IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER (ST.) NO.34304 OF 2015
WITH
CIVIL APPLICATION (ST.) NO.34305 OF 2015

Suman Namdeo Jhinjurde ... Appellant
vs.
Ramdas Sakharam Magar and Others ... Respondents

Mr. N.V. Walawalkar, Senior Advocate a/w. Mr. S.R. Nargolkar i/b. Mr. Swapnil Mohite, for the Appellant.

Mr. D.S. Patil, for Respondent Nos. 1 to 13.

Mr. G.S. Godbole a/w. Mr. Abhinav Chandrachud, Mr. Subhash Jadhav, Ms. Cheryl Fernandis and Ms. Samiha Dabolkar i/b. ALMT Legal for Respondent Nos. 14 to 16.

Mr. S. U. Kamdar, Senior Advocate a/w. Ms. Divyanka Kapoor i/b. Wadia Ghandy & Co., for Respondent No. 17.

CORAM: **MRS.MRIDULA BHATKAR, J.**

DATE: **23rd FEBRUARY, 2016**

P.C.:

. This Appeal is directed against the order dated 3rd October, 2015 passed below Exhibit "5" in Special Chamber Summons No. 622 of 2015 by the 4th Joint Civil Judge, Senior Division, Pune thereby rejecting the application of the Appellant.

Vishal

2. The Appellant has filed a suit in the Court of learned Civil Jude, Senior Division, Pune for partition, separate possession and for injunction and also restraining Defendant Nos. 1 to 17 from creating third party rights in the suit property as mentioned in para 5 of the Plaint. The Plaintiff/Appellant claims her right a coparcener of the ancestral properties which are four in numbers as described in para 1 of the Plaint out of which it is submitted that she has not claimed any right and not demanding any possession in respect of properties A, B and C but prayer was made at Exhibit 5 in respect of only property "D" which is Survey No. 9, Hissa No. 1 and which is divided in 2.80 R and 6.31 R situated at village Undri, Dist. Pune. Therefore the property "D" is addressed as *"suit property"* for the purpose of this Appeal as the claim is restricted only to that property in application at Exhibit 5.

3. Admittedly the suit property is an ancestral property. The Plaintiff/Appellant had filed a suit earlier for her share and demanded partition and separate possession in suit No. 1535 of 1997. However, the said suit was dismissed on 26th November, 1998 on the ground that the Plaintiff being daughter has no right to seek partition during

the life time of her father. Her Appeal No. 539 of 1999 was also dismissed on 10th December, 1999 on the same ground. It is contended by her that till today the suit land was not partitioned and therefore she has undivided right in the suit property. It is her case that due to amendment in Section 6 of the Hindu Succession Act which came into force with effect from 9th September, 2005, she has right in the said property to demand partition being coparcener of the ancestral property. Her father died on 25th July, 2010 and till then property was not partitioned. It is the case of Plaintiff/Appellant that in the month of July, 2011 when she visited the suit land, she noticed that some unknown persons have started construction on the suit land and on inquiry she had knowledge that Respondent Nos. 9 to 17 had purchased the suit property on the basis of illegal and bogus documents. She has mentioned those documents in para 5 of her Plaint. The suit land admeasuring 2 Hector 80 Ares out of Survey No. 9/1 was sold to Vidya Builders i.e. Defendant No. 12 by sale deed dated 18th December, 1998. She has challenged the Power of Attorney executed dated 4th November, 2004 between Vimal Kumar Jain, Indar Kumar Jain and Sakharam Magar and his sons and their family members. Then the registered development agreement dated 4th

November, 2004 in respect of 4 H. 31 R land out of Survey No. 9/1 between Kumar Company through partner Vimalkumar and Sakharam Magar is challenged. So also the sale deed dated 24th June, 2010 between Respondent Nos. 14 and 15 in respect of land 6.81 H is under challenge. Hence this Appeal.

4. The learned senior counsel Mr. N.V. Walawalkar appearing for the Appellant has submitted that the learned Judge of the trial Court has committed gross error in rejecting the application Exhibit 5. The learned Judge has erred in relying on the principle of "*Res Judicata*" as her earlier Suit and Appeal were dismissed. He submitted that the said order will not come in the way of the present Appellant/ Plaintiff because prior to 9th September, 2005 daughter had no right in the ancestral property and now she is claiming her right as a coparcener. Thus, the point of *Res Judicata* ought not to have been considered against the Plaintiff by the trial Court. He further submitted that the trial Court has unnecessarily gave weightage to the development agreement and third party rights have created by the subsequent purchasers and developers. He argued that on the basis of first sale deed of the year 1998, the further development agreements

