

(1977) 12 BOM CK 0015

In the Bombay High Court

Case No : Second Appeal No's. 259 of 1971 and 1202 of 1972

Janakibai Ramchandra Salvi

APPELLANT

Vs

Vasant Laxman Salvi

RESPONDENT

Date of Decision : 07-12-1977

Acts Referred:

Citation : (1979) 81 BOMLR 268

Hon'ble Judges : R.M. Kantawala, C.J

Bench : Single Bench

Judgement

R.M. Kantawala, C.J.—These two appeals arise out of a decree for partition passed by the learned District Judge, Ratnagiri modifying the decree that was passed by the trial Court. A decree came to be passed in a suit filed by Vasant Laxman Salvi for equitable partition and separate possession of his share in the suit-property. The parties are related to each other and it will be more appropriate if reference is made to the genealogy which is referred to in the first paragraph of the judgment of the appellate Court. One Tanbarao died in or about the year 1904 leaving him surviving his widow Sundra alias Kannadiakka and three sons, Ramchandra alias Dada, Laxman alias Aba and Vithal alias Daji. Ramchandra died on or about June 7, 1956 leaving his widow Janaki alias Vahini, defendant No. 7 and three daughters Shalini Malini and Nalini who are not parties to the suit. Laxman died on or about July 27, 1940 leaving him surviving his aunt Anandi defendant No. 8 and six sons and a daughter, namely, Sadanand alias Balasaheb defendant No. 1, Madhukar alias Bapu, defendant No. 2, Vasant the plaintiff, Chandrakant alias Tatya defendant No. 3, Janardan alias Anna defendant No. 4, Ramakant alias Appa defendant No. 5 and daughter by name Shalini, The third brother Vithal alias Daji died on or about August 18, 1944 leaving his widow Rukmini defendant No. 9, a son Pratap alias Nana defendant No. 6 and a daughter Shushila who is not a party to the suit. Vasant, one of the sons of Laxman filed a suit for partition and separate possession of his share. In the plaint initially the contention, of plaintiff Vasant was that the properties described in paragraphs 1A and 1B of the plaint were the joint family properties and he was

entitled to a share therein. In the written-statement filed by the defendant No. 1 he contended that certain other properties which stood in the name of Vithal were joint family properties. Thereafter the plaintiff amended the plaint and contended that pieces of land described in paragraph 1C of the plaint (which were same as described by defendant No. 1 as joint family properties) though standing in the name of Vithal were joint family properties and the same also should be partitioned amongst the members of die family. The members of Vithal's branch in the written-statement contended that the properties described in paragraphs 1A and 1B of the plaint were joint family properties, but the properties described in paragraphs 1C and 1D of the plaint were the properties of Vithal and defendants Nos. 6 and 9 alone were entitled thereto. Janaki defendant No. 7 contended that all the properties described in the plaint in paragraphs 1A, 1B, 1C and 1D were purchased by her husband Ramchandra; that in respect of properties described in paragraph 1A the sale-deed was executed in favour of Ramchandra and he has paid the consideration therefore and on the land thereafter a structure was constructed which was described in paragraph 1B of the plaint. According to her contentions both the properties in paragraphs 1A and 1B belonged to Ramchandra and neither the plaintiff nor the other persons belonging to the branches of Ramchandra's brothers were entitled to any share therein. She also contended that the properties described in paragraphs 1C and 1D though were standing in the name of Vithal they were actually purchased out of the funds supplied by Ramchandra and the purchase in the name of Vithal was merely benami and she was also entitled to the same. The trial Court held that all the properties described in paragraphs 1A, 1B, 1C and 1D of the plaint are joint family properties and the plaintiff was entitled to 10.2/3 pies share in the same. The trial Court held that Ramchandra had purchased the property described in paragraph 1A of the plaint on December 7, 1931 from Gangan for the benefit of the joint family and from joint family funds as he was then the manager; that Ramchandra gave Vardi to Talathi in 1942 and thereby allotted and admitted shares of his brother Vithal and nephews, plaintiff and defendants Nos. 1 to 5, who are the sons of Laxman. The trial Court rejected the contention of defendant No. 6, Pratap that the property which stood in the name of his father was exclusively acquired by his father and as such other persons had no share therein. The trial Court also rejected the contention of defendant No. 6, the son of Vithal, that his father paid the price in respect of properties purchased by Ramchandra under the sale-deed dated December 7, 1931 and Ramchandra had therefore given three annas share to his father Vithal. The trial Court also rejected the contention of defendant No. 6 that the properties described in paragraphs 1C and 1D of the plaint were the self-acquired properties of Vithal. The trial Court held that all the suit-properties were the joint family properties of the three brothers Ramchandra, Laxman and Vithal and whatever property was acquired in the name of any one of the brothers was blended in the joint family properties. Accordingly the trial Court held that the plaintiff was entitled to partition and declared that he had 10.2/3 pies share in all the suit-properties. In view of these findings the trial Court declared the share of the plaintiff and

