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

**CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO. 277 OF 2014**

Narendra Hari Patil

....Appellant

V/s.

Moreswar Hari Patil

.....Respondent

Mr. Subhash Jha a/w Mr. Harekrishna Mishra i/b Law Global  
Advocates for the Appellant

Mr. Manish Jain i/b S. M. Jain & Associates for Respondent.

**CORAM : NITIN W. SAMBRE, J.**

**RESERVED ON: 11/02/2020.**

**PRONOUNCED ON: 26/10/2020.**

**P.C.:**

1] Heard. By consent of the parties, Appeal is heard finally.

2] Present Appeal is by original Plaintiff whose suit for partition and injunction came to be dismissed on 27/02/2007 which Judgment was confirmed in Civil Appeal No. 75 of 2007 by the learned Ad-hoc District Judge-2, Thane on 23/12/2013.

3] Shri Jha, learned council appearing for Appellant-original Plaintiff while questioning concurrent findings would invite my attention to the status of the parties to the petition. According to Shri Jha, one Hari Patil died on 29/11/1988, who was blessed with in all five children. The Appellant-original Plaintiff-younger son, Defendant-Respondent-elder son, three daughters namely Kesribai, Sandhya and Chandrakala. According to Plaintiff agricultural land mentioned in the plaint in the form of first property, second property and Galas in Hari industrial estate situated at survey number 52/26 at village Khari Taluka and district Thane are ancestral properties. According to Shri Jha, property bearing survey number 99/01 of Kharigaon Bhayandar and another property Hari industrial estate standing on survey number 52/26 being ancestral and joint family property of deceased Hari Patil were never subjected to partition. It is further claimed that on 13/01/1989, parties to the suit sold out ancestral property and joint family property Survey No. 99/01 of Kharigaon Bhayandar to one Dinanath Patil and 5 others on 13/01/1989. Out of the sale proceeds, it was agreed vide agreement dated 27/04/1989

that land survey number 3 Hissa No. 1p admeasuring 2050 square metres, Survey No. 3(part) admeasuring 10600 square metres and survey number 7(part) admeasuring 580 square metres at village Vasurikund Taluka Wada district Thane and land survey number 2p admeasuring 8780 square metres were agreed to be purchased for a consideration of Rs. 145000/- and Rs. 110000/- from Baliram Patil, Yamuna Bai Patil and Jayram Patil respectively. It is claimed that part consideration thereof was paid. According to Appellant at the time of agreement, earnest amount that was paid was contributed by the Plaintiff and Defendant from the amount received after sale of the property to Dinanath Patil, however, according to Plaintiff, Defendant purchased the aforesaid properties in his own name. It is the case of the Plaintiff that since the properties purchased by the Defendant in his own name are out of the sale consideration received from transfer of ancestral property, the Plaintiff has share in the same. As such, the Suit for partition.

4] In support off the suit claim, Plaintiff has examined himself, his three sisters at exhibit 31, 58, 60 and 72 respectively. In addition,

Umakant was examined at exhibit 76 by the Plaintiff where as Defendant examined himself at exhibit 69 and two witnesses namely Gopal Patil at exhibit 121 and Hari Kishan Patil at exhibit 122.

5] The learned Civil Judge Junior Division, Wada dismissed the suit claim of the Plaintiff vide impugned Judgment dated 27/02/2007.

6] Feeling aggrieved, Appellant-Plaintiff preferred Regular Civil Appeal No. 75 of 2007 which came to be dismissed vide Judgment dated 30/07/2011. Appellant herein feeling aggrieved, preferred Second Appeal No. 383 of 2012 which was allowed vide Judgment and Order dated 18/06/2013 thereby remanding matter back to the learned District Judge so as to re-appreciate the evidence of the Plaintiff.

7] It appears that parties to the Appeal have tendered their written notes of arguments and learned Ad-hoc District judge 2 Thane, vide Judgment at exhibit 27 delivered on 23/12/2013 confirmed the

findings recorded by the Trial Court and dismissed the suit claim. As such, this Second Appeal.

