

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

SECOND APPEAL No. 709 OF 2015

Tukaram s/o Anandrao Girdhari,
Age 78 years, occup. Legal Practice,
r/o plot No. 115, Samarth Nagar,
Aurangabad

.. Appellant/
Orig. Deft.No.1

versus

- 1) Madhukar s/o Anandrao Girdhari,
died, legal representatives :-
 - i) Mangalabai w/o Madhukar Girdhari,
died during appeal in Dist. Court,
legal representatives are already
on record as ii, iii, iv, v, vi.
 - ii) Vilas s/o Madhukarrao Girdhari,
died, legal representatives :-
 - A) Varsha w/o Vilas Girdhari,
age major, Jaikwadi Nathnagar
North Paithan, Dist. Aurangabad
 - B) Renuka d/o Vilas Girdhari (Minor),
u/g of Varsha w/o Vilas Girdhari,
r/o as above
 - iii) Vishwas s/o Madhukarrao Girdhari,
Age 56 years, occup. Business,
Plot No. 4, Samarthnagar, Aurangabad
 - iv) Sow. Viay @ Sushma w/o Satishrao
Bhalerao, age 53 years, r/o Jaikwadi,
Nathnagar, Paithan, Dist. Aurangabad
 - v) Shobha w/o Shrikant Dixit
age 51 years,
C/o Vilas Madhukarrao Girdhari,
Jaikwadi Nathnagar North Paithan,
Dist. Aurangabad

- vi) Santosh s/o Madhukarrao Girdhari,
age 49 years, occup. service,
Jagdamba-nagar, Bidkin, Tq. Paithan,
Dist. Aurangabad
- 2) Shridhar s/o Anandrao Girdhari,
age 73 years, occup. service,
N-7, h 44-3-71, Near Cidco,
Aurangabad
- 3) Govind s/o Anandrao Girdhari, died,
Legal representative :-
 - A) Arvind s/o Govind Girdhari, died,
Legal Representatives :-
 - i) Smt. Ranjna w/o Arvind Girdhari,
 - ii) Yogendra s/o Arvind Girdhari,
minor, u/g of mother Smt. Ranjana
r/o c/o Anad Pujari, Dr. Rao Bunglow,
13-2-13, Gupta Garden, Ramanthpur,
T.V. Studio, Hyderabad 13.
 - B) Kalindi w/o Govind Girdhari
 - C) Mukund s/o Govind Girdhari
**(deleted as per leave granted
by court on 16-12-2015)**
 - D) Meena d/o Govind Girdhari,
age 26 years,
 - E) Shilpa d/o Govind Girdhari,
age 21 years,
 - F) Ujwala d/o Govind Girdhari,
age 19 years,

All : Sahyognagar, Jalna Road,
Beed.
- 4) Prabhakar s/o Anandrao Girdhari,
Jadhav's House, Zaveri Galli, Beed,
(Already compromised on 9-10-2007)

- 5) Sow Kokilabai w/o Dhannulal Bharuka, died, legal representatives :
- A) Dhanulal s/o Chunilal Bharuka, died 2014 issueless, occup. Agri., Salve Niwas, Near New Stadium, N-2, Cidco, Aurangabad.
- 6) Lilabai w/o Shamrao Shivangikar, died, legal representatives :-
- A) Shamrao Dattatraya Shivangikar, died in 2006, legal representatives already on record as BCDE, and legal representatives compromised in March, 2008.
- B) Ravindra Shamrao Shivangikar, occup. clerk, Health Department, Z.P. Latur,
- C) Rangnath Shamrao Shivangikar, occup. Clerk, P.W.D. Department
- D) Prashant Shamrao Shivangikar, occup. Clerk, Treasury Department

All : Pochamma Galli, Latur,
District Latur

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| E) | Jyoti w/o Nageshrao Hannurkar, age 42 years, Near Navgan College Rd., Beed, Dist. Beed. | .. Respondents/ R. No.1 is org. Pltff., R 2 to 7 are defts No. 2 to 7) (Respdts. 4,5,6 compromised with Resp.No.1 as para 37) |
| 7) | City Survey Office, Padampura, at present Collector Office, Aurangabad | |

Mr. P. V. Mandlik, senior Advocate i/b Mr. D. R. Bhadekar, Advocate for appellant
 Shri F. R. Tandale, Advocate for respondent No. 2 – caveator
 Mr. R. S. Deshmukh, Advocate for respondents No. 1A, 1B, 1(iii) to 1(iv), 3A/ii, 3D, 3E, 3F

CORAM : SUNIL P. DESHMUKH, J.
DATE : 5th May, 2017

ORAL JUDGMENT :

1. Present second appeal questions propriety, legality and validity of judgment and decree dated 15th November, 2005 passed by joint civil judge, junior division, Aurangabad in special civil suit No. 73 of 1992, decreeing claim of the plaintiff for partition and separate possession of their share in suit properties and those of the judgment and order dated 27th July, 2015 passed by district judge – II, Aurangabad in regular civil appeal No. 387 of 2005 confirming the judgment and decree of the trial court.

2. Hereinafter appellant is referred to as defendant No. 1 or appellant, respondent no. 1 as plaintiff/plaintiffs or respondent no. 1 and other respondents as respondents no. 2 to 7 or defendants no. 2 to 7 in that order.

3. Special civil suit No. 73 of 1992 had been instituted originally by plaintiff Madhukar Anandrao Girdhari seeking partition and separate possession of his 1/7th share in suit properties viz; plot No. 115, C.T.S. No.20535, municipal No. 4-14-81 situated at Samarthnagar, Aurangabad and

agricultural lands – survey No. 2 at village Sonari (Bk), Taluka Kannad and survey No. 54 (gut No.147) and open plot admeasuring 50 ft x 40 ft. at village Wahegon, Taluka - Sillod and seeking perpetual injunction restraining defendant No. 1 from causing interference with and obstruction to peaceful possession of plaintiff over suit properties and also restraining him from transferring, alienating, selling or mortgaging suit properties or changing present nature of the same with a declaration that mutation entry dated 20th March, 1984 in P.R. card of C.T.S. No. 20535 - Plot No. 115, prepared by defendant No. 7 is null and void and not binding on the plaintiff and mandatory injunction against defendant No. 7 to cancel mutation entry dated 20th March, 1984 and to prepare fresh P.R. Card bearing names of legal heirs of original owner late Anandrao Wamanrao Girdhari.

4. Original plaintiff Madhukar is eldest son of Anandrao Wamanrao Girdhari and defendants No. 1 to 4 are his (Madhukar's) brothers, whereas defendants No. 5 and 6 are sisters of original plaintiff and defendants No. 1 to 4. The suit is instituted by plaintiff Madhukar through his son Vishwas as his general power of attorney. Plaintiff claims that suit property at Aurangabad bearing plot No. 115 - C.T.S. No.

20535, had been purchased by Anandrao Wamanrao Girdhari from one Hiraji Bapuji Untwal and others in 1964 for a consideration of Rs.900/-. As Anandrao was in service, he had deputed his son Tukaraim – defendant No. 1 to have the execution of registered instrument giving Rs.700/- to him for payment of balance consideration. Sale deed accordingly had been executed on 16th October, 1964 pursuant to agreement of sale dated 18th January, 1962 in favour of Anandrao. Plot No. 115 bearing CTS No. 20535 and municipal No. 4-14-81 (herein after plot No. 115) at Samartha Nagar, Aurangabad was purchased by Anandrao Wamanrao Girdhari and as such is ancestral property of plaintiff and defendants No. 1 to 6. Defendant No. 1 – Tukaram being at Aurangabad had been looking after the family affairs and had been working as *karta*. In 1984, Tukaram got aforesaid property mutated in his name illegally by filing false affidavit of late Anandrao Wamanrao Girdhari. According to the plaintiff, Anandrao was not alive on the date of affidavit in his name.

5. Plaintiff averred that agricultural land survey No. 2 of village Sonwar, taluka Kannad and the agricultural land survey No. 54 (gut No. 147) of village Wahegaon, taluka Sillod are ancestral properties of Anandrao Wamanro Girdhari.

Anandrao had purchased property Plot No. 115 at Aurangabad through earnings from agricultural lands. The parties to the suit were residing jointly albeit defendants No. 2 to 4 were in service outside at different places, they used to come together in *gulmandi* at Aurangabad, and had been contributing to family expenses with defendant No. 1. Defendants No. 5 and 6 were members of joint family till their marriages had taken place.

