IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.6521 OF 2014

1) Usha Ramesh Chavan,
Age 56 years, Occup. Household,
R/o Gat No.66/A, At Post Mhaswad,
Near State Bank of India,
Taluka and District Jalgaon.

2) Atul Ramesh Chavan,
Age 33 years, R/o as above.

3) Mugada Ramesh Chavan,
Age 28 years, R/o as above.

...Petitioner

Versus

1) Bank of Maharashtra,
Jalgaon Road, Branch Jalgaon,
Through its Manager.

2) Rushi Rajesh Kapoor,
Age 37 years, Occup. Business,
R/o 37, Govindpura, Ahmednagar.

3) Ajay Dinkar Chavan,
Age Major, Occup. Business,
R/o Flat No.5, Nishant Apartment,
Ajay Colony, Ring Road, Jalgaon.

4) Prakash Damodhar Chavan,
Age Major, Occup. Business,
R/o Building No.5, Madhuban Apartment,
Shalun, Jalgaon Tq. Dist. Jalgaon.

5) Dilip Damochar Chavan,
Age Major,
R/o Anubandha, Plot No.30,
vivekanand Colony, Bhadgaon Road,
Chalisgaon Tq. Chalisgaon Dist.Jalgaon.

6) Mandakini Madhukar Patil,
Age Major, Occup. Household,
R/o Near Wadi Bhokar Naka,
Wadi Bhokar Road, Deopur, Dhule,
Tq. and Dist. Dhule. ...Respondents

Mr. P. V. Barde, Advocate for petitioner.
Mr. V. R. Patil, Advocate for respondent No.1
Mr. S. J. Singh, Advocate for respondent No.2

CORAM : S. V. GANGAPURWALA &
SMT. VIBHA KANKANWADI. JJ.
DATE : 31-10-2017

PER COURT :

1. The petitioner assails the judgment and order passed by the Debt Recovery Appellate Tribunal confirming the order of the Debt Recovery Tribunal, Aurangabad.

2. The petitioners claim to be the legal heirs of one Ramesh. It is the case of the petitioners that, the writ property was their joint family property. The said property is partitioned on 16-11-1988 and the father of the petitioner was awarded $1/6^{th}$ share. The uncle of the petitioners mortgaged the writ property on 18-01-1989. Subsequently

in the year 1998 the respondent No.1 bank filed a civil suit for recovery of amount. The said suit was transferred to Debt Recovery Tribunal, Aurangabad. The original application filed by the bank for recovery is allowed. Thereafter, to execute the recovery certificate, execution proceedings were filed before Debt Recovery Tribunal. Bank issued a public notice for auction of the writ property on or about 11-09-2008. The father of the petitioners No.2 and 3 filed appeal bearing No.2 of 2009 pointing out that he has 1/6th share in the property and the same cannot be subjected to recovery. The property in the interregnum was auctioned. The possession to the extent of vacant property is taken by the recovery officer. The Debt Recovery Tribunal did not accept the contention of the father of the petitioner. The father of the petitioner filed appeal before Debt Recovery Appellate Tribunal. The Debt Recovery Appellate Tribunal dismissed the appeal.

3. Mr. P. V. Barde, the learned counsel for the petitioner strenuously contends that, the fact that the property is the joint family property can be borne out from the sale deed itself. Though the sale deed is in favour of the Dinkar, the consideration is paid by Damodhar, the grandfather of the petitioners No.2 and 3. The recital to that effect

also appears in the sale deed. Even the agreement of sale is in favour of the grandfather of the petitioner i.e. Damodhar. According to the learned counsel oral partition took place on 16-11-1988, memorandum to that effect is also recorded. Thereafter, for convenience purpose a memorandum was recorded on 13th October, 1995. The application is also made for mutating the names in the revenue record in the year 1995 according to the said partition. The learned counsel submits that there is an error on the part of the tribunal to hold that the partition deed is not registered and as such is inadmissible. Memorandum of partition is not required to be registered. Though the property was purchased in the name of the Dinkar, the same was from the corpus of the joint family and the said property partakes the character of joint family property. The learned counsel submits that, the tribunal is duty bound to consider the claim of the members of the joint family and a finding is required to be arrived at with regard to the right, title and interest of the person claiming to be a member of the joint family and having share in the said property. The learned counsel relies on the Judgment of the Apex Court in a case of *Mrs. Janki Vashdeo Bhojwani and another Vs. Indusind Bank Ltd. and others*, reported in *2004 AIR SCW 964*.

