

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

922 SECOND APPEAL NO.509 OF 2022
WITH CA/11035/2022 IN SA/509/2022

PANDHARINATH RAMRAO DAUD
VERSUS
JITENDRA PANDHARINATH DAUD AND ORS

...
Advocate for Appellants : Mr. V.J. Dhage

...
CORAM : ARUN R. PEDNEKER, J.
DATED : OCTOBER 13th, 2022.

PER COURT :

1. Heard Mr. V.J. Dhage, learned counsel for the appellant/defendant No. 1.

2. Plaintiffs/respondents i.e. plaintiff No.1 son, plaintiff No. 2 daughter and plaintiff No. 3 wife of defendant No. 1 filed a suit for partition of various properties mentioned in the plaint. The defendant Nos. 1 and 2 in their written statement stated that the properties mentioned in the plaint are self acquired properties and not available for partition. It was the specific case of the plaintiffs that properties mentioned in plaint are ancestral, which are as under :-

- (I) Block No. 246 admeasuring 80 R land,
- (II) Block No. 298 admeasuring 36 R land,
- (III) Block No. 292 admeasuring 1 H 54 R land,
- (IV) Block No. 210 admeasuring 1 H 40 R. land,
- (V) Block No. 289 admeasuring 0 H 70 R. land
- (VI) Block No. 534
- (VII) Block No. 538

(VIII) Block No. 532 (Block No. 534, 538 and 532 totally admeasuring 1 H 98 R.)

3. There is no specific pleadings from the defendant that Gat No. 246 is not an ancestral property although in a generic term they say that the land Gat No. 246 is also the self acquired property. The Trial Court after considering the evidence on record and more particularly, the mutation entries which showed that Gat No. 246 was received by the defendant No. 1 on account of partition between him and his brothers and the property being originally owned by father of defendant No. 1, the trial Court held that the in land Gat No. 246 is an ancestral property. As regards the other properties, the Trial Court has held that the other properties are self acquired and personal properties and not available for partition.

4. The defendant No. 1 filed an appeal before the District Court contending that the property in Gat No. 246 belongs to his father. Same was sold to third person and his brother purchased the same from the said third person and thereafter it was given to defendant No. 1. The appellate Court while considering the material on record at para 8 and 9 observed as under :-

8. The plaintiffs pleaded that the suit property was the joint family ancestral property and hence, they are entitled for partition and seperate possession. Defendant no. 1 by his written statement (Exh.22) admitted that the suit property was owned by him in para no.4. But he did not specify what was the source of his ownership. Mr. Deshpande has contended that there is oral and documentary evidence in the nature of Mutation entry no. 117 (Exh. 107) referred above that the suit property was allotted in a partition to defendant no. 1 by his brother. It was not allotted in a partition by the father of defendant no. 1. As such the suit property is the seperate property of

defendant no. 1. Hence, it cannot be partitioned.

9. With assistance of the learned counsel for the parties, I find that neither in the pleadings nor in the oral evidence defendant no. 1 specified that how his brother acquired the suit property. To treat the suit property as a separate property, it must have been purchased jointly by defendant no. 1 and his brother or received from any other person not being in the lineal male ascendants. But unfortunately for Mr. Deshpande neither there are such pleadings nor any evidence. From perusal of mutation entry no. 117, it becomes apparent that the brother of defendant no. 1, one Bajirao Daud partitioned two properties comprised in block nos. 243 and block no. 246 (the suit property). The block no. 243 was allotted in favour of Pandurang Ramrao Daud, who is other brother of defendant no. 1. It means Bajirao Daud partitioned two properties including the suit property in favour of his two brothers. In the absence of any categorical evidence of any joint purchase by the three brothers, or acquisition as a separate property, I can conclude that the suit property was received by Bajirao Daud from his father as the ancestral joint family property. Then, consequently it was partitioned in favour of defendant no. 1. Hence, the suit property being ancestral joint family property is definitely available for partition. The trial court in para no. 31 of the impugned Judgment rightly concluded in the light of the above discussion.

5. The appellate Court has specifically recorded that there was no denial as regards Gat No. 246 being ancestral property and that there is no pleadings that the brother of the defendant has purchased his property from third person and given it to him. The appellate Court held that from perusal of the mutation entry, it becomes apparent that the brother of defendant No. 1, one Bajirao Daud partitioned two properties comprising of block No. 243 and 246 (suit property). The Block No. 243 was allotted in favour of Pandurang Ramrao Daud, who is other brother of defendant No. 1. It means Bajirao Daud partitioned two properties including the suit

property in favour of his two brothers. In the absence of any categorical evidence of any joint purchase by the three brothers or acquisition as a separate property, the appellant Court concluded that the suit property was received by Bajirao Daud from his father as the ancestral joint family property. Thus, the appellant Court has negated the contentions of the appellants that the suit property was originally sold by the appellant's father to some third person and thereafter, the said property was purchased by the brother of the appellant, defendant No. 1 and thereafter given to him in partition.

6. Thus, I find no reason to interfere with the findings of the courts below that there is no mention of sale deed or there is no pleadings as regards the property Gat No. 246 was transferred to the third person by the father of defendant No. 1 and thereafter the same was purchased. This is a story put forth at appellate stage. However, the Court has considered the same and negated the same.

7. The second submission of the appellant that there was no pleadings that the property bearing Gat No. 246 is ancestral property, but at para 3 the plaintiffs have specifically said that all the properties mentioned in the plaint are ancestral properties. Therefore, the parties to the suit has specifically gone to the Court with the pleadings that the suit properties are ancestral properties. However, they were only able to establish that Gat No. 246 is alone the ancestral property and accordingly the direction to partition the same was upheld. But the appellate Court reapportioned shares of the appellant and plaintiff Nos. 1 and 2 from 1/4th to 1/3rd.

8. The learned counsel for the appellant placed reliance on the judgment of this Court in the case of **Bhagwat Sharan Vs. Purushottram and Ors. reported in (2020) 6 SCC 387**, wherein it has been held that the burden is on the person who alleges existence of Hindu Undivided Family to prove the same and he further submits that in the instant case, the burden has not been discharged by the plaintiff. It may be noted in this case that the plaintiff and defendants were closely connected family members and the property has been inherited by defendant No. 1 from his father. Thus, the existence of Hindu Undivided Family is not being denied in the written statement. So also there is no occasion for this Court to hold that the family did not constitute a Joint Hindu Family.

9. The learned counsel also relies upon the judgment of the Hon'ble Supreme Court in the case of **Rajgopal Vs. Kishan Gopal and Anr. Reported in 2003 AIR SCW 4986** to submit that there has to be pleadings that the property involved are joint family properties and in absence of the said pleadings, the courts could not have gone into the same. However, I have observed that in the plaint at para No. 3, the case put up of the properties mentioned that the properties are joint family properties. Therefore, I hold that the findings of fact recorded by the Trial Court and the appellate Court cannot be interfered in this second appeal. No substantial question of law arises in this appeal. Hence, the appeal is dismissed *in limine* Civil Application for stay is also dismissed.

[ARUN R. PEDNEKER J.]

ssc/