

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

**SECOND APPEAL NO. 92 OF 1990
WITH
CA/3189/1990 IN SA/92/1990**

1. Narayan s/o Govindrao, age major.
2. Shivaji s/o Govindrao, aged major.
3. Bhagwan s/o Govindrao, aged 10 years.
4. Namdeo s/o Govindrao, aged 8 years.

Nos. 3 and 4 under guardianship of the mother
Jijabai w/o Govindrao Ghogre, appellant no.5.
5. Jijabai w/o Govindrao Ghogre, aged 42 years
All R/o. Waghala, Tal. And Dist. Nanded
6. Balaji s/o Gangaram Bhangre, aged 32 years.
7. Vishwanath s/o Gangaram Bhangre, aged 26 years.
8. Tukaram s/o Gangaram Bhangre, aged 22 years.
Appellants No. 6 to 8 Occu. Agri. And all R/o.
Gudegao, Tal. And Dist. Nanded.
9. Bhujangrao s/o Pundlikrao Hambarde,
aged 30 years, Occu. Agri. And Business,
R/o. Nanded.
10. Damodhar Shrikishan Darak.
11. Datta Govindrao,
Minor under guardianship of the mother
Jijabai w/o Govindrao, aged 45 years,
Occu. House-hold, R/o. Waghala,
Tal. And Dist. Nanded. (orig deft 1 to 12)

VERSUS

1. Nilavatibai w/o Govindrao Ghogre,
(died) through L.Rs. R/1-A to 1-E
- 1-A. Prayagabai Govindrao Ghogare,
(Prayagbai w/o Sambhaji)
Age. Major, Occu. House-hold,
R/o. Babhulgaon, Tal. and Dist. Nanded.
- 1-B. Yamunabai Govindrao Ghogare,
(Yamunabai w/o Govindrao)
Age. Major, Occu. House-hold,
R/o. Babhulgaon, Tq. and Dist. Nanded.
- 1-C. Kashibai Govindrao Ghogare,
Age. Major, Occu. House-hold,
R/o. Babhulgaon, Tq. and Dist. Nanded.
- 1-D. Renukabai d/o Govindrao Ghogare,
(Renukakbai w/o Gyanoba),
Age. Major, Occu. House-hold,
R/o. Kokale Pimpalgaon, Tq. and Dist. Nanded.
- 1-E. Sayabai d/o Govindrao Ghogare,
(Sayabai w/o Dadarao)
Age. Major, Occu. House-hold,
R/o. Gundegaon, Tal. and Dist. Nanded.
7. Gayabai w/o Anandrao Maske,
aged. 25 years, Occu. House-hold,
R/o. Gundegaon, Tal. And Dist. Nanded.
8. Narayan Govindrao Ghogare,
Age. Major, Occu. House-hold,
R/o. Babhulgaon, Tq. and Dist. Nanded.
9. Shivaji Govindrao Ghogare (died) through L.Rs.
- 9-A. Nagubai Shivaji Ghogare (died) through L.Rs.

- 9-B. Yogesh Shivaji Ghogare,
Age. Minor, through Resp. No. 9-A
9-A to 9-B R/o. Waghala, Tq. and Dist. Nanded.
10. Bhagwan Govindrao Ghogare,
Age. Major, Occu. Agri.
11. Namdeo Govindrao Ghogare,
Age. Major, Occu. Agri.
12. Jijabai w/o Govindrao Ghogare,
(died) through L.Rs. 8,10,11 and 16.
13. Balaji Gangaram Bhangе,
Age. Major, Occu. Agri.
R/o. Gundegaon, Tq. and Dist. Nanded.
14. Vishwanath Gangaram Bhangе,
Age. Major, Occu. Agri.
R/o. Gundegaon, Tq. and Dist. Nanded.
15. Tukaram Gangaram Bhangе,
Age. Major, Occu. Agri.
R/o. Gundegaon, Tq. and Dist. Nanded.
16. Datta Govindrao Ghogare,
Age. Major, Occu. Agri.
Resp. Nos. 8 to 12 and 16
All R/o. Waghala, Tq. and Dist. Nanded.
17. Dathram Maruti Kure,
Age. Major, Occu. Agri.
R/o. Gundegaon, Tq. and Dist. Nanded.