6. Plaintiff further contended that entry on P.R. Card had been made on the basis of bogus document, no notice in respect of mutation being taking place or calling objection had ever been given to the parties. The mutation, as such, is illegal and null and void. The plaintiff, upon becoming aware around 1989 about the same, had submitted application for cancellation of the entry. Since no action was being taken, plaintiff had submitted application to the Superintendent, Land Records in 1991.

7. The plaintiff contends that, defendant No. 1 had been taking disadvantage of entry on P.R. Card and had started interfering with plaintiff's possession over C.T.S. 20535 i.e. plot No. 115 at Samarthnagar, Aurangabad and had lodged

false prosecution pursuant to section 145 of the Code of Criminal Procedure, 1973. According to plaintiff, prosecution of two proceedings, one under Criminal Procedure Code and another under Indian Penal Code, are indication of possession of plaintiff over suit properties. Plaintiff's possession over suit properties is established also by entries on 7 x 12 extracts which show names of plaintiff and defendants No. 1 to 4. Smelling ill-intention of defendant no.1, plaintiff had requested for a meeting in 1989 in the house of Shridhar – defendant No. 2, however, while all other members of the family were present, defendant No. 1 on the pretext of not being well had avoided to attend the meeting. On several other occasions, defendant No. 1 avoided effecting partition and giving separate possession to plaintiff of his legal share in the suit properties. In *diwali* of 1991, defendant No. 1 made his intention clear and had refused to partition suit properties. It is further contended that defendant No. 1 had threatened to deal with suit properties and to alter nature of the same.

8. During pendency of the suit original plaintiff had died and present respondents No. 1 (i) to 1 (vi) were arrayed as plaintiffs.

9. Plaintiff had undergone amendment, contending that during lifetime of Anandrao, he had effected partition of suit properties among family members whereunder equal shares were given to five sons and that the same had been reduced into writing on 30-12-1979. However, defendant No. 1 had denied said partition and was taking disadvantage of mutation entry effected in his favour in C.T.S. record in 1984. Plaintiff has averred that two letters dated 11th April, 1980 and 11th August, 1980 were issued by defendant No. 1 to the plaintiff. Defendant No. 1 had communicated that the partition effected by his father is not admitted by him and had called all brothers for partition and decision. In the letter dated 11th August, 1980, defendant No. 1 had hinted plaintiff that land of his share would not be cultivated by him (defendant No.1) which, according to plaintiff, is a clear indication of acceptance of partition effected by their father Anandrao in 1979.

10. On 16th January, 1992, plaintiff had issued a letter to defendant No. 1 requesting to partition the properties according to deed of 1979 and to end the pending criminal litigation, however, there had been no response. It is averred that open plot of Wahegaon is being shown in the name of Anandrao. Plaintiff also claimed *mesne* profits.

11. Defendant No. 1 combating the suit claim, had filed written statement. He had opposed the suit contending that suit of the plaintiff being wrong and false to the knowledge of the plaintiff was liable to be dismissed with costs and compensatory costs. Defendant No. 1 did not dispute relationship as averred by the plaintiff. It is averred that the suit is not filed by plaintiff Madhukar but is being filed by power of attorney Vishwas - the second son of Madhukar in order to satisfy his selfish motives. It is averred that their father Anandrao was a primary school teacher and had retired in 1SA-709.15.doc956 and was getting paltry pension of Rs.56/- per month which had been insufficient to meet family expenses. Father during his life time had resided with defendant No. 1. Defendant No. 1 had joined services in a co-operative bank on completion of education. Defendant No. 1 had purchased plot No. 115 in the name of his father by paying entire consideration amount from his self and exclusive earnings. Defendant No. 1, as such, had been full owner of plot No. 115 at Samarthnagar, Aurangabad. Neither the plaintiff nor do the other defendants have any right, title and interest in plot No. 115-C.T.S. No. 20535. It is denied that Anandrao Girdhari was in service at the time of

agreement of sale and could not have remained present at the time of execution of sale deed. Defendant No. 1 had entered into transaction and paid entire consideration and got sale deed executed. He has denied that he had been *karta* of the family and looking after affairs of the joint family. It is denied that plot No. 115 had been purchased by Anandrao Girdhari and it was his property.

12. It is averred by defendant No. 1 that he had purchased plot No. 115 in the name of his father and father had subsequently mutated the same in the name of appellant/defendant No. 1 in 1965 by applying to municipal authorities and the suit plot accordingly has been standing in his name. Defendant No. 1 claims to have raised construction over suit property with the aid of loan from office of Collector. Upon application of city survey scheme, pursuant to the record, concerned city survey office found defendant No. 1 to be owner of the property and accordingly mutation had been carried out into city survey record. Neither the plaintiff nor other defendants had raised any objection to the same on any occasion. It has been contended that father of defendant No. 1 expired in 1981 and name of defendant No. 1 had been recorded from 1965. Alternatively, it has been averred that in

any case, Anandrao Girdhari had transferred plot No. 115 to defendant No. 1 during his life time and as such he had not left behind plot No. 115 to be inherited by his other legal heirs.

13. Defendant No. 1 contended, it is false to claim that plot No. 115 - C.T.S. No.20535 was purchased by Anandrao from income of agricultural lands. The agricultural lands are dry lands and there were dues of government and revenue department and nobody was ready to pay the same. It is contended that defendant No. 1's father had allotted survey No. 2 of village Sonari, taluka Kannad to defendant No. 1 and survey No. 54 of Wahegaon was recorded in the name of Madhukar. Defendant No. 1 had been enjoying land survey No. 2 of village Sonari. Neither the plaintiff nor other defendants have any right, title or interest in said land. The revenue record in respect of said survey No. 2 is in the name of defendant No. 1 continuously since 1969. Mutation entry No. 72 in this respect has attained finality and is conclusive and is binding on plaintiff and other defendants. Before death of father of the parties in 1981, no property had been left behind for partition and as such the question of inheritance and partition of suit properties does not arise. Plaintiff and

other defendants have been out of Aurangabad since 1960 being employed in services outside. They had never raised any objection nor claimed any share in suit properties at any time. Since the property at Samarthnagar, Aurangabad had become precious, plaintiff's power of attorney holder Vishwas who had been doing nothing intends to grab the same and as such has instituted the suit to vex and harass defendant No. 1.

14. Defendant No. 1 has reiterated that his name in municipal record has been entered into at the behest of Anandrao pursuant to which city survey record had been carried out and nobody had raised objection to the same at any time and the same as such has become final and conclusive and binding on plaintiff and other defendants.

15. It is contended that name of defendant No. 1 has been recorded by city survey office in respect of plot No. 115 - C.T.S. No. 20535 after due enquiry and at that time none of the parties had raised any objection. Suit plot No. 115 is exclusive property of defendant No. 1. Plaintiff has no right to deny the same. Defendant No. 1 averred that he constructed rooms over suit plot through his own earning and by raising

loan from office of Collector and that he had been in exclusive enjoyment of the same. Neither the plaintiff nor other defendants have any right, title or interest in the same. Defendant No. 1 is the sole owner and occupant of said suit plot. Defendant No. 1 had rented out some portion of construction and from rent derived from the same, had repaid the amount and has yet to pay certain dues. In 1989, municipal corporation, Aurangabad had acquired a portion of suit plot for road widening and defendant No. 1 had received compensation. Around 1989, Vishwas – the general power of attorney of the plaintiff had attempted to break-open lock of suit house and occupy the same forcibly entailing proceedings under section 145 of Code of Criminal Procedure which had been decided in favour of defendant No. 1. Police had also lodged complaint before the judicial magistrate, first class against Vishwas. In retaliation of said actions, present suit had been instituted which is false and vexatious and liable to be dismissed with costs.

16. The written statement was amended by defendant No. 1 averring that entire consideration of plot No. 115 had been paid by him and he had purchased the same in the name of father Anandrao as a *Benamidar*. Anandrao had no interest or

right in the same and was a trustee. Defendant No. 1 is real owner and possessor of said plot.