8] Shri Jha learned counsel for the Appellant would urge that admittedly suit property was purchased after selling the joint family property as reflected in the factual matrix. According to him there was Hindu joint family and the Appellant is younger to Defendant by 11 years. He always respected the words and commands of Defendant. According to him being blood relation and family member, Appellant always trusted Respondent-Defendant. He would further urge that elder in the family plays fatherly figure role, that being so, after the father has passed away, a blind trust is reposed by the Appellant-Plaintiff in Defendant. According to him both courts below have failed to appreciate the evidence as has been brought on record by the Appellant-Plaintiff and also that of evidence of other blood relations i.e. all three sisters. According to him both courts below have lost sight of the fact that in both agreements plaintiff is party purchaser and in absence of any relinquishment of share, the court ought not to have inferred that defendant has every right to purchase

the property as plaintiff has given up his share. While inviting attention of this court to the evidence, Shri Jha would urge that evidence as was brought on record by plaintiff and theory put forth about the sale of ancestral property and purchase of the new property out of the sale proceeds therefrom was not demolished. He would urge that part consideration was paid by the plaintiff against the agreement entered into. As such claim for partition and separate possession is illegally rejected. He would further urge that receipt of consideration of Rs. 6,00,000/- from sale of ancestral property i.e. agricultural land bearing survey No. 114 Hissa Nos. 1 to 7 speaks voluminous about the mode of purchase of the suit property. Shri Jha as such would rely on provisions of section 6 of the Indian Contract Act so as to claim that agreement entered into was not lawfully terminated and further claimed that sale deed executed in favour of Defendant is illegal and fraudulent. He would further urge that evidence of Plaintiff witness Umakant was not correctly appreciated.

9] As such, question of law which is sought to be canvassed by Shri Jha is, (a) Whether the courts below have committed an error in disbelieving the claim of the plaintiff to the extent of purchase of the suit property out of the consideration received from the transfer of ancestral agricultural property and; (b) Whether there is violation of section 6 of the Indian Contract Act in the agreement dated 26/04/1989 and consequently sale deed executed on 23/03/1995.

10] While countering the aforesaid submissions, learned counsel for the respondent would urge that the cumulative effect of evidence of the witness of the plaintiff and himself has been duly considered by both the courts below and it is concurrently held that Plaintiff has failed to demonstrate that the suit property was purchased from the sale proceeds received from the sale of ancestral property. According to him sale of the ancestral property was by consent of all three sisters and court below had rightly appreciated power of attorney at exhibit 73. According to him the claim that the sale deed violates section 6 of the Contract Act has no legal basis and that being so, Second Appeal against concurrent findings is liable to be dismissed.

11] Considered rival submissions.

12] For the purpose of appreciation of issue as is raised in the present Second Appeal, it is necessary to consider the following factual matrix in its nutshell:

FAMILY PROPERTY

*I. Old Survey No.114 (New Survey No. 99) Hissa No.1*

*Agricultural land - 7 gunthas in Bhayandar, Kharigaon*

*7\*12 extract names of 2 brothers & 3 sisters.*

*II. 3 galas in Hari Industrial Estate*

*1 gala with Petitioner*

*2 galas with Respondent (1 in the name of respondent+1 in joint name) - leased out to Bhagwan Mhatre.*

PROPERTY SOLD

*Survey No. 114 (New survey No.99) Hissa No. 1 -7gunthas*

*Sold on 13.01.1989 for 6 lakhs to Gurunath Hari*

*Bhoir/Rohidas Bhoir/Kamlakar Bhoir/Dinanath Patil/*

*Satyawan Dinanath Patil.*

*PROPERTY PURCHASED*

*(A) Agreement for Sale 27.04.1989- Registered*

*5 acres +8 gunthas No.3 Hissa No.1 (Part)*

*Purchased in the names of the Appellant and the  
Defendant*

*Rs.24,000/- advance by the Appellant and the  
Respondent*

*(Vasrikhurd, Wada) S. No.3 (Part) S. No.7 (Part)*

*Baliram Govind Patil/ Yamunabai Govind Patil -Sellers*

*Moreshwar + Narendra Purchasers*

*Consideration amount - Rs.1,45,000/-*

*(B) Agreement for Sale 27.04.1989 Not Registered*

*Stamp Papers Rs.2000/- + 2000/-*

*8780 sq mts. Survey No. 1, Hissa No. 8*

*Survey No. 2 (Part)*

*Jayram Mahadu Patil/ Suresh Mahadu Patil/ Bhai  
Mahadu Patil/ Parvati Mahadu Patil/ Pramila Prabhat Gawde -*

*Sellers*

*Consideration amount Rs.1,10,000/-*

*Moreswar + Narendra – Purchasers*

*1. Sale Deed - 23.03.95 - Not registered*

*Purchaser - Moreswar Patil (exclusively)*

*Sellers - Baliram Govind Patil & Ors.*

*2. Sale Deed 23.03.95*

*Spl. Civil Suit No. 351/98- Suit for Partition of 2 Properties*

*dishonestly purchased in the name of Respondent.*

13] Based on the the aforesaid factual matrix, the suit claim was brought in action by the appellant with following prayer:

