

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

**SECOND APPEAL NO.576 OF 2018
WITH
CIVIL APPLICATION NO.1333 OF 2018
IN
SECOND APPEAL NO.576 OF 2018**

Shri. Sambhaji Vishnu Kharat (Dead)

Through L.R. and Others

...Appellants

vs.

Shri. Sarjerao Shankar Kharat & Ors.

...Respondents

....

Mr. Tushar Sonawane, i/b. Ghanasham S. Jadhav, for the
Appellants/Applicants.

Mr. Mahendra B. Deshmukh, for Respondent Nos. 1, 3 and 5 to 8.

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CORAM : S.C. GUPTE, J.

DATED : 12 MARCH 2020

ORAL JUDGMENT :

. Heard learned Counsel for the parties.

2. This second appeal challenges concurrent judgments and decrees passed by two courts below in a suit for partition filed by the Respondents (original plaintiffs).

3. The plaintiffs' suit was on the footing that the suit properties described in the plaint were all joint family properties. One Pira, who was a common ancestor of the parties, had two sons by the

names of Pandu and Vithu. Pandu died issueless, whilst Vithu had two sons by the names of Sambhaji and Shankar. The plaintiffs are children of Shankar, whereas the original defendant no.1 Sambhaji (since deceased), has been survived by the Appellants herein, children of Sambhaji. It was claimed in the suit that the suit properties were joint properties of Vithu and, thereafter, succeeded to by Shankar and Sambhaji. It was submitted that Shankar died on 11 November 1975 having predeceased Vithu, who died on 26 August 1978. It was submitted that there was no partition amongst the plaintiffs or their father on the one hand and Sambhaji or his descendants at any point of time and they continued to be in joint possession of the suit properties. It was submitted that defendant no.1, who was the main contesting defendant and who is Appellant No.1 to the present appeal (since deceased and now represented by Appellant Nos. 2 to 5), got his name entered in the revenue record of a part of the suit properties on the basis of a fabricated will, whilst through an invalid gift deed and allotment, others of the suit properties were sought to be transferred to the other defendants. It was submitted that Vithu himself, who is the purported testator of the will or executor of the gift deed and allotment, was not entitled to bequeath or gift away or allot the suit properties, the properties being ancestral in his hands. The defendants contested the suit claiming that the suit properties were exclusively owned by Vithu and Shankar was not concerned with the ownership of the properties. They claimed that Shankar had accepted some cash from Vithu and, thereafter, he and his family resided separately and did not pay anything to Vithu. The defendants relied on the will as well as gift deed and allotment executed by Vithu in support of their claim to the suit

properties.

4. On these pleadings, the issues before the trial court were (i) whether the suit properties were self-acquired properties of deceased Vithu, and (ii) whether the properties were lawfully bequeathed or transferred by Vithu by his will dated 16 August 1977 in favour of defendant no.1 as also by a gift deed executed in favour of Defendant Nos. 2 to 5 and also allotment to Shevanta (daughter of Vithu, since deceased and deleted from the cause title) towards her maintenance. The trial court held that it was apparent from the evidence before the court that the suit lands were originally owned by Pira, who was the common ancestor of the parties and after Pira, Vithu and Pandu became the successors and possessors of the suit properties. The trial court observed that the defendants had not brought out any reliable or cogent evidence to rebut the presumption of correctness of mutation entries and that from the record and oral evidence, the suit properties could be seen as joint properties and not self-acquired properties of Vithu. The trial court also held that the defendants had failed to prove the execution of the purported will or remove suspicious circumstances in connection with its execution by cogent or satisfactory evidence. So also, so far as the gift deed is concerned, the trial court came to a conclusion that Vithu himself, not having any right to dispose of the properties, the purported execution of the gift deed in favour of defendant nos. 2 to 5 was of no legal effect. The trial court particularly observed that factually, there was no consent on the part of the other co-parceners to the purported gift made by Vithu in favour of defendant nos. 2 to 5. When the matter was carried by the defendants before the District Court in regular civil appeal, the Court concurred with the findings of the trial court that the

plaintiffs had proved that the suit properties were joint family properties of the plaintiffs and defendants, and that the purported will as well as gift deed and allotment executed by Vithu in favour of the defendants were not binding upon their share.

5. Learned Counsel for the Appellants (original defendants), whilst arguing the second appeal for admission, raises three substantial questions of law arising in the appeal. Learned Counsel submits that the original decree in favour of the plaintiffs decreed their separate share and possession in respect of 5/12th share in the suit properties. Learned Counsel submits that without there being any cross-objection on the part of the original plaintiffs in the defendants' appeal before the District Court, the District Court could not have varied the decree from 5/12th share to one half share in favour of the plaintiffs. Learned Counsel submits that as a matter of law, it was impermissible for the lower appellate court to do so. Learned Counsel, secondly, submits that the plaintiffs had not discharged their onus to show that the suit properties were ancestral or joint family properties. Learned Counsel submits that even in case of joint property of a Hindu undivided family, held in individual name of a coparcener, the plaintiff seeking partition claiming it to be joint family property must, at least, discharge the onus of showing that there was some joint family property, which, by its nature and relative value, would have formed a nucleus from which the suit property may have been acquired and the burden shifts onto the defendant only after this onus is discharged by the plaintiff. Learned Counsel in this behalf relies on the Supreme Court case of **D.S. Lakshmaiah vs. L. Balasubramanyam**¹. Learned Counsel, thirdly, submits

¹ (2003) 10 Supreme Court Cases 310

that so far as the last will and testament or gift deed or allotment of Vithu are concerned, there was no prayer by the plaintiffs in their suit to seek a declaration of invalidity of the will or, for that matter, of the other documents such as the gift deed or allotment. Learned Counsel submits that without seeking such declaration, it was impermissible to the court to have ordered partition of the property, which was partly bequeathed and partly gifted or allotted for maintenance by its owner, Vithu, in favour of the respective defendants.

