

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

SECOND APPEAL NO. 1408 OF 2005
WITH
CIVIL APPLICATION NO. 9083 OF 2005

1. Smt. Anusaya W/o Ramkrishna Sathe
(Since deceased through L.Rs.)
 - 1A) Subhash Bhagwat Lokhande,
Age 53 years, Occ. Agriculture,
 - 1B) Chandrakant Bhagwat Lokhande,
Age 48 years, Occ. Agriculture,

Both R/o. Sawantsar, Tq. Kopargaon,
District Ahmednagar.
 - 1C) Sau. Mandakini Raghunath Gaikwad,
Age 57 years, Occ. Household,
R/o Kokamthan, Tal. Kopargaon,
District Ahmednagar.
 - 1D) Sau. Pushpa @ Kamal Bhikaji Aagare,
Age 50 years, Occu. Household,
R/o. Ekrukhe, Tal. Rahata,
District Ahmednagar.

(Amendment made as per order passed
in Civil Application No. 6451/2006 dated
25/1/2007)
2. Smt. Rakhamabai Bhagwat Lokhande,
(Since deceased through L.Rs.)
 - 2A) Subhash Bhagwat Lokhande,
Age 53 years, Occ. Agriculture,
 - 2B) Chandrakant Bhagwat Lokhande,
Age 48 years, Occ. Agriculture,

Both R/o. Sawantsar, Tq. Kopargaon,
District Ahmednagar.

2C) Sau. Mandakini Raghunath Gaikwad,
Age 57 years, Occ. Household,
R/o. Komamthan, Tal. Kopargaon,
District Ahmednagar.

2D) Sau. Pushpa @ Kamal Bhikaji Aagre,
Age 50 years, Occ. Household,
R/o Ekrukhe, Tal. Rahata,
District Ahmednagar,

(Amendment made as per order passed
in Civil Application No. 6450/2006 dated
25/1/2007)

3. Shri. Chandrakant Bhagwat Lokhande,
Age 47 years, Occ. Agriculture,
R/o Savantsar, Taluka Kopergaon,
District Ahmdenagar.

....Appellants.
(Ori. Deft. Nos. 1 to 3)

Versus

1. Smt. Surekha Shashikant Sathe,
Age 43 years, Occ. Household,

2. Smt. Shakuntala Shivram Sathe,
Age 76 years, Occ. Agriculture,

3. Narendra Shivram Sathe,
Age 34 years, Occ. Service,

4. Rajendra Shivram Sathe,
Age 31 years, Occ. Agriculture,

Nos. 1 to 4 all R/o. Gokulpura, Agra Road,
Kalyan, District, Thane.

5. Smt. Lata W/o Vijay Kakad,
Age 29 years, Occ. Agriculture,
R/o. Chaudhari Chawl, Quality Factory,
Beturkar Wada, Kalyan, Dist.Thane.

6. Smt. Usha Vilas Mehendale,

Age 39 years, Occ. Service,
R/o. Fadkewada, Old Milk Naka,
Gupte Chauk, Kalyan,
District Thane.

7. Smt. Mandabai w/o Shivaji Sathe,
Age 44 years, Occ. Agriculture,
8. Dipak Shivaji Sathe,
Age. Minor through guardian mother
Mandabai Shivaji Sathe,

Nos.7 and 8 R/o. Naygaon,
Tal. Shrirampur, District Ahmednagar.

....Respondents.

(Resp.No. 1 to 4 - Ori.
Plffs., resp. Nos. 5 to 8 -
Ori. Deft. Nos. 4 to 7)

Mr. S.K. Shinde, Advocate for appellants.

Mr. V.D. Hon, Advocate for respondent Nos. 1 to 8.

CORAM : T.V. NALAWADE, J.

DATED : 20th October, 2015.

JUDGMENT :

1) The appeal is filed against judgment and decree of Regular Civil Appeal No. 40/1999, which was pending in the Court of 2nd *Ad-hoc* Additional District Judge, Shrirampur, District Ahmednagar. The first appeal was filed by plaintiffs of Regular Civil Suit No. 520/1991, which was pending in the Court of Civil Judge, Junior Division, Shrirampur for relief of partition and separate possession of Joint Hindu Family Properties. The suit was dismissed by the trial Court. The first appellate Court has set aside the decision of trial Court and has given the relief

of partition and possession in favour of plaintiffs. The defendants have challenged the decision. Both the sides are heard.

