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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO. 122 OF 2016
WITH
CIVIL APPLICATION NO. 191 OF 2016
IN
SECOND APPEAL NO. 122 OF 2016**

Mr. Madhav Namdeo Gangurde and othersAppellants

V/s.

Jairam Rakhmaji GangurdeRespondent

Mr. G. S. Godbole i/b Mr. Chetan Damre for the appellants
Mr. Anilkumar Patil for respondent nos. 1A to 1D

CORAM : NITIN W. SAMBRE, J.

DATE : JANUARY 13, 2020.

P.C.

This Second Appeal is by original defendant.

2] Shri. Godbole instructed by Advocate Shri. Chetan Damre, learned counsel for the appellants, assures that Mr. Damre shall file his Vakalatnama during the course of the day.

3] In the backdrop of partition between the parties as was effected in 1952/1954, respondent no. 1 Jairam Gangurde filed a suit for

declaration of ownership, in alternate for partition and separate possession. The plea raised by respondent no. 1-plaintiff in the suit was, the properties which were held by the parties to the suit are resourced from the common ancestor Rakhmaji who died in 1996 i.e. after the partition was effected in 1952. Each of the beneficiaries under the partition of 1952 were enjoying their respective shares independently. According to him, suit property was purchased by the plaintiff out of his individual income in the name of Rakhmaji and that being so, he is entitled for declaration and possession of independent ownership or in alternate if the property is considered to be ancestral, he is entitled for partition and separate possession of the 1/5th share.

4] Suit came to be partly decreed by the Court of learned Civil Judge Junior Division vide Judgment and Order dated 28/11/2007 whereby relief claimed that of the suit property was purchased by the plaintiff out of his self earned money in the name of his father came to be rejected whereas the Decree for partition came to be ordered. In Appeal, learned Ad-hoc District Judge-1, Malegaon dismissed the

Appeal including that of cross objections filed by respondent no. 1. As such, this Second Appeal.

5] Relying on the Judgment of the Apex Court in the matter of **Shasidhar and others Vs. Ashwini Uma Mathad and Another**¹, the submissions of learned counsel Shri. Godbole are, the Judgment passed by the lower Appellate Court is too cryptic and contrary to the scheme of Section 96 of the Code of Civil Procedure. According to Shri. Godbole, it is the bounden duty of the first Appellate Court while dealing with the claim for partition in exercise of Appellate powers under Section 96 of the Code of Civil Procedure to deal with nature and character of the properties, where such property was self-acquired or coparcener property, how the interest of the parties to the suit devolve, whether property can be subjected to partition etc. According to Shri. Godbole, perusal of the Judgment impugned reflects that Appeal came to be decided on the issue of partition by making observations in single para that too without considering the aforesaid parameters laid down by the Apex Court.

¹ [(2015) 11 Supreme Court Cases 269]

6] While countering aforesaid submissions, learned counsel for the respondent submits that Decree to the extent of partition is confirmed by the Appellate Court having regard to evidence of witnesses of defendant no. 2 who was examined on behalf of defendant nos. 8 & 9. He would further claim that other documents viz. Exhibit 40, application moved before the Tahsildar for mutation and other documents in regard to entitlement of share of the properties to the suit to the extent of 1/5th portion as reflected in Exhibit 67 is formed to be basis for passing the Decree. He sought dismissal.

7] With the assistance, I have perused the pleadings of the parties in plaint, written statement and also observations made by the learned Trial Court and Appellate Court.

8] In the backdrop of respective arguments, question of law which in my opinion deserves consideration is;

“Whether the Appellate Court committed an error apparent on the face of record in delivering the Judgment contrary to the scheme of Section 96 of the Code of Civil Procedure?”

9] Plaintiff has relied in the plaint on the partition effected in 1952 and has come out with a specific pleading that each of the beneficiaries under the said partition have started enjoying their shares independently.

10] The plaintiff thereafter come out with a case that suit property was purchased on 06/11/1969 in the name of the father out of his earning and as such, he sought declaration and possession in alternate to partition.