directed his share therein to be separated by partition by metes and bounds equitably. Other ancillary directions were also given by the trial Court to effect this partition. Against this decree Janaki, widow of Ramchandra, filed Civil Appeal No. 76 of 1969 and Rukmini widow of Vithal and Pratap their son filed Civil Appeal No. 79 of 1969 in the District Court at Ratnagiri. Both these appeals were inter alia heard together. The learned District Judge confirmed the finding of the trial Court that all the properties described in paragraphs 1A, 1B, 1C and 1D of the plaint were joint family properties. The appellate Court held that the properties purchased under the sale-deed exh. 192 dated July 24, 1920 being properties at serial Nos. 5, 20, 22, 23 and 25 in paragraph 1D of the plaint were not purchased from out of the joint family fund and they were not self-acquired properties of deceased Vithal. Though the consideration amount in respect of this transaction was given: by Ramchandra it was not a transaction benami for Ramchandra. According to the appellate Court Ramchandra abandoned his separate interest and treated this property as a joint family property. The appellate Court also held that the properties purchased under the sale-deeds exhs. 181, 182, 183, 193, 194 and 300 (being the properties described inter alia in paragraph 1D of the plaint) were not purchased from the joint family funds; that they were not self-acquired properties of deceased Vithal that the consideration therefore was paid by Ramchandra but the transaction was not benami that Ramchandra had abandoned his separate claim to the said property and thrown the same in the common hotch-potch. The learned District Judge also held that the property purchased under the sale-deed exh. 196 dated November 3, 1941 (being the property at serial No. 1C of the plaint) was not purchased out of the joint family funds; that it was not purchased out of the separate funds of Vithal that the consideration therefore was paid by Ramchandra but the transaction was not benami in the name of Vithal. The learned District Judge confirmed the finding of the trial Court that Ramchandra abandoned his separate interest in this property and treated it as a joint family property. The learned District Judge also held that the property described in paragraph 1A of the plaint purchased under the sale-deed dated December 7, 1931 (exh. 180) was not purchased out of joint family funds; that Vithal had not contributed his appropriate share towards the purchase of this property; that the consideration therefore was paid by Ramchandra, husband of Janakibai that the constructions on the said properties were effected out of joint family funds; that Ramchandra treated the properties described in paragraphs 1A and 1B of the plaint as belonging to the joint family. In view of these findings the learned District Judge declared that the plaintiff and defendants Nos. 1, 2, 3, 4, 5 and 8 are each entitled to $9 \frac{1}{7}$ pies share in all the suit properties; that the defendant No. 7 Janakibai is entitled to 5 annas 4 pies share in the suit properties and that defendants Nos, 6 and 9 together are entitled to 5 annas 4 pies share therein. Appropriate directions were given for partition and separate possession of the plaintiff's share in the suit-properties. Direction was also given that the rest of the defendants would be entitled to partition and possession of their respective shares in the suit-properties on payment of necessary Court fees. It is against

this decree passed by learned District Judge that Second Appeal No. 259 of 1971 is filed by Janakibai defendant No. 7 and Second Appeal No. 1202 of 1972 is filed by Pratap Vithal Salvi defendant No. 6.

