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

**SECOND APPEAL NO.452 OF 2018
WITH
SECOND APPEAL NO.475 OF 2018**

Yashwant Sadashiv Kadam ...Appellant
Versus
Sadashiv Bhau Kadam (Deceased Thru. LRs)
1A) Sopan Sadashiv Kadam ...Respondent

- Mr. P.B. Shah i/b. K.P. Shah, for the Appellant/Applicant.
- Mr. V.S. Talkute, for Respondent Nos.1 to 5.

**CORAM : MADHAV J. JAMDAR, J.
DATE : 22nd FEBRUARY 2023**

P.C. :

1. Heard Mr. Praful Shah, learned counsel appearing for the Appellant and Mr. Talkute, learned counsel appearing for the Respondent Nos.1 to 5.

2. The Appellant is the original plaintiff and by the present Second Appeals the challenge is to the legality and validity of Judgment and Decree dated 10th October 2017 passed in Reg. Civil Appeal No.169 of 2012 and Reg. Civil Appeal No.177 of 2012 as well as the Judgment and Decree dated 9th February 2012 passed by the

Pallavi

learned Joint Civil Judge, Junior Division, Phaltan in Reg. Civil Suit No.22 of 1992.

3. The Appellant is original plaintiff and filed suit bearing Reg. Civil Suit No.22 of 1992 seeking partition. The suit is filed seeking partition with respect to the following properties:-

(A) Mauje Kapshi, Taluka Phaltan, District Satara.

1. Gat No.53 admeasuring 0.21-R,
2. Gat No.54 admeasuring 1.48-R,
3. Gat No.51 admeasuring 0.28-R.

(B) Mauje Pharandwadi, Taluka Phaltan, District Satara.

1. Gat No.60/2 admeasuring 2-H 15-R – purchased on 20-4-1978.
2. Gat No.60/1B admeasuring 1-H 16-R - purchased on 25-11-1982.
3. Gat No.60/1A admeasuring 1-H 18-R - purchased on 22-2-1994.

(C) Mauje Chaudharwadi, Taluka Phaltan.

1. Survey No.89/3B admeasuring 00.91-R.
2. Survey No.89/3C admeasuring 00.91-R.
3. Survey No.71/1B2 admeasuring 1.25-R.
4. Survey No.71/1A2 admeasuring 00.33-R.
5. Survey No.72/1A admeasuring 1.10-R.
6. Survey No.71/1B1 admeasuring 1.19-R.

Pallavi

4. The learned Trial Court passed the decree of partition with respect to all the properties excluding the properties described in Coloum (C) at Sr. Nos.4, 5 and 6. The said Judgment and Decree was challenged by the present Appellant (Orig. Plaintiff) as well as the present Respondent Nos.1 to 4 (Orig. Defendant Nos.2 to 4 and 11). The Appeal filed by the present Appellant is Reg. Civil Appeal No.177 of 2012 whereas the Appeal filed by the present Respondent Nos.1 to 4 is Reg. Civil Appeal No.169 of 2012.

5. The learned Appellate Court dismissed the Reg. Civil Appeal No.177 of 2012 filed by the present Appellant i.e. the Plaintiff and partly allowed Reg. Civil Appeal No.169 of 2012 filed by the present Respondent Nos.1 to 4 i.e. Defendant Nos.2 to 4 and 11. The Appellate Court excluded the suit properties mentioned at column (B) from the partition and also confirmed the exclusion of the properties as directed by the learned Trial Court at Sr. Nos.4, 5 and 6 of column (C). Thus, in effect, the learned Appellate Court confirmed the partition decree as regard the suit properties at Sr. Nos.1, 2 and 3 of column (A) and properties at Sr. Nos.1, 2 and 3 of column (C).

6. As far as the said properties at Sr. Nos.1, 2 and 3 at column (A) and Sr. Nos.1, 2 and 3 of column (C), both the learned counsel Mr.

Pallavi

Shah and Mr. Talkute state that there is no dispute between the parties as regards said part and therefore, it is clarified that the decree passed by the learned First Appellate Court with respect to the properties at Sr. Nos.1, 2 and 3 of column (A) as well as with respect to the properties at Sr. Nos.1, 2 and 3 of column (C) is confirmed.

7. As far as the properties which are at Sr. Nos.1, 2 and 3 of column (B) which are situated at Pharanwadi, Taluka – Phaltan are concerned, it is the contention of Mr. Shah that the same are acquired by utilizing income of joint family. It is his submission that although the properties are purchased in the name of Defendant No.2 – Sopan Sadashiv Kadam, the same are the joint family properties of Defendant No.1 i.e. Sadashiv Bhau Kadam, Defendant No.2 and plaintiff. It is the contention of Mr. Talkute, learned counsel appearing for the Respondent Nos.1 to 5 that the said properties at Sr. Nos.1, 2 and 3 of column (B) are the self-acquired properties of Defendant No.2.

8. To appreciate the rival contentions, it is necessary to set out certain factual aspects:

- i. Father - Sadashiv Bhau Kadam i.e. Defendant No.1
executed a registered partition deed dated 10th November

Pallavi

1976 (Exh.34). The said partition deed is a registered document and the same is signed by plaintiff as well as Defendant Nos.1 and 2.

- ii. The said partition deed specifically states that the properties which are partitioned by the said partition deed are of the ownership of Defendant No.1 i.e. father, however, for the purpose of maintaining cordial relationship between the family, the partition deed is executed and the Plaintiff, Defendant No.1 and Defendant No.2 are given separate possession of respective properties.
- iii. It is admitted position that after the execution of the partition deed in 1976, the Plaintiff, Defendant No.1 and Defendant No.2 are in separate possession of the properties respectively allotted to them.
- iv. The suit properties mentioned at Sr. Nos.1, 2 and 3 of column (B) are purchased by Defendant No.2 by sale deeds dated 20th April 1978, 25th November 1982 and 22nd February 1994.
- v. The said properties are admittedly purchased after the said registered partition deed of 1976.