17. It is claimed that defendant No. 1 is absolute owner of suit plot No. 115 and survey No. 2 at village Sonari and save defendant No. 1, no other party has any concern with the same. The suit of the plaintiff is vexatious and is not maintainable and deserves to be dismissed with costs and compensatory costs. The suit house and the agricultural lands are not ancestral properties of parties to suit. Suit house is self acquired property of defendant No. 1 and agricultural properties are self acquired properties of Anandrao - father of the parties and he had disposed of the same during his life time. At the time of his death, the father of the parties had not left any property intestate and as such the question of partition and separate possession does not arise. It is denied that the plaintiff is in possession of any part of suit house and it is averred that there is no question of any interference by defendant No. 1 in plaintiff's possession. Plaintiff is not entitled to any relief claimed in the suit. It is averred that Anandrao was the absolute owner of his properties and had disposed of the same during his life time leaving behind nothing for inheritance and succession.

Valuation of the properties is denied by defendant No. 1 and also it had been denied that there was cause of action. The suit was requested to be dismissed with costs.

18. Defendants No. 3 and 4 submitted consenting written statement, requesting to decree the suit.

19. Defendant No. 7-the government authority submitted its written statement, seeking dismissal of the suit against it. It has been averred in written statement, property bearing C.T.S. No. 20535 (Plot No.115) had been in the name of Anandrao Girdhari in the year 1971 and that Tukaram Girdhari-defendant No. 1 had submitted an affidavit sworn by him before the competent authority on 21st March, 1984 and accordingly notice was given to respective parties and after holding enquiry, C.T.S. No. 20535 (Plot No.115) is transferred and mutated in the name of Tukaram Anandrao Girdhari. The authority claims ignorance about the document submitted by Tukaram Girdhari to be false or bogus. It is referred to that on the basis of affidavit verified by competent authorities from tahsil office as well as consent letter given by Anandrao in municipal council and construction permission by municipal council, C.T.S. No. 20535 (Plot No.115) is transferred and

mutated in the name of said Tukaram Anandrao Girdhari. So far as mutation and transfer of the property are concerned, the same has been done after considering all the documents on record. It has been averred, the plaintiff had referred to that an application had been submitted to the Superintendent, Land Records against said mutation and until the same is decided, as per the provisions of the Maharashtra Land Revenue Code the civil court would not have jurisdiction to go into the legality of orders of defendant No. 7.

20. It is stated that defendants No. 2 and 5 had not filed written statement.

21. During the course of proceedings before the trial court, an application came to be moved on behalf of the plaintiff with respect to framing of issues wherein it had been asserted that it is defendant No. 1's burden to prove, plot No. 115 is his self acquired property. The application was opposed on behalf of defendant no.1.

22. Trial court had observed that in view of averments appearing in the pleadings, application by the plaintiff had been moved for framing issues and shifting burden of proof on defendant No.1. Application accordingly had been

considered. The trial court had by order granted the request of the plaintiff. Defendant No. 1 had led oral and documentary evidence.

23. Issues before the trial court were, whether defendant No. 1 proves that plot No. 115 situated at Samarthnagar, Aurangabad is his self acquired property; whether he proves that his father got recorded his name in respect of survey No. 2 at village Sonari and the name of Madhukar against survey No. 54; whether he proves that Madhukar and others waive their right to survey No. 2 of Sonari; whether he proves the alleged partition; what is the effect of proceeding under section 145 of the Criminal procedure code; whether the plaintiff is entitled to get $1/7^{\text{th}}$ share in suit property; whether the plaintiff is entitled to partition and separate possession; whether the plaintiff is entitled to *mesne* profits; whether the plaintiff proves that defendant no.7 illegally issued P.R. Card of C.T.S. No. 20535 and is not binding on the plaintiff; whether plaintiff proves that defendants are trying to alienate suit property and whether the plaintiff proves that defendants are carrying on construction over suit property.

24. Subsequently, two issues were added with respect to jurisdiction and limitation.

25. Defendant No. 1 has given evidence along with five other persons among whom are two *talathis*, namely, *Haridas* and *Chandrasekhar* who were examined at Exhibits 179 and 189 respectively, and municipal corporation employee *Karbhari* at Exhibit – 195 and *Dhananjay* -treasury officer at Exhibit 223. Witness for plaintiffs, namely, *Vishwas* had been examined at Exhibit-73. Oral evidence of defendant No. 1 has been countered by plaintiff (Exhibit 220). On behalf of the parties several documents had been produced.

26. Trial court has considered that suit plot No. 115 is claimed to be self acquisition of defendant No. 1 and he has also claimed that purchase of plot is a *benami* transaction. Trial court has observed that evidence of defendant No. 1 does not refer to at all to his personal income at the time of purchase of property. Evidence adduced by him in respect of the same is to the effect that the property had been purchased in the name of Anandrao by a registered sale deed (Exhibit 163). Though defendant No. 1 having been employed since 1962 is not disputed, yet he has not given

any evidence in respect of his financial position at the time of purchase of said plot. It has been referred to that late Anandrao retired as a teacher, he was getting pension since 1956 and further it has emerged on record that the agricultural lands were ancestral properties of late Anandrao and were very much with Anandrao while the purchase of plot was made. Land at Sonari was irrigated and was getting good income during 1960 to 1964. Trial judge has considered that it would not be said to be a case wherein it can be said that suit plot had been purchased exclusively from pension amount of Anandrao whereas the plaintiff has claimed that suit plot was purchased from joint family funds and that the amount of Rs.700/- at the time of execution of sale deed had been paid by Anandrao through defendant no.1. The court referred to photocopy of agreement of sale (*isar pawati*) which has been admitted by defendant No. 1.

27. Documents at Exhibits, 161, 171 and 172, show that suit house at Aurangabad came to be recorded in the name of defendant No. 1 with the municipal authority. Trial court considered that application/affidavit of Anandrao (Exhibit-161) communicating to municipal authorities to record defendant No. 1's name in respect of suit plot No. 115, order

thereupon by tax department of municipal authority (Exhibit-171) coupled with P. R. card (Exhibit-162) showing mutation dated 21st March, 1984, are revenue record and are not documents on the basis of which there can be declaration of title. Trial court has further observed that mutation dated 20th March, 1984 refers to an affidavit by defendant No. 1 and the affidavit had not been filed on record. The mutation as appearing in P.R. Card (Exhibit-162) creates an impression that the same had been keeping back the plaintiff and other legal heirs from the same. As such, those would not bind the plaintiff. Trial court as such had considered it to be not efficacious. Trial judge, however, found that such a recording of name in the background of other evidence particularly Exhibits 175 and 176 - the communications by defendant No. 1, which do not make any reference to suit plot, debilitates the case of defendant no.1. The court further had considered that the arrangement being not equitable and taking into account sections / articles 223 and 223 of the *Mulla's Hindu law*, allotment, if any, by father could not be said to be legitimate and equitable and recording of such a family arrangement can be repudiated. The trial judge has also referred to that survey No. 2 came to be recorded under entry

No. 72 (Exhibit 167) in defendant No. 1's name and from survey No. 54, a piece admeasuring 4.10 acres in favour of plaintiff under mutation entry No. 290 (Exhibit 168). Defendant No. 1 had referred to articles A to D in evidence. However, the same could not be relied on. Besides, the court found the the mutations effected cannot be reliable being based on a document of partition (Article D) which did not bear any date and it was not in respect of whole of the family properties, had been held to be not proved and had not been exhibited.

28. Learned trial judge has considered that Exhibits 175 and 176 (the communications by defendant No. 1 on 14th August, 1980 and 11th April, 1980), to a large extent would show that arrangement made by late Anandrao had not been acceptable to members of the family. In the circumstances, the presumption about revenue entries had not been available to defendant No. 1. So far as proceedings pursuant to section 145 of Criminal Procedure are concerned, it has been held that those do not affect the rights involved in civil proceedings.

29. Trial court with reference to other documents considered that P. R. card (Exhibit-162) read with letters (Exhibits 175 and 176) addressed by defendant No. 1 to plaintiff do not assist the case pleaded by defendant No. 1.

30. It has been observed that pleading of the plaintiff is not seriously challenged by defendant No. 1 by adducing any positive evidence and he attempted to simply raise an issue of limitation.

31. It had been considered that mutation entry is of 1984, refusal to partition suit land is claimed to be in 1991. The cause of action had arisen in 1991. The material available on record was considered to show that suit is within limitation. Suit filed in 1992 was held to be well within limitation.

32. The court considered that there is no bar to jurisdiction of court and suit having been filed for partition in 1992. Trial judge considered that in the circumstances, all the heirs of Anandrao would succeed to suit properties equally and as such the plaintiff would be entitled to 1/7th share in suit properties. The suit accordingly came to be decreed.

