

Corrected in terms of the order dated 13/10/2021

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.6849 OF 2018

Dhanaji Govind Thorat	]	
Residing at Gotkhindi, Tal. Walwa,	]	
Dist. Sangli	]..	Petitioner

Versus

1. Govind Chandru Thorat	]	
	]	
2. Babaso Govind Thorat	]	
Both residing at Mukkam Post	]	
Gotkhindi, Tal. Walwa,	]	
Dist. Sangli	]..	Respondents

...

Mr.Bhushan Walimbe for the Petitioner.

Mr.Umesh H. Pawar for the Respondent Nos.1 and 2.

...

CORAM: BHARATI DANGRE, J.

RESERVED ON : 28th SEPTEMBER, 2021.

PRONOUNCED ON : 05th OCTOBER, 2021.

ORDER:-

1. The Petitioner (original Plaintiff), filed a suit for partition and separate possession in the Court of 5th Additional Civil Judge, Junior Division, Islampur. In the said plaint, two properties are mentioned being Gat No.133 admeasuring 0.86 Hecter and Gat No.130 admeasuring 0.76 Hecter, out of which property admeasuring 0.29 R finds a mention. The description of the property is given in the body of the plaint and the relief is sought by the Plaintiff, claiming 1/3rd share in the properties mentioned in paragraph 1 of the Plaint or the share which he is entitled to as per law being awarded by metes and bounds.

2. The Respondents to the Writ Petition were impleaded as Defendants and they filed their written statement on 17/10/2015, opposing the claim raised by the Plaintiff. In the written statement, Defendant Nos.1 and 2 have admitted that the agricultural land situated in Gat No.130 is jointly owned by Defendant No.1 and other holders and is cultivated by the joint owners as per convenience and it has never been divided by metes and bounds. As far as the agricultural land situated in Gat No.133 is concerned, it is pleaded that it originally belongs to Appaso Balaso Kharade and Ananda Nanaso Kharade, but it was made over to Defendant No.1 for cultivation. On death of the original owners, their legal heirs objected to cultivation of the land in Gat No.133 by Defendant No.1, which constrained him to institute proceedings before the Tehsildar. Pursuant to it, the name of Defendant No.1 was taken on record as against Gat No.133. While cultivating the said land, Defendant No.1 purchased the share of Appaso Balaso Kharade to the extent of 8 Annas from the income generated from the very same land. Thereafter, Defendant No.2 purchased the remaining share of Ananda Kharade to the extent of 8 Annas from his legal representatives from the money earned by him from his service and by obtaining loan from the bank. The said sale was effected on 24/01/1997 and in his share, Defendant No.2 erected an RCC structure in the year 2013 and he is enjoying the said property. It is specifically pleaded that in respect of the property situated in Gat No.133 purchased by Defendant Nos.1 and 2, the Plaintiff has no legal right.

3. On the written statement being filed, the learned Judge framed the following issues :-

- a) Does the Plaintiff prove that the land described in Schedule 1 is a joint property?
- b) Whether the Plaintiff is entitled for partition of the suit property and to what extent?
- c) Whether the Plaintiff is entitled for perpetual injunction?
- d) Whether the Defendants are entitled for compensatory cost?
- e) What order?

4. The Plaintiff moved an application vide Exhibit 60 for deleting Issue No.1 and for framing following two issues.

- a) Whether Defendant Nos.1 and 2 have proved that the suit property situated in Gat No.133 has been independently purchased by Defendant Nos.1 and 2 from their self earned money?
- b) The suit property described at Sr.No.3, being Gram Panchayat property vide No.1794 in form of an RCC building, is constructed by Defendant No.2 from his separate income and whether he has proved it to that extent?

5. The learned Judge proceeded to decide the said application and recorded that the burden to prove the case is upon the Plaintiff and since there is no counter-claim filed by the Defendants, the burden cannot be cast upon the

Defendants, in light of Sections 101 and 102 of the Evidence Act. Holding that the burden cannot be shifted upon the Defendants, the application is rejected.