*“a) It may be declared by the Hon’ble Court that the suit properties viz. land bearing Survey No. 3, Hissa No. 1 (part), admeasuring H-O, R-20 Prati-5, assessed at Rs. 1.45, Survey No. 3 (Part), admeasuring H-1, R-06 Prati-0,*

*assessed at Rs. 0.45 and Survey No. 7 (Part), admeasuring H-0, R-5 (R-14) Prati-8, assessed at Rs. 0.15, situate, lying and being at Village Vasurikurd, Taluka Wada, District Thane, the land bearing Suvey No. 1. Hissa No. 8, admeasuring H-0, R-35, Prati-9, assessed at Rs. 0.25, Survey No. 2 (Part), admeasuring H-0, R-87, Prati-8, assessed at Rs. 2.59, situate, lying and being at village Vasurikurd, Taluka Wada, District Thane and the said Industrial Estate known as Hari Industrial Estate standing on land bearing Survey No. 52, Hissa No. 26, admeasuring 50 sq. meters of Village Khari, Bhayandar, Taluka and District Thane, are the properties jointly belonging to the Plaintiff and the Defendant.*

*b) That the Hon'ble Court be pleased to order and Decree for partition of the suit properties viz. land bearing Survey No. 3, Hissa No. 1 (Part) admeasuring H-0, R-20, Prati-5, assessed at Rs. 1.45, Survey No. 3 (Part), admeasuring H-1, R-06 Prati-0, assessed at Rs. 0.45 and Survey No. 7 (Part), admeasuring H-0 R-5 (R-14) and Prati-8, assessed at Rs. 0.15, situate, lying and being at village Vasurikurd, Taluka Wada, District Thane, the land bearing Survey No. 1, Hissa No. 8, admeasuring H-0, R-35, Prati-9, assessed at Rs. 0.25, Survey No. 2 (Part), admeasuring H-0, R-87, Prati-8, assessed at Rs. 2.59, situate lying and being at Village Vasurikurd, Taluka Wada, District Thane and the said Industrial Estate standing on land bearing Survey*

*No. 52, Hissa No. 26, admeasuring 50 sq. meters of village Khari, Bhayandar, Taluka and District Thane in equal proportion between the plaintiff and the Defendant.*

*c) As incidental to the administration, the suit properties be partitioned between the plaintiff and the Defendant in equal proportion either by metes and bonds or by such other method as may deem fit and proper and the possession of the respective share of the Plaintiff and the Defendant be delivered.*

*d) That the defendant, his heirs, executors, administrators, assignees or any other person or persons claiming through him may be restrained by a permanent injunction of this Hon'ble Court from creating third party interest in respect of the suit properties viz. land bearing Survey No. 3, Hissa No. 1 (part), admeasuring H-0, R-20 Prati-5, assessed at Rs. 1.45 Survey No. 3 (Part), admeasuring H-1, R-06, Prati-0 assessed at Rs. 0.45 and Survey no. 7 (Part) admeasuring H-0, R-5 (R-14) Prati-8, assessed at Rs. 0.15, situate, lying and being at village Vasurikurd, Taluka Wada, District Thane, the land bearing Survey No. 1, Hissa No. 8, admeasuring H-0, R-35, Prati-9, assessed at Rs. 0.25, Survey No. 2 (Part), admeasuring H-0, R-87, Prati-8, assessed at Rs. 2.59 situate, lying and being at village Vasurikurd, Taluka Wada, District Thane and the said industrial estate*

*known as Hari Industrial Estate standing on land bearing Survey No. 52, Hissa No. 26, admeasuring 50 sq. meters of Village Khari, Bhayandar, Taluka and District Thane.*

*e) Interim and ad-interim relief in terms of prayer (d) above.*

*f) cost and professional cost.*

*g) Any other or further relief or reliefs that may be deemed fit and proper in the circumstances of the case be granted”.*

14] The suit claim has been duly resisted by the respondent-defendant by written statement at exhibit 14 wherein the entire suit claim of the plaintiff was denied. According to him, though initially agreement of sale dated 27/04/1989 in respect of suit property was executed in favour of plaintiff and defendant and the earnest money as mentioned therein was paid by plaintiff and defendant equally at the time of execution of the agreement, however, since the plaintiff was not able to complete sale transaction as was prayed by the sellers as he had lacked interest in the said sale transaction, plaintiff

expressed his intention not to get the sale deed executed in his favour by paying balance consideration.

