to be considered by the Trial Court or the First Appellate Court. Rather, Trial Court has analysed both, documentary as well as the oral evidence whereas the First Appellate Court went on appreciating documentary evidence. The Appellate Court while confirming the findings of the Trial Court has recorded independent reasons. That being so, it cannot be said that findings recorded by both the courts below warrant any interference.

16] The questions of law as are sought to be agitated have facet of discharging the burden particularly when members after admitting the existence of jointness in the family properties, assert their claim that some properties out of suit property are self acquired properties. As far as discharge of burden is concerned, Respondents/original Defendants, through documentary evidence such as letter of mother of Jagu and Mukinda, police station record about arrest of Mukinda etc. and the finding in tenancy proceedings, have discharged the burden

about acquisition of properties by Jagu out of his independent earnings. It is also established that Jagu has independent source of income. That being so the burden has been duly discharged by the Respondents in establishing that some of the properties are self acquired. For the aforesaid principle, support can be drawn from the judgment of the Apex Court in the matter of *Adiveppa and Ors. vs. Bhimappa and Anr.* reported in **(2017) 9 SCC 586**.

17] In the aforesaid backdrop, contention that share of each of the parties should have been quantified or Courts below have committed an error in recording finding that the properties do not belong to Hindu Undivided Family cannot be faulted with. As such, present second appeal which is against the concurrent findings does not call for any interference as the same lacks merit and hence dismissed.

(NITIN W. SAMBRE, J.)