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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 620 OF 2013
WITH
CIVIL APPLICATION NO. 1468 OF 2013
IN
SECOND APPEAL NO. 620 OF 2013**

Shankar Jivba Sutar (Deceased) Jivba ... Appellants/Applicants
Atmaram Sutar and Ors

vs.

Pundalik Shankar Sutar and Ors ... Respondents

Mr. R.S. Apte, Senior Advocate i/b. Mr. S.C. Wakankar a/w.

Ms. Aishwarya Bapat, for Appellants/Applicants.

Mr. Rahul Kate for Respondents.

CORAM : GAURI GODSE, J.

DATED : 20th DECEMBER 2024

ORDER:

1. This second appeal is preferred by the heirs and legal representatives of defendant no.1, i.e. Shankar Jivba Sutar, to challenge the concurrent judgments and decrees granting partition and separate possession. The trial court decreed the suit granting 1/4th share in suit land Survey No. 90/1-B and the movable properties mentioned in Scheduled "A" of the plaint. The trial court

granted 1/8th share in the remaining land, i.e. Survey Nos. 85/2 and 66/5-B and house properties bearing V.P.C. Nos. 61/1 and 204/5/2 mentioned in Scheduled 'A' of the plaint. In the appeal preferred by defendant nos.1, 2 and 6, the appeal court modified the decree by granting 1/4th share in the suit land Survey No. 90/1-B and house no. 204/5-2 on the ground that the said properties were willed out by deceased Shankar, i.e. original defendant no.1, in favour of Jivba Atmaram Sutar, i.e. defendant no.6 and Pandurang, i.e. son of Atmaram (defendant no.2). So far as other two properties, i.e. Gat Nos. 85/2, 66/5-B and House No. 61/1, and movable properties described in Schedule 'A' of the plaint, the first appellate court has granted 1/6th share.

2. Learned senior counsel appearing for the appellants submitted that the properties being Gat No. 90/1/B and house no. 204/5-2 were self-acquired properties of Shankar, and thus, the plaintiffs had no right to seek partition and separate possession in respect of the said properties. He submits that the said properties were purchased by Shankar in the year 1958, and the sale deed was in the exclusive name of Shankar. He, thus, submitted that both the courts erred in accepting the said properties as joint family property.

3. Learned senior counsel for the appellants further relied upon the order of remand passed by this court in the earlier round of litigation. This court, by order dated 27th February 2012, had remanded the appeal to the first appellate court. He submits that after remand, the plaintiffs had filed a rejoinder plaint, which amounted to an amendment to the plaint, raising a ground for the first time that the said properties were ancestral joint family properties, though they stood in the name of Shankar. He, thus, submits that after the amendment of the pleadings, the plaintiffs failed to lead any evidence to support their contentions that though the said properties stood in the name of Shankar, they were ancestral joint family property. He submits that the first appellate court erroneously casted a burden upon defendant no.1 to prove that the said properties were the self-acquired property of Shankar.

4. Learned senior counsel relied upon the contents of the will executed by Shankar in favour of defendant no.6-Jivba and Pandurang. He submits that the Will is accepted as a valid Will. He relied upon the contents of the will, which records that the said properties are Shankar's self-acquired properties. He, thus, submits that once the will is accepted as a validly executed will, the defendants' contentions that the property was self-acquired property

of Shankar ought to have been accepted, as the contents of the Will supported the defendants' contentions. He further submitted that the property standing exclusively in the name of Shankar coupled with the averment in the will would be sufficient proof to accept defendant no. 1's contentions that the said properties were his self-acquired properties.

