

IN THE HIGH COURT OF JUDICATURE OF BOMBAY

BENCH AT AURANGABAD

**APPEAL FROM ORDER NO.8 OF 2021 WITH
CIVIL APPLICATION NO.4587 OF 2021**

Smita w/o Kishor Hoke Patil
Age 46 years, occu. Household,
R/o Plot No.428, N-3, Cidco,
Aurangabad

... APPELLANT

VERSUS

1. Kantrao alias Kantikumar s/o
Ramrao Awargaonkar
Aged 70 years, Occu.Nil,
R/o Plot No.20, Disha Shilpa,
Town Centre, Cidco, Aurangabad
 2. Shivraj s/o Kantrao Awargaonkar,
Since deceased, through L.Rs.
 - 2-A) Sheetal wd/o Shivraj Awargaonkar
Age 41 years, Occu. Household
 - 2-B) Pawan s/o Shivraj Awargaonkar,
Age 23 years, Occu. Education
 - 2-C) Varun s/o Shivraj Awargaonkar,
Age 20 years, Occu. Education
- All Residing at Plot No.20,
Disha Shilpa, Town Centre,
Cidco, Aurangabad
3. Prithviraj s/o Kantrao Awargaonkar,
Aged 43 years, Occu. Business,
R/o Plot No.20,
Disha Shilpa, Town Centre,
Cidco, Aurangabad

4. Pushpraj s/o Kantrao Awargaonkar,
Aged 34 years, Occu. Professor/Service,
R/o Plot No.20,
Disha Shilpa, Town Centre,
Cidco, Aurangabad
5. Sangita w/o Shivprasad Shinde
(d/o Kantrao Awargaonkar)
Aged 37 years, Occu. Household,
R/o Government Engineering
College Quarters, Amravati
6. Amarnath s/o Vijaykumar Awargaonkar
Aged 48 years, Occu. Doctor,
R/o Vijay Rekha, Vishrambag Colony,
Padampura, Aurangabad
7. Kiran s/o Vijaykumar Awargaonkar
Aged 46 years, Occu. Business,
R/o Vijay Rekha, Vishrambag Colony,
Padampura, Aurangabad
8. Abhijit s/o Vijaykumar Awargaonkar
died, through L.Rs.
- 8-A) Sandhya Abhijeet Awargaonkar
Aged 37 years, Occu. Household,
R/o Vijay Rekha, Vishrambag Colony,
Padampura, Aurangabad
- 8-B) Jay Abhijeet Awargaonkar
Aged 12 years, Occu. Student
- 8-C) Revati Abhijeet Awargaonkar
Aged 10 years, occu. Student

under guardianship of Resp.No.8-A
- 8-D) Rekha Vijaykumar Awargaonkar
(Mother of Deceased)
Aged 68 years,
R/o Vijay Rekha, Vishrambag Colony,
Padampura, Aurangabad
9. Avinash s/o Vijaykumar Awargaonkar
Aged 40 years, Occu. Business,

R/o Vijay Rekha, Vishrambag Colony,
Padampura, Aurangabad

10. Rekha wd/o Vijaykumar Awargaonkar
Aged 68 years, Occu. Household
R/o Vijay Rekha, Vishrambag Colony,
Padampura, Aurangabad
11. M/s Hotel Shivneri Pvt. Ltd.,
A Company registered under the
Companies Act, 1956
Address : Plot No.15, Town Centre,
Jalna Road, Aurangabad, through its
alleged Chairman & directors :
 - a) Kantrao s/o Ramrao Awargaonkar
(Alleged Chairman)
 - b) Pruthviraj s/o Kantrao Awargaonkar
 - c) Shivraj s/o Kantrao Awargaonkar,
Since deceased through L.Rs.
 - c-1) Sheetal wd/o Shivraj Awargaonkar,
Aged 41 years, Occu. Household
 - c-2) Pawan s/o Shivraj Awargaonkar
Aged 23 years, Occu. Education
 - c-3) Varun s/o Shivraj Awargaonkar
Aged 20 years, Occu. Education

all Residing at Plot No.20,
Disha Shilpa, Town Centre,
Cidco, Aurangabad

... RESPONDENTS

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Shri Ranbir L. Chhabda. Bhandari, Advocate for appellant
Shri V.R. Patil, Advocate for respondent No.1.
Shri Vivek Dhage, Advocate for respondents No.3 and 4
Shri S.V. Adwant, Advocate for respondents No.6 to 10

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CORAM : R. G. AVACHAT, J.

