



IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

915 SECOND APPEAL NO. 408 OF 2023

Sandipan Vithalrao IngleAppellant

VERSUS

Babruwan Vithalrao Ingle & othersRespondents
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Mr. M. B. Kolpe, Advocate for Appellant
Mr. S. B. Solanke, Advocate for respondent No. 1.
Mr. K. R. Choudhari, Advocate for respondents No. 2 and 3.

CORAM : R. M. JOSHI, J.

DATE : 15th FEBRUARY, 2024.

PER COURT :

1. This appeal under Section 100 of Code of Civil Procedure takes exception to the concurrent judgments and decree in Regular Civil Suit No. 239/2012 and Regular Civil Appeal No. 47/2016.

2. Parties are referred to by their nomenclature in the original proceedings.

3. Facts which led to filing of the present appeal can be narrated in short as under :-

Plaintiff filed suit for partition against defendants who are brother and sisters of plaintiff. It is contended by plaintiff that

the suit properties are joint family properties of plaintiff and defendants and that there is no partition effected of these properties. Since defendant No. 1 has refused to partition the same, the suit came to be filed.

4. Defendant No. 1 appeared before the Trial Court by filing written statement. It is his contention that out of the suit properties, properties bearing Gat No. 102, 67, 81 and house property bearing No. 78 are ancestral properties. However, Gat No. 65 is self acquired property of his son and rest of the properties are acquired by him from his own income. It is also claimed that defendants No. 2 and 3 have relinquished their shares in the suit properties by executing relinquishment deed. As far as plaintiff is concerned, it is sought to be contended by defendant No. 1 that plaintiff had requested him to pay Rs. 25,000/- for purchase of plot at Latur and executed deed in his favour relinquishing his right in the suit property.

5. Learned Trial Court framed issues and after evidence was recorded, decreed the suit holding plaintiff and defendants entitled for 1/4th share each in the suit properties. The said

judgment and decree was carried to First Appellate Court unsuccessfully. Hence, this appeal by original defendant No. 1.

6. Learned counsel for defendant No. 1 submits that the learned Trial Court has erroneously recasted the issues and issue with regard to the property at Latur held by plaintiff is joint family property or not is wrongly deleted from consideration. In this regard it is pertinent to note that in the written statement no plea has been raised by defendant No. 1 that the property of plaintiff situated at Latur is joint family property. Though he claims that he paid Rs. 25,000/- to plaintiff but does not state that the said amount is paid from income derived from joint family property. In the absence of any such specific plea raised by defendant No. 1, it was not necessary to frame issue to that effect. The error committed by the Trial Court initially by framing such issue has been rightly corrected by recasting issues.

7. learned counsel further submits that there is evidence to show that amount of Rs. 25,000/- was paid by defendant No. 1 to the plaintiff and from the said amount he has purchased the property at Latur. It is his contention that since it is the case of plaintiff himself

that all suit properties are ancestral joint properties, the amount of Rs. 25,000/- paid to the plaintiff is deemed to have been paid from the joint family income. Said contention though sought to be raised runs contrary to the claim of defendant No. 1 himself in the written statement. In the written statement, defendant No. 1 admits only certain properties to be joint family properties. He further claims that the property at Latur is his self acquired property. Thus, he claims his independent source of income. If it is so, unless there is specific plea raised in the written statement that amount of Rs. 25,000/- was paid to plaintiff out of joint family property, the question of property being purchased by utilising the said fund cannot become joint family property. In any case, since no such plea was raised before the Trial Court, plaintiff is denied opportunity to meet such case. It is therefore not open for the defendant No. 1 to raise issue for first time in this second appeal, as the same is not pure question of law but would be mixed question of fact and law.

8. There is no dispute about the fact that relinquishment deed executed by plaintiff as well as defendants No. 2 and 3 are not registered documents. The said documents mandatorily require

registration under Registration Act. In the absence of registration, the same cannot be relied upon.

9. Having regard to facts and overall circumstances, this Court finds no perversity in the findings recorded by both the Courts below holding that plaintiff as well as defendants are entitled for 1/4th share each in the suit properties.

10. For the purpose of entertainment of second appeal existence of substantial question of law is sine qua non, which is absent in this appeal. As such, no case is made out for causing interference in the impugned judgment and decree. In the result, appeal stands dismissed.

11. Pending application, if any, does not survive and stands disposed of.

(R. M. JOSHI)
Judge

dyb