IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.539 OF 2011
WITH CA/12458/2011 IN SA/539/2011

ABA RANGNATH AWARI AND ORS
VERSUS
NANA DAMU AWARI AND ORS
...
Advocate for Appellants : Mr. C. R. Patil h/f Mr. A. S. Sawant
Advocate for Respondents : Mr. N. C. Garud
...

CORAM : R.M. JOSHI, J

DATE : MARCH 28, 2023

PER COURT :

1. This appeal takes exception to the judgment and decree passed below Exh. 18 by the learned District Judge – 7, Ahmednagar, in Regular Civil Appeal No. 216/2007, dated 10.06.2011 under Section 100 of Code of Civil Procedure.

2. Learned Counsel for the Appellants states that both the Courts below have failed to consider the pleadings and evidence on record and arrived at an erroneous conclusion that the defendant no. 1 failed to prove that the Gut No. 432 is joint family property. He further states that there is no pleading in the plaint with regard to the fact that Gut No. 432 was purchased

from the income of the joint family in the name of defendant no. 1 being Karta of the family. He also contends that the Courts below have committed serious error of misreading entire evidence on record and in particular testimony of Yeshwant. To support his contentions, he placed reliance on the judgment of Hon'ble Apex Court in the case of *State of Rajasthan and Others Vs. Shiv Dayal and Another, (2019) 8 SCC 637*. According to him, though usually the concurrent findings of the fact are binding on the High Court, however, in the facts of the present case, the findings or the decision reached by the Court below could not have been reached in view of the evidence on record and thus, here involves substantial question of law.

3. Learned Counsel for the Respondent opposed the said contention with submissions that there is pleadings to the effect that the Gut No. 432 is a joint family property which is sufficient pleading in order to lead further evidence. He further states that once the plaintiff proves that there was income from the joint family property, sufficient enough to purchase Gut No. 432. The onus shifts on the defendant no. 1 to

prove that the same was purchased from the own income. It is contended that there is absolutely no evidence on record to show as to what income defendant no. 1 was earning in the year 1962 and prior thereto.

4. There is no dispute about the fact that there is a joint hindu family of plaintiff and defendants. Except Gut No. 432 and house property bearing no. 481 and well dug in Gut No. 822, there is no dispute about the fact that the rest of the properties are joint family properties. It is specific pleading in the plaint to the effect that all the suit properties are joint family properties, thus, the basic requirement of pleading that Gut No. 432 is a joint family property is fulfilled. It is settled position of law that merely because a joint family property exists, it cannot be presumed that the property is joint family property and the initial burden is to show that there was sufficient income for the joint family and nucleus sufficient enough to purchase the property. Once the initial burden is discharged, the onus would shifts upon the person who claims it to be self acquired property.

5. There is no dispute about the fact that the

plaintiff lead oral evidence which is duly supported by the documents i.e., 7/12 extract indicating that Gut No. 822 was irrigated land with a well therein and other agricultural lands were also cultivated from the year 1953-54, 1962-63. It is specific evidence of the plaintiff that from the sale of the said yield and after deducting the expenses, their used to be savings of Rs. 300/- p.a. by the joint family. The defendant no. 1 was unable to bring anything on record by way of cross-examination of witness or otherwise to indicate that evidence of the plaintiff with regard to the income of the joint family property is not trustworthy. Thus, the plaintiff has discharged the initial burden to prove that there was nucleus of the joint family sufficient enough to purchase the Gut No. 432.

6. The onus, therefore, has shifted upon the defendant no. 1 to show that the said land was purchased by him from his own income. It is pertinent to note that though Yeshwant was examined to prove that defendant no. 1 was employed with a company however, the evidence of Yeshwant only indicates that from the year 1972 onwards defendant no. 1 was working along

with him. There is absolutely no evidence on record to show that in the year 1961 or prior thereto where he was employed and what income was earned by the defendant no. 1. This becomes more relevant as it is for the defendant to show that he was having sufficient income to purchase the disputed Gut No. 432. Merely because plaintiff admits the fact that even prior to 1956 i.e., during the lifetime of their father defendant no. 1 went to Mumbai and was employed, is not sufficient to hold that there was enough income for the defendant no. 1 to purchase the said land.

7. The trial Court as well as first appellate Court have recorded the findings after due consideration the pleadings and material evidence on record. Merely because the both Courts below have drawn certain inferences about the possible income of the defendant no. 1 in the year 1961, even accepting it to be erroneous that does not become a substantial question of law, as it has no bearing on outcome of the suit.

8. More particularly, in view of the fact that the entire burden was on the defendant no. 1 to prove

his income during the relevant period, even ignoring the said findings of the trial Court and the first appellate Court, this Court finds there is absolutely no evidence on record to hold that the findings recorded by both the Courts that the Gut No. 432 was purchased out of the joint family of the plaintiff and defendant are perverse in any manner. Considering difference in the factual matrix of present case compared to facts involved in the judgment relied upon in the case of State of Rajasthan (supra), it has no application to the present case.

9. For want of involvement of substantial question of law, Appeal cannot be entertained. Resultantly, it stands dismissed. No order as to costs.

10. In view of dismissal of Appeal, nothing survives in the pending application(s), as such the same stand disposed of.

(R.M. JOSHI, J.)

Malani