

**SUPREME COURT OF INDIA**

Kesharbai @ Pushpabai Eknathrao Nalawade (D) by LRs.

Vs.

Tarabai Prabhakarrao Nalawade

C.A.No.3867 of 2014

(Surinder Singh Nijjar and A.K.Sikri JJ.)

14.03.2014

**JUDGMENT**

**SURINDER SINGH NIJJAR, J.**

1. Leave granted.

2. This appeal has been filed against the judgment and decree dated 23rd March, 2009 of the High Court of Bombay (Aurangabad Bench) rendered in First Appeal No.468 of 2004 whereby the High Court has partly allowed the First Appeal of the plaintiffs/respondent Nos. 1 to 3. The High Court has dismissed the suit of the plaintiffs in respect of the agricultural lands and house property at Chikalthan and Neem Dongri. At the same time, the High Court has set aside the judgment of the trial court on Issue No.3 relating to the question as to whether house bearing No.4.13.78 bearing CTS No.4705 admeasuring 138.2 sq. meters alongwith house structure standing therein situated at Nageshwarwadi, Aurangabad is the self acquired property of deceased Eknathrao.

3. The admitted facts are that plaintiff Nos. 1 and 2 to 4 are the wife and children of deceased Prabhakarrao s/o Saluba respectively. Defendant Nos. 7 and 8 to 12 are the wife and children of deceased Trimbakrao s/o Deorao respectively. Defendant Nos. 13 to 15 are the subsequent purchasers of land from the plaintiff. For better understanding of the inter-se relationship between the parties, it would be appropriate to reproduce here the genealogy table of the family, as noticed by the trial court:

Mahipati

Deorao (son) died on Sauba (son) died

15.7.1974

on 6.10.1980

Shewantabai (wife) died Ansabai (wife) died

Prabhakar (son) died

Eknathrao (Son) Trimbakrao (son) Tarabai Santosh Satish Manisha

Died on /11/97 died on 31.5.86 (P-1) (P-2) (P-3) (P-4)

Indubai (wife) D-1 Kamlabai (wife) D-7 Kiran Kranti Asha Jyoti Bharti

D-2 D-3 D-4 D-5 D-6

Pramod Vinod Rajendra

Vidya Vijaya

D-8 D-9 D-10

D-11 D-12

4. The plaintiffs filed a suit for partition and separate possession of half share of the plaintiffs in the following properties:-

(I) Agricultural land Gat No.453 whose survey number is 210 adms. 19 acre 1 guntha situated at village Chikalhana Tq. Kannad.

(II) Land bearing Gat No.146 of whose survey number is 65 adms. 27 acre 39 gunthas situated at Nimdongri Tq. Kannad.

(III) House property bearing No.725 adms. 26.39 sq. meters situated at Chikalhana Tq. Kannad.

(IV) Open plot bearing CTS No.709 adms. 64.3 squ. meter known as 'Girnichi Jaga' situated at Chikalhana Tq. Kannad.

(V) House bearing No.4.13.78 of whose CTS No. is 4705 adms. 138.2 sq. meters along with house structure standing thereon situated at Nageshwarwadi Aurangabad.

