



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 85 OF 2023
WITH CIVIL APPLICATION NO. 2575 OF 2023

BHUJANG APPARAO SANAP AND ORS.
VERSUS
BHAGWAT APPARAO SANAP AND ORS.

Mr. V. M. Humbe, Advocate for the appellants
Mr. K. R. Doke, Advocate for respondents.

CORAM : R. M. JOSHI, J.
DATE : 31st JANUARY, 2024

P.C. :-

1. This appeal takes exception under Section 100 of the Code of Civil Procedure to the judgment and decree passed by the First Appellate Court in RCA No. 14/2019 whereby the judgment decree passed by the Trial Court of dismissal of RCS No. 87/2011 is reversed and the suit is decreed.
2. For the sake of convenience the parties are referred to as plaintiffs and defendants.
3. There is no dispute about the fact that plaintiffs and defendants are real brothers and blood relatives. Plaintiff has filed suit for seeking partition of the suit properties with the averment that the suit properties

were purchased out of the income and for the joint family but in the name of their mother. Undisputedly, the said transaction is dated 30th March, 1979. The plaintiff has specifically averred that out of the income of ancestral joint family properties as well as from independent income of the plaintiff and defendant No.2 the suit properties were purchased. There is also averment in the plaint to the extent of partition of other joint family properties in the year 1982 except for the suit properties. There is allegation against the defendant that by obtaining the documents from mother he has got the property transferred in his name and also mutated his name in the revenue record. With these averments the suit for partition is filed.

4. The defendant No.1 opposed the said contention by claiming that the said properties are his self acquired properties but purchased in the name of his mother.

5. Learned counsel for the defendant No.1 submits that in the instant case the issue is before this Court is as to whether the suit is maintainable when the all properties of the joint family were not included therein. It is his further contention that the First Appellate Court has committed error in decreeing the suit by ignoring the evidence led by the defendant No.1 with regard to his employment and that the proof regarding the purchase

of suit properties by him is ignored by First Appellate Court. In order to support his submissions he has drawn attention of this Court to the evidence led before the Trial Court. According to him, the defendant No.1 has led evidence that at the relevant time he was working at Pune. According to him plaintiff in cross-examination has accepted the fact that he was employed after the purchase of the suit properties and therefore there is no evidence to show that it is purchased from income of plaintiff. He further canvassed that there is no evidence to indicate income from the ancestral and joint family properties. To support his submission he placed reliance on the judgment of the *Hon'ble Apex Court in Case of Kenchegowda (Since deceased) by Legal Representatives Vs. Siddegowda alias Motegowda (1994) 4 SCC 294*. He also placed reliance on the judgment in case of *Shankar Sitaram Sontakke and another Vs. Balkrishna Sitaram Sontakke and others, AIR 1954 SC 352*. Learned counsel for the plaintiff supported the impugned judgment and decree passed by the First Appellate Court.

6. Perusal of the pleadings clearly shows that plaintiff has specifically come out with the case about purchase of the suit properties from joint family properties income from joint family properties as well as from his and defendant No.2's personal income. As far as the said contention is concerned, the evidence on record sufficiently demonstrates that there

were ancestral joint family landed properties. In fact the defendant No.1 in cross-examination has given candid admission to that effect. Though he denies the partition of the properties in respect of those properties, however, in the cross-examination he gives evasive answer in this regard. There is no specific denial even in respect of the property in the said partition which came to his own share. Pertinently all sharers are having independent occupation of their respective shares in agricultural lands. It is not case of either side that these lands are barren/uncultivated lands. Independent cultivation of lands since 1982 clearly indicates that income was derived from joint family lands. Thus, nucleus was available for the joint family to purchase the land. Plaintiff's evidence shows that in the year 1982 the properties were partitioned excluding the properties standing in the name of mother. In the cross-examination it is suggested to defendant No.1 that at the time of previous partition the said land was not partitioned as it was left for the maintenance of the mother. Though this suggestion has been denied by the defendant No.1, the plaintiff has shown probable reason for non inclusion of suit properties in the previous partition. In the light of these facts this Court finds no substance the contention of the learned counsel for the defendant No.1 that all the properties are not included in the suit and therefore suit is not maintainable. From perusal of the judgment of the Hon'ble Apex Court in case of *Kenchegowda (Since deceased)* by

Legal Representatives (supra) shows that it is general rule that on the joint family property should be included in the suit however, this rule is subject to exception. There cannot be any better case than the one in hand wherein there is evidence to indicate that the properties were partitioned between the co-sharers in the year 1982 and they are in exclusive and independent possession of their respective part. In such circumstance, there was no question of including those properties in the present suit. Thus, this Court finds no substance in the objection sought to be raised about the maintainability of the suit.

7. Once it is admitted that there were ancestral properties of the joint family and nucleus was available for the purchase of the properties, there is presumption of jointness of the same. The defendant No.1 claims that the suit properties are self acquired properties. Thus, burden is on the defendant No.1 to prove that he has purchased those properties out of his own income. In this regard evidence of the defendant shows that he vaguely states about he being employed at Pune during the relevant period. However, in the cross-examination he was unable to give even name of the person with whom he worked.

8. Perusal of the evidence led by defendant No.1 sufficiently shows that the defendant No.1 was unable to give any reliable evidence in order

to hold that at the relevant time he was employed and was earning enough money to purchase the suit properties. Defendant therefore has failed to prove that the suit properties are his self acquired properties and he purchased the same in the name of his mother.

9. Having regard to these facts, learned Trial Court was wrong in dismissing the suit and the said error has been rightly corrected by the First Appellate Court. This Court finds no substantial question of law being involved in this appeal. Hence, appeal stands dismissed. Pending civil application, if any, stands disposed of.

(R. M. JOSHI, J.)

ssp