

**HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR**

S.B. Civil First Appeal No. 304/2008

Sushil Kumar, S/o Shri Sanwar Mal, R/o Ward No. 11, Purana Dujod Gate, Hajrika Walon Ki Gali, Sikar

----Appellant

Versus

1. Sanwar Mal S/o Shri Ram Dev, R/o Ward No. 11, Purana Dujod Gate, Hajrika Walon Ki Gali, Sikar
- 1/1. Sushil Kumar S/o late Shri Sanwormal
- 1/2. Shri Suresh Kumar S/o late Shri Sanwormal
- 1/3. Smt. Santosh D/o late Shri Sanwormal W/o Shri Shankar Lal
- 1/4. Smt. Manju D/o late Shri Sanwormal, W/o Shri Ramesh Chandra

2. Suresh Kumar S/o Shri Sanwar Mal (now deceased), R/o Ward No. 11, Purana Dujod Gate, Hajrika Walon Ki Gali, Sikar
- 2/1. Draupadi Devi W/o late Suresh Kumar, R/o Ward No. 11, Purana Dujod Gate, Hajrika Walon Ki Gali, Sikar
...Defendant - respondent no. 6
- 2/2. Pankaj Kumar S/o late Shri Suresh Kumar, R/o Ward No. 11, Purana Dujod Gate, Hajrika Walon Ki Gali, Sikar
...Defendant - respondent no. 2
- 2/3. Pooja Devi D/o late Shri Suresh Kumar, W/o Shri Narayan Kumar, Resident of College Road, Palana, Maharashtra

- 2/4. Rinu D/o late Shri Suresh Kumar, W/o Shri Vikas Modi, Resident of Fatehpur Road Mandava, Distt. Jhunjhunu

- 2/5. Ananya D/o late Shri Suresh Kumar, R/o Purani Collectory, Near Ghanta Ghar, Distt. Sikar
....Defendants - respondents

3. Santosh D/o Shri Sanwar Mal, W/o Shri Shankar Lal, R/o Ramgarh Shekhawati, Presently resident of Shahi Baug Camp Road, Opp. Terapanth, Bhawana Complex, Ahmedabad (Gujrat)

4. Manju D/o Shri Sanwar Mal, W/o Shri Ramesh Chandra, Resident of Raghunathgarh, District Sikar. Presently resident of Bungalow Road Cross, Jas Prem Building No. 10/297, Ichalkaranji, District Kolhapur (Maharashtra)

5. Ajmer Vidyut Vitran Nigam Ltd. through
 - (C) Chairman, Ajmer Vidyut Vitran Nigam Ltd. Head Officer, Ajmer
 - (D) Assistant Engineer, Sub Division-II, Khatri House, Fatehpur Road, Sikar
6. Smt. Draupadi W/o Shri Suresh Kumar
7. Pankaj Kumar S/o Shri Suresh Kumar,
Both resident of Near Old Collectorate Ghantaghar, Sikar

-----Respondents

For Appellant(s)	: Mr. R.B. Mathur, Advocate
For Respondent(s)	: Mr. R.K. Agarwal, Sr. Advocate with Mr. Mamoon Khalid, Advocate

HON'BLE MR. JUSTICE PRAKASH GUPTA

Judgment

Date of Judgment :: 21/12/2021

This Civil First Appeal has been filed by the appellant-plaintiff (for short, 'the plaintiff') against the judgment and decree dated 17.5.2008 passed in Civil Suit No. 66/2005 (33/2004), whereby the trial court partly dismissed the plaintiff's suit for partition and permanent injunction and decreed the respondent-defendant no. 1's and 2's (for short, 'the defendants') counter claim against the plaintiff.

