

Arjun

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.597 OF 2022
WITH
CIVIL APPLICATION NO.69 OF 2022
IN
SECOND APPEAL NO.597 OF 2022

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Shri. Balu Popat Deore & Ors.

...Appellants/
Applicants

V/s.

Shri. Vitthal Karbhari Deore & Ors.

...Respondent

Mr. Rameshwar N. Gite a/w Rohit D. Gorade & Ashwin P.
Pimpale, for the Appellants/Applicants.

Mr. Jayendra D. Khairnar, for Respondent Nos.1 & 2.

CORAM : MADHAV J. JAMDAR, J.
DATE : 28th MARCH, 2023

P.C.:

1. Heard Mr. Gite, learned counsel appearing for the Appellants and Mr. Khairnar, learned counsel appearing for Respondent Nos.1 and 2.

2. The Appellants are the original Defendant Nos.1, 3 and 4. The Respondents are the original Plaintiff Nos.1 and 2 and the Defendant No.2. The Respondent Nos.1 and 2 filed Regular Civil Suit No.111 of 2011 for partition, separate possession and perpetual injunction. The said suit was

decreed by the learned Trial Court by its Judgment and Decree dated 30th November 2013. The Defendant Nos.3 and 4 filed Regular Civil Appeal No.8 of 2014 and the Defendant No.1 filed Regular Civil Appeal No.58 of 2014 in the Court of District Judge, Malegaon at Malegaon, Dist. Nashik. The learned First Appellate Court dismissed both the Appeals. In this Second Appeal challenge is to the legality and validity of the Judgment and Decree passed by both the Courts.

3. Mr. Gite, learned counsel submitted that following substantial questions of law arise in this Second Appeal :

- i) Whether the learned Trial Court and the learned First Appellate Court have erred in shifting the burden to the Defendants to prove that the properties at Serial Nos.1B, 1C and 1D are the joint family properties?
- ii) Whether the property which is at Serial No.1C in the plaint is the absolute property of Defendant No.4 in terms of Section 14 of the Hindu Succession Act, 1956 and, therefore, decree of partition passed by both the Courts is illegal?

4. Mr. Gite, learned counsel pointed out the findings of the Courts as well as the oral evidence of the parties. He also relied on the decision of a learned Single Judge of this Court in the matter of *Suman Vishnu Pathak & Ors. Vs. Usha w/o*

Prabhakar Rao Koparkar & Ors.¹

5. Mr. Gite, learned counsel at the outset fairly stated that, the property at Serial No.1A is the joint family property and as far as that property is concerned, the Appellants are conceding that the same is the joint family property.

6. As far as the property at Serial No.1B is concerned, admittedly, the said property was standing in the name of mother of Plaintiffs and Defendant Nos.1 and 2. The said property was purchased by mother- Jaibai in 1984. It is the contention of the Appellants that, Defendant No.1 was serving in the MSEB as wireman and that he has purchased the said property in the name of his mother. However, both the Courts have concurrently held that, Defendant No.1 has failed to prove that, the said property was acquired in the name of mother of Defendant No.1, by the Defendant No.1.

7. Apart from the above findings of both the Courts, Section 14 of the Hindu Succession Act, 1956 (hereinafter referred to as “**the said Act**”) on which Mr. Gite has relied to contend that the property at Serial No.1C is the absolute property of Defendant No.4-wife of Defendant No.1, the same Section will also apply to the property which was acquired by

¹ (2013) 2 Mh.L.J. 268

Jaibai. Section 14 of the said Act provides that, any property possessed by a female Hindu, whether acquired before or after the commencement of the said Act, shall be held by her as full owner thereof and not as a limited owner. However, both the Courts have held that, the property is acquired from the income of the joint family property and it has been purchased in the name of mother-Jaibai.