2. Mr. Abhyankar on behalf of Janakibai defendant No. 7 contended that all the properties described in paragraphs 1A, 1B, 1C and 1D of the plaint were purchased by Ramchandra and they were self-acquired properties of Ramchandra. He, however, submitted that in respect of properties described in paragraphs 1C and 1D of the plaint, even though the sale-deeds were taken in the name of Vithal, the purchase money was paid by Ramchandra, her husband, it was taken benami in the name of Vithal simply because Ramchandra was a Government employee and he did not desire that the Immovable properties purchased should stand in his name even though the consideration amount was paid by him. In short his submission was that the properties described in paragraph 1C and 1D of the plaint, though standing in the name of Vithal, were the properties of Ramchandra and the name of Vithal in respect thereof was merely benami and he had no beneficial or legal interest therein. So far as the properties described in paragraphs 1A and 1B were concerned, not only were they purchased in the name of Ramchandra and were standing in his name but the consideration in respect thereof was also paid by him and therefore none of the other members belonging to the branches of the two brothers of Ramchandra had any interest therein, Mr. Paranjape on behalf of Pratap, defendant No. 6, submitted that the pieces of land described in paragraphs 1C and 1D of the plaint which are standing in the name of Pratap's father, Vithal, were the separate and self-acquired properties of Vithal that the consideration amount in respect thereof was paid by Vithal from his own earnings and none of the other members belonging to the other branches of the brothers of Vithal had any share or title therein. Mr. Jadhav, on the other hand, on behalf of the respondents Nos. 1 and 8 submitted that the view that has been taken by both the Courts that the properties described in paragraphs 1A to 1D of the plaint are the joint family properties is the correct view and the shares therein given by the learned District Judge in the appeal correctly represent the respective shares of the various parties.

3. The parties to these appeals are members of the families of three sons of Tanbarao, namely, Ramchandra, Laxman and Vithal. The plaintiff, defendants Nos. 1 to 5 and defendant No. 8 belong to the branch of Laxman being the son of Tanbarao. Defendant No. 6 and defendant No. 9 belong to the branch of Vithal being the son of Tanbarao, while defendant No. 7 Janakibai belongs to the branch of Ramchandra being his widow. If it is undoubtedly true that initially the plaintiff when he instituted the suit contended that the properties described in paragraphs 1A and 1B of the plaint were joint family properties but later on after the written-statement was filed by the defendant No. 1 he amended the plaint and also added a plea that the properties described in paragraphs 1C and 1D of the plaint are also joint family properties and he is entitled to a share therein. I have to consider whether the concurrent view taken by both the Courts that the

properties described in paragraphs 1A to 1D of the plaint are joint family properties is justified or whether any other contention of Mr. Abhyankar or Mr. Paranjape has to be upheld. So far as the properties described in paragraphs 1C and 1D of the plaint are concerned, they are agricultural pieces of land while the property described in paragraph 1A of the plaint is a piece of land over which a structure which is described in paragraph 1B has been constructed. It will be necessary to point out, in order properly to appreciate the rival contentions of both the parties, the order in which the various properties were purchased. The properties referred to in the suit as having been purchased earliest in point of time are the five pieces of land known as Kond property. They were purchased under a sale-deed exh. 192 executed on July 24, 1920 for the price of Rs. 4,000 and the sale-deed stands in the name of Vithal. The aggregate area of these five pieces of land is 3 acres and 31 gunthas and they appear to be fertile pieces of land as the rate of assessment exceeds Rs. 3 per acre. The next property that has been purchased is a piece of land under a sale-deed dated August 20, 1921 exh. 193 for a price of Rs. 75 and it also stands in the name of Vithal, Thereafter in order of time by sale-deed exh. 180 executed on December 7, 1931 pieces of land described in paragraph 1A of the plaint were purchased for Rs. 2,000 in the name of Ramchandra husband of Janakibai. Between the years 1930 and 1940 structures were erected on the land described in paragraph 1A and it is the case of Janakibai that these structures were erected between the years 1930 and 1940 and the cost of construction was met by Ramchandra from his own earnings. Then in order of time by sale-deed exh. 195 dated June 6, 1932 a piece of land was purchased for Rs. 200 in the name of Vithal. Thereafter by sale-deed exh. 181 dated October 29, 1940 four pieces of land were purchased in the name of Vithal for Rs. 1,000. It appears that the property described in paragraph 1C of the plaint was initially mortgaged by one Gangan under a mortgage deed dated November 9, 1936 (exh. 298), ostensibly in the name of Vithal with a view to secure repayment of the sum of Rs. 4,000. The equity of redemption in this property was purchased from the heirs of the mortgagor on November 3, 1941 for a consideration of Rs. 4,500 in the name of Vithal This is the property described in paragraph 1C of the plaint. By sale-deeds exh. 183, exh. 300 and exh. 182 respectively dated December 8, 1941, February 8, 1944 and January 6, 1951 agricultural pieces of land were purchased for Rs. 100, Rs. 100 and Rs. 50 respectively in the name of Vithal. This is the order in which the different properties which are the subject-matter of the suit were purchased.

