

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

SECOND APPEAL NO. 247 OF 2020

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Mrs. Nirmala Nitin Koppikar

..Appellant

Versus

Smt. Jigibai Maganlal Shaha & Ors.

..Respondents

Mr. Kishor K. Malpathak for the Appellant.

Ms. Sejal A. Hariyan i/by Padmanabh D. Pise, for Respondent Nos.1,
2 & 3.

CORAM : NITIN W. SAMBRE, J.

DATE : 7th OCTOBER, 2022

PC.

1. This appeal is directed against the judgment and order passed in Regular Civil Suit No.32 of 2010, on 16th February, 2016 by the 2nd Joint Civil Judge, Junior Division, Miraj, confirming in Regular Civil Appeal No.109 of 2016 delivered by District Judge Sangli on 16th March, 2019. In the aforesaid proceedings the claim of the appellant/plaintiff seeking partition of the suit property is dismissed.

2. Few facts necessary for deciding the appeal as under:-

Common nucleus Mr. Maganlal Shaha allegedly migrated from Kaccha, Gujarat to Miraj in Sangli district and married to defendant No.1 who was allegedly illiterate. The

appellant herein claimed to be daughter of said Maganlal and defendant No.1/Smt. Jigibai. The couple was blessed with in all five issues including present appellant.

3. The case of the present appellant is based of the factual matrix viz. the migration of Mr. Maganlal Shaha after disposal of the ancestral properties in Gujrat and investing the said amount in the suit properties.

4. Both the Courts below have concurrently held that the appellant has failed to demonstrate common nucleus thereby failure to discharge the initial burden and as such dismissed the claim for partition.

5. Counsel for the appellant/original plaintiff Mr. Malpathak would urge that the *inter se* relationship between the parties is not in dispute. According to him, Mr. Maganlal Shaha disposed of the ancestral properties from Gujrat and Migrated to Miraj and has purchased the suit property out of the income received from the sale proceeds of ancestral properties. As such, according to him, even if the suit properties were purchased in the name of the other legal heirs of Mr. Maganlal Shaha, including defendant Nos.1, 2 and other defendants that by itself will not give colour of the properties being self acquired. He would urge that the appellant has discharged initial burden of existence of common nucleus Mr. Maganlal Shaha and that being so, Courts below ought

to have decreed the suit. So as to substantiate his contentions, he has invited attention of this Court to the sale-deeds in relation to the suit properties, the letters written by defendant No.1 to the plaintiff acknowledging receipt of the part consideration and the fact that the defendant No.1/mother was not having independent source of income. As such, the grounds which he has canvassed are, both the Courts below committed an error in failing to appreciate the documentary evidence as well as the oral evidence on record. Whether the Courts below have committed an error in recording a finding that the appellant has failed to discharge her initial burden and whether there exists common nucleus.

6. With the assistance of Mr. Malpathak, I have perused both the judgments which are impugned in the present appeal.

7. Though the appellant with an intention to discharge initial burden has entered into the witness box, but was unable to prove or establish that the suit properties were purchased out of sale proceeds received from the disposal of the ancestral properties at Gujarat. Neither such documents or details of the properties which were disposed of at Gujarat are brought to the notice of the Court.

8. Rather the claim of the appellant is, her father deceased Mr. Maganlal Shaha expired on 17th April 1991 was in Pharmacy business. From the earning out of the said business has acquired the properties in the name of the defendants. The appellant has

also claimed that the part consideration was paid to the defendant No.1 for purchase of the properties i.e. to the mother and has relied on certain communication to that effect. The said evidence was discarded by both the Courts below having regard to the provisions of Section 73 of the Evidence Act. The Trial court has compared the signature on the said letter acknowledging receipt of amount by defendant No.1 with that of her admitted signature on the written statement and rightly drawn inference against the appellant.

9. Apart from above, the appellant so as to discharge initial burden though has entered into witness box was unable to demonstrate her own source of income so as to at least *prima facie* infer that she has parted part consideration towards the purchase of suit properties from her own income. Both the Courts below have concurrently held that the appellant is unable to discharge the initial burden and establish case that of existence of common nucleus and status of the suit property as that of ancestral.

10. The findings of both Courts below are based on the appreciation of the oral and documentary evidence. The view expressed by both the Courts below, in the backdrop of observations made by this Court herein-above is quite justified and in accordance with law. The Court below has rightly relied on the judgment of the Apex Court in the matter of ***Makhan Singh Vs. Kulwant Singh*** reported in ***2007 STPL(LE) 38269 SC***, wherein the preposition laid down is already considered by the Trial Court in its judgment.

11. In the aforesaid background, in my opinion, the present Second Appeal is devoid of any question of law, as such fails, dismissed.

[NITIN W. SAMBRE, J.]