2) It is the case of plaintiffs that one Bapuji Sathe was common ancestor of plaintiffs and defendants. Bapuji had two sons by name Ramkrushna and Shivram. The plaintiffs are successors of Shivram and defendants are successors of Ramkrushna.

3) It is the case of plaintiffs that after the death of Bapuji, Joint Hindu Family Properties left behind by Bapuji, were entered in the name of Ramkrushna in the revenue record as he was elder between the two sons of Bapuji. It is contended that Ramkrushna died on 20.9.1977.

4) It is contended that after the death of Ramkrushna on 20.9.1977, the defendants like defendant No. 1, widow of Ramkrushna, took steps to enter the names of only successors of Ramkrushna in the record of rights. It is contended that when the properties were Joint Hindu Family Properties, the name of Shivram was not entered and so, he applied to revenue authority for entering his name in the record of rights of the properties which were standing in the name of Ramkrushna on 26.11.1985.

It is contended that in the said proceeding, his name was entered for 8 Ana share. The properties bearing Gat No. 235, 227, 276 and 12 were standing in the name of Ramkrushna and in the record of these properties, the name of Shivram also came to be entered in the year 1985.

5) It is the case of plaintiffs, successors of Shivram that Shivram was in service in Indian Railways and he lived in Mumbai along with family till his retirement. It is contended that Shivram retired in the year 1972 and he shifted to the native place in the year 1978. It is contended that Shivram started cultivating Joint Hindu Family Properties along with Ramkrushna. It is the case of plaintiffs that when Shivram was working in Mumbai, he was helping Ramkrushna by giving money.

6) It is the case of plaintiffs that after the death of Ramkrushna and after entering the name of Shivram for 8 Ana share, separate portions of the shares of Ramkrushna and Shivram were created by creating *bandh* between the two portions in agricultural lands bearing Gat Nos. 235, 227, 276 and 12. It is contended that since then they started cultivating their shares from the four properties separately.

7) It is the case of plaintiffs that property bearing Gat No. 156, admeasuring 9 Hectors 35 R., also belongs to the Joint Hindu Family. This property is described in plaint para 1/A. It is contended that the house properties described as 1/B in the plaint are also Joint Hindu Family Property. It is contended that the agricultural land bearing Gat No. 156 was purchased by Ramkrushna under registered sale deed dated 15.9.1943 in the name of his wife - Sundarabai. Sundarabai was other wife of Ramkrushna. It is contended that though the properties were purchased in the name of Sundarabai, as they were purchased from the income of Joint Hindu Family Properties, Shivram has 1/2 share in those properties also.

8) Defendant Nos. 1 to 3 i.e. widow of Ramkrushna, daughter of Ramkrushna and grandson of defendant No. 1 filed written statement. They admitted the relationship of plaintiffs with them. They contested the suit by contending that Ramkrushna was employed in Irrigation Department of the State and he had separate source of income. They contended that Ramkrushna never took money from Shivram. They contended that land Gat No. 156 was purchased by Ramkrushna from his separate source of income in the name of Sundarabai. It is contended that Sundarabai was living separate from the family

which Ramkrushna was having from other wife. It is contended that the properties described in plant para 1A and 1B were the properties of Ramkrushna, though they were purchased in the name of Sundarabai. They contended that partition had taken place between plaintiffs and defendants in the year 1985 in respect of all the Joint Hindu Family Properties and so, the suit is not tenable.

9) The submissions made and judgments of the Courts below show that in the Courts below, both the sides had submitted that they did not want to disturb the factual position of properties mentioned in plaint para 1B like Gat Nos. 235, 227, 276 and 12. They had submitted that separate portions were created for the two branches of these properties and there was partition of these properties. So, the suit was prosecuted by the plaintiffs only in respect of properties described in plant para 1A and 1C i.e. Gat No. 156 and all the house properties. Both the sides gave evidence.