Facts of the case are that the plaintiff filed a Civil Suit for partition and permanent injunction against the defendants wherein it was averred that property mentioned in para 2 of the plaint, was self acquired property of their forefather late Ramdev. On partition, Haveli marked 2(a) came in the share of Sanwar Mal. It was also averred that joint family undivided movable and immovable ancestral properties (as described in para 4 of the

plaint), were not partitioned between plaintiff and defendants no. 1 and 2. The plaintiff and defendants no. 1 and 2 being the coparceners of joint Hindu Family, each was having 1/3rd equal share in the said property. The defendants no. 3 and 4 are the real sisters, who got married many years ago from joint family money and are residing in their in-laws house, therefore, they have no right and claim in the joint family property. It was also averred that defendants no. 1 and 2 left the Haveli and are residing in the house, as mentioned in para 4 (b) of the plaint and the plaintiff is residing in the Haveli, as mentioned in para 4 (a) of the plaint and the family business is going on, as was being run earlier. In the last, it was prayed that the plaintiff's suit be decreed.

The defendants no. 1 and 2 filed written statement alongwith the counter claim and submitted that no division could take place of the property described in para 2 of the plaint. So far as the property described in para 4 (b) of the plaint is concerned, it was averred that the said property was not ancestral property, but self acquired property of defendant no.2 Suresh Kumar, his wife Smt. Draupdi and son Pankaj Kumar. The said property was purchased by them from their own money by way of registered sale deed dated 30.4.2002 and thereafter they got constructed the two storied house from their own money and no joint family money was invested therein. In this way, the said property described in para 4(b) is not ancestral property, therefore, the plaintiff had no right to get share therein. It was also averred that three shops were taken on rent from Agarwal Samaj. Out of the said shops, one shop towards southern side was given to the plaintiff for doing business three years' ago with the stipulation that he will bear the rent of the said shop and the expenses being

incurred in white wash, maintenance etc., but neither the plaintiff paid the rent nor got the white wash and maintenance done nor did he get the separate electricity connection of the said shop. In two shops, business of making sweets is being done by the defendants solely from their own money and no joint family money was invested. In the personal income of defendants no. 1 and 2, the plaintiff had no right to get the share, moreso when the shops are on rent.

It was also averred that immovable property - Haveli situated in Ward No. 11, Hajrika Walon Ki Gali, Sikar was partitioned between plaintiff and defendants no. 1 and 2, three years ago, whereupon separate portions were given to plaintiff and defendants no. 1 and 2 and both the parties are in possession of their respective portions.

The property purchased and constructed in old Collectorate is self acquired property of defendant no.2, his son Pankaj Kumar and wife Smt. Draupdi Devi, with which the plaintiff had no relation and he has no right to get share in the aforesaid self acquired property. The plaintiff does not have $1/3$ rd share in the property in question. He has the right to have only $1/12$ th part in the ancestral Haveli.

It was also submitted that plaintiff with malafide intention encroached on more than $1/12$ th part of the Haveli and installed a deep fridge in the mid of the Haveli's chowk. He started the business of making sweets in the Haveli itself. He put a lock on the main entrance gate and latrine bathroom of the Haveli. In

the last, the defendants prayed to dismiss the plaintiff's suit and to accept the counter claim filed by them.

The plaintiff filed the reply to the counter claim mentioning therein that it is wrong to say that the property described in para no. 4 (b) of the plaint is self acquired property of defendant no.2 Suresh Kumar, his wife Smt. Dropadi and son Pankaj. He further mentioned that if defendant no. 1 Sanwar Mal from the joint family business money, got the sale deed of the aforesaid property executed in the name of Suresh Kumar, Smt. Dropdi Devi and Pankaj Kumar, who are the joint family members, the plaintiff's rights would not be affected in any manner. It was also submitted that no partition deed was produced. The defendants had no right to sell the shops and the plaintiff is having the right to get 1/3rd amount of the sale consideration alongwith interest.

On the basis of pleadings of the parties, necessary issues were framed.

After hearing the parties, the trial court vide its judgment dated 17.5.2008 although partly decreed the plaintiff's suit and determined 1/5th undivided share of each plaintiff, defendant no.1 Sanwar Mal, defendant no.2 suresh Kumar, defendant no.3 Santosh and defendant no.4 Manju in the ancestral joint family undivided immovable property, as described in para 4 of the plaint but dismissed rest part of the suit. The trial court also decreed the defendant no. 1's and 2's counter claim against the plaintiff. Hence, this appeal has been filed.

