

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

Second Appeal No. 0586 of 2018

District : Aurangabad

Nirmalabai Sahebrao Shinde,
Age : 47 years,
Occupation : Agriculture,
R/o. Ambewadi, Aghur,
Taluka Vaijapur,
Dist. Aurangabad.

.. Appellant
(Original
defendant no.09)

versus

1. Vatsalabai Karbhari Shinde,
Age : 88 years,
Occupation : Nil,
R/o. Aghur,
Taluka Vaijapur,
Dist. Aurangabad.
2. Kesarbai Ambadas Bankar,
Age : 62 years,
Occupation : Agriculture,
R/o. Dawala,
Taluka Vaijapur,
Dist. Aurangabad.
3. Sudam Karbhari Shinde,
Age : 52 years,
Occupation : Agriculture,
R/o. Ambewadi, Aghur,
Taluka Vaijapur,
Dist. Aurangabad.
4. Ashok Karbhari Shinde,
Age : 47 years,
Occupation : Agriculture,
R/o. Ambewadi, Aghur,
Taluka Vaijapur,
Dist. Aurangabad.

5. Babulal Karbhari Shinde,
Deceased through L.Rs.,

5A) Pushpabai Babulal Shinde,
Age : 42 years,
Occupation : Agriculture,
R/o. Ambewadi, Aghur,
Taluka Vaijapur,
Dist. Aurangabad.

5B) Rahul Babulal Shinde,
Age : 42 years,
Occupation : Agriculture,
R/o. Ambewadi, Aghur,
Taluka Vaijapur,
Dist. Aurangabad.

5C) Pradeep Babulal Shinde,
Age : minor,
Occupation : Education,
Under guardianship of his
mother,
Pushpabai Babulal Shinde,
R/o. as above.

5D) Puja Babulal Shinde,
Age : minor,
Occupation : Education,
Under guardianship of his
mother,
Pushpabai Babulal Shinde,
R/o. as above.

6. Sakhubai Sopan Shinde,
Age : 57 years,
Occupation : Agriculture,
R/o. Nagarsul,
Taluka Yeola,
Dist. Nashik.

7. Hiralal Sopan Shinde,
Age : 35 years,
Occupation : Agriculture,
R/o. Nagarsul,
Taluka Yeola,
Dist. Nashik.

8. Chandrabhan Sopan Shinde,
Age : 32 years,
Occupation : Agriculture,
R/o. Nagarsul,
Taluka Yeola,
Dist. Nashik.

9. Ramesh Sopan Shinde,
Age : 30 years,
Occupation : Agriculture,
R/o. Nagarsul,
Taluka Yeola,
Dist. Nashik.

.. Respondents
(Nos.1 & 2 -
Original
plaintiffs
&

10. Santosh Sopan Shinde,
Age : 27 years,
Occupation : Agriculture,
R/o. Nagarsul,
Taluka Yeola,
Dist. Nashik.

Nos.03 to 10 -
Original
defendants
no.01 to 08)

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Mr. R.V. Gore, Advocate, for the appellant.

*Mr. A.D. Kasliwal, Advocate, for respondents
no.01 and 02.*

*Mr. G.D. Jain, Advocate, for respondents
no.03, 04, 5A to 5D, 06 to 10.*

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CORAM : SMT. VIBHA KANKANWADI, J.

**Date of reserving
the Order : 18th March 2019.**

**Date of pronouncing
the order : 03rd May 2019.**

ORDER :

01. Present appeal has been filed by original
defendant no.09. Present respondents no.01 and 02

are the original plaintiffs who had filed Regular Civil Suit No. 10 of 2005 for partition and separate possession of agricultural land bearing Gut no.89 admeasuring 10 acres 33 gunthas (04 hectares 38 R) situated at Mouje Loni Budruk, Taluka Vaijapur, Dist. Aurangabad, with a declaration that sale deed dated 15-05-2001 is not binding on them as well as for mesne profits. [Parties are referred as per their nomenclature before trial Court.]

