

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

**SECOND APPEAL NO.441 OF 2018  
WITH  
CIVIL APPLICATION NO.7641 OF 2018**

- 1 Bhagwan Sitaram Kale,  
Age 59 yrs., Occ. Agri.,  
R/o Dhanora Kale, Tq. Purna,  
Dist. Parbhani.
- 2 Haribhau Sitaram Kale,  
Age 54 yrs., Occ. Agri.,  
R/o Dhanora Kale, Tq. Purna,  
Dist. Parbhani.
- 3 Nilawati w/o Gangadhar Bhalerao,  
Age 44 yrs., Occ. Household,  
R/o Nandgaon, Tq. & Dist. Parbhani.
- 4 Kalawati w/o Pralhad Khating,  
Age 39 yrs., Occ. Household,  
R/o Sayala Khating,  
Tq. & Dist. Parbhani.
- 5 Balasaheb Daulatrao Kale,  
Age 34 yrs., Occ. Agri.,  
R/o Dhanora Kale, Tq. Purna,  
Dist. Parbhani.
- 6 Kapil Manchakrao Kale,  
Age 34 yrs., Occ. Agri.,  
R/o Dhanora Kale, Tq. Purna,  
Dist. Parbhani.
- 7 Dnyanraj Laxmanrao Khating,  
Age 44 yrs., Occ. Agri.,  
R/o Sayala Khating,  
Tq. & Dist. Parbhani.

- 8 Ramesh Marotrao Kale,  
Age 39 yrs., Occ. Agri.,  
R/o Dhanora Kale, Tq. Purna,  
Dist. Parbhani.
- 9 Bhagwat Madhavrao Kale,  
Age 44 yrs., Occ. Agri.,  
R/o Dhanora Kale, Tq. Purna,  
Dist. Parbhani.
- 10 Ramdas Haribhau Kale,  
Age 39 yrs., Occ. Agri.,  
R/o Dhanora Kale, Tq. Purna,  
Dist. Parbhani.
- 11 Dnyanoba Baliramji Dhawale,  
Age 49 yrs., Occ. Agri.,  
R/o Dhanora Kale, Tq. Purna,  
Dist. Parbhani.

... **Appellants**

... **Versus** ...

- 1 Laxmibai w/o Marotrao Kale,  
Age 54 yrs., Occ. Agri.,  
R/o Dhanora Kale, Tq. Purna,  
Dist. Parbhani.
- 2 The Sub-Registrar,  
Registrar office, Purna,  
Tq. Purna, Dist. Parbhani.

... **Respondents**

...

Mr. P.N. Kalani, Advocate for appellants

Mr. S.B. Ghatol Patil, Advocate for the respondent No.1

Mr. A.M. Phule, AGP for the respondent No.2

...

**CORAM : SMT. VIBHA KANKANWADI, J.**

**RESERVED ON : 13<sup>th</sup> JULY, 2021.**

**PRONOUNCED ON : 20<sup>th</sup> JULY, 2021.**

**ORDER :**

1            Heard learned Advocate Mr. P.N. Kalani for appellants, learned Advocate Mr. S.B. Ghatol Patil for the respondent No.1 and learned AGP Mr. A.M. Phule for the respondent No.2.

2            Present Second Appeal is awaiting its admission and in the background of the said fact it is required to be seen, as to whether the appellants, who are the original defendant Nos.1 to 11, can point out substantial questions of law. Present respondent No.1 had filed Regular Civil Suit No.375/2013 for declaration that she has 1/5th share in the suit property and then further prayed for partition and separate possession of her share as well as perpetual injunction. Further declaration was also sought that the sale deeds executed in favour of defendant Nos.5 to 12 by defendant Nos.1 and 2 be declared as null and void and not binding on her share. Learned Joint Civil Judge Senior Division, Parbhani decreed the suit on 22.11.2016. The said Judgment and Decree was challenged by the original defendant No.1 in Regular Civil Appeal No.147/2016. The appeal was heard

by learned District Judge-1, Parbhani and he dismissed the appeal on 12.04.2018, thereby confirming the Judgment and Decree passed by the learned Trial Judge. Therefore, now, in fact, all the defendants i.e. defendant Nos.1 to 11 have filed the present Second Appeal (Though defendant Nos.2 to 12 appears to be the respondents in the appeal before learned District Judge-1, Parbhani).