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WITH

SA/265/2018

WITH

CA/4581/2018 IN SA/265/2018

WITH

CA/9886/2012 IN SA/265/2018

1. Bhujangrao Pundlikrao Hambarde,
Age. 56 years, Occu. Business and Agri.,
R/o. Anand Nagar, Nanded.
2. Damodhar Shrikishan Darak,
Age. 61 years, Occu. Business and Agri.,
R/o. Bhagatsingh Road, Nanded,
Tq. and Dist. Nanded.

VERSUS

1. Nilavatibai Govindrao Ghogare,
(died) through L.Rs. Resp. No. 2 to 7
2. Prayagabai Govindrao Ghogare,
Age. Major, Occu. House-hold,
3. Yamunabai D/o Govindrao Ghogare,
Age. Major, Occu. House-hold,
4. Kashibai D/o Govindrao Ghogare,
Age. Major, Occu. House-hold,
5. Renukabai W/o Gyanoba,
Age. Major, Occu. House-hold,
6. Sayabai W/o Dadarao,
Age. Major, Occu. House-hold,
7. Gayabai Anandrao Maske,
Age. Major, Occu. House-hold,

R.Nos. 1 to 7 R/o. Bhabulgaon,
Tq. And Dist. Nanded.
8. Narayan Govindrao Ghogare,
Age. Major, Occu. Agri.
9. Shivaji Govindrao Ghogare (died) through L.Rs.

- 9-A. Nagubai Shivaji Ghogare (died) through L.Rs.
- 9-B. Yogesh Shivaji Ghogare,
Age. Minor, through Resp. No. 9-A
9-A to 9-B R/o. Waghala, Tq. and Dist. Nanded.
10. Bhagwan Govindrao Ghogare,
Age. Major, Occu. Agri.
11. Namdeo Govindrao Ghogare,
Age. Major, Occu. Agri.
12. Jijabai w/o Govindrao Ghogare,
(died) through L.Rs. 8,10,11 and 16.
13. Balaji Gangaram Bhangе,
Age. Major, Occu. Agri.
R/o. Gundegaon, Tq. and Dist. Nanded.
14. Vishwanath Gangaram Bhangе,
Age. Major, Occu. Agri.
R/o. Gundegaon, Tq. and Dist. Nanded.
15. Tukaram Gangaram Bhangе,
Age. Major, Occu. Agri.
R/o. Gundegaon, Tq. and Dist. Nanded.
16. Datta Govindrao Ghogare,
Age. Major, Occu. Agri.
Resp. Nos. 8 to 12 and 16
All R/o. Waghala, Tq. and Dist. Nanded.
17. Dathram Maruti Kure,
Age. Major, Occu. Agri.
R/o. Gundegaon, Tq. and Dist. Nanded.

...Respondents...

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Advocate for Appellant : Mr V S Kadam
Advocate for Respondents 2-7 : Mr M.P Kale h/f
G.V.Sukale

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CORAM : V.K. JADHAV, J.

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Reserved on : April 05, 2018

Pronounced on : June 04, 2018

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COMMON JUDGMENT :-

1. Being aggrieved and dissatisfied with the judgment and order dated 23.10.1989 passed by the Additional District Judge, Nanded in RCA No.208 of 1984, the original defendant nos. 1 to 12 have preferred Second Appeal No.92 of 1990. During the pendency of the appeal, appellants no.1 to 8 and 11 remained absent even though court notices were served against them. By order dated 26.4.2010, this court (Coram : P.R.Borkar, J.) has directed that if appellant nos. 1 to 8 and 11 are not ready to join as appellants anymore, the appellant nos. 9 and 10 may take steps for transposing the appellant nos. 1 to 8 and appellant no.11 as respondents. Accordingly, appellant nos. 9 and 10 filed a Civil Application no.10786 of 2015 (CA 10786 of 2015 though filed in the year 2010 registered in the year 2015 for aforesaid purposes) and accordingly by order of this Court, Second Appeal stamp no.5941/2010 and

