

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

**SECOND APPEAL NO. 21 OF 2016**

Sakharam Eknath Agarkar  
- died Thr. L.Rs. & Ors.

**..... APPELLANTS**

**V E R S U S**

Namdeo Eknath Agarkar  
& Ors.

**..... RESPONDENTS**

.....

Mr. S.T.Shelke, Advocate for Appellants.

Mr. A.S.Kale, Advocate for R.Nos. 1-c,2-B & 3-D.

.....

**CORAM : T.V.NALAWADE, J.**

**DATE : 20<sup>th</sup> APRIL, 2016**

**ORAL ORDER :-**

. The Appeal is filed to challenge the Judgment and Decree of Spl. Civil Suit No. 177/2003 which was pending in the Court of the Civil Judge [Sr.Division], Ahmednagar and also against the Judgment and Decree of R.C.A. No. 209/2012 which was pending in the Court of the District Judge – 4, Ahmednagar. Heard both sides.

2. The Suit was filed for relief of partition and separate possession by some of the respondents. One Eknath was the ancestor of plaintiffs and defendants. Eknath is succeeded by 4 sons and 1 daughter. 3 sons of Eknath viz. Namdeo, Sitaram and Dagadu had filed Suit. The Suit was mainly contested by Sakharam, defendant No. 1. Saibai, daughter of Eknath did not contest the Suit.

3. On the basis of record and submissions made, it can be said that the suit properties can be divided into 2 groups. One group consists of 13 properties which include agricultural lands, house property and shop premises. Agricultural lands bearing S.Nos. 64, 164/1, 6/2 and 45/1 and 7 other agricultural lands are admittedly ancestral properties of plaintiffs and defendants and the area of these ancestral agricultural lands was more than 8 Hectors. The lands were situated within the limits of Municipal Corporation, Ahmednagar. The disputed properties consist of 3 agricultural lands and one house property. House property bearing CTS No. 558 situated at Shrirampur is held to be self-acquired property of Sakharam, defendant No. 1 by the trial Court. This decision was not challenged by the plaintiffs. Other 3 agricultural lands viz. S.No. 112 admeasuring 9 H. 82 R., S.No. 64/1 admeasuring 1 H. 60 R. and S.No. 64/1 admeasuring 60 R. are disputed properties. S.No. 112 is situated at Waladgaon, Tahsil Shrirampur and S.No. 64/1 is situated at Shrirampur. It is the case of defendant No. 1 Sakharam that these 3 agricultural lands are his self-acquired properties. On the other hand, it is the case of other sons of Eknath that these lands were acquired jointly by the

successors of Eknath and the consideration was paid from the income of the joint family property and so they are also joint Hindu family properties. It is the case of plaintiffs that the joint family was having shops of flowers at Ahmednagar and Shrirampur and Sakharam, defendant No. 1 was looking after the shop from Shrirampur and the flowers were being sent from Ahmednagar to Shrirampur for this business.

4. It is contended by the plaintiffs that S.No. 112 was purchased in the name of defendant No. 1 from joint family business income and subsequently some portion was entered in the names of sons of plaintiff No. 1, but subsequently defendant No. 1 entered the property in the name of his sons. It is contended that total area of S.No. 64/1 was 2 H. 75 R. and this land was owned by one Dandekar. It is contended that the land was taken for cultivation in the year 1991 by plaintiffs and defendants and the land was being cultivated by plaintiff No. 2 Sitaram and defendant no. 1. It is contended that some portion of the land was surrendered to the owner and in lieu of that, initially 1 H. 60 R. portion was given by Dandekar to the family of plaintiffs and defendants. It is contended that subsequently there was dispute about remaining portion of 60 R. and then Dandekar executed sale deed for the consideration of Rs. 4,000/- in the name of defendant No. 1. It is contended that as there was litigation and there were rights as tenant of the family, the land was shown to be sold for the consideration of Rs. 4,000/-. It is contended that defendant No. 1 mischievously got executed the sale deed in the names of his sons viz. defendant Nos. 3 to 6.

