

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO.212 OF 2015
WITH
CIVIL APPLICATION NO.442 OF 2015**

1 Sudhakar Laxman Shewale
Age: 65 years, Occ: Retired now
Agriculture,

2 Smt. Chandrabhagabai Laxman Shewale
Age: 82 years, Occ: Household

Both R/o: Munjwad, Tal: Satana
District: Nashik

... Appellants

Versus

1 Madhukar Laxman Shewale
Age: 64 years, Occ: Agriculture,

2 Gangadhar Laxman Shewale,
Age; 60 years, Occ: Agriculture,
Nos.1 and 2 R/o: Munjwad, Tal: Satana,
Dist. Nashik

3 Muralidhar Laxman Shewale,
Age: 56 years, Occ: Agriculture,
R/o. Chaundhane, Tal: Baglan, Dist:Nashik
Now: Janata Vidyalaya-Vaygaon (Dundhe)
Tal: Satana, Dist. Nashik.

4 Smt. Durgabai @ Suman Bhaskar Shewale,
Age: 33 years, Occ: Household,

5 Mohini Bhaskar Shewale,
Age: 15 years, Occ: Nil,

6 Manesh @ Mangesh Bhaskar Shewale
Age: 13 years, Occ: Nil,

7 Nilesh Bhaskar Shewale,
Age: 12 years, Occ: Nil,

Nos.5 to 7 minors hence through natural
guardian-Mother-Respondent No.4

Nos. 4 to 7 R/o: Meshi, Tal: Deola,
Dist. Nashik
Now Panchayat Samiti Deola,
Tal: Deola, Dist. Nashik.

... Respondents

...

Mr. Milind M. Sathaye for the Appellants.

Mr. Mahendra N. Sandhyanshiv for the Respondent Nos.1,2 and
4.

CORAM : SANDEEP K. SHINDE J.

DATE : JUNE 27, 2019

ORAL JUDGMENT :

1 Second Appeal is admitted on the following
substantial question of law and with consent taken up for the
final hearing;

“ Whether finding of fact rendered by the Courts below that, Suit Property, Gat No.101/1A/2 is 'joint family property', is consistent with evidence on record ? AND

Whether Courts below were justified in law and fact, to render it, on the basis of so-called admission by the plaintiff; AND

Whether this finding of fact being inconsistent with evidence, substantially affects the rights of the plaintiff ? “

2 It is settled law that, a question of law would be a substantial question of law if it directly or indirectly affects the rights of the parties substantially. A question of fact becomes a question of law if the findings is either without any evidence or material or if the finding is contrary to the evidence or is perverse or there is no direct nexus between fact and the primary fact upon which that conclusion is based.

3 Appellant No.1 (hereinafter called 'Plaintiff') instituted the Regular Civil Suit No.94 of 2006 in the Court of Civil Judge, Junior Division, Satana, Dist: Nashik and sought partition of land Gat No.101/1A and House No.4 wherein his mother is the defendant No.8; defendant nos.1 to 7 are brothers and heirs of the deceased

brother, who contended that plaintiff, being elder brother and karta of the family, sold family land bearing survey no.287/2 in December, 1972 for consideration, and purchased another land bearing Survey No.101/1A/2 in the year 1998 from such consideration and thus, land survey no.101/1A/2 is joint family property. In other words, it is their defence that land Survey No. 101/1A/12 being, not self-acquired property of the plaintiff, he ought to have offered it for partition. The learned trial Judge dismissed the suit solely on the ground, as plaintiff did not include and offer land survey no.101/1A/2 for partition.

4 The decree of the trial Court was carried in Regular Civil Appeal No.65 of 2009, however, the appellate Court confirmed the decree passed by the trial Court by the judgment and order dated 29th September, 2014.

5 Aggrieved by the decree passed in Regular Civil Appeal No.65 of 2009, plaintiff and his mother (who was then supporting the plaintiff) have preferred this Second Appeal.

6 It may be stated that defendant nos.5, 6 and 7 (brother and his family members) instituted Regular Civil Suit No.69 of 2007 in the Court of Civil Judge, Junior Division, Satana for partition of the properties bearing Gat No.101/1A, house no.4 and 101/1A/2 (hereinafter called as 'Second Suit' for short). In this suit the present appellants are the defendants. It may also be stated that respondent no.2 herein (another brother) had also instituted Regular Civil Suit No.207 of 2012 in the Court of Civil Judge, Junior Division, Satana for the partition of the same properties (hereinafter referred to as 'Third Suit'). It is informed across the bar that respondent no.2 has withdrawn the third suit. Thus, as on today, Suit No.69 of 2007 instituted by the respondent nos.4,5 and 6 is pending in the Court of Civil Judge, Junior Division, Satana, wherein they are seeking partition of Gat No.101/1A, House No.4 and 101/1A/2. It is informed that in the second suit, parties have partly led their evidence.