11] It appears that both the Courts below have negated the claim of the plaintiff of acquisition of the suit property out of his individual income. Against such finding, plaintiff has not initiated any Appeal in this Court. As such, plea to the extent of property being self-acquired property by the plaintiff which was answered against respondent has attained finality against him.

12] Once the respondent-plaintiff has come out with a case of property being ancestral and is required to be subjected to partition, the onus is on respondent-plaintiff to prove the same that suit

property is joint family property and he is entitled to have share in the same. Admittedly, Appellate Court has not dealt with the said issue and in a narrow compass, by a cryptic order, proceeded to decide the appeal.

13] What can be noticed from the perusal of the Judgment of the first Appellate court is, the Appellate Court though framed an issue as regards the entitlement of the plaintiff to 1/5th share in the suit property, however, based on Exhibit 67, application which speaks of 1/5th share of the present plaintiff in the suit property and the document moved before Tahsildar for mutation i.e. Exhibit 48, has proceeded to Decree the suit in favour of plaintiff by declaring 1/5th share.

14] As rightly pointed out by Shri. Godbole, the Apex Court in the matter of **Shasidhar and others** [Cited supra] in para no. 20 has observed thus:

“We may consider it apposite to state being a well settled principle of law that in a suit filed by a co-sharer, coparcener, co-owner or joint owner, as the case may be, for

partition and separate possession of his/her share qua others, it is necessary for the Court to examine, in the first instance, the nature and character of the properties in suit such as who was the original owner of the suit properties, how and by which source he/she acquired such properties, whether it was his/her self-acquired property or ancestral property, or joint property or coparcenary property in his/her hand and, if so, who are/were the coparceners or joint owners with him/her as the case may be. Secondly, how the devolution of his/her interest in the property took place consequent upon his/her death on surviving members of the family and in what proportion, whether he/she died intestate or left behind any testamentary succession in favour of any family member or outsider to inherit his/her share in properties and if so, its effect. Thirdly whether the properties in suit are capable of being partitioned effectively and if so, in what manner? Lastly, whether all properties are included in the suit and all co-sharerers, coparceners, co-owners or joint-owners, as the case may be, are made parties to the suit? These issues, being material for proper disposal of the partition suit, have to be answered by the Court on the basis of family tree, inter se relations of family members, evidence adduced and the principles of law applicable to the case”.

15] As such, the Appellate Court was expected to deal with the contentions raised by the appellant while deciding the Appeal in detail

by re-appreciating evidence as is reflected in the judgment of **Shasidhar and others** [Cited supra]. The fact remains that Appellate Court has failed to discharge its duty in accordance with the provisions of Section 96 of Code of Civil Procedure while dealing with the claim in a partition suit. That being so, the Judgment impugned, in my opinion is not sustainable and liable to be quashed and set aside.

16] As such, in my opinion, Appeal needs to be partly allowed with following order:

(I) The Judgment delivered on 02/09/2015 passed by Learned Ad-hoc District Judge-1, Malegaon, in Regular Civil Appeal No. 06/2008 is hereby quashed and set aside.

(II) Appeal stood restored to the file of Ad-hoc District Judge-1, Malegaon who is expected to decide the same within period of 6 months from today.

(III) Parties undertake that the copy of present order will be made available to the learned Ad-hoc District Judge-1, Malegaon within period of 2 weeks from the date of signing of the same.

*(IV) Learned Ad-hoc District Judge-1, Malegaon, while dealing with the Appeal of the Appellant shall be sensitive to the findings recorded by the Apex Court in para 20 of the order in **Shashidhar and Others** [Cited supra].*

(V) Appeal stands partly allowed.

(VI) In view of disposal of Second Appeal, Civil Application also stands disposed of.

17] Parties herein undertake to appear before the First Appellate Court on 10/02/2020.

18] Needless to say that Appellate Court shall decide the Appeal on its own merit without being influenced by the findings recorded herein above.

19] Needless to clarify that parties to the First Appeal shall maintain status-quo till disposal of the appeal.

[NITIN W. SAMBRE, J.]