5. It was claimed that property at Sl.Nos.I and II were jointly purchased by deceased Deorao and deceased Saluba in the name of Deorao. The house at Sl.No.III was said to have been constructed on a plot jointly purchased by the two brothers. Both the brothers were residing in the same house during their life time. With regard to property at Sl.No.V, it was stated that both the brothers had purchased the plot on which the house is constructed. It was further claimed that the plot was purchased in the name of Eknathrao and his family was residing in that house. In short, it was claimed that during the life time of Deorao and Saluba, all the properties were jointly cultivated and were jointly enjoyed by all the family members. Trimbakrao was residing at Kannad and Eknathrao was residing at Aurangabad due to their employment. Similarly, Prabhakarao was in service at different places. It was also the case of the plaintiffs that there was a family arrangement between Eknath, Trimbak and Prabhakarao. Property at Sl.No.I was allotted to Trimbakrao and Prabhakarao to the extent of half share each. Similarly, land at Sl.No.II was allotted to Trimbakrao (7 acres) and to Prabhakarao (6 acres and 39 gunthas). Eknathrao was allotted 14 acres. After the family arrangement, it was alleged that everyone was in possession of the respective parts of land and their names were entered in the revenue record. It is the further claim of the plaintiffs that in the same family arrangement house at Sl.No.III was given in possession of Trimbakrao and Prabhakarao to the extent of half share each. Eknathrao was put in possession of the entire open space known as 'Girnichi Jaga'. It was specifically pleaded that house at Sl.No.V (hereinafter referred to as Nageshwarwadi Property) was not part of the family arrangement. It was exclusively in possession of the deceased Eknathrao and now in possession of petitioners herein, defendant Nos. 1 and 2 in the suit.

6. The plaintiffs also claimed that Prabhakarao during his life time did not raise any objection with regard to the unequal allotment in the share of the joint properties in the family arrangement. It was stated that Prabhakarao was an alcoholic and, therefore, remained under the domination of the petitioners. It is also admitted in the plaint that after the death of Prabhakarao, out of necessity to

survive, certain agricultural lands are sold by the plaintiffs to defendant No.13 to 16. This was necessary to clear up the dues of the co-operative societies and hand loan of other relatives taken by the deceased Prabhakarrrao. After the death of Prabhakarrrao, the plaintiffs claimed to have requested the petitioners i.e. defendants to undo the injustice done to Prabhakarrrao at the time of the family arrangement. Instead of partitioning the joint properties equitably, it was claimed that after the death of Eknathrao, defendant No.1 to 12, which include petitioner No.1 and 2, were trying to enter their names in the revenue records with regard to the Nageshwarwadi Property at Aurangabad. Since the defendants had declined the request for partition, the plaintiffs were constrained to file the suit.

7. In the written statements filed by the defendants, it was pointed out that there was no ancestral joint family nucleus to purchase the agricultural lands and the house at Sl.No.III. It is further claimed that the suit properties are not coparcenary properties in which Deorao and Saluba had equal shares. It was contended that at the most property can be deemed as a joint property of Deorao, Saluba, Eknathrao and Prabhakarrrao. It was also claimed that the partition of the suit property had taken place on 22nd April, 1985, the respective shares were allotted, and final distribution of the property was made. It was contended that the partition having been completed, the suit ought to be dismissed. On the basis of the pleadings of the parties, the trial court framed 8 issues. The trial court records the issues and the findings as follows:-

#### ISSUES FINDINGS

1. Do plaintiffs prove that the suit Properties are the joint family Properties?  
In Negative
2. Do defendants prove that there Was already partition on 22.4.85 And all shares holders are in Possession of their respective Shares? In affirmative
3. Do they further prove that suit Property mention at Sr.No.5 is self acquired property of deceased Eknath? In affirmative
4. Whether suit is maintainable? In affirmative
5. Whether the suit is barred by limitation? In negative

6. Whether plaintiffs are entitled to partition and possession of half share in the suit properties? In negative

7. Whether plaintiffs are entitled to future mesne profit? In negative

8. What decree and order? As per final order.

On the basis of the aforesaid findings, the suit of the plaintiffs was dismissed with costs.

8. Aggrieved by the aforesaid judgment and decree, the plaintiffs filed First Appeal No.468 of 2004 before the High Court. The High Court formulated the points for consideration in appeal which are as follows:

(i) Whether the property at Nageshwarwadi, Aurangabad is self- acquired property of Eknathrao and as such is not liable for partition?

(ii) Whether the transaction entered into on 22.4.1985 by Eknathrao, Trimbakrao and Prabhakarrrao was family arrangement not amounting to partition?

(iii) Whether Civil Application No.10005 of 2007 filed for filing additional evidence should be allowed and in case it is allowed can the partition list dated 22.4.1985 be admitted in evidence?

