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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 439 OF 2022
WITH
INTERIM APPLICATION NO. 3297 OF 2022**

Shobha Namdeo Waghmode and Ors. ... Appellants/Applicants

Vs.

Jaysing Kesu Waghmode and Ors. ... Respondents

Mr. Mahindra Deshmukh for the Appellants/Applicants.

CORAM : GAURI GODSE, J.

DATE : 17th FEBRUARY 2025

ORDER :

1. Heard learned counsel for the appellants. This appeal is preferred by the heirs and legal representatives of deceased defendant no.1 to challenge the concurrent judgments and decrees granting partition and separate possession. The trial court held that the plaintiff and defendant nos. 1 and 2 are entitled to one-fourth share each and defendant nos. 3 to 6 are entitled to one-fourth share jointly in all the suit properties except Gat No. 45 and Gat No. 1179. The trial court further held that the plaintiff, defendant no. 1 and defendant no. 2 are having one-sixteenth share each and defendant nos. 3 to 6 are having one-sixteenth share jointly in suit properties except Gat No. 45 and Gat No. 1179.

2. The trial court further held that the alienation by defendant no.1 in favour of defendant no. 11 in respect of the suit properties is not binding upon the shares of plaintiff and remaining defendant nos. 2 to 6. This decree was challenged by the heirs and legal representatives of deceased defendant no. 1 by filing an appeal. However, the first appellate court has confirmed the trial court's decree. Hence, this second appeal.

3. Learned counsel for the appellants submitted that defendant no. 1 was the exclusive owner of Gat No. 893. He submits that an order under Section 32G of the Maharashtra Tenancy and Agricultural Lands Act, 1948 ("Tenancy Act") was passed in favour of defendant no. 1 and the certificate under Section 32M was also issued in his name. He thus submits that the plaintiff and other defendants would not be entitled to seek partition and separate possession in respect of Gat No. 893.

4. Learned counsel for the appellants further submitted that there was a partition effected 30 years prior to filing of the suit and in the partition the suit property described at Sr. No. 3, 5 and 6 was allotted to the share of defendant no.1. He therefore submits that defendant no. 1 had the right to alienate these properties. To

support the theory of partition, learned counsel for the appellants relied upon Mutation Entry No. 2517 produced at Exhibit-145. He thus submits that the impugned decree for partition and separate possession is passed ignoring the exclusive rights of defendant no. 1.

5. Learned counsel for the appellants submits that once the order under section 32G and the certificate under Section 32M is issued in favour of defendant no.1 under the provisions of the Tenancy Act, the title and possession of defendant no. 1 in respect of these properties had a conclusive value and civil court had no jurisdiction to decide the rights of the parties in respect of these properties.

6. Learned counsel for the appellants further submits that the plaintiff examined himself by filing his examination in chief, however, he never offered himself for cross examination. He thus submits that the pleadings regarding all the suit properties being ancestral joint family properties were not supported by any oral evidence. He submits that the plaintiff examined PW-2, i.e. his son as his power of attorney holder. According to the learned counsel for the appellants power of the attorney holder had no personal knowledge to support the plaintiff's pleadings regarding the property as an

ancestral or a joint family property. He thus submits that the plaintiff's pleadings were not supported by any evidence. Learned counsel for the appellants therefore submits that all the aforesaid grounds raise substantial questions of law.

7. To examine the arguments advanced by the learned counsel for the appellants, I have perused both the judgments and the copy of the plaint. The relations between the parties is not in dispute. From the reasons recorded by both the courts the original holder was father of plaintiff, defendant no. 1 and predecessor in title of defendant nos. 3 to 6 and defendant no. 2.

8. So far as the arguments on exclusive rights in respect of Gat No. 893 is concerned, both the courts have referred to the revenue records where defendant no. 1's name was entered as Manager of the joint family. Mutation Entry No. 2517 relied upon by the learned counsel for the appellants to support the theory of partition is examined by both the courts. Both courts have concurrently held that by way of Mutation Entry No. 2517 name of defendant no. 1 was entered as Manager of the joint family. Both the courts have thus held that the theory of prior partition was not supported by any evidence.

