



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 505 OF 2020

1. Jaising Bapu Divte,
Age : 70 years, Occu : Agriculture,
R/o. Waghunde (Bk), Tq. Parner,
Dist. Ahmednagar
2. Janabai Jaising Divte,
Age : 65 years, Occu : Agriculture,
R/o. As above
3. Shivaji Jaising Divte,
Age : 45 years, Occu : Agriculture,
R/o. As above
4. Sharda @ Kanta Mohan Bhogade
Age : 46 years, Occu : Household,
R/o. Bhoire Gangarda, Tq. Parner,
Dist. Ahmednagar
5. Latabai Anil Albhar
Age : 32 years, Occu : Agriculture,
R/o. Albharwadi (Wadegavhan), Tq. Parner,
Dist. Ahmednagar
6. Manisha Shankar Magar
Age : 35 years, Occu : Agriculture,
R/o. Waghunde (Bk), Tq. Parner,
Dist. Ahmednagar

.... **Petitioners**

(Ori. Defendants No. 3, 7
to 10 and 19)

Versus

1. Raosaheb Jaising Divte,
Age : 60 years, Occu : Agriculture,
R/o. Waghunde (Bk), Tq. Parner,
Dist. Ahmednagar
At present R/o. Ganeshnagar Chikhali,
Tq. Haveli, Dist. Pune

2. Subhadrabai Bhausahab Tarte
Age : 70 years, Occu : Household,
R/o. Bhoire Gangarda, Tq. Parner,
Dist. Ahmednagar
3. Bhagubai Dnyandeo Khodade,
Age : 65 years, Occu : Household,
R/o. Ganji Bhoire, Tq. Parner,
Dist. Ahmednagar
4. Hirabai Namdeo Tarte
Age : 60 years, Occu : Household,
R/o. Mhasne Sultanpur, Tq. Parner,
Dist. Ahmednagar
5. Mandabai Bhaskar Divte
Age : 50 years, Occu : Household,
R/o. Waghunde (Bk), Tq. Parner,
Dist. Ahmednagar
6. Sangeeta Balu Divte
Age : 45 years, Occu : Household,
R/o. Ralegan Sidhi, Tq. Parner,
Dist. Ahmednagar
7. Sonali Vijay Ravde,
Age : 40 years, Occu : Household,
R/o. Kadus, Tq. Parner,
Dist. Ahmednagar
8. Reshma Sandeep Bhagat
Age : 23 years, Occu : Household,
R/o. At Post Panoli, Tq. Parner,
Dist. Ahmednagar
9. Sheetal Uttam Lanke
Age : 21 years, Occu : Household,
R/o. At Post Wadzire, Tq. Parner,
Dist. Ahmednagar
10. Rohit Bhaskar Divte
Age : 19 years, Occu : Student,
R/o. Waghunde (Bk), Tq. Parner,

Dist. Ahmednagar

11. Chandrabhaga Shivaji Divte
Age : 60 years, Occu : Agriculture,
R/o. As above
12. Subhash Dattatraya Gawali
Age : 45 years, Occu : Agriculture,
R/o. As above
13. Haribhau Dattatraya Gawali
Age : 42 years, Occu : Agriculture,
R/o. As above
14. Appa Vishwanath Thite
Age : 50 years, Occu : Agriculture,
R/o. As above
15. Kondiba Dagadu Divte
Age : 41 years, Occu : Agriculture,
R/o. As above

.... **Respondents**
(Ori. Plaintiffs and defendants)

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Advocate for Petitioners : Mr. S. S. Bora
Advocate for Respondent No. 1 : Mr. R. R. Karpe

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CORAM : MANJUSHA DESHPANDE, J.

RESERVED ON : 09 JANUARY, 2025
PRONOUNCED ON : 21 JANUARY, 2025

JUDGMENT :

1. Rule. Rule made returnable forthwith. Heard finally with
the consent of parties.

2. In this writ petition, the petitioners have challenged the order passed by Jt. Civil Judge, Junior Division, Parner, (Trial Court) dated 26.03.2019 on application below Exh. 98 in Regular Civil Suit No. 258 of 2008, wherein the application for recasting of issues filed by the petitioners therein has been partly allowed. However, the application to the extent of deleting issue No. 4 which the petitioners had prayed for has been rejected. Hence, the petitioners are challenging the impugned order to the extent of specific issues raised by the petitioners in the application.