33. Aggrieved by aforesaid judgment of trial court, defendant No. 1 had been before appellate court under regular civil appeal No. 387 of 2005 referred to above. The appellate court had framed points for determination as to whether the suit properties are joint family properties; whether plot No. 115 i.e. C.T.S. No.20535 situated at Samarth Nagar, Aurangabad is self acquired property of defendant No. 1; whether agricultural lands at Sonari and Wahegaon and the plot at Wahegaon are self acquired properties of late Anandrao and he disposed of the same during his life time; whether the suit is barred by limitation and whether the judgment and decree passed by trial court is illegal and perverse.

34. Appellate court found the properties to be joint family properties, defendant No. 1 had failed to prove that property bearing plot No. 115 i.e. C.T.S. No.20535 is his self acquired property and further held that agricultural lands at villages Sonari and Wahegaon to be not self acquired properties of late Anandrao and that the suit was well within limitation. Appellate court, as considered by trial court, has held that documents particularly communications (Exhibits-175 and 176), to a large extent, indicate that the parties were not

happy about subsisting arrangements and had been willing to remove cause of discomfort, show that there had been no equitable partition among members of the family. Appellate judge has referred to that Article D – the partition deed claimed by defendant No. 1 and the one at Exhibit – 202 and found that those do not carry the case forward about partition among parties since the documents did not contain signatures of members of the family. It has been further referred to that while Article D refers to agricultural lands and movables and other articles, yet it does not refer to suit plot No. 115 whereas Exhibit – 202 refers to suit plot No. 115 as well as landed properties, but does not refer to movables and valuable articles. Appellate court additionally has considered that defendant No. 1 has not been able to place any oral or documentary evidence on record in respect of agricultural lands at Sonari and Wahegaon being self acquired properties of late Anandrao, whereas, the plaintiff had produced documents at Exhibits 230, 165 and 166 *Khasara Pahani Patraks* which show that Wahegaon lands were shown in the name of his grand father and the land at Sonari was in the name of Waman Govindrao – Anandrao's predecessor do show that the properties were ancestral properties. Appellate court

as well considered that, criminal proceedings referred to, do not impinge on civil proceedings involving rights claimed by the plaintiff. Appellate court has observed that beyond bare submission about land acquisition compensation being awarded to defendant No. 1, there is nothing placed on record in respect of the same and a mere submission would hardly be able to indicate ownership of property to defendant No. 1.

35. It is considered by appellate court, there is no credible material placed on record to infuse substance into the contention of defendant No. 1, him having constructed house on plot No. 115 by raising loan and him having repaid the same from his salary or any other source. Learned appellate judge has considered that mutation entries would not *ipso facto* depict partition. Suit plot had been agreed to be purchased before defendant No. 1 had joined services. Earnest amount, in fact, had been paid by father Anandrao. At the relevant time, late Anandrao was having agricultural lands and was also receiving pension. Pension amount of Rs.56 per month in 1956-58 was not a meagre amount. Learned judge as such, considered that there had been nucleus and hotch-potch and thus the decision rendered by trial court had been appropriate. In the face of evidence as

appearing, appellate court found, the findings recorded by trial court about defendant No. 1 not having been able to establish suit plot No. 115 to be his self acquired property, to be appropriate. Appellate court, as such, adjudged that suit properties are of joint family and thus amenable to partition among parties to the suit. The appellate court has considered that the claim of defendant No. 1 of suit being barred by limitation as not sustainable having regard to the facts and circumstances of the case and the claim made by the plaintiff about cause of action is lastly stated to have arisen in 1991. It is considered that 1972 events were not an indication of partition and as such it may not be considered that suit was barred by limitation. In the circumstances, the appeal was dismissed with costs, confirming the judgment and decree by trial court.

36. It is against the judgments of two courts hitherto, original defendant No. 1 is before this court in this second appeal as the appellant.

37. Mr. P. V. Mandlik, learned senior advocate for appellant, submits that there is sufficient record which bears that there has been a complete previous partition in 1968 pursuant to

Article 327 of Mulla's Hindu Law, having regard to mutation entries of 1968 and the ones which are taken in 1972. There have been several documents exhibited in this respect and according to him, those do indicate equitable partition by father among sons as each of the sons got equal share in the agricultural lands. He submits that inaction on the part of plaintiff during lifetime of Anandrao to have repartition, upon not being satisfied with previous one, is an indication of the position that plaintiff did not feel partition to be unequal. He submits that suit being not for repartition, unequal partition or partial partition, for which cause of action had arisen in 1968-69, 1972 and in 1979 and, yet, suit had been filed in 1992, is a suit beyond the period of limitation. It is not the case that the suit is for reopening of partition. On the background that appellant had joined services on 2nd July, 1962 and purchase of plot No. 115 having been made in 1964 for a consideration of Rs.900/-, it ought to have been appreciated that appellant had been possessed of not only source of income but also sufficient income. Appellant had asserted and strengthened his rights to plot No.115 treating the same to be his exclusive property, raising and repaying loan on the same and paying taxes continuously.

He submits that existence of nucleus for purchase of plot No. 115 at Aurangabad to be agricultural lands as considered is not proper, for, it has not been a case made out by any of the parties. Decisions of courts hitherto are arbitrary and contrary to law and tend to be perverse.

38. He goes on to submit that the plot No. 115 was purchased by appellant in 1964 by paying valuable consideration, but had been purchased in the name of his father Anandrao as a mark of respect, since he had full faith in Anandrao as in all certainty, Anandrao would not have objected to the plot being considered appellant's property and as a matter of fact acknowledgement of aforesaid finds place when he transferred the plot in appellant's name in 1965 by filing application effecting entry dated 31st October, 1965. Thereafter, appellant obtained construction permission and constructed house by obtaining loan and had started residing there. His name had entered revenue record, city survey record and municipal record. Anandrao, as aforesaid, did neither object to the same nor do other sons or legal heirs of Anandrao during his lifetime or for that matter till 1992, after Anandrao had died twelve years before institution of the suit. He submits that cumulative effect of the conduct of parties to

the suit as well as the documents and the revenue record coupled with payment by government of compensation to appellant upon acquisition of some portion of plot No. 115, not only are pointer to but also firmly establish that property – plot No.115 cannot form subject matter of partition and it is exclusive and self acquired property of appellant No.1.

39. Learned senior advocate Mr. P. V. Mandlik appearing for the appellant – original defendant No. 2 purports to refer to various aspects, which according to him would be involved in present matter.

40. He submits, in first place, suit is outside period of limitation, for, properties have been partitioned long back, more than twenty years before, as it would emerge from record.

41. He submits that, treatment given to plot No. 115, at Aurangabad for over twelve years during lifetime of Anandrao has been that of exclusive property of the appellant. He submits that in the partition of 1968, which is complete in nature, property at Aurangabad bearing plot No. 115 had not found place, since Anandrao had been aware that it had been purchased by appellant in his name as a mark of respect and

had accordingly applied to the local authority referring to other persons do not have any objection. Plot No. 115 at Aurangabad being separate property acquired by appellant had not formed subject matter and had no reason to form subject matter of partition taking place in 1968 as would be depicted by Article "D". Not only during his lifetime, but also at any time after 1968 Anandrao had claimed property to be joint family property. Furthermore, said property being of appellant would be borne out from events which have occurred later in point of time, particularly, the property having been recorded in his name under an application by Anandrao himself and agricultural lands one at Sonari has been recorded pursuant to application by Anandrao in favour of the appellant and the one at Wahegaon in the name of other brothers of plaintiff.

42. He submits that loans taken by appellant for development of plot No. 115, loans repaid, payment of taxes continuously and mutation in his favour in records of various authorities are overt acts supporting exclusion of plaintiffs and other defendants from plot No. 115.

43. He submits, none of the plaintiffs or other legal heirs had staked claim or share in plot No. 115 at Aurangabad during lifetime of Anandrao or even thereafter till 1989 or till suit had been filed. Whole proceedings have started after son of plaintiff tried to force possession over suit plot and proceedings pursuant to section 145 of the Criminal Procedure Code had ensued at the instance of appellant. Till then neither plaintiff nor other legal heirs had asserted and claimed right to plot No. 115.

