IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.34 OF 2021 WITH
CIVIL APPLICATION NO.3324 OF 2021

Bhagubai Vitthal Pande & ors. ...APPELLANTS

VERSUS

Shevantabai Baban Pande & ors. ...RESPONDENTS

....

Mr. S.T. Shelke, Advocate for appellants

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CORAM : R. G. AVACHAT, J.

Date of reserving order : 7th April, 2021
Date of pronouncing order : 28th April, 2021

O R D E R :

This Second Appeal is directed against the judgment and decree dated 29/11/2012, passed by the Court of Civil Judge, Senior Division, Sangamner in Regular Civil Suit No.391/2008 and confirmed with slight modification by judgment and decree dated 13/1/2020, passed by District Judge-2, Sangamner in Regular Civil Appeal No.4/2013.

2. The original defendants No.1 to 4 have preferred

this Appeal. The suit was filed by the respondents No.1 and 2 for declaration that they have one third share in the properties mentioned in paragraph No.1 of the plaint. A further relief of declaration was also sought to the effect that the property described in paragraph No.1-B of the plaint has been allotted to the share of the respondents No.1 and 2 (plaintiffs) in the partition. The trial Court decreed the suit in toto. It has further declared that the two sale deeds dated 2/2/2010 are void-ab-initio. Those sale deeds were effected pending the suit and, therefore, hit by the principle of lis pendence. The appellate Court modified the decree passed by the trial Court. The decree came to be modified to the extent of setting aside the relief of declaring the sale deeds dated 2/2/2010 to be void and non est. The appellate Court declared that those two sale deeds are not binding on the plaintiffs' one third share. The appellate Court set aside the decree declaring those two sale deeds to be null and void.

3. It is the case of the respondents No.1 and 2/ plaintiffs that there existed a joint family consisting of themselves and the appellants herein. The suit lands came to be purchased out of the joint family funds. The lands were decided to be purchased in the names of the wives of the three brothers namely Baban, Vithal and Tukaram. Since the

respondent No.1 Shevantabai (plaintiff No.1) was pregnant, she could not remain present in the office of the Sub-Registrar for execution of the sale deed in her favour. The lands, therefore, came to be purchased in the names of wives of Vitthal and Namdeo. They have acknowledged the plaintiffs' share in the suit land and, therefore, gave application to the revenue authorities to record their names in the revenue record.

4. On appreciating the evidence in the case the trial Court decreed the suit. The appellate Court concurred with the finding of facts recorded by the trial Court except to the extent of modification of the decree as stated hereinabove.

5. I have perused both the impugned judgments. Heard the learned counsel for the appellants. I am of the view that both the Courts below have rightly come to the conclusion to decree the suit. I do not find any perversity in the impugned judgments.

6. Shri S.T. Shelke, learned counsel for the appellants would submit that, both the Courts below erred in appreciating the evidence in the case. According to him, it was the case of the respondent No.1 and 2 that, some portion

of the joint family property was sold in November 1984 by the three brothers and suit lands came to be purchased out of the said sale consideration. The fact, however, is that, the suit lands have been purchased in November 1983. The recitals of the sale deed indicate that the consideration amount was paid three months prior to the execution of the sale deeds dated 24/11/1983. There was a suit (Regular Civil Suit No.137/1983) for partition and separate possession of the joint family properties. These lands were not the subject matter of the said suit. The said suit was compromised. As such, there was severance in status amongst the members of the joint family. The respondents/ plaintiffs did not have evidence to show that there was joint family income and the same was used for purchase of the suit lands. It has come in the evidence that, the plaintiff Shevantabai was not pregnant when the suit lands came to be purchased. The same falsifies the case of the plaintiffs that she could not remain present for execution of the sale deed in her name. According to learned counsel, the entries in the revenue record do not create or confer right, title and interest in immovable property. The learned counsel would further submit that, number of substantial questions of law do arise in this Second Appeal.

7. I have perused the substantial questions of law formulated by the learned counsel for the appellant. It is also the contention of the learned counsel that, by virtue of Section 14 of the Hindu Succession Act, the properties purchased in the name of female members would be their absolute property. Relying on the judgment in the case of **Mangathai Ammal (Died) through L.Rs. and Ors. Vs. Rajeswari and Ors. [AIR 2019 SC 2918]**, the learned counsel would submit that, it is well settled that the burden of proving that a particular sale is benami and the appellant purchaser is not the real owner, always rests on the person asserting it to be so. This burden has to be strictly discharged by adducing legal evidence of a definite character which would either directly prove the fact of benami or establish circumstances unerringly and reasonably raising an inference of that fact. The essence of a benami is the intention of the party or parties concerned; and not unoften, such intention is shrouded in a thick veil which cannot be easily pierced through. But such difficulties do not relieve the person asserting the transaction to be benami of any part of the serious onus that rests on him; nor justify the acceptance of mere conjectures or surmises, as a substitute for proof. According to him, the trial Court did not frame the issues as

regards purchase of the suit land benami in the name of co-sisters of the plaintiff No.1. The issue ought to have been framed.