02. The relationship between the parties is almost not disputed. It is also admitted fact that the suit land was belonging to one Karbhari Shinde. Plaintiff no.01 is his widow. Plaintiff no.02 is their daughter. Defendants no.01 and 02 are their sons. So also, they had sons by name Raosaheb and Sopan, who are the predecessors of defendants no.03 to 08. It is also not in dispute, that the said family had one more agricultural land bearing Gut no.117 situated in the same village. There was partition effected between four sons of Karbhari by Karbhari in his lifetime. It is further not in dispute, that Subhadrabai, who was the mother of defendant no.03, had sold 02 acres 29 gunthas from the suit land to the defendant no.09 on 15-05-2001.

03. With this background, the plaintiffs had come with a case that though Karbhari had effected partition between four sons, in respect of Gut

no.117, it is stated that Gut no.89 i.e. suit property was kept in the share of Karbhari as well as plaintiff no.01. After death of Karbhari, plaintiffs as well as defendants no.01 to 08 were jointly cultivating the suit lands and their names came to be mutated to the 7/12 extract of the suit land. It is also stated that till 2001, they used to distribute the income received from the suit land amongst themselves. However, after 2002, defendants denied share to the plaintiffs. Plaintiff no.02 had taken to plaintiff no.01 to her house as defendants no.01 to 08 avoided to maintain her. The sale transaction between Subhadrabai and defendant no.09 was without any legal necessity and, therefore, the said sale deed is not binding on plaintiffs. It is stated that the plaintiffs have 1/6th share each in the suit property. Hence, they filed suit for partition and separate possession with other reliefs.

04. Defendants no.01 to 08 filed their written statement at Exhibit 17 and admitted the fact of partition in respect of Gut no.117. It is stated that Subhadrabai had taken hand loan of Rs. 30,000/- from defendant no.09 and, therefore, executed the sale deed dated 15-05-2001 as security. It was a nominal sale deed. As such, the said sale deed is null and void.

05. Defendant no.09 contested the suit by filing

separate written statement. It was contended that it is a collusive suit between plaintiff and defendants no.01 to 08. The land which was sold to her was out of Gut no.89 which was allotted to Subhadrabai as *Stridhan* and, therefore, her name was recorded in 7/12 extract. Defendant no.09 has signed the sale deed as consenter. Subhdadrabai was in need of money and, therefore, she had sold 02 acres 29 gunthas to defendant no.09 and since then, defendant no.09 has become owner and possessor of the said property. She claimed that she is *bona fide* purchaser for value without notice. It is also stated that the suit is bad for not bringing all family properties in common hotchpot.

06. Taking into consideration rival contentions, issues came to be framed. Parties have led oral as well as documentary evidence. After hearing both sides and perusing the evidence, the suit came to be partly decreed. It was held that plaintiffs no.01 and 02, defendants no.01 and 02 have 1/6th share each and defendants no.04 to 08 have joint 1/6th share in the suit property. The sale deed dated 15-05-2001 was stated to be binding on the share of Subhadrabai and defendant no.03. However, it is not binding on plaintiffs.

07. Feeling aggrieved and dissatisfied with the said judgment and decree passed by the trial Court,

present appellant filed Regular Civil Appeal No.54 of 2016. The said appeal was heard by the learned Ad hoc District Judge-1, Vaijapur, District Aurangabad and it came to be dismissed on 26-10-2017. Hence, this second appeal.

08. Heard learned Advocate Mr. R.V. Gore appearing for the appellant. Heard learned Advocate appearing for respondents no.01 and 02. So also, heard learned Advocate Mr. G.D. Jain appearing for respondents no.3, 4, 5A to 5D, 6 to 10.

09. It has been vehemently submitted on behalf of the appellant, that Karbhari had partitioned the land belonging to him on 30-01-1990 between four sons. No share was given to Vatsalabai as well as plaintiff no.02 or himself. Karbhari expired on 01-12-1990. Name of Subhadrabai i.e. mother of defendant no.03, who was the wife of of Karbhari's son Raosaheb, came to be mutated vide M.E. no.1312. Now, by this suit, the plaintiffs were seeking partition in respect of only one land i.e. Gut no.89. Such partial partition cannot be allowed. It is to be noted that earlier the suit was decided but it was remanded for fresh trial with directions and even after remand, the same situation is prevalent. There is absolutely no discussion as to how there can be partial partition. He relied on the decision in *Kenchegowda (since deceased) by legal representatives Vs. Siddegowda alias*

Motegowda [(1994) 4 SCC 294], wherein it has been held that when all the joint family properties are not made the subject matter of suit nor the co-sharers impleaded, then the suit for partial partition is not maintainable.