5. Learned senior counsel referred to the relevant findings of the first appellate court and submitted that the first appellate court erroneously casted the burden upon defendant no.1 by ignoring that it was the plaintiff's case that the said properties were joint family properties and, thus, the burden was upon the plaintiffs to prove the same. To support his submissions, learned senior counsel relied upon the decision of the Hon'ble Apex court in the case of *Bhagwat Sharan (dead thr. Lrs) Vs. Purushottam and Ors*¹. He submitted that the Hon'ble Supreme Court held in the said decision that the party claiming a share in the property is not only required to prove jointness of the family, but also the burden lies upon the person alleging the existence of a joint family to prove that the property belongs to joint Hindu family. He, thus, submits that the second appeal would require consideration on the ground that the first appellate court has misplaced burden upon defendant no.1 to prove

¹[2020] 0 AIR(SC) 2361

the nature of the suit property. He further submits that the oral evidence supporting defendant no.1's case and the contents of the will is not correctly appreciated by the first appellate court, and thus, incorrect appreciation of the facts would also require consideration by this court as the same raises a substantial question of law.

6. Learned counsel appearing for the original plaintiffs supports the impugned decree. He submits that the plaintiffs had specifically pleaded that all the suit properties stood in the name of defendant no.1 as he was looking after the same as Karta of the joint family. He submits that the plaintiffs have led oral evidence to support their contentions. He submits that in response to the plaintiffs' pleadings, defendant no.1 contended that the property purchased in his name was his self-acquired property as the sale deed was executed in his name; however, defendant no.1 failed to enter into the witness box to prove his contentions that the property was acquired out of his independent income. He submits that defendant no.1 examined defendant no.2 in support of his contentions, who, in the cross-examination, admitted that there was no evidence to prove that defendant no.1 had his independent source of income to purchase the property in the year 1958.

7. Learned counsel for the original plaintiffs further submits that

the rejoinder plaint was filed in response to defendant no.1's amended written statement. He submits that though it was styled as a rejoinder plaint, it was not an amendment to the original pleadings, and it was only to respond to the amended written statement. With reference to the will executed by Shankar, learned counsel submits that the will, though accepted as a validly executed will, the contents of the will stating that the said property was self-acquired property of Shankar cannot be accepted as sufficient evidence to prove the truthfulness of the statement made in the will. He submitted that the will is accepted as a valid document only to the extent of Shankar's share, which is transferred by way of a will to defendant no. 6 and Pandurang. He, therefore, submits that the ground raised on behalf of the appellants would not require any consideration by this court as the same does not raise substantial question of law.

8. I have considered the rival submissions made on behalf of the parties. The relations between the parties are not disputed. The suit is filed seeking partition and separate possession on the pleadings that the suit properties belong to the joint family through the original holder- Jivba, who had three sons – Krishna, Shankar and Rama. Krishna, who died issueless in the year 1976, had executed the will transferring his rights in favour of defendant no.6. Hence, defendant

no.6 was made a party defendant. The plaintiff, who is the son of Shankar, claimed a share along with Shankar's other three sons, i.e. defendant nos. 2, 3 and 4 and defendant no.5, i.e. widow of Jivba's third son-Rama. Krishna's will was disbelieved by both the courts. After the death of Shankar, i.e. defendant no.1, the first appeal was contested by defendants nos. 2, 3, 4, 6 and heirs and legal representatives of Pandurang. Defendant no.6, i.e. Jivba and Pandurang, are sons of defendant no.2-Atmaram, i.e. fourth son of Shankar. The first appellate court discussed the evidence about defendant no.1's claim of the said properties out of the suit properties being his self-acquired property.

9. A perusal of the reasons recorded by both courts indicates that defendant no.2 was examined as defendant no.1's witness, who admitted that there was no evidence to prove that said properties were purchased by defendant no.1 out of his independent income. Admission given by defendant no.2 that there was no evidence to indicate that Shankar acquired the said properties out of his independent source of income is considered an important factor by both the courts to disbelieve defendant no.1's case that the said properties are his self-acquired property.

