

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

SECOND APPEAL NO. 245 OF 1993

Sow. Kaushalyabai w/o Apparao Patil

Age : 45 Yrs., Occ. Household & Agri.,

R/o : Ravi, Tq. Mukhed, District : **APPELLANT/**
Nanded. **[ORI. PLAINTIFF]**

V E R S U S

1. Apparao s/o Ramchandra Patil
[since deceased Thr. L.Rs. :]

1-A Sunita w/o Shankarrao Patil
Age : 35 Yrs., Occ. Household,
R/o : Ravi, Tq. Mukhed, District :
Nanded.

2. Govind s/o Hullappa Gaud
[since deceased Thr. L.Rs. :]

2/1. Tanabai w/o Govind Gaud
Age : 70 Yrs., Occ. Household,
R/o : Ravi, Tq. Mukhed, District :
Nanded.

2/2. Hullappa s/o Govind
[since deceased Thr. L.Rs. :]

- 2/2 (a) Arun Hullappa Zugande
Age : 40 Yrs., Occ. Agri.,
R/o : Ravi, Tq. Mukhed,
District : Nanded.
- 2/2 (b) Sanjay Hullappa Zugande
Age : 38 Yrs., Occ. Agri.,
R/o : Ravi, Tq. Mukhed,
District : Nanded.
- 2/2 (c) Ramesh Hullappa Zugande
Age : 35 Yrs., Occ. Agri.,
R/o : Ravi, Tq. Mukhed,
District : Nanded.
- 2/2 (d) Narayan Hullappa Zugande
Age : 32 Yrs., Occ. Agri.,
R/o : Ravi, Tq. Mukhed,
District : Nanded.
- 2/3. Ausabai Tulshiram Surnar
Age : 35 Yrs., Occ. Household,
R/o : Ravi, Tq. Mukhed,
District : Nanded.
- 2/4. Dhondubai w/o Shrirang
Age : 30 Yrs., Occ. Household,
R/o : Sawali, Tq. Mukhed,
District : Nanded.

3. Gyanoba Subhanrao Godaji
[since deceased Thr. L.Rs. :]

3 (a) Smt. Padminibai Gyanoba
Age : 71 Yrs., Occ. Agri.
R/o : Ravi, Tq. Mukhed,
District : Nanded.

3 (b) Smt. Vimal Kishan Deokate
Age : 45 Yrs., Occ. Household,
R/o : Tamlur, Tq. Degloor,
District : Nanded.

3 (c) Sakharam Gyanoba
Age : 40 Yrs., Occ. Agri.
R/o : Ravi, Tq. Mukhed,
District : Nanded.

3 (d) Narayan s/o Gyanoba
Age : 35 Yrs., Occ. Agri.
R/o : Ravi, Tq. Mukhed,
District : Nanded.

4. Ramchandra s/o Tofa
[since deceased Thr. L.Rs. :]

4 (a) Venkat s/o Ramchandra Biradar
Age : Major, Occ. Agri.,
R/o : Ravi, Tq. Mukhed,
District : Nanded.

4 (b) Ashok s/o Ramchandra Biradar

Age : Major, Occ. Agri.,

R/o : Ravi, Tq. Mukhed,

District : Nanded.

4 (c) Lakshmibai w/o Baburao Dhulgude

Age : Major, Occ. Agri.,

R/o : Ravi, Tq. Mukhed,

District : Nanded.

4 (d) Narsabai w/o Ramchandra Biradar

Age : Major, Occ. Agri.,

R/o : Ravi, Tq. Mukhed,

District : Nanded.

5. Chandrakalabai w/o Shivaji

Age : 40 Yrs., Occ. Household,

R/o : Risagaon, Tq. Kandhar,

District : Nanded.

6. Prabhubai w/o Ganpatrao Naik

Age : 38 Yrs., Occ. Household &

Agri., R/o : Risagaon, Tq. Kandhar,

District : Nanded.

7. Rukhminibai w/o Nivartirao Patil

Age : 45 Yrs., Occ. Household &

Agri., R/o : Ravi, Tq. Mukhed,... **RESPONDENTS/**

District : Nanded.

[ORI. DEFENDANTS]

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Mr. N.P.Patil - Jamalpurkar, Advocate for Appellants.

Mr. G.J.Karne, Advocate for R.Nos. 3-A to 3-D.

Mr. R.D.Biradar, Advocate for R.Nos. 5 & 6.

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CORAM : T.V.NALAWADE, J.

DATE OF JUDGMENT : 29/04/2016

JUDGMENT :

1. The Appeal is filed to challenge the Judgment and Decree of R.C.S. No. 52/1977 which was pending in the Court of the Civil Judge [Jr.Division], Mukhed and also against the Judgment and Decree of R.C.A. No. 112/1981 which was pending in the Court of the 4th Additional District Judge, Nanded. Both sides are heard.