aaa/-

registered onwards as SA No 265/2018 wherein the original appellant no.1 to 8 and 11 transposed as respondent nos. 8 to 17. Thus, both the appeals are decided by this common judgment. In fact Second Appeal No.265/2018 is the outcome of Second Appeal No 92 of 1990, wherein the other appellants have lost their interest in pursuing the appeal, impleaded as respondents.

2. Brief facts, giving rise to the aforesaid appeals, are as under :-

a] Deceased Nilawatibai had instituted a Regular Civil Suit No.314 of 1981 before the Civil Judge S.D. Nanded for partition and possession of the suit property consisting of various agricultural lands and house property situated at village Waghala Tq. & District Nanded as described in the plaint. It is the case of the deceased Nilawatibai/original plaintiffs alongwith her three children as original plaintiff nos. 2 to 4 that, original defendant no.1/deceased Govind was a husband and the father of plaintiff nos. 2 to 4. Original

defendant no.6-Jijabai is the second wife of deceased defendant no.1/Govindrao and original defendant nos. 2 to 5 are the sons of defendant no.6 Jijabai from deceased defendant no.1/Govindrao. Deceased Nilawatibai / plaintiff no.1 was residing separate from her husband/defendant no.1 deceased Govindrao from 10 years prior to the institution of the suit as he had performed second marriage with defendant no.6-Jijabai. Defendant no.1/deceased Govindrao with an intention to make severance of the joint Hindu family effected partition of the suit property between himself and the defendant nos. 2 to 6. According to deceased Nilawatibai/plaintiff no.1, plaintiffs were neither given any share in the joint Hindu family property nor any arrangement was made for their maintenance by the original defendant no.1/deceased Govindrao. In pursuance of the partition, mutation was effected under mutation entry no. 720 dated 3.4.1980. The defendant no.1/deceased Govindrao since was intending to deprive the plaintiffs from the suit property, executed the sale deeds of the suit lands in the name of original defendant

nos. 7 to 9 at the instigation of his second wife/defendant no.6-Jijabai. Original defendant no.7 to 9 are the real brothers of defendant no.6-jijabai. According to deceased Nilawatibai / original plaintiff no.1, sale deeds executed by defendant no.1/Deceased Govindrao on 25.2.1981 in favour of original defendant nos. 7 to 9 are nominal and not binding on the share of the plaintiffs. Accordingly, plaintiffs have demanded their share in the suit property and, accordingly, instituted the suit claiming partition and separate possession in respect of the suit property to the extent of $\frac{1}{2}$ share alongwith the declaration that sale deeds dated 25.5.1981 are not binding on their shares and also for future mesne profits. During the pendency of the suit, defendant no.1 deceased Govindrao died on 6.3.1982. Plaintiffs and defendant nos. 2 to 6 are the only legal heirs of deceased/defendant no.1.

3. Though, defendant no.6-Jijabai, who happened to be the natural mother of minor defendant nos. 2 to 5 failed to appear in pursuance of the notice served

against her, the clerk of the Court came to be appointed as guardian-ad-litum for minor defendant nos. 2 to 5. On behalf of the minor defendant nos. 2 to 5 claim of the plaintiffs came to be resisted by filing the written statement exh.13. The original defendant nos. 2 to 5 have admitted the relationship as stated in the plaint paragraph no.1. They have specifically denied that deceased defendant no.1 Govindrao neglected the plaintiffs and plaintiffs were not residing with the deceased defendant no.1 since last ten years. It has also been contended that partition never effected between the defendant nos. 1 to 5. They have also denied that sale deed came to be executed at the instance of original defendant no.6-Jijabai in favour of defendant nos. 7 to 9. As there is no partition of the suit property between the defendant nos. 1 to 5, plaintiffs have no right to file the suit against the defendants.