9. The order passed under the Tenancy Act is also examined by

both courts. The decision of the tenancy authorities discloses name of defendant no.1 as tenant and heir of deceased Kesu Nivrutti Waghmode i.e. original holder. The other mutation entries relied upon by the heirs of defendant no. 1 are also examined by both the courts. The common ancestor i.e. Kesu expired in the year 1954. Hence, it was argued on behalf of defendant no. 1 that in view of Section 40 of the Tenancy Act after death of the original tenant i.e. Kesu the tenancy was continued only in the name of defendant no.1.

10. The reasons recorded by both the courts thus indicate that there is no dispute that Kesu was the original tenant of Gat No. 893. In view of the original tenancy of Kesu in respect of Gat No. 893 the said property is accepted as joint family property on the ground that name of defendant no. 1 was entered as Karta or Manager of the joint family.

11. The age of defendant no. 1B who deposed to support the contentions of defendant no. 1 is considered as an important factor to disbelieve his oral evidence in support of the oral partition and the claim of exclusive tenancy in respect of Gat No. 893. It is well established principle of law that the civil court has jurisdiction to adjudicate upon the nature of the suit property when the orders

under the Tenancy Act are issued in the name of one of the members of the joint family. This court in the decision of ***Rajaram Gadade vs. Govinda Gadade***¹ relied upon the well-established principles settled by various decisions of the Hon'ble Apex court and this court. This court held that the jurisdiction of the civil court in deciding the nature of the property that falls within the exclusive province of Civil Court is not ousted in view of Section 85 of the Tenancy Act, as it cannot be decided by the tenancy authorities under the Tenancy Act.

12. Hence, I do not find any substance in the argument raised on behalf of the appellants that the civil court had no jurisdiction to record findings that Gat No. 893 belonged to the joint family. So far as prior partition is concerned, both the courts have disbelieved the theory of prior partition for want of any supporting evidence. Mutation Entry No. 2517 relied upon by the learned counsel for the appellants is referred to by both the courts which records the name of defendant no. 1 as Karta of the joint family. Thus, in the absence of any supporting evidence regarding prior partition, the said ground raised on behalf of the appellants would also not require any consideration by this court.

13. The ground argued regarding the plaintiff not offering himself

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for cross examination would not be of any relevance in view of the other evidence on record. The admissions given on behalf of defendant no. 1 are considered and examined by both the courts and based on documentary and oral evidence on record both the courts have concurrently held that name of defendant no. 1 has been entered as Karta of the joint family.

14. The first appellate court after re-examining the evidence on record has confirmed the trial court's findings. In view of the concurrent findings recorded based on oral and documentary evidence on record, the other two grounds argued on behalf of the appellants would not require any consideration by this court as they do not raise any substantial question of law.

15. In view of the findings recorded regarding nature of the suit property being ancestral joint family properties, the alienation by defendant no. 1 in favour of defendant no. 11 is not binding upon the shares of plaintiff and defendant nos. 2 to 6. The determination of the shares made by the trial court and confirmed by the first appellate court are not in dispute.

16. Hence, I see no reason to interfere with the impugned judgment. The second appeal does not raise any substantial question of law. Hence, the second appeal is dismissed.

17. In view of dismissal of the second appeal, interim application is disposed of as infructuous.

18. Learned counsel for the appellants at this stage prays for stay of the execution and operation of the impugned decree. The second appeal is dismissed as there is no substantial question of law, hence there is no question of any stay to the execution and operation of the impugned decree. However, since the decree is for partition and separate possession, actual handing over of physical possession pursuant to the impugned decree shall remain stayed upto a period of six weeks from the date of uploading this order.

19. It is clarified that proceedings for division of the property shall continue. This protection is granted subject to the appellants not creating any third party rights or parting with possession in favour of any third party.

[GAURI GODSE, J.]