2. R.C.S. No. 52/1977 was filed for relief of partition of joint Hindu family property by one Dnyanoba, son of present appellant Kaushalyabai born from respondent Apparao. The Suit was filed against Apparao, 2 wives of Apparao including the present appellant and step sister of Dnyanoba. The suit was filed also against

the purchasers of the suit properties from Apparao. At the relevant time, age of Dnyanoba was 9 years and so he was allowed to be represented by his grand-father from maternal side by the trial Court as next friend. Now Dnyanoba is dead and the next friend is also dead. In view of these circumstances and as the L.R. of Dnyanoba , as the real mother of Dnyanoba, the Appeal is filed by the appellant though she was defendant in the Suit. Initially, the Suit was filed by her for Dnyaboba as next friend, but as she was defendant also, the Court had directed to see that some other person represents Dnyanoba as next friend.

3. The Suit was filed in respect of agricultural lands bearing S.No. 24 [to the extent of 8 Acres], S.No. 24 [to the extent of 8 Acres 17 G.], S.No. 22 [to the extent of 6 Acres 4 G.], S.No. 22 [to the extent of 2 Acres] and S.No. 15 [to the extent of 2 Acres]. The Suit was filed also in respect of one house property and open space. The plaintiff had contended that he has 1/3rd share in all these properties and he had prayed for partition and separation of his share. He had claimed relief of declaration that the sale deeds executed by

Apparao, defendant No. 1, to the other defendants, the purchasers, are not binding on him. The sale deeds and transactions as follows were challenged in the Suit.

- [i] Sale deed in favour of defendant No. 3, other wife of defendant No. 1 dated 14/12/1972.
- [ii] Sale deed in favour of defendant No. 4 dated 22/02/1969.
- [iii] Sale deed in favour of defendant No. 5 dated 03/01/1970.
- [iv] Sale deed in favour of defendant No. 6 dated 04/04/1970.
- [v] Sale deed in favour of defendant Nos. 7 and 8 dated 14/12/1972.
- [vi] Sale deed in favour of defendant No. 9 in respect of some portion of Gadhi, open space and house property dated 12/05/1975.

4. Defendant No. 3 is step mother of Dnyanoba and defendant Nos. 7 and 8 are step sisters. Defendant Nos. 7 and 8 were however born to the first wife of defendant No. 1, who died and after her death, defendant

No. 1 had married with defendant Nos. 2 and 3. Plaintiff Dnyanoba has one real sister, but she was not made party to the Suit.

5. It is the case of plaintiff that in the past there was ancestral and joint Hindu family property, 250 Acres of agricultural land and one Gadhi with open space. It is contended that the defendant No. 1 was addicted to bad vices and to satisfy them, before the birth of the plaintiff, defendant No. 1 had disposed of more than 200 Acres of agricultural land. It is contended that after the birth of plaintiff, land as mentioned above, was disposed of by defendant No. 1 in favour of defendant Nos. 3 to 9 and that was also done to satisfy his bad vices. Dnyanoba had contended that defendant No. 1 was not ready to partition the suit property and give his share and so the Suit was required to be filed.

6. Defendant No. 1 Apparao filed Written Statement and contested the Suit. He contended that he had effected the partition between himself and plaintiff and the share of plaintiff was given to him. He contended that prior to the birth of plaintiff, he had sold

some land, but those transactions were made for medical expenses on the treatment given to first wife. It is his case that the first wife did not survive even after the treatment and then he married other wife. He denied that he was addicted to bad vices and he had disposed of said properties for satisfaction of bad vices. He contended that the health condition of defendant No. 2, real mother of plaintiff, was also not good and for giving treatment to her also, he was required to sell around 50 Acres of agricultural land. He contended that for many years, no issue was born to defendant No. 2 and so with her consent, he married defendant No. 3. He contended that he was required to spend for marriages of defendant Nos. 7 and 8 and for that also he was required to sell some agricultural lands.