8. It is an admitted fact that, Jaibai passed away in 2006 and, therefore, the said property will be available for inheritance to the heirs and legal representatives of said Jaibai i.e. mother of the Plaintiffs and Defendant Nos.1 and 2. Therefore, there is no perversity or illegality as far as finding regarding property at Serial No.1B is concerned.

9. As far as the property at Serial No.1D is concerned, the same was purchased in the year 2000 and standing in the name of son of Defendant No.1. Both the Courts have concurrently held that, the said property was not purchased by Defendant No.1 from his own income, but it had been purchased from the income of joint family property in the name of son i.e. Defendant No.3. Both the Courts have concurrently held that, Defendant No.3 has not entered into

the witness box to prove that he has purchased the said property and it is his self-acquired property. Thus, adverse inference is required to be drawn against Defendant No.3. Both the Courts by appreciating the evidence on record of the witnesses for the Plaintiffs and for the Defendants have come to a conclusion that, as far as the property at Serial No.1D is concerned, the same is the joint family property of the Plaintiffs. It is the contention of Mr. Gite, learned counsel that, the burden has been shifted to the Defendants and the same is not permissible. He relied on the decision of *Suman Vishnu Pathak & Ors. (supra)*, to support his contention. He relied on paragraph Nos.13, 14 and 41 of the said decision. The said paragraphs read as under :

"13. In the background of the aforesaid undisputed factual position, I would like to consider the substantial question of law at Serial No.(4) in respect of burden of proof, shifting of onus and drawing of an adverse inference. It is the party who comes to Court to get a decision on any legal right or liability depending upon the existence of certain facts, which he assert, carries the burden of proof. This principle is laid down in section 101 of the Evidence Act.

14. Before dealing with the question as to

whether the onus in the present case is shifted upon the defendants in the facts of the present case, the relevant portion of the decision of the Privy Council in the case of *Appalaswami vs. Suryanarayanamurti*, reported in AIR 1947 PC 189 at Page 192, needs to be seen. The same is, therefore, reproduced below :

“The Hindu law upon this aspect of the case is well settled. Proof on the existence of a joint family does not lead to the presumption that property held by any member of the family is joint, and the burden rests upon anyone asserting that any item of property was joint to establish the fact. But where it is established that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property in question may have been acquired, the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family property.”

The aforesaid portion is quoted and followed in the subsequent decision of the Apex Court in the case of *Srinivas Krishnarao Kango vs. Narayan Devji Kango and others*, reported in AIR 1954 SC 379. The portion in para 10 in the decision in the case of *Srinivas Krushnarao Kango*, cited supra, is also

relevant and the same, therefore, reproduced below :

“(10) Whether the evidence adduced by the plaintiff was sufficient to shift the burden which initially rested on him of establishing that there was adequate nucleus out of which the acquisitions could have been made is one of fact depending on the nature and the extent of the nucleus. The important thing to consider is the income which the nucleus yields. A building in the occupation of the members of a family and yielding no income could not be a nucleus out of which acquisitions could be made, even though it might be of considerable value. On the other hand, a running business in which the capital invested is comparatively small might conceivably produce substantial income, which may well form the foundations of the subsequent acquisitions. These are not abstract questions of law, but questions of fact to be determined on the evidence in the case.”

The decision of the learned Single Judge of this Court in the case of *Harihar Diwakar Choube (deleted since dead) and others vs. Govind Diwakar Choube and others*, reported in 2010(4) *Mh.L.J.* 524, follows the decision of the Allahabad High Court in the case of *Mangal Singh vs. Harkesh and another*, reported in *AIR 1958*

Allahabad 42, wherein it has been held that the presumption arises only if nucleus is substantial and is such that its yield could provide in whole or at any rate in considerable part the money necessary for acquiring the property in question.”

“41. Thus, there is a consistent view of the Apex Court that if the property stands in the name of a coparcener of a Hindu Undivided Family, then presumption is that it is his self-acquired property, unless it is shown that it is acquired with the aid of nucleus of the joint family property. The principles laid down by the Apex Court in these decisions are attracted in the present case, rather than the principles laid down by it in its decision in the case of *Mallesappa bandeppa desai and another vs. Desai Mallappa alias Mallesappa and another*, cited supra.”