Date of reserving judgment : 21st September, 2021

Date of pronouncing judgment : 24th September, 2021

J U D G M E N T:

This is a plaintiff's Appeal from Order, rejecting her application for temporary injunction restraining the respondents herein (defendants in the suit) from alienating or creating any kind of third party interest in respect of properties, subject matter of Special Civil Suit, being Suit No.307/2020.

2. The appellant (plaintiff) claims to have a birth right in the suit properties, by virtue of Section 6 of the Hindu Succession Act (for short Act). It is her case that, agricultural lands, Survey Nos.39 and 59 were the ancestral properties of the plaintiff and defendants. These lands admeasure 22 acres 20 gunthas and 7 acres 20 gunthas respectively with high fertility. Income from these lands formed a nucleus for acquisition of almost all the properties in the suit. Way back in 1993, one of the defendants filed a suit, Special Civil Suit No.468/1993 for partition and separate possession of the joint family properties. The plaintiff and her sister (defendant

No.5) had not been parties to the said suit. The suit was compromised. A compromise decree is said to have been passed. The terms of the compromise decree would indicate that, it required registration in view of Section 17 of the Registration Act. The said compromise decree cannot be read in evidence for want of registration. It was a collusive suit, fraud was practised on Court for obtaining a consent decree. As such, the decree in the said suit is non est and its validity could be challenged in a proceeding wherein the said decree is relied upon. Since the plaintiff was not party to the said suit, the so called decree therein is not binding on her. With all these contentions, the suit for partition and separate possession has been filed with an application (Exh.5) for temporary injunction restraining the defendants from creating any third party interest therein.

3. The defendants (respondents herein) resisted the suit and the application as well, contending that the suit, Special Civil Suit No.468/1993 was compromised before the Maharashtra Amendment of 1994 to the Act was brought into effect. Over 25 years have passed since the suit was compromised. The appellant – plaintiff has no right, title and interest in the suit properties.

4. The Trial Court rejected the application Exh.5 with prima facie observations that the plaintiff does not have right, title and interest in the suit properties.

5. Heard. Perused the impugned order and the material relied on.

Shri Ranbir L. Chhabda, learned counsel for the appellant – plaintiff reiterated the averments in the plaint. According to him, income from the agricultural lands (Survey Nos.39 and 59) was more than sufficient to make further acquisition of the properties in the suit. The father of the plaintiff was blind by birth. He did not have his source of income. His brother Vijaykumar also did nothing to earn his living. Late Ramrao, grandfather of the plaintiff, would look after all the affairs of the family. It was he who was instrumental in acquiring all the property in the suit. The pleadings in the suit, Special Civil Suit No.468/1993 filed by one of the defendants, would reinforce the claim of the plaintiff herein. The parties to the said suit would be bound by their respective pleadings. Admission in the pleadings stand on higher pedestal. Those would act as proprio vigore. The subsequent understanding arrived at between the parties to the suit is illegal and non est. The terms thereof would

vouch for its illegality. Right, title and interest has been created thereunder for the first time. The said decree, therefore, required registration. Since the same has not been registered, it cannot be looked into. The terms of the decree would further indicate that it was a collusive suit and by practicing fraud on the Court the decree has been obtained. According to learned counsel, the plaintiff would at least have undivided share in the property that came to the share of her father by virtue of the compromise decree in the former suit. According to learned counsel, the Trial Court accepted most of the submissions advanced on behalf of the plaintiff. It, however, erred in refusing to grant temporary injunction. The learned counsel has relied on Section 6 of the Act. He has also placed reliance on the following authorities :-

