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

**SECOND APPEAL NO.513 OF 2019
WITH
CIVIL APPLICATION NO.1205 OF 2019
IN
SECOND APPEAL NO.513 OF 2019**

Sau Suman Namdev Gawade ...Appellant
Versus
Shahji Ramrao Dhawan and Anr. ...Respondents

- Ms. Savita A. Prabhune, for the Appellant.
- Mr. Sumit Khaire, for the Respondent No.1.

CORAM : MADHAV J. JAMDAR, J.

DATE : 20th MARCH 2023

P.C. :

1. Heard Ms. Savita Prabhune, learned counsel appearing for the Appellant and Mr. Sumit Khaire, learned counsel appearing for the Respondent No.1.

2. By the present Second Appeal, the Appellant who is the original defendant No.1 is challenging the legality and validity of the judgment and decree dated 13th February 2012 passed by the learned Trial Court in Reg. Civil Suit No.29 of 2009 as confirmed by the learned First Appellate Court by the Judgment and Decree dated 28th

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November 2017 passed in Civil Appeal No.79 of 2012.

3. The Appellant is the original defendant No.1 and the plaintiff is the Respondent No.1. It is admitted position that both the plaintiff and the defendant No.1 purchased the suit property from the defendant no.2 on 1st November 2004 for the total consideration of Rs.6 Lakhs and both the plaintiff and defendant no.1 advanced Rs.3 Lakhs each. It is admitted position that the suit property i.e. Gat No.31 admeasuring 10 H 88 Are was purchased jointly. The suit was filed for partition and separate possession of half share of the plaintiff and the fact that plaintiff and Defendant No.1 are having half share each is admitted position. The Trial Court decreed the suit and the decree was confirmed by the First Appellate Court.

4. Ms. Prabhune submitted that property was purchased jointly. According to her, there is an oral partition between the plaintiff and the defendant no.1 and the defendant No.1 has carried out improvement in the portion which has been allotted to the Defendant No.1 and therefore, it is her submission that the said portion be directed to be handed over to her in partition.

5. Both the learned Courts have considered the said aspect. Both the Courts have come to the conclusion that the suit property is not

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ancestral property of plaintiff and defendant no.1 and the same has been purchased by them jointly by advancing an equal consideration.

6. It is the contention of Mr. Khaire that certain portion of the suit property is not cultivated and if the contention of the Appellant is accepted then such un-cultivable portion will come to the share of the Respondent No.1. The learned Appellate Court has specifically considered the said contention in paragraph 20 and also considered the judgment of the Supreme Court reported in **AIR 1972 SC 2069** in the matter of **S. Shanmugam Pillai Vs. K. Shanmugam Pillai**. In the said judgment, it has been held that in case of family arrangement between the members of Hindu joint family and if the same is *bonafide* and the terms thereto are fair, in the circumstances of a particular case, then the Courts would more readily give assent to such an agreement than to avoid it.

7. The learned First Appellate Court has, however, observed that in the present case, the property is not of the Hindu joint family and it has been purchased by the plaintiff and defendant no.1 jointly. Apart from that, it is the contention of the Respondent that if the Appellant's contention is accepted then the portion of property which is un-cultivable will come to his share. Admittedly, the said case is

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only of oral partition and there is no partition by metes and bounds. Both the Courts have disbelieved the case of oral partition by giving cogent reasons. Therefore, there is no substance in the contentions raised by the learned counsel of the Appellant.

8. Accordingly, Second Appeal is dismissed, however, with no order as to costs. As the Second Appeal is dismissed, nothing survives in the Civil Application and the same is also dismissed of accordingly.

[MADHAV J. JAMDAR, J.]