6. Neither of the grounds raised by learned Counsel for the Appellants raises any substantial of law for consideration of this Court. Insofar as the first ground urged by learned Counsel, namely, the purported impermissibility of correcting the plaintiffs' share in appeal without there being any cross-objection on their part, is concerned, it is pertinent to note that the lower appellate court found a mistake in the operative part of the order of the trial court whilst decreeing the suit. What the court found was that the entire discussion in the trial court order, particularly, in its reasons in support of the decree, made it clear that the plaintiffs and the defendants were entitled to one half share each in the suit properties as legal heirs and family members representing the branches of Shankar and Sambhaji. The court found that as the judgment of the trial court indicated, when the will, gift deed and allotment were not considered as valid, the plaintiffs could be said to have proved their entitlement to one half share of the suit properties as legal heirs of Shankar, the other half being owned by defendant no.1 as the other legal heir of the common ancestor, Vithu. The court found that in the discussion of Issue No.7 before the trial court, namely, whether the plaintiffs were entitled to partition, there was nothing to

show how the share of the plaintiffs was determined by the trial court as 5/12th, as indicated in its operative order. The court, in other words, was merely correcting an error in the operative part of the judgment and decree. An appeal is merely an extension of the original proceedings in the suit and any obvious error committed by the trial court in the operative order can very well be corrected by the appellate court, even if there is no particular prayer for such correction. In fact, in case of a suit for partition, every party to the suit being in the position of a plaintiff, any party could seek such correction from the appellate court. Correction of the plaintiffs' share in the decree by the lower appellate court, thus, does not give rise to any substantial question of law for the consideration of this Court.

7. Coming now to the onus of proving the status of the property as joint family property, it is pertinent to note that the trial court, in its order, has considered oral as well as documentary evidence led by the parties before it. The documents placed on record showed that the property was originally owned by Pira, the common ancestor of the parties, and after him, they were mutated in the names of his sons, Vithu and Pandu. The trial court also found that even assuming that the mutation entries would merely have a presumptive value, there was nothing placed by the defendants before the court for rebutting that presumption. The trial court also took into account oral evidence led by the parties in this behalf and came to a conclusion that the record and oral evidence placed by the parties before the court made it clear that the suit properties were ancestral joint family properties and the defendants had failed to show that they were self-acquired properties of Vithu. These observations were also affirmed by the lower appellate court.

Insofar as the one particular sale deed executed in favour of Vithu by one Rajge is concerned, which was placed before the lower appellate court, the court came to a conclusion that there being proof in support of joint family property and the income of the defendants' predecessor, Vithu, having been shown as arising out of this joint family property, there was sufficient proof of nucleus of joint family property, from which the particular piece of property might have been purchased by Vithu and the onus, accordingly, shifted onto the defendants to show that the property was not so purchased from out of the nucleus of joint family property, but separately by Vithu as his own self-acquired property.

8. Once again, in doing so, the court has simply followed the settled principles of law. As the Supreme Court has said in **D.S. Lakshmaiah's** case (supra), referring to the old Privy Council case of **Appalaswami vs. Suryanarayanamurti**², the Hindu law upon this aspect of the case was well settled. Proof of existence of a joint family did not lead to any presumption that the property held by any member of the family was joint, and the burden always lied upon whoever asserted that it was so joint to establish that fact; but where it was established that the family possessed some joint property which, from its nature and relative value, might have formed the nucleus from which the property in question could have been acquired, the burden shifted to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family property. As the court noted, the initial burden of showing that there was a nucleus of joint family property has been discharged by the plaintiffs here; the defendants, for their part, have failed to discharge the burden, which shifted onto them,

² AIR 1947 PC 189 : 1947 All LJ 587

to prove otherwise. The court having correctly applied these settled principles of law and the assessment of evidence in this behalf for applying these principles by the courts below not showing any unreasonableness or perversity, no substantial question of law arises for consideration of this Court.

9. Insofar as the third ground urged by learned Counsel for the Appellants, namely, there being no specific prayer for declaring the documents of will, gift deed or allotment as null and void, the plaintiffs have clearly alleged in the plaint that there was no execution on the part of Vithu and that the documents produced by the defendants were not genuine. Besides, it was submitted that Vithu himself had no authority to dispose of the joint family properties and that the alleged documents were not binding on plaintiffs' share. It was on this basis that the plaintiffs had prayed for partition and separate possession of their share. The courts below had applied their mind and decreed the plaintiffs' share accordingly. Want of specific declaratory prayer in this behalf does not vitiate the findings or the decree. These are clear issues of fact or, at any rate, mixed issues of law and fact. The courts below having reasonably and fairly assessed the evidence before them and come to a possible conclusion on the same, no substantial question of law arises for the consideration of this Court so far as the merits of the judgments and decrees of the courts below on these issues are concerned.

10. Accordingly, there is no merit in the second appeal. The second appeal is dismissed.

11. In view of the disposal of the second appeal, the civil application does not survive and is disposed of as such.

12. Learned Counsel for the Appellants prays for stay of the impugned orders of the courts below. During the pendency of this second appeal, there was admittedly no stay. Now that the appeal has been comprehensively heard and disposed of against the Appellants, there is no question of now granting any stay. The application is rejected.

(S.C. GUPTE, J.)