4. We have also heard learned counsel for the respondents.

5. With the assistance of the learned counsel we have gone through the Judgment delivered by the tribunal and the appellate tribunal, so also the documents on record.

6. The sale deed is in the name of Dinkar suggesting the property being purchased by Dinkar.

7. It is trite that, there is a presumption that the joint family exist but there is no presumption that the property in the name of an individual purchased by registered sale deed is a joint family property.

8. It would appear that the property is purchased under registered sale deed of the year 1975. The same is mortgaged with respondent No.1 bank by Dinkar in the year 1989. The grandfather of the petitioners No.2 and 3 is also guarantor to the loan taken by the Dinkar. So also the other two brothers of Dinkar are also guarantors. The case put forth by the petitioner certainly does not inspire confidence. The recital of the partition deed which is styled as commemoration regarding partition of immovable property also runs counter to the case of the petitioner about oral partition in the year 1988. The relevant part of the partition deed is reproduced as under ;

> "Agricultural land bearing Gat No.66/1A situated within the limits of Panchayat Samiti, Mhasavad, Taluka and District Jalgaon, ad measuring 0-H 40.47 R, assessed at Rs.80.90 Ps. This immovable property belongs to the members of the joint family. In this land, there is alive well. We all assembled together and in presence of panchas mutually have agreed on this date 30-05-1995 orally partitioned the aforementioned..."

9. Reading the said recital it is manifest that the for the first time the members assembled and partitioned the property on 30th May, 1995. Much prior to the alleged partition the property was already mortgaged with the respondent No.1 bank.

10. The grandfather of the petitioners No.2 and 3 i.e. Damodhar was also a guarantor to the loan taken by Dinkar in whose name the sale deed stands. The grandfather of the petitioners No.2 and 3 did not at any material point of time raised any objection that the property is not exclusively owned by the Dinkar or that he had paid the consideration amount. On the contrary he was party to the loan transaction in the capacity of guarantor. The other two brothers of Dinkar also were party to the loan transaction in the capacity of guarantor. They also did not raise any objection about their interest in the said property. It is only when the things went awary the documents

are sought to be shown to have been executed regarding partition, more particularly when the property was already mortgaged and encumbered with respondent No.1 bank. The said documents do not inspire confidence.

11. It is trite that, a memorandum of partition need not be registered but a partition deed the instrument under which the partition takes place is required to be registered. The document dated 13th October, 1995 depicts that the same is a partition deed on the very day the partition is alleged to have taken place under the said document.

12. Moreover apart from the above, the factual matrix does not lead to even remote inference that the property was a joint family property as the grandfather of the petitioners No.2 and 3, the other brothers of Dinkar were also parties to the loan transaction in the capacity of guarantor. They never asserted any right in the writ property.

13. The Judgment of the Apex Court in a case of Mrs. Janki Vashdeo Bhojwani (Supra) would not inure to the benefit of the petitioner in as much as in the said case property which was attached

by the bank was not mortgaged in favour of the bank.

14. In the present matter the property is mortgaged in favour of the bank and we have also considered the case of the petitioner with regard to their right, title and interest on merits. As observed above, the petitioners have failed to prove their right or interest in writ property.

15. In light of the above, no error has been committed by the Tribunal and the Appellate Tribunal in negativing the claim of the petitioner.

16. The writ petition as such dismissed. No costs.

17. The amount deposited by the petitioners is allowed to be withdrawn by the petitioners along with accrued interest, if any.

[SMT. VIBHA KANKANWADI]
JUDGE

[S. V. GANGAPURWALA]
JUDGE

vjg/-.