were entered into by the Respondents. However, this will not affect the right of the coparcener in the suit property. He argued that the Plaintiff's right and undivided share in the suit property cannot be destroyed on the basis bogus documents and development agreements and by creating third party rights. He submitted that there are two portions of the land i.e. 2.80 R and 6.31 R. He submitted that on both the portions of the land, buildings are constructed by the Respondents, however the entire portion of the land is not used. He submitted that under Right to Information Act, he has obtained information from the Corporation by letter dated 11th December, 2015 and 29th December, 2015 that from portion A of the land wherein 6.31 R land is transferred from 8.65 R is approximately 7000 sq.mtrs of land is unused and from the portion 2.80 R land admeasuring 5050 sq.mtrs land is yet to be consumed. Therefore, on this unconsumed land the Appellant seeks injunction against Respondents that they should not construct anything on this land so that the right of the Appellant can be protected. He submitted that the Appellant has good case on merits. He submitted that the agreements i.e. sale deeds of these two lands are bogus. The so called Power of Attorney issued by her father in favour of Shalutai Buddhiwant who had executed Power of Attorney dated 1st December, 1997 had no power to dispose of the suit land by a sale deed for Sakharam Magar and his other brothers and his two sons as they have never executed the Power of Attorney in favour of Shalutai Tukaram Buddhiwant, Lukman Haffijuddin Khan and Hemant Tukaram Buddhiwant in respect of the suit land. Therefore the agreement of sale dated 1st December, 1997 and sale deed dated 18th December, 1998 of the land admeasuring 2.80 R i.e. of property 'D' is bogus and invalid. He also challenged the sale deed which is taken place between Respondent No. 13 to 16 and her father on different dates in respect of property admeasuring 6.31 R. He pointed out the Power of Attorney of Lalitkumar Jain and submitted that he is not the one who had signed the sale deed. He challenged the sale deed dated 24th June, 2010 admeasuing area 6.81 R which is executed in favour of Defendant Nos. 14 to 16. He relied on the reply given by Defendant No. 17 wherein it is admitted that no partition was taken place. He submitted that the agreement and Power of Attorney were not signed by the father of the Appellant. Therefore, the transactions of the suit land by way of development agreements and sale deeds are bogus. He submitted that the Appellant enjoys her undivided right under Section

6 of the Hindu Succession Act in the suit property. The learned senior counsel Mr. Walawalkar has relied on the case of *"**Prakash and Others vs. Phulavati and Others**"*[1] and submitted that both the father and daughter alive in 2005 when enactment came into force and therefore the Appellant has right to claim the partition in the property.

5. This Appeal was opposed by the learned senior counsel Mr. S. U. Kamdar appearing on behalf of Respondent No. 17. He relied on the Power of Attorney dated 1st December, 1997 and development agreement by which the development rights were transferred by Sakharam Magar and his two sons in favour of Shalutai Tukaram Buddhiwant and Lukman Haffijuddin Khan in respect of land admeasuring 2.80 R. He submitted that on the basis of the agreement of sale and Power of Attorney, the parties entered into the registered sale deed on 18th December, 1998. He submitted that Defendant No. 17 claims his right and interest in the portion of the suit land on the basis of the said registered sale deed. He submitted that it was agreed between Sakharam Magar and his sons for the consideration of Rs. 60 lacs and the entire consideration was paid by

1 Civil Appeal No. 7217 of 2013, S.C.I.

registered sale deed dated 18th December, 1998. Therefore the Appellant has no right in the suit property. He further submitted that on the basis of sale deed, further registered sale deed and Power of Attorney were executed with other parties.

6. The learned counsel Mr. G.S. Godbole appearing on behalf of Respondent Nos. 14 to 16 and the learned senior counsel Mr. Kamdar both have raised the point of limitation and challenged the maintainability of the suit. It was argued by both the counsel that though the Plaintiff is claiming her right on the basis of amendment dated 9th September, 2005, she did not file a suit till her father died on 25th July, 2010 but fled it on 23rd February, 2012. She was aware of the agreement however, there was no mention and no challenge in the Plaint in respect of the sale deed but by way of amendment in para 4, she filed amendment application on 2nd February, 2013 and the application was allowed and para 5 of the Plaint was amended. The challenge to the document was first given on 7th January, 2015. Both the learned counsel have submitted that the Plaintiff had knowledge of these documents prior to the filing of the suit in the year 2011 therefore suit is barred under Article 58 of the Limitation

Act. It is argued by both the counsel that the Plaintiff/Appellant has not pleaded in the Plaint or filed in the trial Court the contention raised and averments made at the time of hearing of the Appeal and therefore there submissions also not to be appreciated and can not be taken into account. It is further argued by the learned counsel Mr. Godbole that the Plaintiff has not come with clean hand. The first agreement of sale and development right dated 15th October, 1996 is in respect of one hector land out of 6.31 R i.e. B property and it was between Sakharam Magar and others. Thereafter on 23rd October, 1996 the second sale deed about another one hector land had taken place on the 4th November, 2004. Thereafter on the same date the development agreement has taken place in respect of remaining land i.e. 4.31 R land and the consideration amount (approx.) of Rs. 5.50 Crore was agreed to be paid out of which 4,57,22,00,000/- was promised to be paid at the time of sale deed. He pointed out that Sakharam and his brothers executed the Power of Attorney in favour of Jain brothers on 4th November, 2004 and subsequently on the basis of the Power of Attorney and agreement of sale of the year 2004, the registered sale deeds were executed of property B admeasuring 6.81 R on 24th June, 2010 i.e. before Sakharam died. He submitted that the entire consideration amount was paid at the relevant time and thus the property was already disposed of and alienated when the amendment of 2005 came into force.

