

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

WRIT PETITION NO.2749 OF 2023

Narayan Gangaram Shet Petitioner

Vs.

Ashok Gangaram Shet and Ors. Respondents

Mr. Prashant K. Aher for the Petitioner.

Mr. Dormaan J. Dalal for Respondent No.1.

Mr. Onkar A. Wable i/b Mr. Abhijeet Khade for Respondent No.2

CORAM : SHARMILA U. DESHMUKH, J.

DATE : 21st JUNE 2023.

P. C.

1. Heard.

2. The challenge in the petition is to the order dated 5/11/2022 passed by learned District Judge-1, Mangaon upon Exhibit-24 in Regular Civil Appeal No.3/2017 rejecting the petitioner's application under Order-41 Rule 25 r/w Section 151 of Code of Civil Procedure seeking framing of additional issue and for remand of the matter to the trial Court for recording evidence on the said issue.

3. The factual matrix appears to be that the petitioner-original plaintiff filed Regular Civil Suit No.8/2008 against the respondent-defendant for declaration as to ownership and for partition and separate possession of the properties between the petitioner and respondents by metes and bounds. In the plaint, there were 14 properties which were listed and in the written statement which was filed by Respondent No.1-Defendant, it was claimed that the properties listed at Serial Nos. 8 to 12 and 14 were self acquired property of respondent No.1. Trial Court vide its judgment dated 28/11/2016 partly decreed the suit by holding that only the properties mentioned at Serial Nos. 1 to 7 and 13 of para 2A and properties No.1 to 3 of para 2 B are joint family properties of the plaintiff and defendants.

4. Having suffered rejection in part, the petitioner filed an appeal in which the application came to be filed seeking framing of additional issue which reads as under:

"Whether the defendant No.1 (Respondent No.1) proves that the properties at serial No.8 to 12 and 14 out of the suit properties are purchased by the defendant No.1 out of the own income of the Defendant No.1 ?"

5. The learned counsel appearing for the petitioner submits that the trial court failed to frame the relevant issue i.e. whether the properties which are mentioned at Sr. No.7, 8 to 12 and 14 are the self acquired properties of respondent No.1. He would urge that it is the specific case of respondent No.1 in his written statement that those properties are self acquired properties and in the light of specific pleadings, the issue in this regard was required to be framed. He has invited attention of this Court to the issues framed by the trial Court as also the evidence led by him as regards the property which is listed at Item No.14 of the listed properties. He would further submit that in absence of the relevant issue being framed, evidence in that behalf could not be led by the petitioner. He submits that the provisions of Order 41 Rule 25 of CPC is squarely applicable to the facts of the present case. In support of his submission he relied upon the decision of the Apex Court in *Bachahan Devi and Anr. vs. Nagar Nigam, Gorakhpur and Anr.*, (2008) 12 Supreme Court Cases 372, *Pandurang Sitaram Choudhari (Borse) & Ors. vs. Sunil Pralhad Choudhari and Ors.*, 2022 SCC Online Bom 3452, *Shivakumar v. Sharanabasappa*, (2021) 11 Supreme Court Cases 277. He would

urge that as the parties are disputing the nature of properties, the issue in this regard is required to be framed.

6. Per contra, learned counsel appearing for the respondent has pointed out that necessary issue as regards joint family properties was framed by the trial Court and the petitioner has failed to prove that the properties in question were joint family properties. He has invited attention of this Court to the finding which is recorded at paragraph No.31 of the trial Court judgment which reads that respondent No.1 had produced documents which *prima facie* shows that the properties were acquired by respondent No.1 by payment of consideration amount and as the plaintiff-petitioner has not shown nucleus of the joint properties, no question arises as to discharging of burden by Respondent No. 1-Defendant. He would urge that the purpose of the application is to cure the lacunae in as much as the petitioner failed to discharge the burden of the properties being joint family properties.

7. Considered the submissions of the parties.

8. The petitioner sought partition and separate possession of the properties on the basis that the properties were joint family properties. After analyzing the evidence on record the Trial Court in paragraph 31 has held as under:

"31. In view of above evidence on record the plaintiff has not discharged a mandatory burden shown that properties at the Sr. No.8 to 12 and 14 of Para 2A were joint family properties or self acquired properties of his father. On the contrary, defendant No.1 produced 7/12 extract at Exh.23/1 of Gat No.204/1, 204/2, 205/2, 202/2, 206 and sale deed of Gat No.206 at Exh. 23/2 and Gat No.202/2 at Exh.23/4 and sale deed of Gat No.204/2 and 204/1 at Exh.23/3, Gat No.264 at Exh.193 which prima facie shows that defendant No.1 has acquired those properties by giving consideration amount. But, before shifting a burden upon defendant No.1 have come to conclusion that the plaintiff has not shown any source of the nucleus of the joint property from which properties i.e. Sr. No.8 to 12 and 14 of Para 2A were acquired. Therefore no question arises as to discharging of burden by defendant No.1."