10. Learned Advocate for the appellant further submitted that the pleadings in the plaint as well as written statement would show that there is clear collusion between plaintiffs as well as defendants no.01 to 08. Both the Courts below did not consider the fact that the appellant was a *bona fide* purchaser for value without notice. Defendants no.01 to 08 had accepted the fact that Subhadrabai was in need of money and, therefore, she had sold the property to defendant no.09. Under such circumstance, when she had proved that she is a *bona fide* purchaser for value without notice, the substantial question of law to that extent is arising and the second appeal deserves to be admitted.

11. Per contra, learned Advocates appearing for the respondents have submitted that the other land i.e. Gut no.117 was already divided and there is no dispute about the heirs of Karbhari. Mutation entry no.933 was effected on 30-01-1990 to that effect. Gut no.89 was never partitioned. In fact, it was kept for Karbhari and plaintiff no.01 and after death of Karbhari, it was never partitioned. Appellant

cannot be said to be a *bona fide* purchaser for value without notice for the simple reason that she did not care to see the record, especially the mutation entry no.933. Merely because Subhadrabai's name is appearing in mutation entry no.1312, she cannot become exclusive owner of the said property. Under such circumstance, there is no question that only partial partition has been demanded in the suit. In fact, it was the only joint family property which was left to be partitioned and, therefore, there is no question of any substantial question of law arising in this matter, requiring admission of the second appeal. Reliance has been placed on behalf of respondents no.01 and 02, on the decision in *Santosh Hazari Vs. Purushottam Tiwari deceased by L.Rs.* [2001(2) Mh.L.J. 786], wherein it has been held that "*The High Court cannot proceed to hear a second appeal without formulating the substantial question of law involved in the appeal and if it does so it acts illegally and in abnegation or abdication of the duty cast on court. The existence of substantial question of law is the sine qua non for the exercise of jurisdiction under the amended section 100 of the Code of Civil Procedure.*" Almost similar view is taken in *Damodar Lal Vs. Sohan Devi & others* [2016 ALL SCR 379]. It has been held therein, that "*Inadequacy of evidence or a different reading of evidence, is not perversity. Safest approach on perversity is the classic approach on the reasonable man's inference on the facts. To him, if the conclusion on facts in evidence made by court below is possible, there is no perversity. If not, the finding is perverse.*" Further it is observed, that

"Even if finding of fact is wrong, that by itself will not constitute a question of law."

12. Here, in this case, important point to be noted is that respondent no.09 is not a family member. So, the best evidence that can be considered in respect of partition that had taken place on 30-01-1990 is the evidence of plaintiffs and defendants no.01 to 08. Defendant no.03 Babulal was examined on behalf of defendants no.01 to 08; whereas plaintiff no.02 has examined herself and placed on record the 7/12 extract as well as mutation entries. Defendant no.09 has also examined herself. If we consider the evidence of defendant no.03, he is accepting that Gut no.117 was only partitioned on 30-01-1990. Mutation entry no.933, Exhibit 63, would make it clear that partition was effected in respect of Gut no.117 only. Both the properties were belonging to Karbhari. Under such circumstance, natural inference that can be drawn is that Karbhari had kept Gut no.89 for himself. After his death, said property i.e. Gut no.89 devolved on his heirs. Though defendants no.01 to 08 had come with a theory that Subhadrabai had raised loan to the extent of Rs.30,000/- from defendant no.09, except the words of defendant no.03 and defendant no.09, there is nothing. They have explained as to why when it was a loan transaction, there should be sale deed. Defendant no.09 has come with a case, that it is out and out sale and not a

transaction of loan. When she was coming with a case, that she is a *bona fide* purchaser for value without notice, then burden was on her to prove the same.

