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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATER JURISDICTION

SECOND APPEAL NO. 269 OF 1992

1. Shri Vishnu Laxman Padule,
aged 37 years
2. Shantabai Laxman Padule
(Deceased) (abated).....

APPELLANTS

...VERSUS...

1. Laxman Rama Padule,
S/D., By heirs :-
- 1A. Vishnu Laxman Padule,
R/o at : At & Post : Deolali,
Taluka : Karmala,
District Solapur
(Heir of Respondent No.1)
2. Shantabai Laxman Padule,
(Deceased) (abated)
3. Bhimrao Laxman Padule,
age 27.
4. Arjun Laxman Padule,
age 25
5. Bhrat Laxman Padule,
age 25

Nos. 1 to 5 agriculturists of
Dhangarwadi (Under Raogaon)
Taluka Karmala, District : Solapur.

6. Sahebrao Rama Padule,
age 62, Occ. Agriculturist,
R/o. Dhangarwadi (Under Raogaon)
Taluka Karmala, District : Solapur.

7. Tanubai Gangaram Waghmode
8. Sonabai Dhavale,
(S.A.stands dismissed as
against Respondent Nos. 7 & 8 as
per Additional Registrar's Order
dt. 14.01.94).....

RESPONDENTS

Shri Sarang S., Aradhye, counsel for Appellant
Shri Anukul Seth i/by Shri V.M.Thoraqt, counsel for Respondent nos.
1 to 3

CORAM: N.W.SAMBRE, J.
DATE : 9 JANUARY, 2020.

1] This appeal is by original plaintiff. Rama was a common ancestor who was married to Karabai. The couple was blessed with four issues, Laxman – Defendant No.1, Sahebrao – Defendant No.6, Tanubai – Defendant No.7 and Sonabai – Defendant No.8.

2] Laxman claimed to have married to Shantabai – plaintiff No.2 and was blessed with son Vishnu. It is the case of the appellant-plaintiff that defendant No.1 drove away plaintiff No.2 and started residing with defendant No.2 Shantabai. Defendant Nos. 3 to 5 are the sons born to defendant No.2.

3] Since the plaintiff Shantabai and her son Vishnu were not permitted to draw income from the ancestral property consisting of Gat No. 323 and Gat No. 287 situated

at village Raogaon, Taluka Karmala, District Solapur, initiated Regular Civil Suit No. 19/1975 for partition and separate possession.

4] The suit came to be partly decreed vide judgment and order dated 31st March, 1987, thereby allowing the partition of Gat No. 287, thereby declaring 1/6th share to each of the appellants, whereas the claim for partition of Gat No. 323 was dismissed.

5] The appellant feeling aggrieved preferred Regular Civil Appeal before the Court of learned Additional District Judge Solapur. The appeal came to be partly allowed, thereby modifying the shares of the appellants to the extent of entitlement of 1/3rd instead of 1/6th in land Gat/Block No. 287.

6] As such this appeal is by the original plaintiff, questioning the dismissal of their claim for partition of land Gat No. 323.

7] Heard the respective counsel. The submissions of learned counsel for appellant Shri Aradhey is, land Gat No. 323 was initially owned by deceased Rama, who died on 21.12.1950. The said property was transferred on 23.05.1950

in favour of one Namdeo Tukaram Dhakate. The land thereafter in 1950-51 was cultivated by one Shantaram Jadhav. The respondent No.1 – Laxman claimed to have started cultivating the land as a Karta of the joint family since 1953-54 and as he was in cultivating possession of the suit property i.e. Gat No. 323 on tillers day i.e. 01.04.1957, the sale certificate came to be issued under Section 32(m) of the Bombay Tenancy and Agricultural Lands Act. According to him, once the respondent No.1 was cultivating Gat No. 323 in the capacity of Karta and the property was purchased out of the income drawn from the cultivation of Gat No. 287 (-) which is admittedly an ancestral property, both the Courts below have committed an error in answering the issue in relation to land Gat No. 323 as self acquired property of respondent No.1. Shri Aradhye then would urge that the provisions of Section 43 of the Bombay Tenancy and Agricultural Lands Act will not be attracted in the case in hand and as such the embargo on partitioning such land will not operate against the appellant. The further contention of Shri Aradhye is, once it is held that the original defendant No.2 is not legally wedded wife of defendant No.1, they ought not to have granted any share to defendant Nos. 2 to 5 in the suit property. As such, according to Shri Aradhye, the judgments impugned are required to be set aside thereby decreeing the suit of the appellant in its entirety.

8] The learned counsel for respondent Nos. 1 to 3 would support both the judgments. According to him, against the concurrent findings the present appeal is preferred which is liable to be dismissed as there is no merit in the appeal.

9] With the assistance of respective learned counsel, I have perused the entire record and proceedings.

10] As the respondents have come out with the case that Gat No. 323 is not the ancestral property, but was a self acquired property of defendant No.1, the Court below rightly shifted the burden on the respondent No.1 to prove that land Gat No. 323 is not an ancestral property.

11] The trial Court framed the issues at Exh. 22 as under and were answered accordingly.

