

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.572 OF 2017.
WITH
CIVIL APPLICATION NO.1072 OF 2017

Shri.Baban Narayan Ubale (deceased) Thru Lrs.
1) Shri.Rajendra Banan Ubale Appellant.

Versus

Smt.Saraswati Pandharinath Barmukh ...Respondent.

Mr. Ajay Joshi a/w. Mr. Rajesh A. More and Mr.Soham Powar for the Appellant.

Mr. Namitkumar S. Pansare i/b Mr. Drupad S. Patil for Respondent Nos.1 to 5.

Coram : Sharmila U. Deshmukh, J.

Date : 2nd April, 2024.

P. C. :

1. Being dissatisfied by judgment dated 8th December 2016 passed by the Appellate Court in Civil Appeal No.644 of 2012 dismissing the appeal and confirming the findings of the Trial Court in RCS No.1398 of 2003, the original defendant No.1 is before this Court

2. The plaintiff has filed suit seeking partition and separate possession of the suit properties. It was contended that the suit properties were the ancestral properties of the parties and that no partition has been effected. The father of the plaintiffs and the defendant one Narayan Ubale expired on 22nd November 1976 and the plaintiffs claim to have 1/3rd share in the suit properties. As partition was demanded and refused, suit came to be filed.

3. Defendant Nos.1 and 2 resisted the claim and contended that the plaintiffs are not entitled to a share being daughters. It was further contended that the suit properties Gat No.34 and 35 were purchased by the defendant No.2 out of his income and that the same were self acquired property although purchased in the name of their father. The Trial Court after considering the evidence on record held that the properties are ancestral properties and decreed the suit declaring that each party had 1/7th share. The Trial Court negated the issue as regards the property bearing Gat No.34A and 35 B being self acquired property of the defendant. As against this, Regular Civil

Appeal No.644/2012 was filed by the defendant No.1. The Appellate Court on re-appreciation of the evidence held that there is no evidence which has been brought on record to show that the properties were purchased by Baban Ubale out of his own funds. The Appellate Court also considered the admission of DW-1 i.e. the suit properties were self acquired properties of Narayan. The Appellate Court on re-appreciation of evidence has dismissed the appeal by holding that the suit property was self acquired property of Narayan Ubale and the plaintiffs and defendants are entitled to their respective 1/7th share.

4. Heard *Mr. Ajay Joshi for the Appellant and Mr. Namitkumar S. Pansare for Respondent Nos.1 to 5.*

5. Learned counsel for the Appellant would submit that the substantial question which arises is perversity of findings. He submits that oral evidence was adduced by the defendants that the property bearing Gat No.34A and 35B are the self acquired properties of the defendant No.1 as he was in service at that point of time. He submits that in view of the evidence which has

come on record, the Trial Court and the Appellate Court committed an error in mis appreciation of evidence.

6. *Per contra*, learned counsel for the plaintiffs would submit that the admitted position was that there was no partition of the suit properties which stood in the name of their father Narayan Ubale. He submits that the defendants have failed to discharge the burden which is cast upon them for establishing that the properties are the self acquired properties of defendant No.1. Pointing out to the evidence of defendant No.1, he would submit that the properties bearing Gat No.34 and 35 were claimed to be their self acquired properties however the fact remains that the same were purchased in the name of their father. There is absence of evidence to establish that the same were purchased by defendant No.1 out of his own funds. He submits that there is no substantial question of law arising in the present case.

7. Considered the submissions and perused the record.

8. As far as rest of the properties are concerned the admitted position is that the properties were the self acquired property of deceased Narayan Ubale and it is well settled that the plaintiffs who are daughter have equal share in the ancestral property as that of the sons. The only issue which is sought to be raised is in respect of properties bearing Gat No.34 and 35 which is claimed by defendant No.1 to be self acquired properties.

9. The Plaintiffs have adduced evidence on record to show that the properties were ancestral properties and the properties which are claimed to be self acquired properties are standing in the name of their deceased father Narayan Ubale. The burden was clearly upon the defendant No.1 to establish by leading cogent evidence that the properties were purchased out of his own funds and therefore constitute his self acquired properties. Upon re-appreciation of the evidence, the Appellate Court has observed that except the bare words of the witness, there is no material which is produced on record from which it can be conclusively established that the lands were purchased by defendant No.1 from his own source of funds. The Appellate

Court has further considered that there is no evidence as to where defendant No.1 was serving, his income and no explanation was tendered as to why property was not purchased in his own name. The Appellate Court also found variance in the pleadings and proof as in the written statement it was contended that Gat No.34A and 35 B were purchased by defendant No.2 in his name. Considering the evidence which has come on record, the Appellate Court has held that the defendants have failed to prove that Gat No.34A and 35B are the self acquired properties.

10. Considering that there was no partition of the properties and there was failure on the part of defendants to establish that Gat No.34 and 35 were purchased out of their own funds and constitute self acquired properties, the Appellate Court has rightly partitioned the properties in equal share as per the settled position in law.

11. In exercise of powers conferred under Section 100 of CPC, it is impermissible for this Court to re-appreciate the

evidence unless it is shown that the findings are based on no evidence or wrong inference has been drawn from proven facts by applying law erroneously. The findings of the Appellate Court do not demonstrate any perversity of findings.

12. Having regard to the discussion above no substantial question of law arises in the present case. Appeal stands dismissed. Civil Application/Interim Application, if any does not survive for consideration and is disposed of.

[Sharmila U. Deshmukh, J.]