3. The factual matrix leading to the filing of application by the petitioners in nutshell are ; one Bapu Diwate who is defendant No. 1 in the original suit filed by the plaintiff was *karta* of the family. His grandson namely Raosaheb filed Regular Civil Suit No. 258 of 2008 in the Trial Court with a prayer for partition and separate possession to the extent of his 1/12th share in the suit properties including agricultural as well as house properties described in para 1-A and 1-B of the plaint. The plaintiff has alleged that all the suit properties are joint Hindu family properties and some of the properties have been purchased from the income generated from the properties belonging to the Hindu joint family. The plaintiff has further contended that some of the properties, details of which are

given in the plaint, have been purchased from the proceeds of the joint family property and some of the properties have also been sold by the defendant No. 1 and 8 by registered sale-deed. When the plaintiff has demanded his share, it was denied by defendants. Hence, he was constrained to file R.C.S. No. 258 of 2008, with a prayer for partition and separate possession as well as declaration and perpetual injunction.

4. On receiving the suit summons, the petitioners in the present writ petition appeared before the learned Trial Court and filed their written statement and denied the claim of the plaintiff. The original defendants No. 3, 7 and 8 in their say have specifically contended that there was already a separation effected amongst defendants No. 1 to 16 and plaintiff. Suit property bearing Gat No. 72 was purchased by the defendant No. 3 Jaysing from Raghunath from his own income. Therefore, it is his self-acquired property. Even, properties in Gat No. 133 ad-measuring 12R and Gat No. 131 ad-measuring 60R were purchased by Jaysing from Thite Brothers. Hence, these properties are also his self-acquired properties.

5. On the basis of pleadings of the parties, the Trial Court was pleased to frame the issues below Exh. 86 wherein issue No. 4

has been framed, casting entire burden on the defendants No. 3, 7 and 8 to prove that the properties bearing Gat No. 8, Gat No. 133 ad-measuring 12R and Gat No. 131 ad-measuring 60R are self-acquired properties of defendant No. 3. Hence, being aggrieved by the framing of an issue, thereby wrongly shifting burden of proof on the defendants, the petitioners filed application below Exh. 98. In the application at Exh. 98, the petitioners have made a prayer for recasting of issues.

6. The Trial Court has framed issues on 14.10.2014 at Exh. 86. The issue No. 4 which is requested to be recasted by the present petitioners reads thus :

“Whether the defendants No. 3, 7 and 8 prove that the suit properties Gat No. 8, 12R from Gat No. 133 and 60R land from Gat No. 131 are the self-acquired properties of defendant No.3 ?”

7. In view of the issue No. 4 framed by the Trial Court, the defendants No. 3, 7 to 10, 18 and 21 have filed an application for recasting as well as framing of additional issues. Upon hearing the respective parties, the Trial Court has been pleased to pass, order dated 26.03.2019. The Judge of the Trial Court has been pleased to observe that, the issues are framed by the Court as per Order XIV of

the Code of Civil Procedure, and on the basis of the pleadings of the parties. Since the defendants have filed 'say' contending that the suit properties are purchased by them and they are their self-acquired properties, hence, issue No. 4 framed by his Predecessor is proper. It is further observed that since according to the 'say' of the defendants, if a joint Hindu family property is purchased from the income of the joint family, burden of proof is on the plaintiff. Therefore, the issue regarding the same cannot be deleted as per the prayer made by the defendants. Hence, prayer of the defendants has been rejected. The Trial Court has further observed that since the properties have been purchased from and for the joint Hindu family, burden is also on the plaintiff to prove the same. Therefore, additional issue No. 4-A has been framed and added which reads thus :

“4-A : Whether the plaintiff proves that properties in Gat No. 8, 12R from Gat No. 133 and 60R from land from Gat No. 131 have been purchased by defendant No. 3 for the Hindu joint family ?”

8. On above background, the petitioners have challenged the order dated 26.03.2019 passed by the Trial Court below Exh. 98.

9. It is the contention of the petitioners that they are the defendants in the suit. The plaintiff has filed the suit for partition,

declaration and injunction, with a specific pleading that the properties belonging to the present petitioners are the properties of Joint Hindu family. When the present petitioners have filed their 'say' categorically denying that the properties are not joint family properties but they are self-acquired properties of the defendant No. 3. It was burden on the plaintiff to prove that the suit properties are joint family properties in which he is claiming 1/12th share. When he has filed an application for recasting of issues, taking exception for wrongly shifting of burden on the defendants, the Trial Court has passed the impugned order creating further complication.