9. Upon consideration of the entire material, the High Court has answered point No.(i) in the negative and Point Nos.2 and 3 in the affirmative. As a result of the aforesaid findings, the suit in respect of agricultural lands and house property at Chikalthan and Neem Dongri has been dismissed. However, the plaintiffs/respondent Nos. 1 to 3 are held to be entitled to partition of Nageshwarwadi House at Aurangabad. It has been further directed that the respondents who are legal representatives of deceased Prabhakarrrao are entitled to half share on the one hand and the remaining half share is to be divided equally by the petitioners and respondent No.1 to 6 on the other.

10. Aggrieved by the aforesaid judgment of the High Court, the petitioners who were defendants in the suit have filed the S.L.P. (C) No.27916 of 2009 giving rise to the present appeal.

11. We have heard the learned counsel for the parties.

12. Mr. Shekhar Naphade, learned senior counsel appearing for the appellants submitted that in Paragraph 25 of the impugned judgment, the High Court has accepted the fact that there was a complete partition between the parties. The High Court has held that the family arrangement amounts to final distribution of property amongst sharers. Plaintiffs themselves have also treated the property allotted to them as their exclusive property. Treating the property allotted to their share as their exclusive property, they have sold some portions of the land to respondent Nos. 13 to 16. The High Court also held that the plaintiffs are estopped from challenging the existence and validity of the partition effected in the year 1985. The High Court even held that they are not entitled to fresh partition of the properties which were admittedly covered by the partition of 1985. Mr. Naphade submitted that having held that there was a final partition between the parties, the High Court committed an error of jurisdiction in reversing the findings recorded by the trial court on Issue No.III. According to Mr. Naphade, the High Court has wrongly placed the burden of proof on the petitioners, who were defendants in the suit to prove that Nageshwarwadi property was self-acquired property of Eknathrao. Learned senior counsel also submitted that the High Court ignored the evidence produced by the parties, which would establish that the parties had always treated the Nageshwarwadi property as the self-acquired property of Eknathrao.

13. On the other hand, learned counsel appearing for the respondents has submitted that the trial court had wrongly decided the Issue No.III against the plaintiffs. The defendants (petitioners herein) have failed to prove that Eknathrao had sufficient independent income to have acquired the Nageshwarwadi property. It is submitted that although the defendants had claimed that Eknathrao was employed with the Indian Army, no proof with regard to the employment was produced.

14. We have considered the submissions made by the learned counsel for the parties.

15. Mr. Naphade is quite correct in his submission that the High Court having accepted the findings of the trial court that there was completed partition between the parties, has committed an error of jurisdiction in putting the burden of proof on the defendants on Issue No. III.

16. The trial court on appreciation of the entire evidence had concluded that “the evidence on record discloses that as contended, family arrangement alleged to have taken place in the year 1985 in presence of three brothers and by accepting it, every one took possession of their respective shares and was enjoying the same. Not only this but their names were mutated to revenue records. Everything was done in presence of deceased brother.”

17. The trial court also finds that mutation entry bearing No.726 and No. 1116 were effected on the strength of the partition deed dated 22nd April, 1985. Furthermore, the mutation entries were confirmed by issuing notices to the parties. It was specifically noticed on the mutation entries that no objection was taken by any of the parties. The trial court, in our opinion, has rightly concluded that no objections having been taken at the time when the mutation entries were confirmed, the plaintiffs are estopped from saying that these entries are effected on wrong basis of partition. Noticing the conduct of the parties, even further, the trial court held that the plaintiffs by selling the land allotted to them, treating the same to be their exclusive property. This property was sold without the consent of defendant Nos. 1 to 12. Thus treating the same to be their exclusive property and not coparcenary property.

