

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 469 OF 2012

Bhausahab s/o Pandurang Waghaskar
& others

Appellants

Versus

Gangubai w/o Balkrishna Lahare & others

Respondents

Mr. S. S. Gangakhedkar, Advocate holding for Mr. R. R. Karpe,
Advocate for the appellants.

Mr. P. R. Katneshwarkar, Advocate for respondents No. 1-A, 1-B, 1-C
& 2-A.

CORAM : R. M. JOSHI, J.

RESERVED ON : 27th April, 2023.

PRONOUNCED ON : 11th July, 2023.

ORDER

1. The Hon'ble Apex Court, by order dated 4th July, 2017 passed in Civil Application No. 8690/2017 in SLP (C) No. 34911/2015 has relegated this appeal back to this Court for decision afresh. The said order shows that the remand is made essentially in view of the judgment of the Apex Court in case of Prakash and others vs. Phulavati and others, (2016) 2 SCC 36. Pertinently, after said judgment, another judgment came to be passed by Apex Court in case of Danamma @ Suman Surpur and another vs. Amar and

others, (2018) 3 SCC 343. There were contrary views expressed by two bench of the Hon'ble Apex Court. Thereafter Full Bench of the Hon'ble Apex Court passed judgment in the case of Vineeta Sharma vs. Rakesh Sharma and others, **AIR 2020 Supreme Court 3717** and has settled down the controversy created in view of the aforesaid two judgments.

2. As far as facts of the present case are concerned, the only question that would arise for determination is as to whether the observations in Clause No. (v) in paragraph No. 129 of the Judgment would apply to the present case or not. This issue would be dealt with in later part of judgment.

3. In order to avoid any mis-interpretation of the order of the Hon'ble Apex Court, wherein though reference is made about consideration of judgment of Prakash (supra), however, since there is further clear direction to decide the appeal afresh, this Court finds it appropriate to decide the entire appeal on merits.

4. Plaintiff No. 1 is sister of defendants No. 1 and 2 and mother of defendant No. 14. It is the contention of plaintiffs that the

suit properties are ancestral properties of joint family. Their ancestor Pandurang died in the year 1974 and left behind him plaintiff, defendants No. 1, 2, Anajanabai and another daughter Yamunabai. It is specifically contended that the properties mentioned in Annexure A are ancestral joint family properties and that the defendants did not have any other source of income and from the income of the joint family property, they acquired further properties. It is further specifically averred that from the said income, defendants have also acquired movable properties such as gold ornaments, shares in the society etc. It is averred that there is no partition by metes and bounds and recently, the properties are purchased in the name of Defendants No. 4, 5 and 7 which are listed in Annexure 'C'. Since the plaintiffs were refused partition on demand, suit came to be filed.

5. Defendants No. 1 and 3 filed their written statement at Exhibit 144 wherein various issues like bar of limitation, non-joinder/mis-joinder of parties, challenge to pedigree etc. were raised. Written statement of these defendants is essential in denial form. It is claimed that Pandurang was not ancestor of the family but Parsaram was the original ancestor who had two sons i.e. Pandurang and Yogu and one daughter Vithabai. It is averred that the daughter

of Parsaram was married to Sahadu Lohare and begotten two sons Balkrishna and Baburao. It is alleged that said Balkrishna was working in revenue department and had tremendous influence over Waghaskar family. It is specifically averred that in the year 1963, Vithabai sought partition from Pandurang and Bapurao and land bearing Survey No. 134/3 was given to her share. It was however recorded in the name of Balkrishna and thus there was previous partition of the joint family property and hence the suit is not tenable. It is the case of these defendants that under the influence of Balkrishna, the properties of the family were purchased jointly in the name of plaintiff No. 1 and Balkrishna too. Those properties, therefore, are sought to be included in the present suit.

6. Learned Trial Court framed issues at Exhibit 148. Apart from casting burden on plaintiffs to initially prove that the suit properties are joint family properties, further burden was placed on defendants to show that there was previous partition of the suit properties.

7. On behalf of plaintiff No. 1, her power of attorney lead evidence and other witnesses were also examined to substantiate her

contention. On behalf of defendants No. 1 to 3, 5, 8, 9, 11 and 12, Ashok was examined at Exhibit 387. Evidence of Govind, defendant No. 4, was also lead at Exhibit 441.

8. Learned Trial Court partly decreed the suit and held that plaintiffs No. 1 and 2A are entitled to get 1/10th share from the properties from Schedule A to D. However, the prayer of partition of movable properties was rejected. Being aggrieved by the said judgment and decree, defendants preferred Regular Civil Appeal No. 57/2005. Cross objection was also filed by plaintiffs. Appeal was dismissed by judgment dated 5th December, 2011 with modification of the impugned decree to the effect that plaintiffs No. 1 and 2A are entitled to 1/5th share each instead of 1/10th share each. Being aggrieved by this order, present second appeal is preferred by the contesting defendants.