6. There is no dispute on the factual aspect of the matter as it clearly surface from the record that the Plaintiff filed the suit for partition qua the properties mentioned in the Schedule and claimed the suit properties to be joint properties and staked $1/3^{\text{rd}}$ share in the said properties. The Defendants in the written statement admit that property located in Gat No.130 is a joint family property and there is no partition. As far as the property situated in Gat No.133 is concerned, it is admitted by the Defendants that the said property is purchased by Defendant Nos.1 and 2 from their own hard earned money and Defendant No.2 has constructed a building on Gat No.133, which is recorded as property number 1794.

7. Section 101 of the Evidence Act reads thus :

“Burden of proof.-Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.”

Section 102 of the said Act casts a burden of proof in a suit or proceedings on the person, who would fail if no evidence at all was given on either side. Section 103 of the Evidence Act prescribes that a burden of proof as to any

particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. In the wake of the aforesaid provisions, the contentions of the parties and the impugned order will have to be examined.

8. Learned counsel Mr.Pawar appearing for the Respondents placed reliance on the decision of the Hon'ble Apex Court in case of Bhagwat Sharan (dead through legal representatives) Vs. Pursushottam and Ors.¹, which determines as to who shall discharge the burden of proof in case of an HUF property. The ratio flowing from the judgment, relied upon by the learned counsel appearing for the Respondents, is to the effect that the burden is on the person, who alleges existence of HUF to prove the same. It is held that proof is required not only with respect to jointness of family but also with respect to fact that property concerned belongs to joint Hindu family, unless there is material on record to show that the property is the nucleus of joint Hindu family or that it was purchased through funds coming out of this nucleus.

The aforesaid proposition of law cannot be disputed and the Hon'ble Apex Court, by the earlier decision, in case of Adivappa and Ors. Vs. Bhimappa and Anr.² has held that when a Plaintiff filed a suit, inter alia, seeking a declaration that some of the suit properties were his self-acquired properties, it was obligatory upon the Plaintiff to have proved that despite existence of jointness in the family, the properties described

¹ (2020) 6 SCC 387

² (2017) 9 SCC 586

were not part of ancestral properties, but were self-acquired properties. Their Lordships of the Hon'ble Apex Court have held that there is presumption of jointness of properties and the the presumption lies to the effect that every Hindu family is joint in food, worship and estate and in the absence of any proof of division, such legal presumption continues to operate in the family. The burden, therefore, lies upon the member who after admitting the existence of jointness in the family properties asserts his claim that some properties out of entire lot of ancestral properties are his self-acquired property.

9. On the written statement being filed by the Defendants, contesting the claim of the Plaintiff, that all the three properties in paragraph 1 of the Plaint are joint family property and the Defendants categorically admitting that property in Gat No.130 is a joint family property whereas the property located in Gat No.133 is the exclusive property of Defendant Nos.1 and 2, the burden to prove the said plea is to be discharged by the Defendants. When the Defendants have denied the claim of the Plaintiff that the property located at item Nos.1 and 3 is not a joint family property, but stands excluded from it, the burden will have to be discharged by a person, who claims that out of the entire lot of ancestral property, certain property is self-acquired property. Merely because a counter-claim has not been filed, it will not be a ground to refrain from framing of issue Nos.1 and 2 as put forth by the Plaintiff vide Exhibit 60. However, at the same time, issue No.1 framed by the learned Judge about the property situated at serial No.1 shall stand modified, casting

the burden on the Plaintiff to prove that property located at Gat No.130 is a joint family property and the two additional issues formulated by the Plaintiff will be framed in addition to the issues already framed.

With the aforesaid direction, the Writ Petition is partly allowed by setting aside the impugned order passed vide Exhibit 60 and the issues shall be re-casted as above.

(SMT. BHARATI DANGRE, J.)