10. Learned Advocate Shri. S. S. Bora for the petitioners contends that the issues are framed as per the provisions of Order XIV of the CPC. When material proposition of the facts or law is affirmed by one party and denied by the other, the issues are framed accordingly. In the present case, the plaintiff has come with a specific case that all the properties described in the plaint are the Hindu joint family properties and some of them are purchased from the proceeds of the joint family properties. Per contra, the defendants have categorically denied that suit properties have been purchased from the income of Hindu undivided family property. According to them, there was a partition and separate possession long back. There exists

no Hindu joint family, they are separated long back, defendant No. 3 purchased Gat No. 8 for a consideration of Rs. 5,000/- in 1970 and Gat No. 131 and 133 to the extent of 60R and 12R respectively, has also been purchased from his own income from Kashinath Raskar, hence, it is his self-acquired property. Therefore, from the pleadings of the parties, the Court was expected to frame appropriate issues. Unfortunately, the Trial Court has failed to frame proper issues. When the present petitioners have filed application for recasting of issues, the Trial Court has further misdirected itself by framing issue No. 4-A which is not arising out of any material proposition affirmed and denied by the respective parties.

11. It is further contention of the petitioners that, there is no presumption in law that all joint family properties are ancestral and therefore, the person who claims that all the properties are joint family properties, is required to prove it. Hence, the burden is always on the person who claims that, the properties are joint family properties. Merely assertion that the persons belong to joint Hindu family by that itself, would not make property standing in name of independent members of joint family, a Hindu undivided family property. It is always for the plaintiff to prove that all the properties standing in name of individual member of joint Hindu family are

belonging to the joint Hindu family. The burden is always on the plaintiff to prove the same. Hence, according to him, the order passed by the learned Trial Court dated 26.03.2019 needs to be quashed and set aside.

12. Per contra, the learned Advocate Shri. R. R. Karpe for the respondent No. 1 i.e. original plaintiff has opposed the writ petition by relying on the reply affidavit. It is his contention that the application itself was filed at a belated stage by the defendants i.e. after framing of issues. There is delay in filing the application. The issues were framed on 14.10.2014 and the application seeking recasting of issues has been filed by the defendants on 11.06.2018 i.e. almost after four years of framing of issues. Hence, there was no cause of action for the defendants to file such an application. It is his contention that the issues are to be framed from the pleadings of the parties and not as per the will of parties. Hence, the Trial Court has rightly added additional issue No. 4-A, 2-B and 4-B. The Trial Court only upon appreciation of order XIV of the CPC, has passed the order framing additional issues wherein the burden of proof is on the plaintiff to prove whether the property purchased by any member of Hindu joint family is purchased from the income of Hindu joint family property.

13. Hence, according to him, the request made by the defendants for deleting the said issue cannot be accepted as the burden is cast upon the plaintiff. It is further urged by the learned Advocate for the respondents that the application has been filed by the defendants at very belated stage. Much time has been consumed in the said process. Now, the matter is at the stage of evidence when the present writ petition has been filed. Hence, on this count also, the writ petition needs to be dismissed.

14. So far as the initial burden of proving jointness of the properties is concerned, according to the learned Advocate for the respondents, the initial burden is proved by the plaintiffs through their pleadings itself. Hence, it was for the defendants to prove that the properties in question of which partition is claimed is self-acquired property. According to him, he had already discharged the burden. Hence, it was for the defendants to prove that it was self-acquired property. Even otherwise, according to him, issue No. 4-A framed by the learned Trial Court is proper. It casts burden on the plaintiff to prove that the defendant No. 3 had purchased the properties from the joint family. Hence, he has prayed that impugned order does deserve any interference at the hands of this Court.

15. Learned Advocate for the respondents has placed reliance on the judgment of the Hon'ble Supreme Court in case of ***Mallesappa Bandeppa Desai and Anr. Vs. Desai Mallappa Alias Mallesappa and Anr, 1961 SCC Online SC 270***, wherein Hon'ble Supreme Court has observed in context of the facts of that case that -

“where a manager claims that any immovable property has been acquired by him with his own separate funds and not with the help of the joint family funds of which he was in possession and charge, it is for him to prove by clear and satisfactory evidence his plea that the purchase money proceeded from his separate fund. The onus of proof must in such a case be placed on the manager and not on his coparceners.