44. In the circumstances, learned senior advocate Mr. Mandlik submits that looking at the matter either way properties stood to be treated to be exclusive property of defendant No. 1 - appellant and he had been allowed to enjoy the same as exclusive properties of appellant. The plaintiff and other legal heirs stood ousted from said supposed joint family properties and were excluded from its enjoyment and in the circumstances suit instituted in 1992 is barred by limitation by several years.

45. He submits that it clearly emerges that, even going by case sought to be developed about property at Aurangabad Plot No. 115 being ancestral property, the same is destroyed,

for, the plaintiffs and other defendants stand excluded from said plot and taking into account Article 110 of Limitation Act, 1963, suit is far beyond the period of limitation.

46. Suit in fact, according to learned senior advocate, is a suit for repartition. He submits, while observations of the courts hitherto do indicate that they have considered that there had been a partition with reference to events referred to above, however, same is not equitable and as such, ought to have framed proper issue regarding repartition, unequal partition or partial partition by determining cause of action with reference to events and thus ought to have considered suit to be barred by law of limitation.

47. Learned senior advocate submits that reference of Articles 323, 222, 304, 233 of Mulla M. Hindu Law by the courts had been misplaced and had been wide off the mark. Whereas what would have been relevant in the scenario is Article 327 of Mulla's Hindu Law, caption "Evidence of partition", explaining evidentiary values of conduct of parties during lifetime of father and mutations in revenue record acting upon previous partition and its continuation for a long time. He submits this aspect has been missed out on by the courts hitherto.

48. He submits that courts have considered arrangement / partition does not appear to be equitable, is a friable consideration since each of the male member of family had been allotted equal share in ancestral agricultural lands.

49. He submits that Articles "B", "C" and "D", viz., partition deeds and application of entry of five sons are documents showing complete partition around 1968 and ought to have been exhibited.

50. Another leg of submissions of Mr. Mandlik is, 1964 transaction does show that property is transferred in the name of one person for a consideration paid and provided by another person and as such, said transaction in the name of Anandrao is *Benami* transaction way back before provisions of the Prohibition of Benami Property Transactions Act, 1988, had come into effect.

51. He submits that burden of showing plot No. 115 to be self acquired property is erroneously cast on the appellant rather which shall and ought to have been on plaintiffs to show it is joint family property.

52. He submits that signature on document Exhibit-202 claimed to be of Anandrao could not be proved. The document has emerged on record to be fraudulent one. The document had been produced with an intention to have cancellation of previous partition and with a view to include property at Aurangabad.

53. He submits that in the face of evidence emerging on record, a documentary one that of sale deed in particular dated 16th October, 1964, Exhibit-163 clearly goes to show that in the presence of registrar appellant had paid Rs.700/- in cash to the executants which gives an indication of that consideration at least the major chunk had been paid by the appellant which shall clinch the issue about property being self acquired property of appellant.

54. He further goes on to submit that Anandrao had not been possessed of wherewithal to purchase property in 1964, as he had retired in 1956 and had been drawing meagre pension of Rs.56/- per month, with which no purchase of such property could have been possible. It ought to be considered that he could not make any purchase of property while he was in service as a teacher, whether he could purchase the

property after retirement. He submits that appellant had joined services in July, 1962 and the plot had been purchased for Rs.900/- in 1964.

55. He passingly submits that even otherwise a partition of plot No. 115 would not be possible as it would result in fragments being created, which is prohibited under the Maharashtra Prevention of Fragmentation and Consolidation of Holdings Act, 1947.

56. He submits that elderly and parental communications of 1980 are being misused, however, those do refer to previous long standing position that there being partition. The communications were intended to diffuse discomfort and tension in the family relations among sons of late Anandrao and were issued as parties were residents of different places, yet same would not give cause of action to file suit or for that matter would override law of limitation.

57. Apart from aforesaid, learned senior advocate Mr. Mandlik contends that the evidence has been given by general power of attorney holder Vishwas, who had no and could not have knowledge of the factual position subsisting in 1965 about intention underlying transfer of plot No. 115 in

appellant's name and the loan taken and repaid, land acquisition compensation being paid to the appellant. As such, evidence by him cannot be said to be an authentic or admissible or acceptable evidence in law. Even otherwise, one will have to take into account that power of attorney holder can be of assistance in evidence only in respect of facts, which had taken place in his presence and not otherwise. He submits that it is only Vishwas who has entered witness box and has given evidence on behalf of the plaintiff.

58. He further purports to contend that since defendants No. 4, 5 and 6 have compromised their claim with the appellant, that clinches the issue for no other coparcener had been before the court to lead evidence and since general power of attorney holder Vishwas's evidence is not admissible and cannot be relied upon, suit of the plaintiff ought to have been dismissed.

59. His submission also is when plaintiff has claimed that there had been no partition and also tried to claim partition on the basis of a forged document, while he fails to prove his such claim, suit was liable to be dismissed and the trial court committed grave error in decreeing the suit and appellate court by maintaining the same.

60. In support of and in aid of his submissions, learned senior advocate appearing on behalf of the appellant has placed reliance on a few reported decisions.

61. He refers to and relies on the case of “*U. R. Virupakshaiah V/s Sarvamma and Another*” reported in 2009 AIR (SC) 1481 to contend that findings of facts arrived at upon consideration of inadmissible evidence and based on presumption are liable to be interfered with under section 100 of the Civil Procedure Code. According to him, since inadmissible evidence has been considered and weighed with the court, particularly evidence of general power of attorney holder, if the same is excluded, judgment would rest on presumptions, which are untenable in present matter as the power of attorney holder's evidence is inadmissible.

62. In order to support his submission that power of attorney holder cannot give deposition in place and instead of principal, he cites the case of “*Janki Vashdeo Bhojwani and Another V/s Indusind Bank Ltd.,*” reported in AIR 2005 SC 439.

63. He further refers to a case decided by the Supreme Court in the matter of “*Makhan Singh V/s Kulwant Singh*” reported

in 2007 AIR (SC) 1808, to submit that it is for the propounder to establish that there was nucleus of joint family and income was available from the same from which it can be said that property has been purchased.

64. According to learned senior advocate in 1968 there had been complete partition of ancestral properties and in such a case, burden had been on plaintiff to prove that certain property was excluded from partition and it cannot be held that plaintiff has been able to discharge said burden, for said submission he refers to and relies on a judgment of the Supreme Court in the case of “*Kesharbai @ Pushpabai Eknathrao Nalawade V/s Tarabai Prabhakarrao Nalawade*” reported in 2014 AIR (SC) 1830.

65. He purports to refer to a decision in the case of “*Murugesu Naicker V/s M. Sadayappa Naicker and Others*” reported in AIR 1997 Madras 4 to buttress his submission that it is for plaintiff to discharge burden about existence of joint family.

66. Mr. R. S. Deshmukh and Mr. F. R. Tandale learned advocates appearing for the respondents, submit that two courts have arrived at concurrent findings of facts regarding there being no earlier partition and further that the property,

particularly bearing plot No. 115 situated at Samarth Nagar, Aurangabad is property of late Anandrao and plaintiff and other legal heirs of Anandrao have share in the same. The findings are based on evidence as has come on record. Thus, findings of fact are not open to probe in second appeal. It has emerged that defendant No. 1 could not place anything on record to support his claim of the property plot No. 115 being his self acquired property, although a specific issue had been framed in respect of the same and burden had also been placed on him. While the burden was so placed on him, under an order, he had submitted to the order and had proceeded with the matter. Learned advocates refer to that it is an admitted position, the property at Aurangabad, plot No. 115 was agreed to be purchased by Anandrao from the vendors under written document of January, 1962 for a consideration of Rs.900/- and further that admittedly, defendant No. 1 had no source of income at all in January, 1962. Nor it is a case that employment of defendant No.1 had ever been in contemplation in January, 1962.

67. Relying on a judgment in the case of *“Surendra Bhatia and etc. V/s Punam Bhatia and Others”* reported in *AIR 2001 RAJASTHN 338* learned advocates appearing on behalf of respondents

contend that once having admitted existence of certain fact, defendant cannot be allowed to take inconsistent plea which would prejudice case of the plaintiff. This judgment appears to have been cited in the context of that while the appellant has admitted that there had been agreement of sale dated 18th January, 1962 for purchase of property at Aurangabad, bearing plot No. 115, and neither it is the case of appellant that agreement had been in his favour nor is that the agreement was intended to favour him. In the face of acceptance of the fact that the property was agreed to be purchased in the name of father and property had in fact been purchased in the name of father, now he would not be able to retract from the same and claim the property to be his exclusive and self acquired property.