7. The learned counsel Mr. Godbole for Respondent Nos. 14 to 16 also relied on the point of legal necessity. There was a legal necessity for Sakharam Magar to sale the properties. He relied on the relevant portion of the agreement of sale of the year 1998 that the family was having loan and was in need of money. On this point, he relied on "***Prasad and Others vs. V. Govindaswami Mudaliar and Others***"[2].

8. Heard both the learned counsel of the parties. Perused the documents.

9. In this Appeal, a short point is to be considered that at the time of enforcement of the enactment i.e. 9th September, 2005 whether the father's right or interest in the suit property was alive.

10. The claim of the Appellant/original Plaintiff is based on

2 (1982) 1 Supreme Court Cases 185.

Section 6 of the Hindu Succession Act and which reads as follows:

*S.6 : "**<u>Devolution of interest of coparcenary property</u>**"*

"When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act: PROVIDED that, if the deceased had left him surviving a female relative specified in class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.

<u>Explanation 1</u>: For the purposes of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

<u>Explanation 2</u>: Nothing contained in the proviso to this section shall be construed as enabling a person who has separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein."

11. Sakharam Magar, the father of Plaintiff/Appellant and

Respondent Nos. 1 and 2 died on 25 July, 2010 i.e. after the enactment. Thus, both the father and daughter were alive at the time of the effect of amendment. In the case of **Prakash and Others** (supra) the Hon'ble Supreme Court has observed that *"the amendment of a substantial provision is always prospective unless either expressly or by necessarily the enactment it is retrospective. In the present case, there is neither express provision or giving retrospective effect to the amended provision nor necessary enactment to that effect. Thus, the provision is held as prospective, however while considering the entitlement of the relief of the Plaintiff's daughter under Section 6 of the Hindu Succession Act, it is necessary to see whether the father had right or interest in the property on 9th September, 2005".*

12. In view of the submission of learned senior counsel Mr. Kamdar and Mr. Godbole, it shows that the property was alienated by agreement of sale or development agreement for consideration in the year 1997, 1998, 2004 and subsequently in the year 2010. The properties A and B were disposed of by a registered sale deed. The registered sale deed of property B i.e. 6.81 R was executed on 24th June, 2010 i.e. after 2005. However, this was registered pursuant to

the earlier registered agreement of sale and Power of Attorney executed between Sakharam and his two brothers and Defendant Nos. 14 to 16 i.e. on 4th November, 2004 and the entire consideration has paid. Thus, *prima facie* the property was alienated and no interest of Sakharam was left in the property and thus the relief asked for by the Plaintiff cannot be granted at this stage and the order passed by the learned Judge of the trial Court not to be interfered with.

13. It is to be mentioned that two Power of Attorney are produced before this Court. Both were executed on 1st December, 1997 one is in favour of Shalutai and Lalit Jain and Vimal Kumar Jain. On the basis of the Power of Attorney, Shakharam has executed a registered sale deed with Respondent No. 17 on the same date i.e. 1st December, 1997. However, the Power of Attorney which was executed in favour of Shalutai produced here is compared with the Power of Attorney of Lalit Kumar Jain, it appears doubtful as it looks like a photocopy of the Power of Attorney of Lalit Kumar Jain and only the names of Shaluati and other persons are replaced. However, the genuineness of this Power of Attorney is a matter of evidence and it can be challenged at the time of final hearing of the trial.

14. Assuming that the Power of Attorney is bogus, then it can be considered that the Power of Attorney had never ever given by Sakharam Magar to execute the sale deed in favour of Defendant No. 17 and therefore the edilice of further sale deeds to collapse. However, the fact that Sakharam and other coparcener did not take any objection since year 1997 to 2010 and so also other Defendants i.e. the brothers of the Appellant are not raising any objection to this transaction, this fact is taken into account at this stage and therefore the following order will meet the ends of justice.

15. The Appeal from Order is dismissed and accordingly disposed of with limited relief in favour of the Appellant.

16. The order dated 3rd October, 2015 passed by the trial Court is hereby maintained. The construction/development on land "A" i.e. 2.80 R is subject to the outcome of the suit.

17. In view of this, Civil Application does not survive and accordingly disposed of.

(MRS.MRIDULA BHATKAR, J.)