4. Original defendant nos. 7 to 9 (purchasers) resisted the claim of the plaintiffs by filing their written statement at exh.32. They have admitted the relations

between the parties. According to them, suit property was never partitioned amongst the defendant nos. 1 to 5 as there was no partition, plaintiffs are not entitled to claim any share in the suit property. According to them, defendant no.1/Govind had executed the sale deed dated 25.2.1981 in respect of the suit property in their favour after receiving full consideration at market rate for family necessity. On these grounds, original defendant nos. 7 to 9 have prayed for dismissal of the suit.

5. The learned 4th Jt. Civil Judge J.D., Nanded though recorded findings in the affirmative to issue no.1 and held that, plaintiffs prove that partition of the family property was effected between defendant nos. 2 to 5 by deceased defendant no.1/Govindrao, neither any arrangement was made for them, nor any share was given to them, dismissed the suit mainly on the ground that plaintiffs have failed to add other necessary parties and the plaintiffs have no right to claim partition during the life time of deceased Govindrao.

6. Being aggrieved by the same, the plaintiffs have preferred Regular Civil Appeal No.208/1994 before the District Court, Nanded and the learned Additional District Judge, Nanded by the impugned judgment and order dated 23.10.1989 partly allowed the appeal with costs and held that the plaintiff no.1 Nilawatibai has 1/14th share in the agricultural lands described in claim paragraph of the plaint and right of residence to the extent of 1/14th share in the residential house as described in claim para.

7. Being aggrieved by the same, the original defendants have preferred Second Appeal No.92/1990 and since the appellant nos. 1 to 8 and 11 in Second Appeal No.92/1990 failed to pursue the appeal, despite the notice issued by this court and served on them, by order of this Court in Civil Application No.10786/2015, Second Appeal No.265/2018 came to be registered, wherein the original respondent nos. 9 to 10 who impleaded as party respondents in the pending appeal No.208/1984 before the District Court, prosecuted the

appeal as appellants and original appellants in Second Appeal No.92/1990 came to be impleaded as party respondents in Second Appeal No.265/2018.

8. Learned counsel for the appellants in Second Appeal No.265/2018 submits that, during the pendency of appeal bearing Regular Civil Appeal No.208/1984, the original defendant nos. 7 to 9 (Balaji Bhangе, Vishwanath Bhangе and Tukaram Bhangе) more specifically the original defendant no.8 Vishwanath Bhangе with the consent of defendant no.6-Jijabai had executed the sale deed no.6178 in favour of the present appellants Damodhar Darak out of the suit land gat no.77 to the extent of southern 2 acres (80R) and likewise with consent of defendant no.6 had executed another sale deed no.6177 dated 1.12.1986 in favour of the appellant Bhujangrao out of the suit land gat no.77 to the extent of 2 Acres (80R) in his south corner. Original plaintiff no.2 Prayagbai had filed an application Exh.20 for impleading the present appellants as party respondent in Regular Civil Appeal no.208/1984 and

accordingly they were impleaded as party respondents for the first time in the pending appeal no.208/1984 before the first appellate Court. Learned counsel for the appellants submits that, first appellate court has partly allowed the appeal without giving an opportunity to the present appellants to file written statement and to lead necessary evidence. Learned counsel submits that, the appellants are the bonafide purchasers for valuable consideration without notice, however, first appellate court has passed the impugned judgment and decree without giving an opportunity to them to file the written statement and contest the suit on merits. Learned counsel submits that, impugned judgment and decree passed by the lower appellate court is contrary and against the principles of Hindu Law. Learned counsel submits that, there is ample evidence to show that, on 25.2.1981 defendant no.1/deceased Govindrao, who happened to be the Karta of the family had sold the suit land to original defendant nos. 7 to 9 and as such, plaintiffs being female members of the family have no right to challenge the alienation. Learned counsel