10) The Trial Court considered the area of Joint Hindu Family properties which was available as nucleus. The area of these lands was around 7 Hectors 76 R. The trial Court held that it was probably a dry land and it was not possible to purchase

Gat No. 156, having area of 9 Hectors 35 R., from the income of Joint Hindu Family properties. The Trial Court also held that it was not possible to purchase the house properties mentioned in plaint para 1C from the income of Joint Hindu Family Properties. The circumstance that in the year 1985 when the aforesaid properties were divided, properties described in plaint para 1A and 1C were not considered and not partitioned, was held against plaintiffs. The circumstance that till the death of Sundarabai, no steps were taken by the plaintiffs in respect of property No. 1A and 1C is also considered against the plaintiffs. The first appellate Court has held that when it is admitted that the Joint Hindu Family had agricultural lands, the burden was on defendants to prove that that the properties described in plaint para 1A and 1C were acquired from separate income by Ramkrushna and they were self-acquired properties of Ramkrushna. The first appellate Court has held that there is no convincing evidence in that regard and so, the relief of partition needs to be given in respect of these properties to the plaintiffs.

11) When the appeal was admitted by this Court (Other Hon'ble Judge), following substantial question of law was formulated.

(i) "Whether the District Court was justified in

reversing finding of the Trial Court and holding that the properties described in para 1A and 1C of the plaint are joint family properties and as such, liable for partition ?"

12) It can be said that it is necessary for appellants/defendants to show that there is perversity in the judgment of the first appellate Court and that may be due to circumstances like not considering relevant material or committing mistake in application of Hindu Law.

13) Before considering the evidence, following admitted facts need to be kept in mind.

(i) Ramkrushna was elder than Shivram and his name was entered in the revenue record after the death of their father Bapuji as a person who was owner and who was cultivating the lands. Admittedly, he was *Karta* of Joint Hindu Family of plaintiffs and defendants. Admittedly, the severance of status took place in the year 1985.

(ii) It is not disputed that Shivram was employed in Indian Railway and till his retirement, he lived in Mumbai with his family. Prior to 1985 he had probably no opportunity

to manage the properties. His name came to be entered in the revenue record in the year 1985 and that too, in respect of lands Gat Nos. 235, 227, 276 and 12 and since then, he started getting separate income in respect of the portion of his share from these lands.

(iii) As Shivram was living in Mumbai, after the death of Ramkrushna, successors of Ramkrushna had got entered their names in the revenue record and they had avoided to inform that Shivram was also having share in the aforesaid properties. This entry continued for many years.

(iv) The defendants are not disputing that Ramkrushna had purchased the properties described in plaint para 1A and 1C in the name of Sundarabai, his wife. From this pleading, it can be said that they are not disputing that Sundarabai had no separate source of income and so, these properties were not self-acquired properties of Sundarabai.

(v) During the lifetime of Sundarabai, one mutation was made and some portion of Gat No. 156 was shown to be given in partition to defendant No. 3, the heir of Ramkrushna from other wife. Sundarabai has not left

behind any issue.

14) Evidence is given by plaintiff Nos. 3 and 4, son and widow of Shivram, in support of aforesaid case. Though there are some admissions given by widow of Shivram showing that the property was of Sundarabai, those admissions cannot be considered in view of the aforesaid pleadings of defendants.

15) Defendant - Rakhmabai, who is daughter of other wife of Ramkrushna has given evidence that it was self-acquired property of Sundarabai. It is already mentioned that the pleading was otherwise and defendants came with the case that properties described in plaint para 1A and 1C were purchased by Ramkrushna in the name of Sundarabai. Thus, the evidence of Rakhmabai of this nature cannot be considered.

16) The record like service book of Ramkrushna was proved by examining one employee of Irrigation Department by the defendants. This record shows that in the year 1943, Ramkrushna was confirmed in his service and in that year, he started getting monthly salary of Rs. 33.12 ps. Admittedly, Gat No. 156 was purchased in the year 1943 for consideration of Rs. 1500/-. Thus, there was no sufficient income of Ramkrushna