18. On Issue No.III, the trial court has held that there is no evidence except the bare words of the plaintiffs to show that Nageshwarwadi property is purchased by the deceased Deorao and deceased Saluba in the name of Eknathrao. The trial court, in our opinion, has correctly held that all the other joint property had been purchased either in the name of Deorao or deceased Saluba. There was no explanation as to why the property at Nageshwarwadi was purchased by them exclusively in the name of Eknathrao. On the basis of the evidence, the trial court found that Eknathrao was residing exclusively in the aforesaid property. At that time Prabhakarrrao himself was living in rented premises. No explanation is given as to why Prabhakarrrao was not living in the aforesaid house, in case, it was joint property of Eknathrao and Prabhakarrrao. The trial court also noticed that it was not only Nageshwarwadi property, which was not made part of the partition but also the house of Trimbakrao at Kannad was kept outside partition. The trial court also held that Eknathrao had independent means to purchase Nageshwarwadi property. He was employed with the Military as a Head Clerk from 1944 to 1956. On the basis of the entire evidence, the trial court came to the conclusion that Nageshwarwadi property was the self-acquired property of Eknathrao. The High Court had reversed the aforesaid findings on the basis that the petitioners, who were defendants in the civil suit had not led any evidence to show that Eknathrao

had independently purchased Nageshwarwadi property at Aurangabad. The High Court has reversed the findings of the trial court on the basis that petitioners have failed to prove that Eknathrao was working in the Ammunition Factory, Khadki, Pune from 1944 to 1956. The High Court further held that in this case, a presumption would arise that Nageshwarwadi property was joint property, purchased from the income derived from the other joint property, which form the nucleus. Therefore, it was for the petitioner to prove that Nageshwarwadi property was acquired without the aid of the joint family.

19. In our opinion, the aforesaid presumption is wrong in law in view of the fact that the High Court has affirmed the findings of the trial court that in 1985, there was a complete partition and the parties had acted on the same. It is a settled principle of law that once a partition in the sense of division of right, title or status is proved or admitted, the presumption is that all joint property was partitioned or divided. Undoubtedly the joint and undivided family being the normal condition of a Hindu family, it is usually presumed, until the contrary is proved, that every Hindu family is joint and undivided and all its property is joint. This presumption, however, cannot be made once a partition (of status or property), whether general or partial, is shown to have taken place in a family. This proposition of law has been applied by this court in a number of cases. We may notice here the judgment of this Court in *Bhagwati Prasad Sah & Ors. Vs. Dulhin Rameshwari Kuer & Anr.*[1], wherein it was inter alia observed as under:

“8. Before we discuss the evidence on the record, we desire to point out that on the admitted facts of this case neither party has any presumption on his side either as regards jointness or separation of the family. The general principle undoubtedly is that a Hindu family is presumed to be joint unless the contrary is proved, but where it is admitted that one of the coparceners did separate himself from the other members of the joint family and had his share in the joint property partitioned off for him, there is no presumption that the rest of the coparceners continued to be joint. There is no presumption on the other side too that because one member of the family separated himself, there has been separation with regard to all. It would be a question of fact to be determined in each case upon the evidence relating to the intention of the parties whether there was a separation amongst the other co-parceners or that they remained united. The burden would undoubtedly lie on the party who asserts the existence of a particular state of things on the basis of which he claims relief.”

20. This principle has been reiterated by this Court in Addagada Raghavamma & Anr. Vs. Addagada Chenchamma & Anr.[2]

21. In this case, the trial court as well as the High Court has held that there was a complete partition in the year 1985. Therefore, the presumption would be that there was complete partition of all the properties. Consequently, the burden of proof that certain property was excluded from the partition would be on the party that alleges the same to be joint property. Therefore, in our opinion, the High Court clearly committed an error in placing the burden of proof on the petitioners, who were defendants in the suit to prove that the Nageshwarwadi property at Aurangabad was a self-acquired property of Eknathrao.

22. In view of the aforesaid, we allow the appeal and set aside the findings recorded by the trial court on Issue No. III. The judgment of the Trial Court is confirmed on Issue No. III also. Consequently, the suit filed by the plaintiffs (respondents herein) shall stand dismissed.

[1] [1951] 2 SCR 603

[2] AIR 1964 SC 136