submits that, appellate court has not considered the position as on the date of institution of the suit and erroneously considered the change owing to the death of the deceased Govind during the pendency of the suit. Learned counsel submits that, trial court has rightly dismissed the suit, however, the first appellate court has not considered the legal aspect of the case and erroneously partly allowed the appeal. Learned counsel in the alternate submits that, in paragraph no.17 of the impugned judgment and order, the first appellate court has observed that, during the lifetime deceased Govind had executed a sale deed in favour of defendant nos. 7,8 and 9 and so those sale deeds will bind on 1/7th share of deceased Govind and as such, if during the pendency of the appeal, if original defendant nos. 7 to 9 have sold some portion of the suit land in favour of present appellants, same relief may also be granted to the present appellants.

9. Learned counsel for respondent nos. 1A to 1E (legal heirs of plaintiff no.1/deceased Nilawatibai) and

respondent nos. 2 to 7 submits that, present appellants had purchased the suit property during the pendency of appeal from original defendant nos. 7 to 9 and as such, they are bound by the impugned judgment and order passed by the first appellate court. Learned counsel submits that, first appellate court in paragraph no.17 of the impugned judgment has rightly observed that the sale deeds executed in favour of the present appellants in the year 1986 (during the pendency of R.C.A. No.208/1984) will not bind the shares of the plaintiffs and other defendants having interest in that property. Learned counsel submits that, the first appellate court has rightly considered the provisions of the Hindu Succession Act and Hindu Women's Right to Property Act in its proper perspective and, accordingly, partly allowed the appeal granting thereby the share to deceased plaintiff Nilawatibai to the extent of 1/14th share in the suit agricultural land and also right of residence to the extent of 1/14th share in the residential house. Learned counsel submits that, there is no substantial question of law involved in this appeal and

thus both the appeals are liable to be dismissed with costs.

10. In view of the above submissions, following substantial question of law arises in this appeal :-

- I] “Whether the suit filed by the plaintiffs was maintainable when defendant no.1/deceased Govindrao was alive and succession has not been open on the date of filing of the suit, whether first appellate court is justified in considering the change that has been occurred during the pendency of appeal owing to the death of deceased Govindrao ?
- II] Whether first appellate court was justified in partly allowing the appeal without granting an opportunity to the present appellants to file their written statement and lead necessary evidence to show that they are the bonafide purchasers for valuable consideration without notice ?

11. On careful perusal of the impugned judgment and order passed by the first appellate court, it appears that, on appreciation of the evidence, first appellate

court has rightly concluded that, on the basis of the 7/12 extract filed on record and mutation entry, the mere ascertainment of the share of the minor defendant nos. 2 to 5 is not a sufficient factor to hold that there was partition between deceased defendant Govind and his son in the year 1980. The First appellate Court has rightly observed that partition is not a mere ascertainment of the share and it is a severance of a joint status and it requires definite and unequivocal indication of a member of joint family to separate himself from the family and enjoy the shares severally. In the instant case, all the coparcener defendant nos. 3 to 5 had no capacity to demand the partition and they did not have a capacity to indicate their intention to live separate. Minor defendant nos. 2 to 5 never carried out the cultivation as per the shares allotted to them. On the basis of mere entry in the revenue record is not helpful to draw inference that there was a partition in the year 1980 between defendant no.1 and defendant nos. 2 to 5. Admittedly, plaintiff no.1 – Nilawatibai was not given any share in the suit property. The First

Appellate Court has rightly interpreted Section 3 of Hindu Women's Right to Property Act, 1937 and partly allowed the appeal. I do not find any fault in the impugned judgment and order wherein the first appellate court has given the effect to the change owing to the death of defendant no.1 deceased Govindrao during the pendency of the suit. Deceased Nilalwatibai had instituted the suit in the year 1981 and during the pendency of the suit her husband deceased Govindrao died on 23.6.1982. The First Appellate Court has decided the appeal on 23.10.1989. In terms of the provisions of Section 3 of the Hindu Women's Right of Property Act, deceased Nilawatibai gets the right of partition and first appellate Court has rightly observed that for doing a substantial justice, instead of directing the deceased Nilawatibai to institute a fresh suit, it would be appropriate to consider the subsequent change owing to the death of deceased Govindrao and consider her interest in the suit property.