9. Before dealing with the question raised in the appeal, it will be appropriate to consider the scope of Section 100 and 103 of the Code of Civil Procedure which reads thus :

“100. Second appeal – (1) Save as otherwise expressly provided in the body of this Code or by any other law

for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

(2) An appeal may lie under this section from an appellate decree passed ex parte.

(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question :

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the court to hear for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question.”

Section 103 – Power of High Court to determine issues of fact – In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue necessary for the disposal of the appeal,-

(a) which has not been determined by the lower Appellate Court or both by the Court of first instance and the lower Appellate Court, or

(b) which has been wrongly determined by such Court or Courts reason of a decision on such question of law as is referred to in Section 100.

10. The position of law is fairly settled that unless appeal involves substantial question of law, it cannot be entertained. In the event Court finds involvement of substantial question of law then such question needs to be framed and then to decide the same. No doubt, where findings on fact recorded by the Courts below are contrary to evidence on record or in ignorance of material evidence, which could be termed as perverse, this Court may interfere into it.

11. Reverting back to the present case, it needs to be recorded that the learned Trial Court has rightly placed initial burden on the plaintiffs to prove that the suit properties are ancestral

and joint family properties. Since contesting defendants took stand that there was previous partition, burden was squarely on these defendants to prove the said fact.

12. Essentially, there is no dispute about the fact that the properties mentioned at Serial No. 1 to 7 of Schedule A are the ancestral properties of Waghaskar joint family. It is the case of plaintiffs that from the income of these properties, defendants acquired further properties which are specifically described in plaint as well as in the evidence. Thus, plaintiff No. 1 has succeeded in discharging her initial burden to prove the fact that the suit properties are joint family properties of plaintiffs and defendants. In view of this evidence, the burden shifted on defendants to prove that there was previous partition in respect of these properties. Perusal of evidence of Ashok shows that he has candidly admitted that the properties at Serial No. 1 to 7 in Schedule A are ancestral properties. He further gives admission to the effect that the defendants are agriculturists and have no other source of income. He further goes to accept the fact that the properties at Serial No. 8 and 9 in Schedule A are purchased from the income of joint family. As regards contention about joint purchase of properties by Waghaskar

family and plaintiff's matrimonial family is concerned, there is admission of this witness that plaintiff No. 1, defendants No. 1 and 2 and one Nagnath jointly purchased the land at Kashti. His further evidence shows that it was independent transaction which has nothing to do with the joint family properties of plaintiff and defendants. With regard to the claim of defendants about previous partition, he was unable to say as to whether it was an oral or written partition. It was brought on record that this witness has no personal knowledge with regard to the same owing to his young age at relevant time. Similar is the evidence of Govind who also candidly accepts of he having no knowledge about the alleged partition. He further admits that he is unable to say as to the portion of properties given to plaintiff No. 1 and Anjanabai. However, he accepts that there is no documentary evidence to prove said fact. Defendants thus were unable to prove that there was previous partition of the suit properties.

13. Having regard to the entire evidence on record, it is clear that the findings recorded by the learned Trial Court are based upon and in proper appreciation of the evidence led before it and no perversity is found therein requiring any interference therein. The

learned First Appellate Court has rightly confirmed the judgment of the Trial Court by accepting these findings except final order that plaintiffs No. 1 and 2A are entitled for 1/5th share instead of 1/10th share each. It is pertinent to note that Pandurang died intestate leaving behind himself defendants No. 1 and 2, his sons, plaintiff No. 1 Anjanabai, mother of defendant No. 14 and Yamunabai, mother of defendant No. 1. Thus, on death of Pandurang, the joint family properties are required to be partitioned between his children equally and hence they are entitled to 1/5th share each. In the circumstances, no fault can be found with the modification of judgment of the Trial Court as done by the First Appellate Court.

14. Now, question arises as to whether the present case is covered by Clause (v) of paragraph No. 129 of the judgment in the case of Vineeta (supra) which reads thus :-

(v) In view of the rigor of provisions of Explanation to Section 6(5) of the Act of 1956, a plea of oral partition cannot be accepted as the statutory recognised mode of partition effected by a deed of partition duly registered under the provisions of the Registration Act, 1908 or effected by a decree of a court. However, in exceptional cases where plea of oral partition is supported by public documents and partition is finally evinced in the same manner as if it had been affected by a decree of a court, it may be accepted. A plea of partition based on oral

evidence alone cannot be accepted and to be rejected
outrightly. (emphasis supplied)

15. It is held by Hon'ble Apex Court that in exceptional cases where plea of oral partition is supported by public document and partition is finally evinced in the same manner as if it had been affected by a decree of a Court, it may be accepted. Here in this case, there is no specific plea even taken by the defendants as to whether it is oral partition or otherwise. Witnesses of defendant have candidly admitted that they are unable to say whether it is oral or written partition. Thus, in view of this Court, defendants are not entitled to get benefit of the aforesaid clause.

16. In view of the aforesaid discussion, there is no substantial question of law involved in the appeal. Hence, appeal stands dismissed.

17. Pending application, if any, does not survive and stands disposed of.

(R. M. JOSHI)
Judge