9. The Petitioner seeks remand of the matter to the Trial Court with a direction to frame the relevant issue and to take necessary evidence in this regard. The question is whether the Trial Court has failed to frame the issue relevant to arrive at right decision of the suit. The legal principle as held by the Apex Court in the case of *D.S. Lakshmaiah & Anr vs L. Balasubramanyam & Anr reported in (2003) 10 SCC 310* is that there is no presumption

of a property being joint family property only on account of existence of a joint Hindu family. The one who asserts has to prove that the property is a joint family property. If, however, the person so asserting proves that there was nucleus with which the joint family property could be acquired, there would be presumption of the property being joint and the onus would shift on the person who claims it to be self-acquired property to prove that he purchased the property with his own funds and not out of joint family nucleus that was available.

10. In the present case the following issues were framed by the Trial Court:

Sr. No.	ISSUES
1	Whether the suit properties are the joint family properties of the parties ?
1A	Whether the plaintiff proves that the late Gangaram Gowardhan Shet purchased/owned the suit properties ?
2	Whether the plaintiff proves that he became the owner of the suit properties described in para 4 of the plaint by way of the Will dated 26/4/2001 ?

3	Whether the plaintiff is entitled to have partition of the suit properties ? If yes, what would be the respective shares of the properties ?
3A	Whether the suit is bad for non-joinder of necessary parties ?
4	Whether the plaintiff is entitled for declaration as prayed for ?
4A	Whether the plaintiff is entitled for possession as prayed for ?
5	Whether the plaintiff is entitled for perpetual injunction as prayed for ?

11. The Trial Court on the basis of evidence which has come on record has held the initial burden has not been discharged by the petitioner. Taking the submission of the petitioner that in the absence of issue being framed whether property is acquired by respondent No.1-Defendant, the petitioner could not lead evidence in that respect, it is required to be noted that the burden was cast upon the petitioner to establish that the suit properties are joint family properties of the parties. There was nothing to prevent the petitioner from leading necessary evidence to discharge the burden. Even if no issue was framed casting the burden upon the

respondent to prove that the properties were self acquired, it was always open for the petitioner to lead necessary evidence and prove its case that the properties were joint family properties. It is only upon the initial burden being discharged that the onus shifts on the person who claims the properties to be self acquired properties. There is no quarrel with the proposition that the appellate Court is empowered under Order 41 Rule 25 of Code of Civil Procedure to frame additional issue and remand the matter to the trial Court for further evidence. The Apex Court in *Bachchan Devi (supra)* has held that in order to bring in application of the said provision the appellate Court must come to a conclusion that the trial Court has omitted to frame issues and or failed to determine any question of fact which the appellate Court finds it essential for right decision of the suit upon merits. The Apex Court has further held that there is no compulsion on the part of the Appellate Court to do so. This is clear from the use of the expression "may". In the present case ,upon considering the provisions as well as the evidence on record, the appellate Court has rightly held that initial burden to prove was required to be discharged by the petitioner and only thereafter the onus shifts upon the other party. The appellate Court

after considering the finding of the trial Court has concluded that the petitioner has failed to discharge the initial burden cast upon him that the suit properties are joint family properties.

12. The provisions of Order 41 Rule 25 provide that where there is omission to frame any issue which appears to the Appellate Court essential to the right decision of the suit upon merits, the Appellate Court may if necessary frame issues and refer the same to the Trial Court for recording evidence. In view of the settled position in law that the one who asserts has to prove that the property is joint family property, the issue in that regard was rightly framed by the Trial Court. The Appellate Court on consideration of the material has rightly come to the conclusion that there is no need of framing the issue as suggested by the Petitioner.

13. By the present Petition this Court has been called upon to exercise the jurisdiction under Article 227 of Constitution of India, which is supervisory in nature and is to be exercise for keeping the subordinate courts within the bounds of their jurisdiction. When the subordinate Court has assumed a

jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction. However the jurisdiction is not available to correct mere errors of fact or of law unless the following requirements are satisfied: (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (iii) a grave injustice or gross failure of justice has occasioned thereby.

14. In the present case the learned counsel has failed to demonstrate that there is a manifest error resulting in grave injustice or gross failure of justice to warrant interference under Article 227 of Constitution of India.

15. For the reasons above, there is no merit in the writ petition and stands dismissed. Needless to clarify that the

observations made herein above are only for the purpose of deciding the validity of the impugned order and the appeal is to be decided without being influenced by the observations made hereinabove.

SHARMILA U. DESHMUKH, J.