68. Over and above this, defendant No. 1 has not placed anything on record to show his income upon employment. On the contrary, his case has been that late Anandrao had been getting pension of Rs.56/- per month since 1956.

69. Learned advocates further go on to submit that the application made by late Anandrao to local authority for showing property in the name of defendant No. 1 was an arrangement to facilitate development over purchased

property. It had never been the intention of Anandrao to absolutely give the property and the title therein to defendant No. 1. There is no transfer of title to immovable property through any legally admissible mode. This being the position, claim of defendant No. 1 that these are events which indicate that Anandrao desired to transfer property to him is a fallacious case tried to be projected, suiting convenience of defendant No. 1. In such an event, even otherwise, one will have to consider that there is indeed an acceptance of the fact that the property belonged to Anandrao. Anandrao had also by his application given clear indication of that property belonged to joint family by referring to that other members of the family do not have any objection. Anandrao had never applied to city survey office to mutate property in the name of defendant No. 1 during his lifetime. Had real intention of Anandrao been to transfer property in the name of defendant No. 1, he would have been required to execute a proper registered deed transferring title to property. Thus, it clearly surfaces that Anandrao never intended to transfer property plot No. 115 absolutely to defendant No. 1 and further that applications to local authority were with intention to facilitate development of the property and as a matter of convenience.

70. Learned advocates further go on to submit that although it has been referred to by defendant No.1 that land acquisition compensation had been paid to him, there is no evidence which has been placed by him in support of his said claim.

71. They submit that courts have taken into account, Article "D" is an undated and unspecific document shown to have been written for partition of agricultural lands under signature of late Anandrao, yet, it has been rightly appreciated by the courts that since it does not bear signatures of other family members, it cannot be accepted as a deed of partition. Apart from aforesaid, courts have aptly considered, it is not the case that it is a partial partition or what was to be partitioned was only agricultural lands, particularly for that it does not refer to any other immovable or movable properties and as such, it falls short of being a partition deed.

72. Learned advocates for the respondents submit that although it is being referred to that a few of the defendants have arrived at a settlement with defendant No. 1 and have accepted his claim, it would not at all affect rights of the plaintiff to have partition of suit property.

73. Learned advocates further submit that so far as objection to the evidence by power of attorney holder of plaintiff is concerned, power of attorney holder himself is a joint family member and suit for being partition, evidence given by him, looking at the relationship, cannot be whisked away and thrown out saying that a power of attorney holder will not be able to give deposition in a suit for partition of the joint family properties. Learned advocates for respondents submit, it would have to be taken into account that a power of attorney holder, if he happens to be member of family, is treated on different footing and that his evidence is not excluded from being considered, for, he does have access to know about the family matters including the intention. They submit that as a member of joint family, power of attorney holder had come to know about various aspects including facts and antecedents of the family. As such, evidence by power of attorney holder in the matters of partition just cannot be scoffed off as is sought to be done under the arguments on behalf of the appellant. Besides, power of attorney holder himself has been a party to the suit. His evidence as such cannot be despised by referring to him only as a power of attorney.

74. Learned advocates submit that the record is self speaking, which sufficiently bears that property at Aurangabad is a joint family property. The joint family had been possessed of source of income. The property was agreed to be purchased by Anandrao for joint family from sources available with the family along with the aid of the pension received by him. The property had been agreed to be purchased while defendant No.1 had not been employed. Intention to purchase the property for joint family is amply borne out from the fact that agreement of sale was in favour of Anandrao. Registered deed of sale is also in favour of Anandrao. Had it been not so, registration of deed in the course of events could have been possible in the name of defendant No.1. But it is not so since intention had never been so. It was applied to local authority to facilitate development over the property since it had been convenient to show property in the name of defendant No.1 who was at Aurangabad and rest of the family members were occupied outside Aurangabad.

75. Learned advocates further submit that while two courts have appreciated evidence as has been adduced on record, appreciation being with reference to the record, it cannot be

said that the appreciation is erroneous or improper or is perverse.

76. Learned advocates have submitted that proceedings under section 145 of the Criminal Procedure Code against the power of attorney holder do not in any way affect rights of family members to have partition of suit properties. Possession, rather physical possession, is concerned, as is found during those proceedings would not at all affect rights of parties to have partition of suit properties.

77. So far as limitation is concerned, according to learned advocates for the respondents, the joint family members had not intended separation of their shares for a long time after death of Anandrao. However, defendant No.1 had surreptitiously moved on and got property at Aurangabad mutated in his name. Since family members were not intending to separate their shares, they had no occasion to assert their rights over suit properties. However, around 1989, there had been some turbulence and it became apparent that defendant No. 1 had attempted to claim exclusive rights to property at Aurangabad asserting to be self acquired property.

78. As such, applications were moved to the city survey officer in 1989 and 1991. Some litigation had also ensued in respect of possession u/s 145 of the Criminal Procedure Code over the property and thereafter the suit has been instituted in 1992, which is well within time of prescribed period of limitation.

79. Learned advocates submit that even if Article 110 of the Limitation Act is to be invoked, it is apparent that intention to exclude other family members of joint family left behind by late Anandrao, the same had surfaced only around 1989 and not before. In the circumstances, suit filed for partition cannot be said to be barred by law of limitation. Looking at the matter in any way, bar of limitation hardly arises in the present matter. Both the courts hitherto have rightly adjudged the same and question of limitation being a question of fact and law and facts having been appreciated and proper law having been applied, findings on said issue is not at all liable to be interfered with in second appeal.

80. Learned advocates for the respondents, therefore, submit that no case can be said to be made out for interference with the decisions given by the courts hitherto.

81. Learned advocate for the respondent no. 1/plaintiff refers to a judgment in the case of “*R. Rajagopal Reddy and Others V/s Padmini Chandrasekharan and Others*” reported in *AIR 1996 SC 238*, purportedly to support that defence of Benami transaction would not now be available to the appellant, for, suit having been instituted after enforcement of the Prohibition of Benami Property Transactions Act, 1988.

82. Learned advocates for the respondents have referred to and relied on a decision of the Supreme Court in the case of “*Sk. Sattar Sk Mohd Choudhari V/s Gundappa Ambadas Bukate*” reported in *(1996) 6 SCC 373*, particularly emphasizing head note “B” reading, thus-

“B. Transfer of Property Act, 1882 – Ss. 5 and 2 (d) – Transfer – Partition of joint family property by family arrangement – Not a transfer within the meaning of S. 5 – Family arrangement presupposes existence of antecedent title in the parties and it only defines their separate title – However, partition effected by a partition decree in a suit is a transfer under S. 2 (d) – No decision rendered on this anomalous situation – Question left open – Hindu Law – Partition – Family arrangement.”

83. Learned advocates submit that as has been observed above, application moved by Anandrao to show plot No. 115 in the name of defendant no. 1/appellant was only with an

intention to have a family arrangement for the benefit of family to develop the property and is not a transfer in favour of defendant no. 1/appellant at all.

84. A decision in the case of *“Nilkanth Sampat Khandade V/s Bhaurao Sampat Khandade”* reported in 2008 (4) Mh.L.J. 215, has been referred to, wherein it has been considered that a document which is not in accordance requirements of section 34 read with section 37 of the Maharashtra Stamps Act, 1958 and section 17 read with section 49 of the Registration Act, 1908, the document is rendered inadmissible and it is submitted so is the case in respect of document adduced at Article “D”.

85. Learned advocates further rely on a judgment of the Supreme Court in the case of *“Banwarilal V/s Chando Devi and Another”* reported in (1993) 1 SCC 581 referring to that a compromise should be lawful and if it is not so, contract itself is fraudulent, void and unlawful and as such, so called settlement among a few defendants would not at all affect rights of the plaintiff to have partition.