Learned counsel for the plaintiff submits that the plaintiff pleaded and adduced evidence to the effect that the property described in para 4 (b) of the plaint was purchased from the joint family business funds and the defendants no. 2, 6 and 7 had no independent income. He further submits that the defendant no.2 had admitted that the business was joint and he was not having independent income. The defendant no. 6 is a house wife and defendant no. 7 was not an earning member as he was pursuing his studies. Therefore, it was established and proved that the property described in para no. 4(b) of the plaint was also joint family property, which was purchased from joint family business and therefore, the plaintiff had equal share in the same and the said property was liable to be partitioned. However, the learned Trial Court has committed material illegality by not considering this aspect of the matter.

In support of his contentions, he has placed reliance on the following judgments:

i) **Madan Lal Versus Ram Prasad (deceased) by LRs**
reported in AIR 2002 Rajasthan 99

ii) **Appasaheb Peerappa Chamgade Versus**
Devendra Peerappa Chamgade and others
reported in (2007) 1 SCC 521.

On the other hand, learned Sr. Counsel appearing for the defendants has supported the impugned judgment and submits that after due consideration, the impugned judgment has been passed, with which no interference is required by this Court.

Heard. Considered.

The sole question which arises for determination in the instant appeal is:

"Whether the judgment and decree passed by the trial court considering the property mentioned in paragraph 4(b) of the plaint as self acquired property of defendants no. 2, 6 and 7 is perverse and based on misreading and non-reading of material evidence on record?

In the plaint, it was pleaded by the plaintiff that in old Collectorate at Sikar, 4 years' ago a plot was purchased and construction was raised. The said land and building were purchased from joint family business funds of Ramdev and Sanwarmal, therefore, the said property was ancestral property of plaintiff and defendant nos. 1 and 2.

In the written statement filed by the defendants on 5.6.2004, it was specifically pleaded that the property mentioned in para 4(b) was not an ancestral property, but self acquired property of defendant no.2 Suresh Kumar, his wife Smt. Dropdi Devi and son Pankaj Kumar. On 30.4.2002, they purchased a plot through registered sale deed from their own money and got constructed shops and two storied house over there from their own money and they were not purchased / constructed from joint family funds. In this way, when the said property is not ancestral property, the plaintiff has no right to get share therein. It was also specifically pleaded in the written statement that about 3 years' ago (i.e. in the year 2001) the defendant no. 1 had separated the plaintiff by giving him 1/2 share in the ancestral

haveli and out of three rented shops situated in Chiranji Panwadi Ki Gali, one shop in the western side was also given to the plaintiff, over which the plaintiff is doing the business of sweets making. In the evidence, it was pleaded by the defendant that plaintiff and defendant are doing their separate businesses. The plaintiff in his cross-examination also admitted that before filing the suit, there had been separate business of both the plaintiff and the defendant. This fact has also been corroborated from the evidence of DW-1 Sanwar Mal (father of the plaintiff and defendant no.2), who testified that prior to plaintiff's departure to foreign, he was separated in the year 2001. In this way, from the evidence of plaintiff and defendant, it is proved and established that since year 2001, the plaintiff and defendant no.2 were doing their separate businesses and in rebuttal thereto, no documentary evidence was adduced by the plaintiff. The defendant no.2 purchased the suit property on 30.4.2002 by registered sale deed i.e. after the year 2001, from which also it is quite evident that when the suit property was purchased by the defendant no.2, plaintiff and defendant were doing their separate businesses.

Further in his cross-examination PW-1 Sushil Kumar admitted that he did not know as to in whose name the property situated at Collectorate was purchased. He never saw the sale deed of the said plot. He had no knowledge if the sale deed of the said plot would have been executed in the name of Suresh, Draupdi and Pankaj.