Hence, according to learned Advocate for respondents, when the manager in the said matter claimed that the immovable properties were purchased from his own pockets. Above observations have been made by the Hon'ble Supreme Court.

16. As against that, the learned Advocate for the petitioner has placed reliance on the judgment of this Supreme Court in case of ***Bhagwat Sharan (Dead) thr. L.Rs. Vs. Purushottam and Ors. MANU SC 0354 2020***. In para 10 of **Bhagwat** (supra), Hon'ble Supreme Court held thus.

“10. At the outset we may note that a lot of arguments were addressed and judgments were cited on

*the attributes of HUF and the manner in which it can be constituted. In view of the facts narrated above, in our view, a large number of these arguments and citations need not be considered. The law is well settled that the burden is on the person who alleges that the property is a joint property of an HUF to prove the same. Reference in this behalf may be made to the judgments of this Court in **Bhagwan Dayal v. Reoti Devi** MANU/SC/0374/1961 : AIR 1962 SC 287. Both the parties have placed reliance on this judgment. In this case this Court held that the general principle is that a Hindu family is presumed to be joint unless the contrary is proved. It was further held that where one of the coparceners separated himself from other members of the joint family there was no presumption that the rest of coparceners continued to constitute a joint family. However, it was also held that at the same time there is no presumption that because one member of the family has separated, the rest of the family is no longer a joint family. However, it is important to note that this Court in **Bhagwati Prasad Sah and Ors. v. Dulhin Rameshwari Kuer and Ors.** MANU/sc/0060/1951 : (1951) 2 SCR 603, it held as follows :*

“.... Except in the case of reunion, the mere fact that separated coparceners chose to live together or act jointly for purposes of business or trade or in their dealings with properties, would not give them the status of coparceners under the Mitakshara law.”

It is specifically observed that person who alleges that the property is a joint property of Hindu undivided family has to prove the same. While making the said observations, the Hon'ble Supreme Court has relied upon various judicial pronouncements made in that behalf. One of the observation in the judgments which is also referred

in the above judicial pronouncement, in case of ***Shrinivas Krishnarao Kango Vs. Narayan Devji Kango and Ors. MANU SC 0126 1954*** is reproduced herein below which lays down as under :

“The legal principle, therefore, is that there is no presumption of a property being joint family property only on account of existence of a joint Hindu family. The one who asserts has to prove that the property is a joint family property. If, however, the person so asserting proves that there was nucleus with which the joint family 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.”

17. Hence, in view of the above legal position and after considering the submissions made by the respective Advocates and also on going through the impugned order and the documents placed on record as well as the various judicial pronouncements placed on record, the undisputed position that emerges is that the Trial Court has committed grave error in passing the impugned order below Exh. 98 wherein though it is observed that it is burden on the plaintiff to prove that the property is purchased from the proceeds of Hindu undivided family property, however, while passing the order, the prayer of the petitioners have been rejected and additional issue No. 4-A has been framed which has created further confusion. Since it was not the part of the pleading of either of the parties that the defendant No. 3 had purchased the properties in Gat No. 8, Gat No.

133 and 131 for the Hindu joint family.

18. Therefore, though the burden is cast on the plaintiff in said additional issues, it was neither the case of the plaintiff nor of the defendant that the defendant No. 3 has purchased the properties for Joint Hindu family. In fact, from the pleadings of the parties, it is evident that the plaintiff claims that the disputed properties have been purchased from proceeds of the Hindu undivided family property in the name of defendant No. 3. As against it, the case of the defendant is that the defendant No. 3 has independently purchased the properties which are his self-acquired properties. Hence, the issue No. 4-A which is additionally framed is also not as per the pleadings of the parties and contrary to what is contemplated under Order XIV of the CPC. In view of the same, the order passed by the learned Trial Court deserves to be quashed and set aside. Hence, following order.

ORDER

- I. Writ Petition is **allowed**.
- II. The order dated 26.03.2019 passed by the learned Jt. Civil Judge Junior Division, Parner below Exh. 98 in Regular Civil Suit No. 258 of 2008, stands quashed and set aside.
- III. Learned Trial Court is hereby directed to pass an appropriate order on the application filed by the defendants at Exh. 98,

after giving an opportunity to the respective parties and decide the application preferably within a period of three months from the date of this order.

- IV. Rule is made absolute in above terms. Writ Petition stands disposed of.

[MANJUSHA DESHPANDE, J.]

Omkar Joshi