86. Heard learned advocates for the parties as aforesaid. Facts as would emerge and not much in dispute appear to be,

Anandrao had been possessing ancestral properties at Sonari and Wahegaon. At both the places properties were agricultural lands. Additionally one plot was available to joint family at Wahegaon. Since 1956 Anandrao had been getting pension per month. The property at Aurangabad bearing plot No.115 of Samarth Nagar was agreed to be purchased by Anandrao in January, 1962 for a consideration of Rs.900/- under a written agreement of sale with payment of Rs.200/- as earnest amount / advance amount. Appellant – Defendant No.1 had been employed in a co-operative bank from July, 1962. In October, 1964 registered sale deed came to be executed in furtherance of agreement of sale of January, 1962 in favour of Anandrao and balance of the consideration has been paid through hands of appellant - defendant No. 1. Anandrao had applied in 1965 to local authority to show plot No. 115 in the name of appellant – Defendant No.1 and had submitted that other family members have no objection to the same. Accordingly, property in the record of municipal council had been shown in the name of defendant No. 1. Mutation Entry bearing No. 72 had taken place about 1968 and Mutation Entry No.290 in 1972 respectively in the name of appellant – defendant No.1 and original plaintiff in respect of agricultural

lands at Sonari and Wahegaon pursuant to application therefor by late Anandrao. Letters Exhibit-175 and 176 dated 14th August, 1980 and 11th April, 1980 respectively, were issued by appellant – defendant No. 1. In 1984 mutation in city survey record in the name of appellant – defendant No. 1 in respect of property at Aurangabad had taken place. In 1989 proceedings under section 145 of the Criminal Procedure Code were lodged and also around same time, application had been moved for cancellation of mutation of 1984. In 1991 another application was filed to City Survey Office in respect of property at Aurangabad.

87. It has also emerged that while the property was being requested to be shown in the name of appellant in record maintained by local authority by Anandrao, rest of the earning family members, brothers of the appellant, were occupied outside Aurangabad city.

88. Discomfort in the family arrangement had been growing after death of Anandrao and the two letters at the instance of defendant No. 1 at Exhibits-175 and 176 were issued showing his willingness to remove discomfort by sitting together for disposition of joint family properties.

89. However, it appears that he had proceeded ahead with intention to appropriate plot at Aurangabad and to have it in his own name and applied to city survey office and accordingly mutation in his favour had been carried out in 1984 replacing name of Anandrao. His movement had been under an application and an affidavit in support of the same. It is not the case that any notice had ever been received at the end of other family members left behind by late Anandrao.

90. Uneasiness in respect of family arrangement had been ebbing away resiliene and plaintiff/his family members had applied in 1989 and 1991 to the city survey office, to reconsider mutation and to add their names. Litigation pursuant to section 145 of the Criminal Procedure Code had been initiated at the behest of appellant in or about 1989.

91. It is then denial of right to property at Aurangabad became explicit. It does not appear before aforesaid appellant had made intention explicit to claim the property as his exclusive property and claim to be his self acquired one. It appears to have caused institution of proceedings for partition. As such, it is not the case wherein it can be said

appreciation by two courts hitherto that the suit cannot be said to have been barred by law of limitation is improper.

92. The document on which reliance being placed by defendant No. 1 submitting that from the same, it should be adjudged that there had been partition of properties in 1968, is Article "D" claiming it to be partition deed. It is a document which according to the appellant brings about partition of ancestral properties. However, same is only with reference to agricultural lands and does not refer to other properties of the joint family. Besides this, that is an undated document. It does not bear signatures of all the family members. The entries of 1972 and 1968 in the name of plaintiff and defendant No. 1 in respect of properties at Wahegaon and Sonari have little significance so far as those being indicating factum of partition. Further, while Exhibit-202, which is claimed by plaintiff to be deed of partition in respect of properties, it refers to only property at Aurangabad and movable articles and does not refer to other immovable joint family properties. Finding that the evidence of partition having taken place, around 1968 or for that matter pursuant to Exhibit-202, falls short of establishing the factum of partition in fact and in law, is not liable to be dabbled with.

93. Thus, documents of partition have been discarded by two courts hitherto. For appropriate reasons, courts hitherto have declined to accept the same as deeds of partition.

94. In respect of the claim based on land acquisition compensation having been received exclusively by appellant, there is no evidence given at all in support of the same by defendant no. 1.

95. As submitted by advocates for the respondents, the compromise between appellant and some of the defendants does not at all affect rights of plaintiff and other legal heirs of late Anandrao in respect of suit property.

96. So far as burden of proof is concerned, specific application had been moved therefor by the plaintiff which was resisted by appellant, parties were heard and an adjudicatory order had been passed and legality and propriety of the same had not been questioned before leading evidence. Having acted in furtherance of order of the court and suit having been proceeded with and evidence having been led accordingly, defendant No.1 – appellant is precluded from reverting to and question propriety of burden being placed on

appellant. Evidence having been led on the issue, the burden of proof would not have rather it loses its significance.

97. So far as evidence of power of attorney holder is concerned, he is a joint family member and had been acquainted with documents concerning the properties and through family members had known historical background and antecedents. In fact, plaintiff and power of attorney holder are father and son. Later, during pendency of suit, power of attorney holder has been brought on record as a party. His evidence, as such, also bears character of evidence by party to the suit. As such, his evidence is not liable to be thrown out cursorily.

98. It appears that the appellant had joined service in a bank. Self acquisition of plot No. 115 is being claimed by defendant No. 1 with income from employment of appellant. However, sufficiency of said source to bring about purchase in 1964 has not been given evidence of. It is worthy to note that defendant No. 1 – appellant has been shy of disclosing his income received from employment.

99. So far as his own income is concerned, appellant/defendant no. 1 had been silent. Anandrao had

been possessed of source of income from ancestral agricultural properties situated at Sonari and Wahegaon. Anandrao was receiving pension of Rs.56/- per month from 1956. There have been, as such, at least two known sources of income and were indeed sufficient to purchase a property at the consideration agreed upon of Rs.900/-. It is not the case wherein it can be said that property had been purchased for defendant No. 1 contemplating that he would have a source of earning. Nor it is a case of anyone, including defendant No. 1 that the property had been agreed to be purchased for defendant No. 1 by Anandrao. While in 1964, sale deed came to be executed by passing the balance of consideration, through hands of defendant No. 1, in the background that agreement of sale had been in favour of Anandrao without there being evidence particularly that the money was that of defendant No. 1 or for that matter, even if it is assumed that it is of defendant No. 1, he had passed the same on to vendors for himself and not for Anandrao at the event of execution of sale deed.

100. It is not the case of defendant No. 1 – appellant that the property plot No. 115 was being purchased in the name of Anandrao by him in pursuance of agreement of sale of

January, 1962 nor it is a case that Rs.200/- were paid by him to Anandrao or other joint family member at any point of time. Even if it is assumed that it was being purchased for appellant – defendant No. 1, it appears that he had no objection to consider the property as having been thrown in property hotchpotch of the family. Anandrao had written to local authority around 1965 to show the property at Aurangabad in the name of appellant, making reference to no objection of other family members, gives a clear indication of that property was considered as joint family property. It thus, necessarily had borne character of a joint family property.

101. It is difficult to consider passing of consideration through defendant No. 1 would confer title to defendant No. 1. It was not either intention of the vendor or for that matter purchaser that the title of the property was to be transferred to defendant No. 1.

102. It may have to be referred to that for a transfer of title to immovable property, a transfer has to be in the way and in the manner as is required in law applicable thereto. Hitherto, it had never been the case of appellant that transfer of title claimed by him had been by procedure as contemplated in

law, particularly the Transfer of Property Act. In the present case title has been vested in late Anandrao under registered deed of transfer.

103. One may have to consider that both, late Anandrao and defendant No. 1 appear to be reasonably educated persons, capable of understanding legal position while they purchased property under registered sale deed and had understood that title to the property stood in the name of Anandrao. An application had been moved to local authority to show property in the name of defendant No. 1 in its record, referring to that other members do not have any objection to the same. The application had been for the purpose of facilitating development of said property without intention to transfer property and not in the sense as it would be understood as transfer of title, as would be discernible from the undisputed surrounding circumstances. Title of the property had not been intended to be transferred and as such, there have been no further movement for getting of the transaction registered. If transfer of immovable property is to be by one person to other, the same is possible only by a registered deed, if the property is worth more than Rs.100/-. Admittedly, in the present case, property is worth much more

than Rs.100/- and there is no registered deed of transfer. It is not the case that either Anandrao or defendant no. 1 was unaware of this requirement in law. Further, it appears, appellant has been an advocate.