The learned counsel also relied on the judgment of the Apex Court in the case of **Bhagwat Sharan (Dead) through L.Rs. Vs. Purushottam and Ors. [2021(1) Mh.L.J. 485]** to submit that, the burden lies upon the person alleging existence of a joint family to prove that the property belongs to joint Hindu family. The learned counsel ultimately urged for admission of the Second Appeal to decide the substantial questions of law formulated by him and mentioned in Grounds I to XIV of appeal memo.

8. Ramji was the common ancestor. He was survived by his two sons – Ganpat and Namdeo. Ganpat has four sons namely – Bhau, Laxman, Mahadu (deceased) and Khandu. Namdeo has three sons – Vitthal, Tukaram and Baban and daughter Radhabai. The suit (R.C.S. No.137/1983) was between members of the two branches of Ganpat and Namdeo. The present suit under appeal is between the members of the branch of Namdeo alone. As stated above, Vitthal, Tukaram and Baban are the three sons of Namdeo. Shevantabai (plaintiff No.1), is the wife of Baban. Bhagubai,

defendant No.1, is the wife of Vitthal and Vithabai is wife of Tukaram. As such, these three females are the co-sisters. The suit lands have been purchased on 24/11/1983 in the name of Bhagubai and Vithabai. There is no evidence to indicate that Bhagubai and Vithabai did have their independent source of income. There is also no evidence to indicate that the three brothers – Baban, Vitthal and Tukaram were separate in estate and they have their independent source of income. The agricultural lands, the subject matter of the partition suit (R.C.S. No.137/1983) was the source of income for three brothers. Since the said suit was between the two branches of Ramji, the present suit lands could not be the subject matter of the said suit. The trial Court has rightly observed that the suit lands have been purchased in the names of female members of the family with a view to avoid them to be branded to be the joint family properties of the two branches of Ramji. The said suit (R.C.S. No.137/1983) was compromised. The compromise decree was passed on 23/12/1983. Those suit lands have been purchased well before the compromise decree was passed. The sale consideration was paid three months before the suit lands came to be purchased. The same indicates that there was no severance in status among the three brothers.

9. True, there is no evidence to indicate that Shevantabai was pregnant and, therefore, could not remain present for execution of the sale deed in her name. The suit has been filed in 2008. The lands have been purchased 25 years before filing of the suit. There is overwhelming evidence to indicate the suit lands to have been purchased out of joint family funds, though there is no direct evidence of the existence of the nucleus for purchase of the suit lands.

10. There is evidence to indicate that defendants No.1 and 2/ appellants No.1 and 2 gave application to the revenue authorities to record the name of Shevantabai (co-sister) to the extent of one third share in the lands purchased by both of them. Pursuant to those applications, mutation entries No.1437and 1482 have been effected way back in 1994. The said revenue record continues up to 2008. There is also evidence to indicate that both Bhagubai and Vithabai have sold the portion of the suit land to the extent of not more than their share (one third) therein. Some portion of the suit lands appears to have been acquired for public purpose. During the joint measurement, Shevantabai (plaintiff No.1) was found in possession of the suit land described in para No.1-B of the plaint. As such, the evidence in the suit undoubtedly disclose

that it was a joint family of the three brothers – Baban, Vitthal and Tukaram. The suit lands were purchased in the names of defendants No.1 and 2. The plaintiff No.1 could not remain present for execution of sale deed in her name along with defendants No.1 and 2. The family did not have other source of income. The income from the lands (subject matter of R.C.S. No.137/1983) was the source of income for the three brothers. The defendants No.1 and 2 and their better-half namely Vitthal and Tukaram acknowledged the plaintiffs to have one third share in the suit lands. To the extent of one third share, she was found in possession of the suit land described in paragraph No.1-B of the plaint. As such, both the Courts below have concurrently held the plaintiffs to have proved their case.

11. Before both the Courts below, neither Section 14 of the Hindu Succession Act nor Section 3 or 4 of the Prohibition of Benani Properties Transactions Act was relied on. The written statement was silent to take such defence. The parties to the suit went for trial knowing fully well each other's case. The trial Court has rightly framed the issues placing the burden on the plaintiffs to prove their case.

12. Section 2(g) of the Prohibition of Benani

Properties Transactions Act defines benami transactions to mean :-

(A) a transaction or an arrangement :---

(a) where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person; and

(b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration, **except when the property is held by** –

(i) a **Karta, or a member of a Hindu** undivided family, as the case may **be, and the property** is held for his benefit or benefit **of other** members in the family and the **consideration** for such property has been provided or **paid** out of the known sources of the **Hindu undivided** family;

(ii) . .. .

13. It was the case of the plaintiffs that there existed a Hindu undivided family. The property has been purchased in the names of female members of the joint family. The purchase price has been paid out of joint family funds. The same has been proved by the evidence in the case. It is reiterated that, no substantial question of law arises in this

Second Appeal. The Second Appeal is thus sans merit. The same is dismissed.

In view of dismissal of the Second Appeal, Civil Application No.3324/2021 also stands dismissed.

(R. G. AVACHAT)
JUDGE

fmp/-