from salary and there is no record to show that he had accumulated that much of amount prior to 1983 from other source of income. On the other hand, there were agricultural lands, which were ancestral and joint family properties, admeasuring 7 Hectors 76 R. and so, there was the nucleus. Ramkrushna was *Karta* of the joint family and so, the income was coming in to his hands from the Joint Hindu Family Properties. Though ordinarily, *Karta* is not expected to maintain accounts and he is expected to spend on the members of the Joint Hindu Family, at the time of partition and when there are circumstances like present one like *Karta* purchasing property in the name of his wife, it becomes necessary for *Karta* to explain as to what was the income from Joint Hindu Family Properties, what was spent and how families were maintained. In this behalf, it needs to be kept in mind that both Ramkrushna and Shivram were in service. Shivram was living in Mumbai. Though his son has given admission that Ramkrushna was giving income to Shivram, this admission cannot be used as it is not the case of defendants that right from the beginning these two brothers were dividing the income from agriculture and the income, which was coming in to hands of Ramkrushna from agriculture was used for purchasing the suit properties. The plaintiffs have come with the case that Shivram was giving money to Ramkrushna by

way of help.

17) Ramkrushna was getting entire income of Joint Hindu Family Properties. He had married two wives. Apparently, he was keeping two wives in separate houses. Thus, from his salary income, he was required to spend for his two families, from two wives. There was no reason for him to spend for the family of Shivram. In view of these circumstances, the burden was heavy on the defendants to show that Shivram had a separate source of income and from that income, he purchased properties described in plaint para 1A and 1C.

18) Both the sides placed reliance on the observations made by Apex Court in the cases reported as **AIR 1969 SUPREME COURT 1076 [Mudigowda Gowdappa Sankh and Ors. Vs. Ramchandra Revgowda Sankh (dead) by his L.Rs. and Anr.]** and **2003 SAR (Civil) 817 [D.S. Lakshmaiah and Anr. Vs. L. Balasubramanyam and Anr.]**. The Apex Court has laid down as follows :-

"There is no presumption that a Hindu family merely because it is joint, possesses any joint property. The burden of proving that any particular property is joint family property, is, therefore, in the first instance upon the person who claims it as

a coparcenary property. But if the possession of a nucleus of the joint family property is either admitted or proved, any acquisition made by a member of the joint family is presumed to be joint family property. This is however subject to the limitation that the joint family property must be such as with its aid the property in question could have been acquired. It is only after the possession of an adequate nucleus is shown, that the onus shifts on the person who claims the property as self-acquisition to affirmatively make out that the property was acquired without any aid from the family estate."

19) There cannot be dispute over the proposition made by the Apex Court in the case cited supra. Purchasing of property by one coparcener, when he was living in joint family, is different thing than purchasing a property by *Karta* in the name of his wife when he was getting income from Joint Hindu Family Properties. The burden is more on *Karta* and his successors to show that *Karta* had separate source of income and from that income, he purchased the properties in the names of his wife or children. In view of peculiar facts and circumstances of the present case, this Court holds that the initial burden was discharged by the plaintiffs and it was up to the defendants to show that Ramkrushna had separate source of income, which was

sufficient for purchasing the properties described in plaint para 1A and 1C and that he could have done that after spending on his families from two wives. Thus, it is not possible to believe in this case that properties described in plaint para 1A and 1C were self-acquired properties of Ramkrushna and they were acquired without any aid from the joint family estate.

20) From the evidence of parties, it can be said that plaintiffs had no personal knowledge as everything was being done behind their back and witness examined by the defendants has also no personal knowledge. When there is the record of aforesaid nature and there is evidence to show that there was a nucleus and Ramkrushna was required to spend much on his two families, there was no other alternative than to hold that the properties were purchased from the income of joint family estate. Thus, the first appellate Court has not committed any error in giving decree in favour of plaintiffs. The first appellate Court has considered the aforesaid material. On pre-ponderance of probabilities, the decision is given.

21) The circumstance that some properties which were standing in the name of Ramkrushna were partitioned in the year 1985 cannot come in the way of plaintiffs to get share in

properties described in plaint para 1A and 1C. These properties were standing in the name of Sundarabai and it can be said that only after the death of Sundarabai, steps were taken by plaintiffs to get share in those properties also. As the properties were purchased by Ramkrushna and from joint family estate, the plaintiffs are entitled to get share in these properties. In the result, the point is answered against the appellants.

22) So, the appeal is dismissed. Civil Application is disposed of. The learned counsel for appellants requests for stay and eight weeks time to challenge the present decision. Eight weeks time is given as prayed.

[T.V. NALAWADE, J.]

ssc/