10. The remaining suit properties are not disputed to be joint

family properties. There is no dispute that the parties had a joint family nucleus. Defendant no.1 failed to enter into the witness box to support his contentions that the said properties were purchased in the year 1958 out of his independent source of income. A perusal of the pleadings and evidence on record does not indicate that any material is brought on record to support defendant no.1's contentions that the said properties were purchased out of his independent source of income. The ground raised on behalf of the appellants opposing the grant of partition and separate possession is based on the contentions that the said properties stand in the name of defendant no.1, and, thus, it is self-acquired property.

11. In the plaint, it is pleaded that all the suit properties are joint family properties and stand in the name of defendant no.1 as Karta of the joint family. It is not in dispute that all the suit properties were standing in the name of defendant no.1. The list of documents referred to by both the courts indicates that the plaintiff relied upon revenue records to support his case that all suit properties stood in the name of defendant no.1 as Karta of the joint family. Nothing is argued in the second appeal to point out any contrary evidence with regard to the remaining suit properties and the said properties standing in the name of Shankar, as pleaded by the plaintiff to have

been entered as Karta of the joint family. The first appellate court has thoroughly examined the evidence on record and concluded that in the absence of any pleadings and evidence on the part of defendant no.1, the said properties could not be accepted as his self-acquired properties when the joint family nucleus is not in dispute.

12. Both the courts have in detailed referred to the cross-examination of defendant no.2 and admission given by him regarding there being no evidence to indicate any independent source of income of defendant no.1. When the joint family nucleus is not in dispute, and the plaintiff relied upon the revenue record that indicates that all the suit properties stood in the name of defendant no.1 as Karta of the joint family properties, both the courts have rightly casted a burden upon defendant no.1 to prove that the said properties were purchased out of his independent income and was his self-acquired property.

13. In view of these facts, the legal principles relied upon by the learned senior counsel for the appellants in the decision of *Bhagwat Sharan* would be of no assistance to the arguments raised on behalf of the appellants. The Hon'ble Apex Court referred to the well-settled legal principles that once it is proved that there was a

nucleus with which the joint family property could be acquired, there would be a presumption of the property being joint, and the onus would shift on the person who claims it to be self-acquired property to prove that he purchased the property with his own funds and not out of joint family nucleus that was available. In the present case, admittedly, there is a joint family nucleus, and part of the suit properties belong to the joint Hindu family. Thus, when the joint family nucleus is not disputed, and the name of defendant no. 1 is entered in the revenue record as karta of the joint family, the burden was upon defendant no.1 to prove that he had his independent source of income and that the said properties were purchased from his independent source of income. Thus, there is also no substance in the argument that as the will is proved, the contents should be accepted in support of the contentions that the said properties were self-acquired properties of shankar. The truthfulness of the contents are not proved by any independent evidence.

14. I do not find any illegality or perversity in the reasons recorded by both the courts in accepting that the said properties are also joint family property. Thus, the arguments raised on behalf of the appellants would require a re-examination of the pleadings and evidence on record, which is not permissible under Section 100 of

the Civil Procedure Code, 1908. Hence, the ground raised on behalf of the appellants on the findings recorded by both the courts would not require any consideration by this court as the same does not raise any substantial question of law.

15. There is no dispute on the determination of the shares of the parties. The first appellate court accepted the will executed by Shankar in favour of defendant no.6 and Pandurang, and hence, the first appellate court has rightly modified the shares by granting 1/4th share in respect of the properties that are willed out by Shankar and granted 1/6th share in respect of the remaining properties. The grounds raised in the second appeal regarding the determination of share are only based on the appellants' contentions that the said properties were self-acquired property of Shankar, and, therefore, the plaintiffs would not be entitled to claim any share. Hence, the second appeal would also not require any consideration on the ground of the determination of the shares.

16. The second appeal does not raise any substantial question of law. Hence, the second appeal is dismissed. In view of the dismissal of the second appeal, the pending civil applications are disposed of as infructuous.

(GAURI GODSE, J.)