1] Whether the defendant no.1 prove that defendant no.2 is his legally wedded wife and that defendant nos. 3, 4 and 5 are his legitimate sons?	In the negative
2] Whether the defendant Nos. 1 to 5 prove that the suit land gat no. 323 is the ancestral property of the defendant No.1?	In the affirmative

3] Whether the defendant Nos. 1 to 5 prove that the plaintiffs are not entitled to claim any share in the suit land Gat No. 323?	In the affirmative
4] Whether the plaintiffs prove that they have 1/3 share in the suit property?	Plaintiffs have 1/6th share in Gat No. 287 only
5] Whether the plaintiffs prove that defendants denied to allot shares to plaintiffs in partition in response to the plaintiff's notice dated 9.9.1974?	In the affirmative
6] Whether the plaintiffs are entitled to separate possession of their share by partitioning?	In the affirmative only as regard Gat No.287.
7] Whether the defendant Nos. 1 to 5 prove that the suit is bad for non joinder of necessary parties ?	Does not survive
8] Whether the plaintiffs are entitled to mesne profit?	In the Gat No.287 affirmative as regards.
9] What order and decree ?	The suit is partly decreed.
10] Do plaintiffs prove that they have right to file this suit for partition?	In the affirmative
11] Is the suit barred by B.P. and P.H. Act?	In the negative
12] Is the suit of plaintiffs in respect of Gat No. 323 barred by Bombay Tenancy Act?	In the affirmative

13] Does the defendant No.6 prove that there took place partition in between plaintiff and defendant nos. 1 to 6 and he has got 1/2 share in all the suit properties?	In the negative
14] Does he further prove that the defendant no.2 is concubine of defendant No.1 and defendant Nos. 3 to 5 are the sons of defendant No.2 and born to defendant no.1?	In the negative
15] Do plaintiffs prove that land Gat No.323 was obtained under the provisions of Tenancy Act by the joint family of the plaintiffs and defendants ?	In the negative
16] Whether defendant No. 7 and 8 have got any share in the suit property ?	In the negative
17] Do defendant No. 1 to 5 prove that they have expended Rs.9000/- for the improvement of land Gat No. 323?	In the negative

12] It is established through the evidence of respective parties that land Gat No. 323 was an ancestral property of the plaintiffs and the defendants. Said property was mortgaged to Namdeo and was in possession of the respondent – defendant No.1. In his evidence plaintiff No.2/Appellant has admitted that deceased Rama sold the suit property Gat No. 323 to Namdeo vide sale deed dated 23rd May, 1950 - Exh.99 and the possession thereof stood handed over to said Namdeo.

13] From the evidence of the respective parties, it has come on record that respondent No.1 started cultivating the said

land as a tenant of Namdeo with effect from 1953-54 and continued to be in possession on tillers day i.e. 1st April, 1957.

14] Pursuant to proceedings taken out under the provisions of the Bombay Tenancy and Agricultural Lands Act, the land was purchased by defendant No.1 on 20th August, 1960, as there is Section 32(m) proceedings answered in favour of respondent No.1. Both the Courts below noticed that respondent No.1 continued in possession of Gat No. 323 from 1953 onwards and was earning independently from the suit property and as such adjudicated the said property Gat No. 323 as that of self acquired property of respondent No.1.

15] Apart from above, the fact remains that the provisions of Section 43 of the said Act reads thus –

"(1) No land purchased by a tenant under Section 32, 32F, (32-I, 32P) (33-C or 43-1D) or sold to any person under Sec. 32-P or 64 shall be transferred by sale, gift, exchange, mortgage, sale or assignment or partitioned without the previous sanction of the Collector (such sanction shall be given by the Collector in such circumstances, and subject to such conditions, as may be prescribed by the State Government"

16] As such the property cannot be subjected to partition though a claim to that effect is made by the appellant without there being any permission from the Collector to that effect.

17] Apart from above, the Courts below have relied on the provisions of the Hindu Marriage Act, particularly Section 8 of the Hindu Succession Act. This Court in the matter of Laxmibai and others vrs. Limbabai, reported in 1983 Mh.L.J.103, has recorded a finding that the children born out of the marriage which is void cannot be termed illegitimate one and they are covered by the expression 'son and daughter - class-I' for Scheduled 8 of the Hindu Succession Act.

18] Apart from above, fact remains that even though the claim for partition was consented by the defendant No. 6 who happens to be brother of defendant No.1, that by itself will not entitle the appellant to claim partition of Gat No. 323, which was already held to be self acquired property of defendant No.1.

19] In view of the defence raised by defendant No.1, the burden was shifted on defendant Nos. 1 to 5 to prove the fact that it was their self acquired property, which they have rightly discharged.

20] The first appellant Court while reconsidering the claim of the appellant for the share to the extent of $1/3^{\text{rd}}$ in Gat No. 287 has considered the entitlement of defendant No.6 to the suit property being brother of defendant No.1 and as such rightly carved out $1/3^{\text{rd}}$ share in favour of the appellants.

21] In the aforesaid background, the concurrent findings which are recorded by both the Courts below are based on proper appreciation of legal provision and the documentary evidence, so also the legal provisions under the provisions of Bombay Tenancy and Agricultural Lands Act, Hindu Marriage Act and Hindu Succession Act.

22] In my opinion, no case for interference against the concurrent findings is made out. The appeal as such fails. It is dismissed.

JUDGE