7. It is the case of defendant No. 1 that defendant No. 2, mother of the plaintiff, was taking side of Amrut, who has rivalry against defendant No. 1 and due to that, many litigations were started. He contended that to defend the said proceedings, he was required to spend huge amount and for that he was required to sell land after the birth of the plaintiff. He contended that in

the partition, he gave 6 Acres of land from S.No. 22 to defendant No. 3, though the document of gift was executed in her favour. Defendant No. 1 contended that the property which was given to the plaintiff, defendant No. 3 and the property which was sold to Amrut and others is not included in the Suit and so the Suit is bad for non inclusion of those properties. He also contended that the Suit is bad for non-joinder of necessary parties. He mentioned some properties which were not included in the Suit viz. 4 Acres 22 gunthas out of S.No. 22 shown to be given to defendant No. 3, properties sold under sale deed dated 13/05/1974, sale deed in favour of Yadav from S.No. 15 dated 14/12/1974, property sold to Amrut under sale deed dated 31/07/1974 admeasuring 3 Acres 30 gunthas out of S.No. 24 and property sold to one Dhondiba s/o Maruti under sale deed dated 13/05/1974 and the land sold to Maruti and Nivrati sons of Vishwanath out of S.No. 24 to the extent of 3 Acres 10 gunthas. He contended that he has sold open space to other persons viz. Gundappa and that property is also not included in the Suit. All the properties are situated at Ravi.

8. Defendant No. 1 specifically contended that on 23/04/1974 he had effected partition and he has given 6 Acres 7 gunthas out of S.No. 22 to plaintiff and some space of Gadhi was also given. He contended that he has given some portion of Gadhi to defendant No. 3. He contended that 3 families are living separate and they started living separate from the date of partition. He contended that some property given to defendant No. 3 is sold to one Shivaji and he is not made party to the Suit. He contended that the property was sold to Maruti and Nivrutti, but they are not made parties to the Suit. Similar Written Statement was filed by defendant Nos. 3,6 and 9. Defendant Nos. 4,5,7 and 8 adopted the Written Statement. Thus, only plaintiff and defendant No. 2, real mother of plaintiff, were interested in getting the relief.

9. On the basis of aforesaid pleadings, issues were framed. Both sides gave evidence. The trial Court held that there was no partition. The trial Court further held that suit properties were sold for legal necessity. The trial Court held that many other properties were sold after birth of the plaintiff, but they are not included in the

Suit and Suit is bad for non inclusion of those properties. The trial Court has observed that when some properties are given to the plaintiff and defendant No. 3 also and as they are not included in the Suit and as the real sister of plaintiff is not made party to the Suit, the Suit is not tenable.

10. The learned counsel for the appellant/original defendant No. 1 submitted that when burden of proof of the ground of legal necessity was on the defendant, the vendor or the purchasers, the trial Court had held that such burden was on plaintiff and so the error is committed in deciding the matter. It is true that such issue was framed by the trial Court. However, the Suit is decided not only on the basis of the finding given on this issue but the Suit is dismissed due to grounds of non inclusion of some properties and non-joinder of necessary parties to the Suit.

11. Defendant No. 1 was karta of the joint family and he had the power to alienate the joint family property, though for legal necessity. It needs to be kept in mind that the Suit was filed for relief of partition and

in partition, defendant No. 1 was entitled to get share in the property. The evidence on record shows that more than 50 Acres land was there with the family after the birth of plaintiff and in the Suit, partition is claimed only in respect of the area of 26 Acres. Thus, other properties are not included and the transactions made in respect of other properties are not challenged in the Suit. It can be said that there could have been equitable partition if all the properties were included in the Suit and during partition, the lands already sold by defendant No. 1 could have been given to his share if there was evidence to show that the purchasers need to be protected. All these circumstances need to be considered while appreciating the evidence given and while considering the claims made by the plaintiff.

12. In the Written Statement, defendant No. 1 has mentioned that he has transferred some properties to Amrut and Yadav after the birth of the plaintiff. Similarly, area of 6 Acres 7 gunthas is given to the plaintiff himself. These properties and some other properties are not included in the Suit. Defendant No. 2, mother of the plaintiff did not contest the Suit and now she is appellant.

13. In the substantive evidence, in Examination-in-Chief, the grand-father of the plaintiff had admitted that around 26 Acres portion was sold by defendant No. 1 and evidence shows that there was more area which could have been included in the Suit. He has however given evidence that the property was sold by defendant No. 1 for his own enjoyment and not for the needs of the family.

14. In the cross examination, the next friend of the plaintiff has admitted that defendant No. 1 had spent on the marriages of defendant Nos. 7 and 8. His evidence shows that these marriages were solemnized after the birth of plaintiff. He admits that area of 6 Acres 7 gunthas was given to the plaintiff though under the gift deed and it was joint family property. This property is not included in the Suit. He admits that some property was sold to Yadav, Amrut and that property is also not included in the Suit. He has shown ignorance about the sale transactions made in respect of portion of Gadhi in favour of Amrut and Vyankat. He could not say as to why other properties which could have been included in the Suit for partition, were not included. The witness of

plaintiff [P.W. 2] has admitted that till the date of Suit, plaintiff was living with defendant No. 1 and only after filing of the Suit, he started living separate from defendant No. 1. His evidence also shows that after the birth of plaintiff, defendant No. 1 had sold lands to Yadav, Amrut, Maruti and portion of Gadhi was sold to Vyankat and Gundappa. Similar evidence is given by P.W. 3. He admits that plaintiff and defendant Nos. 1 and 2 are living separate in separate portions of Gadhi.