- (1) Chitralekha builders & ors. Vs. G.I.C. Employees Sonal Vihar Co-op. Housing Society Ltd. & ors. [2021(2) ALL MR 776]
- (2) Francisco A. D'Souza & anr. Vs. L and T Finance Ltd., Mumbai [2015(5) Mh.L.J. 390]
- (3) prakash Gobindram Ahuja Vs. Ganesh Pandharinath Dhonde & ors. [2016(6) Bom.C.R. 262]
- (4) Uttam Vs. Saubhag Singh & ors. [2017(1) Mh.L.J. 294]
- (5) Narendra Plastic pvt. Ltd., Mumbai & anr. Vs. DBS Bank Ltd., Mumbai [2017(4) Mh.L.J. 860]

According to learned counsel, principle of lis pendence would not be an adequate relief for the plaintiff. The defendants may go on creating third party interest in respect of the properties in the suit with a only view to defeat the claim of the plaintiff. According to him, there is no iota of material to indicate that any of the male members of the joint family had their independent source of income. The Trial Court, therefore, ought to have allowed the application for temporary injunction.

6. Shri Vivek Dhage and Shri S.V. Adwant, learned counsel for respondents No.3 and 4 and 6 and 10 respectively made extensive submissions to ultimately support the impugned order.

7. The normal state of every Hindu family is joint. Such family is presumed to be joint in food and worship. The presumption is stronger in the case of brothers than in the case of cousins and the further one goes from the founder of the family, the presumption becomes weaker and weaker. There is, however, no presumption that a family, because it is joint, possesses joint property. A person asserting the existence of joint family property has to prove the nucleus with which such property could be acquired. It is only then

such property could be presumed to be joint and the onus of proving self acquisition would shift to the person asserting as such.

8. Late Dnyanoba was the common ancestor. He was survived by his three sons, Ramrao, Dadasaheb and Vasantrao. Ramrao was survived by his widow Panchawatibai and sons Kantrao and Vijaykumar. Kantrao is the defendant No.1. The plaintiff is daughter of Kantrao. It is her case that, land Survey Nos.39 and 59 originally belonged to Dnyanoba. It was partitioned among his three sons, Ramrao Dadasaheb and Vasantrao. The properties in the suit are said to have been acquired by Ramrao out of the income of the lands in Survey Nos.39 and 59 that came to his share. Except bare assertions in that regard, there is prima facie nothing to infer the same. Admittedly, late Ramrao was a politician and a social worker. He was a Member of Legislative Assembly and Member of Parliament as well. The defendants are from the family of Kantrao and Vijaykumar. None from the family of Dadasaheb and Vasantrao are parties to the suit. The ancestral land Survey Nos.39 and 59 are not the subject matter of the present suit. It is a case wherein the plaintiff is on one side and all the defendants, including some of her blood relations, on the other. Way back in 1993, Kiran

(defendant No.7) had filed the suit for partition and separate possession of the properties claimed to have been joint family properties. A copy of the plaint in the said suit is on record. What has been averred by the plaintiff in her plaint herein is a reiteration of the pleadings in the said suit, particularly as regards the nature of the properties and mode of acquisition thereof. Defendant Kiran is said to be bound by his pleadings in the earlier suit. There can be no dispute over the legal proposition that admissions in the pleadings stand on higher pedestal. Such admissions act proprio vigore. It, however, needs to be mentioned that admissions are not conclusive proof. Admission can be explained, proved to be wrong or can successfully be withdrawn. When the said suit was filed, Kiran was of 19 years of age. The Trial Court has, therefore, rightly observed that it was a suit filed at the instance of his late father Vijaykumar. Kiran has filed an affidavit herein explaining his stand/ pleadings in the said suit. Mere averments in the plaint are not sufficient to make out a case unless averments are proved on the basis of cogent and reliable evidence.