4. The question to be considered is whether these or any of these properties have been rightly held to be joint family properties by both the Courts, in which the parties to this litigation have shares. It is not disputed by any of the parties that if they are joint family properties, then the shares that have been declared by the learned District Judge therein are correct. It is found by both the Courts that the only ancestral properties which belonged to Tanbarao were the lands bearing survey Nos. 33, 7 and 102 situate at Phansopad measuring about 53/4 gunthas and the maximum pieces of agricultural lands that were owned by

Tanbarao admeasured 9 1/2 gunthas as indicated in Khata No. 104 exh. 220. If this was the property which was possessed by Tanbarao then naturally it cannot form nucleus for acquisition of the subsequent properties later on. It is well-settled that in a suit for partition when a party contends that a particular property is joint family property, the burden of proving that it is so, rests on the party asserting it. To render the property joint the plaintiff must prove that the family was possessed of some property with the income of which the property could have been acquired or from which the presumption could be drawn that all the properties possessed by the family are joint family properties. Where it is established and admitted that the family possessed some joint family property, which from its nature and relative value had formed the nucleus from which the property in question may have been acquired, a presumption arises that it is a joint property and the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family funds. In order to give rise to the presumption the nucleus must be such that with its aid the property claimed to be joint could have been acquired. However, it is clear that there is no presumption that a family because it is joint possesses joint family property or any property. It is equally clear that property which was originally separate or self-acquired property of a member of a joint family may by the operation of the doctrine of blending become joint family property if it is voluntarily thrown by him into the common stock with the intention of abandoning all separate claims in regard thereto. A clear intention to waive his separate rights must be established and it will not be inferred on the very fact of his allowing other members of his family to use it jointly with him nor from the fact that the income of the separate property was used to support the other members of the family.

5. Having regard to the meagre nature of the property that belonged to Tanbarao it is not possible for any one of the parties to contend that the properties owned by Tanbarao could have formed the nucleus out of which all or any of the properties described in paragraphs 1A to 1D of the plaint could have been purchased. Tanbarao died in or about the year 1904. His eldest son Ramchandra started serving in the Police Department on January 3, 1916 and was earning salary in the grade of Rs. 75-5-145. He retired from service as a sub-inspector. Laxman is the second son of Tanbarao and he was serving as a peon in the Criminal Tribes Settlement at Sholapur in the year 1918 and within a short time he was taken up as a head constable. Later on, he too became a sub-inspector. So far as the third son Vithal was concerned, he studied in the native place and cultivated the family lands. So far as Vithal was concerned he was hardly 19 or 20 years old when the first Immovable property was purchased, under the sale-deed exh, 192. By this sale-deed on July 24, 1920 five pieces of land known as Kond property in all admeasuring 3 acres and 31 gunthas were purchased for Rs. 4,000. Looking to the earning capacity of the three brothers, there was no possibility of Vithal having contributed any share towards the purchase of this property. The major part of the purchase price must have been contributed by

Ramchandra and a token contribution might have been made by Laxman he having been employed in Government service about two or three years prior thereto. For reasons best known to Ramchandra even though a major part of the purchase price, if not the whole, was paid by him he took the sale-deed in the name of his brother Vithal. There is no controversy that not only right upto the time Ramchandra retired from service Vithal continued to cultivate this land on behalf of the family, but even after Ramchandra retired no attempt was made by him to have this land retransferred in his name. Actually the conduct of Ramchandra and Laxman showed that even though the purchase price might have been substantially, if not wholly paid by Ramchandra and only a token contribution was made by Laxman, both the brothers treated this property as joint family property on the footing that it was thrown into the common stock. The learned District Judge has taken the view that the entire price for purchase of this property was paid by Ramchandra but looking to the circumstances which I have pointed out it is quite proper to infer in the absence of direct evidence that most of the price, if not the entire price, was paid by Ramchandra and there might have been a token contribution by Laxman and no part of the price was paid by Vithal. However, the three brothers treated this property as a joint family property on the footing that it was thrown into the common stock. Such conclusion is only consistent with the conduct of the parties right upto the death of Ramchandra in the year 1956.