9. Both the Courts have concurrently held that the properties at Sr. Nos.1, 2 and 3 of column (B) are purchased by the Defendant No.2 after the partition deed and both the Courts have found that the said properties are purchased from the income received from the yield of the agricultural lands allotted to the Defendant No.2. Thus, there is no illegality or perversity in the said finding.

10. It has also come on record that Defendant No.1 i.e. father had filed Reg. Civil Suit No.149 of 1991 against the present plaintiff for evicting him from the shop in one of the property. The said suit was decreed. Appeal filed by the present plaintiff was dismissed. Second Appeal was also filed in the High Court, however, in the meantime, father passed away and thereafter, the said Second Appeal was not pursued. Thus, it is clear that the relations between the parties were strained and therefore, there was no possibility of purchase of land in the name of the Defendant No.2 for the entire family.

11. The contention of Mr. Shah cannot be accepted that the said properties are properties of entire family. Admittedly, the said properties were purchased after the execution of partition deed of the year 1976. The partition deed which is the registered deed and

Pallavi

executed by the plaintiff, the Defendant No.1 and Defendant No.2 specifically states that the relations between the parties are not cordial and therefore, the said partition deed was executed. Two properties were purchased by the Defendant No.2 after about two years and six years respectively of execution of the partition deed i.e. on 20th April 1978. On 25th November 1982 third property was purchased in 1994 i.e. after the father filed said suit bearing R.C.S. No.149 of 1991 against the present plaintiff. Therefore, the contention that although the properties were purchased in the name of Defendant No.2, however, the same were purchased for the benefit of the entire family cannot be accepted. Therefore, the decree passed by the learned First Appellate Court i.e. dismissal of suit seeking partition in properties at Sr. Nos.1, 2 and 3 of column (B) is confirmed.

12. In view of above discussion, for the consideration of this Court, only dispute remains is with respect to properties at Sr. Nos.4 and 5 of column (C). Admittedly, the said properties at Sr. Nos.4 and 5 have come to the share of father – Sadashiv in aforesaid registered partition deed of the year 1976. Therefore, the same is exclusive property of the father. Admittedly, father passed away during the

Pallavi

pendency of the present partition suit bearing Reg. Civil Suit No.22 of 1992. It is the contention of Mr. Shah that in those properties the plaintiff and Defendant No.2 each will have half share. It is the contention of Mr. Talkute that after death of father, the Plaintiff has got amended the plaint. It is his further submission that present suit is for partition and if the plaintiff is now seeking share in the property of father by way of succession and therefore, it changes the nature of the suit.

13. However, it is admitted position that the said properties at Sr. Nos.4 and 5 of column (C) were the exclusive properties of the deceased father. It is further admitted position that although deceased father has executed registered Will dated 14th May 1997, the said Will was not proved. The learned Trial Court as well as learned First Appellate Court has recorded concurrent finding that the Will is not proved.

14. The learned First Appellate Court while rejecting the claim of the plaintiff regarding those properties has although held that Defendant No.2 has failed to prove the Will has observed that on the basis of the said Will, the said properties were mutated in the name of wife of Defendant No.2 on 3rd November 1990. As the Will has

Pallavi

been concurrently held by the Court as disproved no effect can be given to the said Will. Therefore, although both the Second Appeals are dismissed as far as suit properties at Sr. Nos.1, 2 and 3 of column (B) and both the parties have accepted the decree of the learned First Appellate Court as far as the properties at Sr. Nos.1, 2 and 3 of column (A) and properties at Sr. Nos.1, 2, 3 and 6 of column No.(C), both the Second Appeals are admitted only with respect to the properties at Sr. Nos.4 and 5 of column (C) as described in R.C.S No.22 of 1993 on the following substantial questions of law:

- I] Whether in view of the concurrent finding of both the Courts that the Defendant No.2 failed to prove Will dated 14th May 1997, the decree of partition or share in the father's property can be refused?
- II] Whether once it is held that said properties are exclusively belonging to the father and when father passed away during the pendency of the suit, properties of father are available for partition and can be made subject matter of suit for partition?
- III] Whether the father i.e. defendant No.1 can transfer the properties in favour of wife of defendant No.2 by simple

Pallavi

application filed under section 85 of the Maharashtra Land Revenue Code, 1966?

IV] Whether properties can be transferred simply by application purported to have been filed under section 85 of Maharashtra Land Revenue Code, 1966 in favour of person having no share in the properties and in absence of any valid sale deed, gift deed or any transfer deed in accordance with law?

15. It is clarified that the Second Appeal is admitted only on the aforesaid substantial questions of law relating to the properties which are at Sr. Nos.4 and 5 of Column No.(C) of the plaint in Reg. Civil Suit No.22 of 1982. For clarification, the said properties are specifically set out herein-below :-

मौजे चौधरवाडी, ता. फलटण, जि. सातारा ग्रामपंचायत हद्दीतील जमिन मिळकत —

अ.नं.	स.नं.	क्षेत्र	आकार	
		हे. आर	रु. पै.	
४.	<u>७१/१अ२</u>	पोख	०.२९ <u>०.०४</u> ०.३३	१=४९
५.	<u>७२/१अ</u>	पोख	१.०१ <u>०.०९</u> १.१०	५=३७

Pallavi

16. It is further made clear that with respect to other properties which are subject matter of Reg. Civil Suit No.22 of 1992, the Second Appeal is dismissed.

[MADHAV J. JAMDAR, J.]