9. The plaintiff and her sister Sangita w/o Shivprasad Shinde (defendant No.5) were not parties to the said suit. When the suit was filed, although the plaintiff and her sister

might have been the members of joint family, they were not the coparceners, entitled to have a share in the joint family properties, if any. The plaintiff has claimed birth right in the suit properties by virtue of Section 6 of the Act. The daughter of a coparcener has been given a status of a coparcener by birth, in her own right in the same manner as the son. Proviso to Section 6, however, states that, nothing contained in the said Section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which has taken place before 20th day of December 2004. By virtue of the explanation, the term 'partition' means any partition made by execution of a deed of partition duly registered under the Registration Act or partition effected by the decree of a Court.

10. A copy of the terms of compromise submitted in Special Civil Suit No.468/1993 is on record. Clause (1) to (3) of the terms of compromise read as under ;

(1) The ancestral properties belonging to the deceased Dnyanoba s/o Narayan Jagtap (Awargaonkar) was the land Survey No.39 (Gut No.150) admeasuring 22 acres and 26 gunthas and Survey No.59, admeasuring 7 acres and 20 gunthas, situated at village Awargaon, Tq. Dharur, Dist. Beed. He had three sons by names Ramrao Awargaonkar, Dadasaheb Awargaonkar and Vasantrao Awargaonkar, the partition of the above

referred two properties took place in the year 1971 amongst the sons of deceased Dnyanoba namely Ramrao, Dadasaheb and Vasantrao. The defendant No.1 got 1/3rd share in the said land. However, the defendant No.1 Ramrao Dnyanoba Awargaonkar (Jagtap) gave the land that came to his share to his brothers Dadasaheb and Vasantrao in the year 1973 itself. Consequently the defendant No.1 did not claim the right in the ancestral property belonging to Dnyanoba s/o Narayanrao Jagtap (Awargaonkar). He also did not take any income from the above referred to agricultural land or any other property belonging to deceased Dnyanoba. He do not acquire or gain any property in his name or in the names of his wife defendant No.2 or his two sons i.e. Defendant No.3 Kantrao alias Kantikumar and Defendant No.4 Vijaykumar from the income above referred to two lands Sy.Nos.39 and 59. It is agreed by the plaintiff and defendants that the above referred to two lands were only ancestral properties belonging to deceased Dnyanoba s/o Narayan Jagtap. It is agreed that the lands Survey No.39 and 59 are cultivated by Dadasaheb and Vasantrao only. The income from aforesaid lands have been utilised by the Dadasaheb and Vasantrao only for their families.

(2) It is agreed that, Hotel Panchawati situated at Padampura, Station Road, Aurangabad, is self acquired property of the defendant No.4 Vijaykumar s/o Ramrao Awargaonkar and it is also agreed that Hotel Ramgiri constructed on Plot No.5 on the open space, situated in M.I.D.C. Area, Jalna Road, Aurangabad, is self acquired property of defendant No.3 Kantrao alias Kantikumar s/o Ramrao Awargaonkar. It is further agreed that the Hotel Shivneri constructed on Plot No.15 with open space is the self acquired property of defendant No.1 Ramrao s/o Dnyanoba Awargaonkar, defendant No.2 Mrs. Panchwati Bai

w/o Ramrao Awargaonkar and defendant No.3 Kantrao alias Kantikumar s/o Ramrao Awargaonkar.