7 Mr. Sathaye, the learned counsel for the appellants, has taken me through the evidence as well as judgments of the Courts

below. The trial Court dismissed the suit on the ground that plaintiff did not offer the land bearing no.101/1A/2 for partition, though he admitted in evidence that this land was purchased by him as a Karta of the joint family. Mr. Sathaye learned counsel for the appellants has taken me through the evidence led by the parties, however, it may be noted that defendants did not step into witness box but cross-examined the plaintiff. Mr. Sathaye submits that findings recorded by the trial Court that the property Gat No.101/1A/2 is not self-acquired property of the plaintiff, but a joint family property is not only incorrect but it is perverse. To substantiate this submission, he has taken me through the evidence of the plaintiff, which discloses that since 1972, plaintiff was a teacher in the school and he denied the suggestion, that he had purchased Gat No.101/1A/2 from consideration received from selling joint family property bearing no.287/2. I have gone through the evidence carefully. I have not come across admission by the plaintiff in the cross-examination that the property no.101/1A/2 was purchased by him as a 'Karta' of the joint family property and that too from the consideration realised

from the sale of land 287/2 in 1972. In fact, it is the defendants' case that the plaintiff being elder brother sold one of the joint family properties in the year 1972 for consideration wherefrom he purchased Gat No.101/1A/2 in the year 1998 and thus, to prove this fact, being 'fact in issue', the defendants ought to have stepped into witness box and proved this fact. The defendants, neither stepped into witness box nor examined or led evidence to prove following facts;

- (1) that in the year 1972, plaintiff sold one of the family properties, for consideration; and
- (2) purchased property being land bearing Gat No.101/1A/2, from such consideration.

8 Thus, the findings rendered by the Trial Court and Appellate Court that land survey no.101/1A/2 is joint family property and not self-acquired property of the plaintiff is not only inconsistent with evidence but perverse. This finding substantially affects rights of the appellant/plaintiff and, therefore, the impugned judgment is wrong and necessary to reverse it. Thus, for the reasons

recorded here-in-above, the impugned decree is quashed and set aside. That once, the finding is recorded that the impugned judgment and order of the trial Court and of the appellate Court are erroneous, this Court is empowered to exercise powers of the remand under Order 41 Rule 21A of the Code of Civil Procedure, 1908. That upon considering the facts of the case and upon assessing the evidence and the findings recorded by the Courts below, I am of the view that it is an appropriate case for relegating parties to the Trial Court for a fresh trial in the Regular Civil Suit No.94 of 2006.

9 Mr. Sathaye the learned counsel for the appellants, however, correctly pointed out that second suit instituted by the respondent nos.2,5 and 6 is close to leading evidence, in which they are seeking partition of all the three properties, i.e., 101/1A, House No.4, 101/1A/2. He, therefore, submits that in stead of relegating parties for fresh trial in Regular Civil Suit No.94 of 2006, let this suit be transferred to the Court, trying the second suit and further by issuing appropriate orders that the Trial Court may be directed to

dispose of both the suits together.

10 Mr. Sathaye is right in his submissions that instead directing the parties to conduct trial afresh in the Regular Civil Suit No.94 of 2006, purpose would be served if Regular Civil Suit No.94 of 2006 and the Regular Civil Suit No.69 of 2007 (instituted by respondent nos.4,5 and 6) is heard by one and the same Court. Hence, following order:

(1) Substantial question of law as framed is answered in the affirmative.

(2) The judgment and decree passed in the Regular Civil Suit No.94 of 2006 by Civil Judge, Senior Division, Satana and confirmed in the Regular Civil Appeal No.65 of 2009 by the Ad-hoc District Judge, Thane is quashed and set aside.

(3) Regular Civil Suit No.94 of 2006 then instituted in the Court of Civil Judge, Junior Division, Satana, Nashik is restored to the file.

(4) That for the reasons stated here-in-above, Regular Civil Suit No.94 of 2006 and Regular Civil Suit No.69 of 2007 instituted by respondent nos.4,5 and 6 herein are directed to be heard by one and the same Court.

(5) The learned Judge shall conclude hearing in both the suits on its own merits without being influenced by the judgments rendered in the Regular Civil Suit No.94 of 2006. The Second Appeal is allowed in the aforesaid terms and disposed of. All civil Applications are disposed of.

(6) All to act on an authenticated copy of this judgment and order.

(SANDEEP K. SHINDE, J.)