15] It is alleged in the written statement by the defendant that Plaintiff sought refund of the earnest money of his share and accordingly an amount of Rs. 27500/- was received by the Plaintiff in presence of Waman Gharat and Hari Patil. It is further claimed that after Defendant paid balance consideration, sale deed was executed on 24/03/1995 after the permission was obtained from the Collector as was required under the relevant provisions of the law. It is further claimed that plaintiff has no share in Hari industrial estate property and the suit claim is false.

16] Having regard to the rival claims, the trial court framed issues at exhibit 23 and answer the same as under:

#### ISSUES

#### FINDINGS

*1) Whether plaintiff proves that the*

*First properties, Second properties*

*and Hari Industrial Estete as  
men-in para.8 of plaint (suit properties )  
are jointly owned by plaintiff and  
defendant ?*

*NO*

*2) Whether he proves that sisters of plain-  
tiff and defend ant have released their  
their share in Hari Industrial Estate  
in favour of plaintiff and defend ant as  
alleged ?*

*YES*

*3) Whether he proves that defend ant got  
transferred his name in record of rights  
of First Properties and Second Properties  
illegally and without his consent ?*

*NO*

*4) Whether defend ant proves that First  
Properties and Second Properties as men-  
tioned in plaint are exclusively owned  
and po3sessed by him ?*

*YES.*

*5) Whether suit is bad for non joinder of*

*necessary parties ?* *NO*

*6) Whether suit is properly valued ?* *YES.*

*7) Whether plaintiff is entitled for  
half share in suit property ?* *NO.*

*8) Whether plaintiff is entitled for  
declaration as prayed ?* *NO*

*9) Whether plaintiff is entitled for  
injunction as prayed ?* *NO.*

*10) Whether plaintiff is entitled for  
possession to the extent of his  
share upon partition?* *NO.*

*11) What order and decree ?* *The suit is dismissed with  
cost.*

17] In the aforesaid background if the question of law as is sought

to be agitated by the learned counsel for the appellant is considered, it is required to be noted that the Plaintiff has come out with a case that the ancestral property was never subjected to the partition and Defendant being elder brother, was the custodian of the entire consideration received from the transfer of the ancestral property. Once the appellant-plaintiff has come out with such a plea, the burden is on the appellant to prove that there was a joint family property and the Defendant was Karta and the property was never subjected to partition.

18] So as to establish the said claim, plaintiff has examined his three sisters and also one witness Umakant Vaiti at exhibit 76.

19] At the outset, it is required to be noted that all three sisters were cited as witness who have examined themselves. It is the case that all of them have executed power of attorney in favour of appellant and defendant on 10/11/1989 which is at exhibit 73, a notarized document.

20] As far as evidence of Plaintiff is concerned, in his evidence, he has stated that ancestral property being survey No. 114 was sold for Rs. 600000/- and out of the said sale proceeds, suit property was purchased. According to him there was an agreement entered into in his name and also in Defendant's name for purchase of the suit property and part consideration was paid by him. He claimed that he was not aware of the sale deed executed in favour of the Plaintiff and after he came to know about the same, he has brought suit into action. Exhibit 73, a notarized power of attorney executed by all three sisters in favour of plaintiff and defendant is an admitted document particularly in the light of provisions of section 85 of the Indian evidence act. Section 85 of the Indian evidence act reads thus:

*85. Presumption as to powers-of-attorney. - The Court shall presume that every document purporting to be a power-of-attorney, and to have been executed before, and authenticated by, a Notary Public, or any Court, Judge, Magistrate [Indian] Consul or Vice-Consul, or representative of the [Central Government], was so executed and authenticated".*

21] As far as the said power of attorney is concerned, Plaintiff has not disputed execution of the same so also the Defendant and one of the sisters has admitted that she has signed the same.

22] Once the power of attorney, exhibit 73 is a notarized document, there is presumption that every document property to be a power of attorney which was executed before Notary Public was so executed and authenticated. Of course such presumption is rebuttable and it is for the Plaintiff and his witnesses to rebut the same. If the evidence of all three sisters of the plaintiff so also that of Plaintiff is appreciated, the said presumption is not rebutted and that being so, it is apparent that all three sisters have given up their share in favour of the Plaintiff and Defendant from the ancestral property. Apart from above, it is required to be noted that on the issue of exhibit 73, notarized power of attorney, two of the sisters have tried to depose against this and as such their evidence required to be ignored to that extent.