(3) It is agreed that the defendant No.1 Ramrao and Deft. No.3 Kantrao and the heirs of Kantrao shall not claim any right or share in the property of Hotel Panchawati and deft. No.4 Vijaykumar, deft. No.5 Amarnath, defendant No.6 Abhijit, Defendant No.7 Avinash and plaintiff shall not claim any right or share in the property of Hotel Ramgiri and Shivneri. In view of the above position, Hotel Panchawati, Hotel Ramgiri and Hotel Shivneri are not properties which can be subject matter of partition because these are self acquired properties of respective persons. All taxes including Municipal Taxes, Govt. taxes etc. of Hotel Panchawati shall be on defendant No.4 Vijaykumar and not on defendant No.1 Ramrao, defendant No.2 Mrs. Panchawati Bai and defendant No.3 Kantrao alias Kantikumar and heirs of defendant No.3. All liabilities in respect of land, all taxes including Municipal taxes, and Govt. dues etc. of Hotel Ramgiri shall be on defendant No.3 Kantrao alias Kantikumar. The liabilities in respective payment of land, taxes, Municipal taxes, Govt. dues of Hotel Shivneri shall be on defendant No.1 Ramrao, defendant No.2 Mrs. Panchawatibai and defendant No.3 Kantrao alias Kantikumar.”

11. The properties described in paragraphs No.4 and 5 of the said terms of compromise are self acquired properties of defendant Ramrao who made irrevocable allotment of those properties in favour of plaintiff Kiran, Ramrao and Panchawatibai, Kantrao, father of the plaintiff herein and other defendants as well.

12. It is true, the immovable properties which are said to have been self acquired properties of Ramrao, have been transferred in favour of some of the defendants, without there being registered conveyance and/or compromise decree.

13. It has been little over 26 years since the said suit was disposed of in terms of the compromise. None of the parties to the said suit has taken exception thereto. Although it has been alleged that it was a collusive suit, the same could not be inferred. True, the said suit might have been filed by plaintiff Kiran in collusion with his father Vijaykumar. There is prima facie nothing to indicate the decree passed in terms of the compromise to be non est on the ground of collusion or fraud. It is true that, the decree has not been registered.

14. In case of **Ripudaman Singh Vs. Tikka Maheshwar Chand [Civil Appeal No.2336/2021]**, it has been observed by the Hon'ble Supreme Court as under :

“18. The legal position qua clause (vi) can, on the basis of the aforesaid discussion, be summarized as below :

- (1) Compromise decree if bona fide, in the sense that the compromise is not a device to obviate payment of stamp duty and frustrate the law relating to registration, would not require registration. In a converse situation,

it would require registration.

- (2) If the compromise decree were to create for the first time right, title or interest in immovable property of the value of Rs.100/- or upwards in favour of any party to the suit the decree or order would require registration.”

15. The terms of compromise indicate that, some of the immovable properties comprised in the memo of compromise were not the subject matter of the suit. In some of the immovable properties, right, title and interest has been created for the first time. The compromise decree would, therefore, require registration. The decree is unregistered. In view of Section 49 of the Registration Act, the compromise decree shall not be received as evidence of any transaction affecting such property. The proviso to Section 49, however, permits such document to be received as evidence in proof of any collateral transaction not required to be affected by any registered instrument. The terms of the compromise can, however, very well be looked into as an admission made in terms of the compromise by the parties thereto. As such, the terms of the compromise decree undoubtedly indicate the parties to have acknowledged/ admitted that the properties in the suit were self acquisitions of the parties thereto.

16. As such, the plaintiff (appellant) failed to make out a prima facie case to show the properties in the suit to be ancestral or joint family properties. Her claim that at least she may be prima facie held to have share in the properties that have fallen to the share of her father also cannot be accepted for want of supporting material. The Trial Court has rightly refused to grant interim injunction. This Court has no reason to interfere with the impugned order. It is, however, clarified that, refusal to grant interim relief should not be construed to be a licence to create third party interest in respect of the suit properties. Needless to mention, any creation of right, title or interest in respect of the suit properties pending the suit shall be subject to the principle of lis pendence. The Trial Court would decide the suit uninfluenced by the observations made in this order.

17. In the result, the appeal fails. The same is dismissed. Consequently, Civil Application is also dismissed.

**(R. G. AVACHAT)
JUDGE**

fmp/-