6. If the property purchased under the sale-deed exh. 192 is treated as a joint family property on the footing that it has been blended into the common stock, then all the other properties described in paragraph 1D purchased under the sale-deeds exh. 193, exh. 194, exh. 181, exh. 183, exh. 300 and exh. 182 are under the Hindu law presumed to be joint family properties. The price paid for the properties varies between Rs. 50 and Rs. 1,000 and it will not be unreasonable to presume that the family was in a position to save the amounts of price paid for the properties during the period from 1921 to 1951 when these purchases were effected. Thus once the property purchased under sale-deed exh. 192 is deemed to be joint family property in the absence of independent evidence by Vithal to show that it was purchased from his self-acquisition it will be legitimate to presume that all the other properties above described are also joint family properties.

7. So far as the properties described in paragraph 1A are concerned, they were purchased under the sale-deed exh. 180 on December 7, 1931 for the price of Rs. 2,000. Between the years 1930 and 1940 structures have been erected on these lands, which are described in paragraph 1B of the plaint. Even though the price as held by the learned District Judge appears to have been paid by Ramchandra, his conduct in giving Vardis exh. 239 and exh. 241 clearly shows that he was never anxious to treat it as self-acquired property and he treated it as property of the family. Even after the structures were erected there is unequivocal expression of opinion on the part of Ramchandra as shown in his letter dated March 1, 1956 written by him to the defendant No. 2. In this letter

he has clearly stated "You know the house belongs to everyone- I need not write anything more". Thus even though for purchase of the property described in para. 1A and for erection of the structures described in para. 1B of the plaint, a substantial part of the price and/or expenditure, if not the whole of it, was paid or incurred by Ramchandra, he treated it as joint family property as exhibited by his clear expression of intention in the above letter. Thus both the Courts, in my opinion, were right in taking the view that these properties were also thrown into the common hotch-potch and were treated as the properties of the joint family.

8. So far as the property described in para. 1C of the plaint is concerned, initially mortgagor Gangan had mortgaged this property on November 9, 1936 by mortgage-deed exh. 298 to secure repayment of the sum of Rs. 4,000 and the mortgage-deed was taken ostensibly in the name of Vithal. This is what is described by the parties as Nachana property. The equity of redemption was ultimately purchased from the mortgagors on November 3, 1941 under a sale-deed exh. 196 for the price of Rs. 4,500 and that sale-deed is also taken in the name of Vithal. It appears from the books of account of Gangan and the entries therein that the amount was advanced by Ramchandra and not by Vithal. Actually at no place in the books of account maintained by Gangan the name of Vithal appears. Whatever entries were made in the books of account indicated that the amounts were lent by Ramchandra. However, probably by reason of the fact that Ramchandra was in Government service he preferred to have not only the mortgage but also the sale of equity of redemption in the name of his brother Vithal. Simply because the property was purchased in the name of Vithal it cannot be treated as the self-acquired property of Vithal. In fact, Vithal did not have self-acquisition out of which he could have purchased the same. The consideration both in respect of the mortgage as well as the purchase of equity of redemption has flowed from Ramchandra and he has purchased the same in the name of Vithal with the intention of treating it as joint family property by throwing it into the common stock. The very fact that even after retirement of Ramchandra, notwithstanding the fact that the consideration amount for purchase of the Nachana property was paid by Ramchandra, he allowed it to be kept in the name of Vithal, clearly shows the intention to treat this property as joint family property. Thus, in my opinion, both the Courts were right in taking the view that the properties described in paragraphs 1A, 1B, 1C and 1D of the plaint are joint family properties. If they are joint family properties there is no controversy between the parties that the correct shares to which the parties to this litigation are entitled are as set out by the learned District Judge in the decree. Thus the decree passed by the learned District Judge is just and proper.

9. In the result, both the appeals Nos. 259 of 1971 and 1202 of 1972 are dismissed. As this is a litigation between the members of the family I direct that each party will bear its own costs throughout.

10. There is one direction which I would, however, like to give as regards the manner in which the partition should be effected. While dividing the houses by

metes and bounds, if without causing prejudice to the rights of other parties, a house or a portion of a house which is in possession of a particular party can be allotted to his or her share, then equitable consideration ought to weigh with the Commissioner while partitioning houses by metes and bounds and such house or the portion of the house as far as possible should be allotted to the party in possession thereof.