PW-1 Sushil Kumar also admitted in his cross-examination that he gathered the information from his father that

the said property was purchased from joint family funds, whereas DW-1 Sanwar Mal Ginodiya, who is the father of the plaintiff and defendant no.2 in his evidence categorically stated that the said residential property was not purchased from joint family funds and the same is self acquired property of the defendant no.2.

It is revealed from the evidence on record that the defendant no.2 was in exclusive possession of the said property. After discussing the evidence in detail, the trial court rightly observed that the plaintiff failed to prove that the property in dispute was purchased from joint family funds and it was a joint family property.

The Coordinate Bench of this Court in para no. 11 of its judgment passed in the case of **Madan Lal** (supra) observed as under:

"11. The plaintiff in his statement before the Court below admitted that the disputed plot was purchased from the income of General Machinery Stores (at page 28 of the paper book), therefore, it is clear that the property was not purchased by the plaintiff by his own income as alleged by the plaintiff in the plaint. Now relevant fact remains is that what was the status of General Machinery Stores : whether it was joint Hindu family business as alleged by the defendant or it was the sole proprietorship business of the plaintiff as alleged by the plaintiff".

From a perusal of the aforesaid judgment passed by the Coordinate Bench of this Court in the case of (supra), it is clear that in the said case, the plaintiff admitted in his statement before the Court below that the disputed plot was purchased from the income of General Machinery Stores, whereas in the instant

case, no such admission is there that the said property was purchased from joint family funds and therefore, the said property was ancestral property of plaintiff and defendants no. 1 and 2. Rather, the defendant no.2 admitted that the property in question was purchased by him from his own money in the name of himself, his wife and his son by way of registered sale deed dated 30.4.2002. In this way, the judgment passed by the Coordinate Bench of this Court in the case of Madan Lal (supra) relied upon by counsel for the plaintiff does not apply in the facts of the present case.

Similarly, the Hon'ble Apex Court in para no. 12 of its judgment passed in the case of **Appasaheb Peerappa Chamdgade** (supra) observed as under:-

"12. So far as the legal proposition is concerned, there is no gainsaying that whenever a suit for partition and determination of share and possession thereof is filed, then the initial burden is on the plaintiff to show that the entire property was a joint Hindu family property and after initial discharge of the burden, it shifts on the defendants to show that the property claimed by them was not purchased out of the joint family nucleus and it was purchased independent of them. This settled proposition emerges from various decision of this Court right from 1954 onwards.

In the instant case, initial burden to prove issue no. 3 was on the defendants no. 2, 6 & 7, which they duly discharged, as mentioned above. Thereafter the burden was shifted on the plaintiff to prove that the said property was ancestral property. As stated above, in his cross-examination the plaintiff admitted that he gathered the information from his father that the property at Collectorate was purchased from joint family money, but the

plaintiff did not produce any evidence to prove the same. On the contrary, the defendant no.1 Sanwar Mal (who is the father of the plaintiff) in his evidence specifically denied that the Suresh (DW-2) purchased the property from joint family funds. He stated that Suresh (DW-2) purchased the property in question from his own money and got constructed the same from his own money. In this way, the judgment passed by the Hon'ble Apex Court in the case of Appasaheb (supra) and relied upon by the counsel for the plaintiff also does not apply in the facts of the present case.

In my view, there is no reason to discard or disbelieve the evidence of DW-1 Sanwar Mal, who is the father of both the plaintiff and the defendant no.2. No evidence in rebuttal, either oral or documentary, was adduced by the plaintiff to prove that the said property was purchased from joint family funds and the said property was ancestral property of plaintiff and defendant nos. 1 and 2.

From the aforesaid discussions, the findings arrived at by the trial court are just and proper, with which I fully concur. The question is answered accordingly that the property mentioned in paragraph 4(b) of the plaint was self acquired property of defendants no. 2, 6 and 7 and the judgment passed by the trial court is based on proper appreciation of evidence on record.

I find no force in this appeal and the same being bereft of any merit is liable to be dismissed, which stands dismissed accordingly.

(PRAKASH GUPTA),J