12. Present appellants came to be impleaded as party

respondents during the pendency of appeal no.208/1984 before the First Appellate Court. The First Appellate Court has not extended any opportunity to the present appellants to file their written statement and contest the suit on merits with regard to their contention to the effect that they are the bonafide purchasers for valuable consideration without notice. However, at the same time, there is no point in remanding the matter to the trial court after such a long span. In paragraph no.17 of the impugned judgment and order, the first appellate Court has observed that during the lifetime deceased Govind executed sale deed in favour of defendants nos.7,8 and 9 and those sale deeds bind to the 1/7th share of deceased Govind. There is no dispute that original defendant no.8 had executed the sale deed to the extent of some portion of the suit property in favour of the present appellants. If such protection is extended to original defendant nos. 7 to 9, present appellants are also entitled for the same protection to the extent of the sale deed executed in their favour with regard to **1/7th (1/6th)** share of

deceased Govind. I am inclined to grant the same protection to the present appellants for the reason that they had no opportunity to contest the suit on merits so far as their plea of bonafidely purchasing the suit property for valuable consideration without notice is concerned. However, the first appellate court has erroneously observed that, deceased Govind has five sons from his second wife defendant no.6 Jijabai. In fact, the original defendant nos. 2 to 5 who are four in numbers are the sons of deceased Govind. In view of the same, each of them including two widows and deceased Govind are entitled to the extent of $1/6^{\text{th}}$ share each in the suit property and plaintiff no.1 deceased Nilawatibai is entitled for the share to the extent of $1/12^{\text{th}}$ share in the suit property as well as in the house property, also. Thus, to the extent of the same, the impugned judgment and order passed by the first appellate court requires to be modified alongwith the protection as discussed aforesaid. With these observations, I proceed to pass the following order.

ORDER

- I. Both the Second Appeals i.e. Second Appeal No. 92 of 1990 (Narayan Govindrao Ghogare and others Vs. Nilawatibai w/o Govindrao Ghogare and others) and Second Appeal No. 265 of 2018 (Bhujangrao Pundlikrao Hambarde and another Vs. Nilawatibai Govindrao Ghogare (deceased) through L.Rs. And others) are hereby partly allowed.
- II. The judgment and order dated 23.10.1989 passed by the Additional District Judge, Nanded in Regular Civil Appeal No.208 of 1984 is modified as follows :-
 - a] The plaintiff no.1 Nilawatibai wd/o Govindrao Ghogre has 1/12th share in the agricultural land described in claim para of the plaint and right of residence to the extent of 1/12th share in the residential house described in the claim para.
 - b] The sale deeds executed in favour of the present appellants in appeal no.265/2018 (i.e. Bhujangrao Pundlikrao Hambarde) by the

original defendant nos. 7 to 9 (7- Gayabai Govindrao Ghogre, 8- Narayan Govindrao Ghogare and 9- Shivaji Govind Ghogare died through Lrs. 9A- Nagubai Shivaji Ghogare and 9B- Yogesh Shivaji Ghogare) will bind 1/6th share of deceased Govind to the extent of suit land purchased under those sale deeds.

- III] Rest of the judgment and order passed by the Additional District Judge, Nanded in Regular Civil Appeal No.208/1984 stands confirmed.
- IV] Decree be drawn up as per the above modification.
- V] In the circumstances, there shall be no order as to costs.
- VI] Pending Civil Applications also stand disposed of.

(V.K. JADHAV, J.)

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