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SA 410.15f.odt

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

SECOND APPEAL NO. 410 OF 2015

**DAGADU EKNATH KAMBLE (DIED)
THROUGH LRS AND OTHERS
VERSUS
DNYANOBA BABU KAMBLE (DIED)
THROUGH LR^s. AND OTHER^S.**

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Mr. V.S. Undre, Advocate for appellants
Mrs. M.A. Kulkarni, Advocate for respondent Nos. 1B to 1F.
Other respondents served.

CORAM :S.G. CHAPALGAONKAR, J.

DATE : 3rd FEBRUARY, 2025.

ORDER :-

1. The appellants/original plaintiffs impugn judgment and decree dated 07.07.2015 passed by learned District Judge, Osmanabad in Regular Civil Appeal No.164/2011 thereby modifying judgment and decree dated 22.07.2011 passed by Civil Judge Junior Division Kallamb in Regular Civil Suit No. 158 of 1986. (For sake of convenience, parties are referred by their original status)

2. The appellants/plaintiffs instituted Regular Civil Suit No.158/1986 seeking relief of partition and separate possession in respect of suit properties which are more particularly specified in the plaint. It includes the land bearing survey No.63/C situated at village Dhaba and land survey No.11/A-1, 14/A-1 situated at village Kothala.

The original plaintiff Dagadu and defendant Nos. 1 and 2 i.e. Dnyanoba and Tulsidas are legal heirs of Ganpati. The plaintiffs are legal heirs of Dagadu, son of Ganpati and defendant Nos. 1,2, 5 to 8 are legal heirs of Babu, son of Ganpati. After death of Ganpati, Babu and Dagadu resided jointly during subsistence of joint family of Babu and Dagadu. They cultivated suit land survey No.63/C as tenant and lateron they purchased it in the year 1959 out of income of joint family properties situated at village Kothala. However, Babu prepared false record and mutated his own name as owner. The plaintiffs further contend that even land survey Nos. 11 and 14 are joint family properties purchased from one Radhabai. Joint family of Dagadu and Babu was in existence till 1986. Dagadu asked $\frac{1}{2}$ (half) separate share and possession to defendant, but they failed to do so. Therefore, the cause of action arose to file the suit.

3. The defendants denied plaintiff's contentions, came with the case that partition between Babu, Dagadu and Ganpati took place in the year 1945. The suit property survey No.63/C is self acquired property of Babu. However, they admit that the suit property at village Kathala was jointly purchased along with one Bali Bobade and name of Dagadu was inserted in the sale deed as Benamidar. Lateron, he relinquished his share in the suit land. The defendant Nos.3 and 4, who are purchasers asserted that they are bonafide purchasers of the property.

4. The Trial Court on appreciation of rival contentions framed issues, recorded evidence and finally concluded that the plaintiff proved that he has $\frac{1}{2}$ share in the suit property and entitle for partition and separate possession. Consequently, passed decree of partition declaring that plaintiff and defendant Nos. 1,2 and 5 to 8 have $\frac{1}{2}$ share in the suit

lands. The defendant Nos. 3, 4, 9 and 10 are held to have stepped into shoes of defendant Nos. 1 and 2 and defendant Nos. 5 to 8 have their $\frac{1}{2}$ share in the land to the extent they purchased.

5. Aggrieved defendants filed appeal before District Judge at Osmanabad. The learned District Judge, after hearing the parties, partly allowed appeal and maintained entitlement of plaintiffs to receive $\frac{1}{2}$ share in land survey No.11/A-1 and 14/A-1. However, rejected their claim in respect of land survey No.63/C. The plaintiffs/appellants are aggrieved by decision of appellate Court as regards to refusal of their claim in land survey No.63/C.

6. Mr. V. S. Undre, learned Advocate appearing for the appellant would submit that Trial Court, on appreciation of evidence, concluded that the land survey No.63/C was purchased jointly. The defendant No.1 could not disclose the source of income and his capacity to pay the amount of Rs. 1500/- towards purchase price of survey No.63/C. He submits that the certificate of ownership issued by Tahsildar in favour of defendant No.1 as tenant is on the basis of the deposit of the amount of Rs. 1500/- which was incurred by joint family. He would, therefore, urge that the Appellate Court was wrong in holding that the land survey No.63/C was self-acquired or under exclusive ownership of defendant No.1.

7. Per contra, Smt. M. A. Kulkarni, Learned Advocate appearing for respondents/defendants supports impugn judgment and decree dated 07.07.2015 passed by learned District Judge.

8. Having considered submissions advanced, only issue that arises for consideration in this Second Appeal is, as to whether land survey No.63/C is exclusive property of defendant No.1 or same was a joint family property. The Trial Court observed that sale certificate (Exhibit 202) is issued on 07.11.1959 in favour of defendant No.1, however, there is no evidence as to his income source to deposit amount of Rs. 1500/- deposited towards purchase price. Conversely, Appellate Court observed that although, plaintiff's witness No.1-Vishnu states that land survey No.63/C is purchased by his father and deceased Babu out of joint family income, evidence on record do not suggest that the plaintiff and Babu were cultivating land as joint tenants hence Babu was declared as protected tenant of land survey No.63/C and certified as owner under Section 38E of Bombay Tenancy Act.

9. It is not disputed before this Court that vide certificate dated 07.11.1959, placed at Exh. 202, Babu has been conferred with the ownership under Section 38-E of Tenancy Act being a protected tenant. Nothing is placed on record to show that Babu and Dagadu were joint tenants or they had cultivated land jointly prior to its declaration and conferment of certificate in the name of Babu. Mere statement is made in plaint that the purchase price was jointly paid by them or the purchase price was paid out of joint income. Even assuming for a moment, that the purchase price has been paid jointly, tenancy conferred upon Babu and the certificate under Section 38-E of the Bombay Tenancy Act issued in his favour would not be obliterated. The ownership under the tenancy laws is result of statutory fiction. The person who was in occupation of the land as a tenant on the Tiller's Day is entitled for declaration of

ownership under Section 38-E. The purchase price is nominal amount required to be deposited by tenant and in case of his default, such amount can even be recovered as land revenue. Therefore, assuming that some contribution was made by Dagadu in purchase price, that itself would not confer any right over him. Upon conferment of ownership of certificate, land would remain in exclusive ownership of the person declared as a protected tenant. Undisputedly, Babu was declared as protected tenant and conferred the certificate. Therefore, the Appellate Court is justified in modifying the decree to the extent of the land survey No.63/C and restricting right of plaintiffs to seek partition over the land survey No.11/A-1 and 14/A-1.

10. In result, no substantial question of law arises for consideration in the appeal. Appeal stands dismissed. Civil application, if any, stands disposed of.

[S.G. CHAPALGAONKAR, J]

grt/-