104. It has clearly emerged that the property at Aurangabad was a joint family property and was being so treated by all the members while appellant is trying to assert exclusive rights to the same, claiming the same to be of self acquisition. Defendant No. 1 has not tendered any evidence as to the remuneration he had been receiving from his said employment. There is virtually no evidence given on behalf of the appellant as to about him being possessed of wherewithal for purchase of said property save and except that he had been employed since July, 1962. However, he had been really in possession of consideration amount from remuneration of employment has not been shown by him. The joint family is shown to have been possessed of source of income and father in whose name property has been purchased admittedly had another source in the shape of pension being received by him. His pension amount surrounded by the fact that other members of family being occupied earning outside Aurangabad gives indication of that other family members not

being dependent on late Anandrao is an apparent position. As such, income sources of ancestral property and him being receiving pension since 1956 gives to a considerable extent credibility to the position that Anandrao having purchased the property from sources available with him.

105. It appears, in order to facilitate development of property, an arrangement had been arrived at wherein the property was allowed to stand in the records of local authority in the name of appellant. It is not the case that late Anandrao had ever given an understanding to other family members that this arrangement is being made in their exclusion. Nor it is the case of appellant that pursuant to the same, further steps had been taken to let title vest in the appellant which have a legal sanction. Had real intention of Anandrao being to invest appellant with title to the property, both Anandrao and appellant, who were literate and educated, ought to have acted in furtherance of their said intention and done further acts vesting property in appellant.

106. There has been sufficient record showing that the family members left behind by Anandrao were not comfortable with the family arrangement hitherto being operating. There have

been two writings issued to remove and settle discomfort as would emerge from communications by defendant No. 1 to the plaintiff and other legal heirs of late Anandrao vide Exhibits-175 and 176. The courts have found that although reference has been made to affidavit, that affidavit had not been placed on record and the claim of defendant No. 1 being dubious and unreliable. The courts have also found that mutation of 1984 in respect of property at Aurangabad is untenable for it does not appear to have been recorded after following due procedure.

107. It is rather queer, as to why learned senior advocate has tried to contend that transaction shall be deemed to be *benami* transaction for the reason that transactions is of 1964 and is not hit by provisions under the Prohibition of Benami Property Transactions Act, 1988. Claim of the transaction being *benami* transaction also falls flat on the floor for section 4 of the Prohibition of Benami Property Transactions Act, 1988 prohibits defence being taken by true owner of the transaction being *benami* transaction on and from the date of enforcement of section 4 of the Prohibition of Benami Property Transactions Act, 1988. Relevant provisions of the Prohibition

of Benami Transactions Act, 1988, particularly, section 4 thereof, which read as under:

“4. Prohibition of the right to recover property held benami.—

(1) No suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property.

(2) No defence based on any right in respect of any property held benami, whether against the person in whose name the property is held or against any other person, shall be allowed in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property.”

108. From aforesaid, it is explicit that a person is even precluded from taking benefit or a defence of the transaction being Benami on and after appointed date and upon enforcement of said enactment. As such, the defence being taken that transaction being *benami* is not at all available to the appellant. Thus, this particular defence also dwindles and debilitates case of appellant.

109. Learned senior counsel has referred to *U.R. Virupakshaiah's* case (*supra*) to impress upon that the findings of facts on consideration of inadmissible evidence and based on assumption are liable to be interfered with under section 100 of the Code of Civil Procedure. According to him, since the evidence by plaintiff's son who is power of attorney holder

is inadmissible, such an evidence could not be relied on. He has referred to decisions in the cases of *Janki Vashdeo Bhojwani (supra)* and *Shankar Shridharrao Deshmukh vs. Vyankatesh Shankarrao Deshmukh*, reported in 2007 (1) Mh. L. J. 541 which according to him deal with, inefficacy of evidence of power of attorney holder in respect of acts of the principal in the circumstances involved in said cases. Although it is being so submitted, in this respect, one may have to have regard to the decision of the supreme court in the case of *Man Kaur v. Hartar Singh Sangha*, reported in (2010) 10 SCC 512 wherein under paragraph no. 17 certain exceptions have been recognized particularly of the evidence by a person managing affairs. It appears to have been referred to that it would be possible to accept evidence of attorney holders who are managing the affairs of old parents. In present case, though initially suit had been filed by plaintiff, however, upon his death, power of attorney holder has been a party in his own right to the suit and has given evidence. His evidence would not be said to be only of power of attorney holder of the plaintiff but, also in his own capacity as a party. Apart from aforesaid distinguishing factor in the present matter, one would have to take into account that the power of attorney holder has been a member of joint family

and appears to be acquainted with the documents and the facts and appears to have been conversant with the scenario. In the circumstances, it does not appear to be a case wherein the evidence of the power of attorney holder is inadmissible. Thus, it is not the case wherein with reference to aforesaid decisions relied on, evidence given in the present case by power of attorney holder who has been a party to the suit later, can be overlooked and disregarded absolutely.

110. Learned senior advocate has referred to the case of *Makhan Singh (D) by L.Rs. (supra)* in support of his submission that it is for the propounder to establish that there was nucleus of joint family and income was available from the same. So far as this aspect is concerned, the parties have addressed themselves and evidence on record to a large extent shows the plaintiffs have discharged their burden that there has been nucleus of joint family and income from the same was available with another source for the head of the joint family to purchase properties and the property at Aurangabad has been purchased in the name of head of the joint family – Anandrao, with such sources. In the scenario, said citation as well does not come to the aid of the appellant.

111. Learned counsel during the course of his submissions has referred to case of *Murugesha Naicker (supra)* to submit that proof of existence of joint family property is a burden on the plaintiffs and failure to discharge the same would dis-entitle plaintiffs to the reliefs claimed. In said case, it appears plaintiff himself had been treating property purchased by him as his individual and separate property and in the absence of blending of properties purchased by members of family and the plaintiff failing to prove existence of joint family property, it has been held the suit cannot be decreed.

112. No analogy can be drawn from the cases of *Murugesha Naicker* and *Makhan Singh (supra)* which are based on altogether different background than the one in present matter as, to a substantial extent plaintiff herein appears to have brought forth that there have been ancestral agricultural lands for income, coupled with his grand father being receiving pension since 1956, the burden to a large stands discharged by the plaintiff about there being nucleus and joint family property and other sources with father to purchase property at Aurangabad. That apart, question of burden loses significance when there is evidence to showing the purchase being for family by head of the family.

113. Learned senior counsel had referred to the case of *Kesharbai @ Pushpabai (supra)* to support his contention that there had been a complete partition in 1968 and as such burden lies on plaintiffs to establish that certain property was excluded from partition yet, as discussed above, the position emerges that the evidence on record does show existence of joint family and joint property and further that defendant no. 1 has not been able to support his case with credible material. Thus, this case as well does not aid the cause of the appellant.

114. Although learned senior advocate refers to a judgment in the case of “*C. Gangacharan V/s C. Narayanan*” reported in *AIR 2000 SCC 589* in support of his submission that the Prohibition of Benami Property Transactions Act, 1988 does not have retrospective operation and as such, would not affect claim by defendant No.1 to be real owner in respect of transaction of sale of 1964 being *Benami* in the name of Anandrao. However, the decision relied on would not support appellant at all. What has been considered therein is the Act is not retrospective in operation and would not apply to pending suits, which had already been filed and entertained prior to coming into force

section 4 of the Act. It does not take into account fact-situation involved in present matter. No analogy as is sought to be drawn would be available in the facts of present case especially in the face of statutory provision u/s. 4.

115. Evidence has been led on either side and the same has been appreciated, particularly the documentary evidence and its implications. While the plaintiff has one perspective of the same, the appellant is trying to have another angle, which may suit his purpose. In such a case, findings arrived at by the two courts hitherto are not such as can be said to be suffering a defect as would spoil and defeat entire evidence and same would be razed to the ground. There is sufficient evidence on record which has been appropriately adjudged by the two courts hitherto.

116. All requisite aspects have been appreciated by the two courts hitherto. The appreciation as has been appearing cannot be said to be away from evidence on record. Thus, findings of facts which have been recorded by the two courts hitherto are not liable to be faulted with. For, there can be other view from other angle would not be reason to intercept the decisions.

117. Second appeal, thus, does not raise questions, as are sought to be framed on behalf of appellant.

118. Second appeal, as such, fails and stands dismissed. In view of dismissal of second appeal, all pending civil applications stand disposed of.

SUNIL P. DESHMUKH,
JUDGE

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