10. In the present case, the Plaintiffs have examined three witnesses. PW-1 is the Plaintiff No.1 and his evidence affidavit clearly shows that, the family was a joint family and family was cultivating the lands as well as engaged in the business of selling sheeps. Khandu Kedu Pawar who is the brother-in-law of Plaintiff No.2 has been examined as PW-2 and, he has stated in his evidence affidavit that, the family of Plaintiffs and Defendant Nos.1 to 3 was the owner of about

100 sheeps and that they were earning an income from the said business. PW-3 is having property of agricultural land adjoining the land of the joint Hindu family. His evidence shows that, the suit properties are the joint family properties of the Plaintiffs and Defendants. Thus, there is no substance in the first substantial question of law raised by Mr. Gite that the burden is shifted on the Defendants.

11. The Defendants have examined Defendant No.1 as DW-1. The DW-2 is from the same village and DW-3 is the brother in law of Defendant No.1. Defendant No.1 has specifically come with the case that, he purchased the suit property at Serial No.1B in 1984 in the name of his mother and that his wife-Defendant No.4 purchased the suit property at Serial No.1C in the year 1996 from her own income and Defendant No.3 purchased the suit property at Serial No.1D in the year 2000 from his own income and, therefore, it is his contention that, the property at Serial No.1B although standing in the name of Jaibai, is purchased by him and, properties at Serial Nos.1C and 1D are purchased by Defendant No.4 i.e. his wife and by the Defendant No.3 i.e. his son, respectively from their respective income.

12. As far as the property which has been purchased by Jaibai is concerned, I have already held that, the same is the joint family property and as per Section 14 of the Hindu Succession Act, 1956, the said property is the absolute property of Jaibai and, therefore, after her death, the Plaintiffs and Defendant Nos.1 and 2 are entitled to a share in the said property.

13. As far as the property at Serial No.1D is concerned, the son of Defendant No.1 i.e. Defendant No.3 had not entered into the witness box to prove that the same has been purchased by him exclusively from his own income. The learned Trial Court as well as the learned First Appellate Court have by appreciating the evidence on record, come to the conclusion that, the said property at Serial No.1D is the joint family property available for partition. Mr. Gite, learned counsel failed to point out any perversity or illegality in the concurrent findings recorded by the learned Trial Court as well as the learned First Appellate Court with respect to the property at Serial No.1D.

14. However, Mr. Gite, learned counsel is right as far as the property at Serial No.1C which, admittedly, is standing in the

name of Defendant No.4 i.e. wife of Defendant No.1. Section 14 of the Hindu Succession Act, 1956 specifies that, any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner. It is an admitted position that, the said property at Serial No.1C is in possession of Defendant No.4. Therefore, the decree passed by the learned Trial Court as well as the learned First Appellate Court is required to be modified with respect to the property at Serial No.1C.

15. Accordingly, the Second Appeal is allowed to the above extent. The decree passed by the learned Trial Court is modified and, it is held that, Gat No.40 is the absolute property of Defendant No.4 and, therefore, not available for partition. However, it is clarified that, the decree passed by the learned Trial Court as confirmed by the learned First Appellate Court with respect to the properties described in the plaint at para 1A i.e. Gat No.380, at para 1B i.e. Gat No.379 and at para 1D i.e. Gat No. 378 situated at Village Earandgaon, Tal. Malegaon, Dist. Nashik does not require any interference and is confirmed.

16. The Second Appeal is partly allowed as above only with respect to the property at Serial No.1C i.e. Gat No.40 and the same is dismissed as far as the remaining properties are concerned.

17. In view of disposal of the Second Appeal in above terms, nothing survives in the Interim Application and the same is also dismissed.

[MADHAV J. JAMDAR, J.]