3           It has been vehemently submitted on behalf of the appellants that both the Courts below have not considered the facts as well as law involved in the case. The Judgment and Decree of both the Courts below suffer from illegality and they are perverse. The property originally belong to Dharubai i.e. mother-in-law of the original plaintiff and mother of original defendant Nos.1 to 4. She expired on 18.11.2010. Plaintiff's husband Marotrao had pre-deceased Dharubai. Marotrao had expired on 01.06.2007. Under the said circumstance, the property had become exclusive property of Dharubai under Section 14 of the Hindu Succession Act, and therefore, devolution of the suit property was only as per Sections 15 and 16 of the Hindu Succession Act and the widowed daughter-in-law is not legal heir in Schedule-I. The plaintiff could not have claimed any share in the suit property. This aspect has not been properly considered. Further, it has been wrongly observed by both the Courts below that Dharubai's husband Sitaram

was the original owner of in all three properties and he had partitioned two properties, and therefore, probably the third property i.e. the suit property was the separate property of Sitaram and after death of Dharubai it can devolve on all the legal heirs left by Sitaram. There could not have been partial partition in the past. The revenue record has not been properly considered by both the Courts below. The second point is in respect of Court fee. It has already come on record that the suit property, which was earlier the agricultural land, was then converted into non agricultural and it was divided in plots. It was sold to defendant Nos.5 to 11 by separate sale deeds. Plaintiff herself has produced the certified copies of those sale deeds on record, which shows that consideration amount, that has been paid in each of the sale deed is Rs.60,000/-. Under such circumstance, the Court fee ought to have been paid and the suit ought to have been valued based on the consideration amount. There could not have been an exemption to the plaintiff from payment of Court fee, as the suit for partition, that has been brought by her, cannot be said to be “matrimonial dispute”.

3.1 He placed reliance on the decision of this Court in **Writ Petition No.7479 of 2011, Shrinivas Ramnathji Kathod and others vs. Smt. Savitribai wd/o Sureshchandra Kathod and others**, decided on 13.09.2012, wherein reliance was placed on the Division Bench decision of this Court in *Girish*

*Kanaiyalal Munshi vs. Sudha Girish Munshi and another, 2008(4) Bom.C.R. 787.*

3.2 Further it has been observed in this writ petition by the Single Judge that -

“The Full Bench of this Court very clearly mentioned that the term ‘matrimonial matter’ appearing in Notification of 2000 is not replaceable by the word ‘matrimonial relationship’. Therefore, if a woman after her husband’s death seeks any relief against her in-laws and if such relief is relating to her relationship with the deceased husband, the exemption given by the Notification will not be available to her.”

3.3 Further reliance has been placed on the decision in **A. Nawab John and others vs. V.N. Subramaniam, 2012(4) ALL MR 481 (S.C.)**, wherein it has been held that “Determination of Court fee is a matter between the plaintiff and the Court. Defendant has no right to file revision petition against the decision of the Trial Court.” However, it has been held that “Such point can be raised in appeal and in view of the finality attached under sub-section (1) to Section 12 of the Court Fees Act, 1870 to the decision of the Trial Court and the time of the limited scope of the Appellate Court’s power to examine whether the lower Court wrongly decided the question to the detriment of the revenue, the conclusion obviously is inevitable. The defendant has no right to file a revision petition against the

decision of the Trial Court.”

4           Taking into consideration these aspects, there are substantial questions of law arising in this case, though there is concurrent findings by both the Courts below. Learned Advocate for the appellants, therefore, canvassed for admitting the Second Appeal and grant of stay to the impugned Judgment and Decrees.

5           Per contra, the learned Advocate appearing for the respondent No.1-original plaintiff submitted that both the Courts below have given perfect and correct legal reasonings which require no interference. The facts have been properly appreciated on the basis of mutation entries, which have been filed by the defendants themselves. Now, the defendants were interested in denying the rights to the plaintiff at any costs, and therefore, they went on to the extent of making contentions that the plaintiff was divorced by her deceased husband and since she has not returned to her village for about 20-25 years, she has no right. But they have not led any evidence in respect of legal divorce. Though the property was standing in the name of Dharubai, yet the mutation entry, which is at Exh.63, would clearly show that after death of Sitaram it was decided that the suit property should be mutated in her name only. The said mutation entry cannot give her exclusive ownership, and therefore, there was no question of invoking

provisions of Sections 14, 15 and 16 of the Hindu Succession Act. It was the property of the Joint Family, and therefore, plaintiff's husband had share in the same and after his death that share was devolved on plaintiff. Further, as regards question of Court fees is concerned, the learned Trial Judge has considered all the aspects. He has not exempted the plaintiff from payment of Court fee and it has been specifically observed that as the suit is not matrimonial dispute, therefore, plaintiff is required to pay necessary Court fee of Rs.400/-. The calculation of Rs.400/- has been given and it is stated that it is as per Section 6(v)(c) of The Bombay Court Fees Act, 1959. In the operative order along with Decree it has been specifically stated that the plaintiff should pay deficit Court fee within a period of one month. Definitely, it has been paid and now this question cannot be raised as a substantial question of law, by the present appellants, in this Second Appeal. Learned Advocate for the respondent No.1 has vehemently submitted that substantial questions of law are not arising in this case, and therefore, the Second Appeal be dismissed at the stage of admission.

6            Learned AGP submitted that respondent No.2 was the original defendant No.2 and it appears that the said authority is only a formal party.