15. There is revenue record and it shows that out of 2 H. 9 R. from S.No. 22/1, 1 H. 6 R. is standing in the name of defendant No. 3 and S.No. 22/4 admeasuring 88 R. is shown to be owned by the plaintiff. These properties are joint family properties. Copies of some sale deeds are produced on record and it can be said that the transactions made under sale deed dated 13/05/1974, 03/07/1970 and 22/08/1968 are not challenged in the Suit. It is the specific case of defendant No. 1 that one Amrut is behind this litigation. In view of these circumstances, such probability can not be ruled out.

16. The aforesaid discussion shows that around 40 – 50% property, which ought to have been included in the Suit for partition, is not included in the Suit. Some sale transactions are not mentioned in the Suit. Thus, there was no possibility of having equitable partition. Some property is already in possession of the plaintiff and he has not contended that the said property is also available for partition. It is already observed that defendant No. 1 had at least 1/3rd share in the suit property and he could have dispose of this share even when there was no legal necessity and so the Suit is bad for non inclusion of the properties in the Suit.

17. When Appeal was admitted on 31/10/2007, this Court had formulated following substantial questions of law.

[i] Whether in the facts and circumstances of the present case, the first appellate Court and the trial Court committed patent error and rendered perverse findings by improper framing of issues and misdirecting itself in the process of the trial on the question of legal necessity for the alienations which the plaintiff challenged ?

[ii] Whether in the facts and circumstances of the present case, the first appellate Court and the trial Court committed patent illegality while dismissing the suit when the evidence on record did not go to bear out the existence of pressure on the property nor there was benefit derived by the joint family of the defendant No. 1 and the plaintiff ?

18. The aforesaid points were only in respect of legal necessity. It is already observed that there is specific admission that till the date of Suit, plaintiff was living with defendant No. 1 in joint Hindu family. The next friend of plaintiff did not have personal knowledge regarding the transactions and he admits that defendant No. 1 had sold some properties for marriages of defendant Nos. 7 and 8. Evidence is given to show that some property was given to plaintiff and mutation was also effected in respect of that property. Due to these circumstances, there was some burden on plaintiff, but those circumstances are not explained. As defendant No. 2, real mother of plaintiff did not dare to step in witness box, adverse inference can be drawn. It is already admitted that plaintiffs and defendant No. 2 are on one side. As the Suit was dismissed mainly on the ground of

non inclusion of many properties in the Suit and non-joinder of necessary parties, there was no necessity of considering the point of legal necessity. Thus, the aforesaid substantial questions of law were not really involved in the matter. This Court holds that it is not possible to interfere in the decision given by the Courts below.

19. Learned counsel for the appellant placed reliance on following reported cases.

- [i] 2013 (5) Supreme – 666**
[Rohit Chauhan Vs. Surinder Singh & Ors.]
- [ii] 2015 (5) Mh.L.J. – 853**
[Basheer s/o Amir Patel
[since deceased Thr. L.Rs.
Madina Bee Bashir Patel & Ors. Vs.
Dnyaneshwar s/o Bhikarchand
Thr. its L.Rs. Dattu Dnyaneshwar
Sonawane & Ors.]
- [iii] AIR 1964 Supreme Court – 510**
[Guramma Bhratar Chanbasappa
Deshmukh & Ors. (in C.A. No. 334 of
1960) 2. Nagamma Bhartar Chanbasappa

Deshmukh & Anr. (in C.A. No. 335 of 1960). Vs. 1. Mallappa Chanbasappa & Anr. (in C.A. No. 334 of 1960) 2. Guramma Bhratar Chanbasappa & Ors. (in C.A. No. 335 of 1960).]

**[iv] AIR 1953 Supreme Court – 495
[C.N.Arunachala Mudaliar Vs.
Muruganatha Mudaliar & Anr.]**

**[v] Laws (SC) – 2009-7-91
M.Yogendra Vs. Leelamma N.**

**[vi] (1986) 3 Supreme Court Cases - 567
Commissioner of Wealth Tax
Kanpur & Ors. Vs. Chander Sen & Ors.**

20. There can not be any dispute over the proposition made in aforesaid reported cases. In the peculiar facts and circumstances of the case, this Court holds that the ratios of aforesaid reported cases are of no help to the appellant.

21. In the result, Second appeal stands dismissed.

[T.V.NALAWADE, J.]