5. On the other hand, defendant No. 1 and his successors after his death contended that the aforesaid 3 agricultural lands were self-acquired properties of defendant No. 1 and he had taken the lands initially for cultivation and then he had purchased the lands from the income of his own business.

6. It is the case of the contesting defendants that Eknath, the common predecessor, died in the year 1956 and at that time the notional partition took place and the joint family did not remain in existence. They contended that the parties were living separate from each other. It is contended that when Namdeo died, there was no source of income for his issues and so some portion of land was given for cultivation from S.No. 112 by defendant No. 1 to the sons of Namdeo, but they had no right of ownership in this land.

7. On the basis of the aforesaid pleadings, issues were framed. Both sides gave evidence. It appears that on court commission, evidence of defendant no. 1 was recorded due to his old age. It needs to be kept in mind that in the Written Statement itself it is admitted that most of the properties, which are already described, are joint Hindu family properties. The area is also mentioned of those properties. In the pleadings of Written Statement also, there are some specific admissions that the joint family had started the business of flowers shop at Ahmednagar. In the cross examination, defendant No. 1 has given vital admissions. He has given admission that the house of joint Hindu family was situated in land S.No. 64/1 and the number of the house was

3187. He has specifically admitted that S.No. 64/1 admeasuring 2 H. 75 R. was in his possession for the joint family. He has specifically admitted that his name was entered in the revenue record of S.No. 64/1 as he was residing at Shrirampur and the property was situated at Shrirampur. In the pleadings itself, there is admission in respect of S.No. 112 that the land was transferred in the names of sons of plaintiff No. 1 in the year 1984 to the extent of half portion. In view of these admissions and the admissions given in the pleadings itself that there was the business of flowers shop at both Ahmednagar and Shrirampur, the burden was heavy on the defendants to prove that there was separate source of income to defendant No. 1. The evidence of defendant No. 1 shows that he had no separate source of income. Due to the aforesaid vital admissions and the fact that there was nucleus which was sufficient for getting income from which new properties could have been purchased, the Courts below have held that the aforesaid properties were purchased from the income of joint family. Further, the property was sold as the property was with the joint family as tenant and due to that less consideration was required to be paid. There was specific case of the partition of defendants and so there was no other alternative before the trial Court than to decree the Suit.

8. Learned counsel for the appellant/defendant No. 1 placed reliance on the case reported as 1970 Mh.L.J. - 392 [Mudigowda Gowdappa Sankh Vs. Ramchandra Revgowda Sankh]. In this case, the Apex court has discussed the provisions of Hindu Law with regard to joint

family property. The Apex Court has observed that” the family may be joint but there is no presumption that the family possesses joint property . It is observed that the burden of proof is on him who claims the property to be joint Hindu family property. However, if there was nucleous and the acquisition was made of one property when the family was joint, it can be presumed that such property was also joint Hindu family property and then the burden shifts on the party claiming it to be self-acquired property ”. There is no dispute over this proposition.

9. Reliance was placed on another case reported as Mh.L.J.-2015 (5) – 770 [Rajaram Gopal Govekar Vs. Arjun Gopal Govekar]. In this case, this Court [other Hon'ble Judge] had observed that when there is dispute whether only one member of joint family was tenant or the property was with the joint family for cultivation, such dispute needs to be referred to the tenancy Court. There is no need to go into the details of this ratio as in the present matter there is admission of defendant No. 1 that the land was with him for joint family for cultivation and there is record showing that other land S.No. 112 was transferred in the names of sons of plaintiff No. 1 though to the extent of half portion. Other circumstances are already mentioned. Thus, no substantial question of law as such is involved in the matter and it is not possible to interfere in the decision given by the trial Court.

10. In the result, Second Appeal stands dismissed. In view of dismissal of Second Appeal, C.A. No. 237 of 2016

does not survive and stands disposed of.

11. At this stage, learned counsel for the appellants prayed for granting stay to the execution of the Judgment and decree so far as property bearing S.No. 64/1 situated at Shrirampur, district Ahmednagar is concerned. The execution is stayed only for the period of 5 weeks from today only in respect of aforesaid S.No. 64/1.

**[T.V.NALAWADE, J.]**

KNP/S.A. 21.2016.odt