7            Taking into consideration the above points raised with some facts, we may arrive at the conclusion, as to whether any substantial question

of law is arising or not. Perusal of the record would show that most of the public record has been produced by the defendants themselves. It appears from Mutation Entry No.84 (Exh.69), Mutation Entry No.228 (Exh.70), 7/12 extract (Exh.72) and 7/12 extract (Exh.73) of land Sy. No.168 and 407 respectively that those properties were purchased by Sitaram – father of deceased Marotrao and present defendant Nos.1 to 4. Further, that document also shows that present suit property i.e. Gat No.19 admeasuring 01 H 69 R including *potkharab* was purchased by Sitaram on 22.11.1967. Thereafter, there is Mutation Entry No.115 (Exh.62) showing that Sitaram had partitioned land Gat Nos.168 and 407 amongst his three sons and it appears that it had taken place somewhere in the year 1990. The said mutation entry specifically states that, that Sitaram had partitioned those lands and gave 01 H 48 R land from Gat No.168 and 00 H 27 R from land Gat No.407 to each of the sons i.e. Marotrao, Bhagwan and Haribhau. It appears that there is no dispute as such in respect of this partition because nobody had challenged that mutation entry nor filed any suit including two daughters left by Sitaram. In fact, they themselves have come with the case that they had relinquished their share but there is no such entry or statement made by them before the competent authority. These two lands, which were partitioned between as above said, are not the suit properties in the suit. At the costs of repetition, it can be said that only Gat No.19 admeasuring 01 H

90 R is the suit property. We can get further mutation entry at Exh.63, wherein it is stated that Sitaram had expired three months prior to the said mutation entry, which was taken on 14.05.2001 and then it was decided amongst the three sons and the two daughters that this land i.e. Gat No.19 admeasuring 01 H 19 R should be mutated in the name of Dharubai. Though it is mentioned that it was given as owner to her, it is a well settled law from the catena of Judgments of the Hon'ble Supreme Court that mutation entry cannot create or extinguish title. Both the Courts below have correctly held that only on the basis of mutation entry (Exh.63) Dharubai cannot become the exclusive owner as contemplated under Section 14 of the Hindu Succession Act, and therefore, there was no question of invoking Sections 14, 15 or 16 of the Hindu Succession Act, in this case. A family property can be mutated in the name of one member and that does not give him/her exclusive ownership. Now, as regards the partial partition is concerned, both the Court have rightly interpreted Exhs.62 and 63. In fact, when all the properties were purchased properties of Sitaram, he was at liberty to disburse those properties. If it is to be taken into consideration that those properties were purchased from the Joint Family property income, then also parties may settle to a certain extent and there can be a partial partition. Even if we consider that at the time of that partition Gat No.19 was retained by Sitaram with him; yet, since it was his separate properties, that is, which was

purchased by him by sale deed dated 22.11.1967, after his death the said property had devolved on all his heirs, but at the costs of repetition, as per mutation entry Exh.63 they decided to mutate it in the name of Dharubai alone. Therefore, Dharubai cannot be said to be the exclusive owner of the property debarring widowed daughter-in-law from succeeding. Definitely, the plaintiff has 1/5th share in the suit property, as there is nothing on record to show that the daughters had relinquished their share from Gat No.19.

8                Now, turning towards the point regarding Court fee, in fact, the Trial Court has not given any concession to the plaintiff, though it appears that she had claimed it. It has been rightly held that the suit for partition filed by her against her in-laws cannot be said to be a matrimonial dispute. It has also been correctly held that plaintiff is required to pay Court fee of Rs.400/- and the calculation given by the Trial Court in para No.20 of its Judgment is correct. It was not necessary for the plaintiff to get those sale deeds set aside and it was sufficient for her to get a declaration in respect of those sale deeds. The defendant No.1 in his cross-examination has admitted that he and defendant No.2 had not taken consent of the plaintiff before entering into the sale deeds with defendant Nos.5 to 11. Under such circumstance, taking into consideration the concurrent findings based on elaborate discussion and dealing with all the legal aspects, no substantial

question of law is arising, in this case.

9           The Three Judge Bench of Hon'ble Apex Court in **Kirpa Ram (deceased) through L.Rs. and others vs. Surendra Deo Gaur and others, 2021 (3) Maharashtra Law Journal, 250** has laid down -

“Therefore if the substantial question of law framed by the appellants are found to be arising in the case, only then the High Court is required to formulate the same for consideration. If no such question arises, it is not necessary for the High Court to frame any substantial question of law. The formulation of substantial question of law or reformulation of the same in terms of the proviso arises only if there are some questions of law and not in the absence of any substantial question of law. The High Court is not obliged to frame substantial question of law, in case, it finds no error in the findings recorded by the First Appellate Court.”

10           Under such circumstance, this appeal deserves to be dismissed at the admission stage, as no substantial question of law is arising. Accordingly it is dismissed. The Civil Application also stands rejected, in view of the dismissal of the Second Appeal.

( Smt. Vibha Kankanwadi, J. )

Date : 20.07.2021.

**Later on :**

11           After the pronouncement of the order, the learned Advocate for the appellants prayed for the interim relief to continue for a period of four weeks, as the appellants intend to approach the higher Court.

12           It is to be noted that the three Courts are against the appellants and by detailed orders the contentions raised by the appellants have been rejected. Under such circumstance, the oral request is rejected.

**( Smt. Vibha Kankanwadi, J. )**

agd