13. As regards the objection in respect of partial partition, para 327 of Mulla's Hindu Law, 22nd edition, specifically states that "*A partition between coparceners may be partial either in respect of the property or in respect of the persons making it.*" Further, para 322 provides that "*The father of a joint family has the power to divide the family property at any moment during his life, provided he gives his sons equal shares with himself, and if he does so, the effect in law is not only a separation of the father from the sons, but a separation of the sons inter se, the consent of the sons is not necessary for the exercise of that power.*" Even if for the sake of arguments it is accepted that there were unequal shares, then also, the law provides in the same paragraph, that "*When under a partition by a father, unequal shares are given to the sons, the transaction will be binding on the sons as a family arrangement, if acquiesced in by them.*" There is no evidence in this case and defendants no.01 to 08 have not come with a theory that the partition which was effected in respect of Gut no.117 was unequal. Therefore, defendant no.09 being a stranger to the family, cannot question Karbhari's right to effect partial partition in respect of his properties. She is only concerned with Gut no.89.

14. Coming back to the point that defendant no.09 claim to be *bona fide* purchaser for value without notice, she has not come with a case that she had also perused mutation entry no.933. M.E. no.1312 could not have given exclusive right to Subhadrabai. No doubt, in that land i.e. Gut no.89, Raosaheb and his heirs are definitely having share and, therefore, the learned trial Court has rightly held that the sale deed dated 15-05-2001 in favour of defendant no.09 is legal and binding on Subhadrabai and defendant no.03's 1/6th share. The wording in the operative part may not be so happily worded. But then what was intended to be conveyed is that the sale deed in favour of defendant no.09 is binding to the extent of 1/6th share of Subhadrabai and defendant no.03 in the suit property. In other words, the said sale deed is not binding on the share of the plaintiffs.

15. There is concurrent finding given by both the Courts below. Therefore, this Court would be slow in interfering with such judgment and decree. One more fact that has to be mentioned is that defendant no.09 being the stranger, could not have challenged the capacity of Karbhari, as aforesaid, so also the relationship between Karbhari and plaintiffs as well as defendants no.01 to 08. Here, in this case, defendant no.09, though not pleaded in written

statement, went on cross examine and in cross examination, denying the relationship between Karbhari and plaintiff no.01 which cannot be allowed at all. In fact, defendants no.01 to 08 have not challenged the said relationship. Defendant no.03 is the successor or heir of Subhadrabai who was the vendor of defendant no.09. That means, defendant no.09 had stepped into the shoes of Subhadrabai. Under such circumstance, she could not have gone beyond the pleadings of defendant no.03.

16. Learned Advocate appearing for respondents no.01 and 02 has rightly relied on the decision in *Haren Krishnakumar Mehta Vs. Kamla Pribhdas Nebhanani* [2001(2) Mah.L.R.369], wherein it has been held that "*When the defendant puts forth a case not pleaded by him and about which there is no averment in the written statement, it is not incumbent and necessary upon the plaintiff to cross-examine the witness in that regard. That evidence of defendant which is beyond pleadings has to be rejected even in absence of any cross-examination.*"

17. Another fact to be noted is that defendant no.09 has come with a case that the property which was sold to her was the *Stridhan* of Subhadrabai. However, she has not disclosed the source and why she is calling it as *Stridhan* of Subhadrabai. Already Raosaheb or Subhadrabai were given their share from Gut no.117 and, therefore, it could not have been

stated that by way of M.E. no.1312, Subhadrabai was given the portion of the land towards maintenance so that it can become *Stridhan*. Therefore, from any angle, if we consider the facts as well as law, it cannot be stated that Subhadrabai had exclusive authority to sell out demarketed portion (i.e. with boundaries) to any person. Under such circumstance, at the most, defendant no.09 to the extent of share of Subhadrabai and defendant no.03 can get the said property adjusted while effecting partition in the suit land.

18. Taking into consideration the decisions in *Santosh Hazari (supra)* as well as *Damodar Lal (supra)*, no substantial question of law is arising in this case, requiring the second appeal to be admitted.

19. Hence, the following order :-

The second appeal is disposed of as '**not admitted**'.

(Smt. Vibha Kankanwadi)
JUDGE

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