23] The contention of the Petitioner that the ancestral property was sold on 13/06/1989, however, the suit sale transaction is neither been established nor it is demonstrated through any evidence that after such sale transaction, amount of consideration has gone to the coffers of the Respondent-Defendant. Rather in the evidence of the Appellant it has come on record that amount in fact deposited in the bank of present Appellant and Respondent has also incurred expenditure on the marriage of the Appellant.

Appellant has failed to establish that agreement for purchase of the property of which he has sought partition was to be purchased jointly by the Appellant and the Respondent and the Respondent from the sale proceeds, received from the transaction of the ancestral property.

As such, both the Courts below have rightly inferred against the Appellant on failure to discharge his burden to prove his case particularly when the sale deed depicting the sale of ancestral property was neither produced nor proved.

24] Apart from above, it is required to be noted that Plaintiff who has alleged that suit property was purchased out of the sale proceeds of the ancestral land and he has share in the same, it was for him to establish the same by discharging the burden which of course from his evidence cannot be inferred to have been so discharged. That being so, the claim of the Plaintiff that suit property was purchased out of the sale proceeds of the ancestral property, was at all not established or can be inferred from the evidence of the Plaintiff or his witnesses. As such the contentions to that effect are rightly rejected by the courts below.

25] As far as the submissions of learnt counsel for the appellant on the violation of section 6 of the Indian Contract Act is concerned, section 6 of the Indian Contract Act reads thus:

***“6. Revocation how made — A proposal is revoked —***

*(1) by the communication of notice of revocation by the proposer to the other party;*

*(2) by the lapse of the time prescribed in such proposal for*

*its acceptance, or, if no time is so prescribed, by the lapse of a reasonable time, without communication of the acceptance;*

*(3) by the failure of the acceptor to fulfil a condition precedent to acceptance; or*

*(4) by the death or insanity of the proposer, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance”.*

26] Plain reading of section 5 & 6 of the Act demonstrates that it deals with the revocation of proposal and how revocation is to be made.

27] It is claimed that there was no notice of revocation by the proposer i.e. by Defendant to the Plaintiff or by the seller to the Plaintiff.

28] In the case in hand, if said provision is considered, what is required to be noticed is the agreement of sale claimed to have been entered into way back on 27/04/1989. It is claimed that part of the advance amount was paid by the Plaintiff and sale deed was got

executed by the defendant in his name on 23/03/1995 whereas the suit has been brought into action in 1998. Perusal of the suit claim particularly in the light of the prayer as is narrated hereinabove, it is apparent that sale transaction is not questioned by the Plaintiff in the suit claim. Rather agreement dated 27/04/1989 has not been sought to be taken to its logical end by filing suit for specific performance against the seller. Plaintiff has come out with a case of having share in the suit property by virtue of purchase of the same from the sale of the ancestral property which he has failed to establish. As such, the claim that he was not given notice of revocation of agreement will be of hardly any consequence and that be so, Section 6 of the Indian Contract Act will not come to the rescue of the appellant-plaintiff as far as the suit claim is concerned.

29] The lower appellate court while dealing with the claim put forth by the Appellant has observed that Plaintiff and Defendant were already separated in mess so also their business as is apparent from the evidence of Plaintiff's witness Chandrakala who was

examined at exhibit 58. She has also proved exhibit 73, power of attorney thereby giving up the claim from the ancestral property.

30] Apart from above it is for the first time the Plaintiff has come out with a case that in notice dated 04/07/1997, exhibit 43, he claimed to have paid 50% of the total consideration to seller Baliram Patil and another, however, he was unable to show so as to when the same amount of 50% was paid. He was also unable to disclose the details of the consideration paid for the purchase of suit property.

31] In the aforesaid background, the case put forth by the Plaintiff that the court below has committed an error in recording affirmative finding that there is violation of section 6 of the Indian Contract Act while dealing with the agreement dated 27/04/1989 cannot be inferred. Rather the question of law sought to be framed and canvassed on the said provision of section 6 of the Indian Contract Act cannot be inferred in favour of appellant.

32] Appellant as such failed to demonstrate that the suit property is ancestral property or purchased from the sale of ancestral property and he has share in the same.

33] That being so, no case for interference is made out. Appeal lacks merit, as such stands dismissed.

**[NITIN W. SAMBRE, J.]**