

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.596 OF 2018

SMT. SUNDARABAI BALKRUSHNA THORAT
DECEASED BY HER LEGAL HEIRS AND OTHERS
VERSUS

SHRI. BABAJI KIONDIBA MAPARI AND OTHERS

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Advocate for Appellants : Mr. Y. P. Deshmkh.
Advocate for Respondents No.1 to 5 : Mr. N. G. Kale.

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CORAM : SMT.VIBHA KANKANWADI, J.

**DATE RESERVING THE ORDER :
14-10-2021**

**DATE OF PRONOUNCING THE ORDER :
01-12-2021**

ORDER :

1. Present second appeal has been filed by the original plaintiffs challenging the concurrent Judgment and decree passed by the Courts below.

2. The present appellants/plaintiffs had filed Special Civil Suit No.297 of 2009 before 2nd Joint Civil Judge, Senior Division, Ahmednagar, for cancellation of sale deed dated 29-01-2002 and for possession and perpetual injunction. The said suit came to be dismissed on 19-03-2014. The plaintiffs challenged the said Judgment

and decree by filing Regular Civil Appeal No.143 of 2014. The said appeal came to be dismissed on 13-03-2018 by learned Adhoc District Judge-5, Ahmednagar. Hence, this second appeal.

3. Heard learned Advocate Mr. Y. P. Deshmukh for appellants and learned Advocate Mr. N. G. Kale for respondents No.1 to 5.

4. It has been vehemently submitted on behalf of the appellants that the Courts below have not considered the facts and the evidence properly. It has been wrongly held in spite of the fact that had come on record that deceased Sunderabai was not having any independent source of income, yet it was considered as her self-acquired property by giving a wrong interpretation to Section 14 of the Hindu Succession Act. Further, the plaintiffs had contended that Sunderabai had no intention to sell the land but defendants No.1 to 5 played fraud upon her and got executed two sale deeds in respect of the suit lands on 29-01-2002. It was specifically pleaded that Sunderabai was taken by defendants No.1 to 5 under the pretext that she would be taken for medical treatment. Admittedly she was old age on 29-01-2002. She was residing with plaintiff No.3 and on that day plaintiff No.3 and his wife had gone out of station. It was not considered that even defendant No.5 who was the son of

Sunderabai had taken part in the said fraud. Sunderabai would have definitely relied on defendant No.5-her own son. That means, she was vulnerable for fraud. Immediately after the fact was noticed that such document has been got executed, the suit was filed. There was no legal necessity for Sunderabai to execute the sale deeds as the plaintiffs were looking after her. Both the Courts below failed to consider that Sunderabai was a Pardanashin lady and also old and, therefore, any such document which has been got executed from her without her knowledge and without consideration, would be void. In order to support this contention, reliance has been placed by the learned Advocate on the decision in :-

- 1) *Mst. Kharbuja Kuer v. Jangbahadur Rai and others, reported in IR 1963 Supreme Court 1203,*
- 2) *Rankanidhi Sahu v. Nandakishore Sahu, reported in AIR Orissa High Court 64, and*
- 3) *Ashok Kumar and another v. Gaon Sabha, Ratauli and other, reported in AIR 1981 Allahabad High Court 222.*

5. It has been further submitted on behalf of the appellants that in fact the burden was on the defendants to prove that the suit property was the separate property as alleged by them. In *Mudigowda Gowdappa Sankh and others v. Ramchandra Revgowda*

Sankh (Dead) by his legal representatives and another, reported in AIR 1969 Supreme Court 1076, it has been held that,

"There is no presumption that a Hindu family merely because it is joint, possesses any joint property. The burden of proving that any particular property is joint family property, is therefore, in the first instance upon the person who claims it as coparcenary property. But if the possession of a nucleus of the joint family property is either admitted or proved, any, acquisition made by a member of the joint family is presumed to be joint family property."

Here, admittedly *Sunderabai had no source of income. Further, in V. K. Surendra v. V. K. Thimmaiah and others, reported in (2013) 10 Supreme Court Cases 211, it has been held that,*

"Properties purchased from the sale of ancestral lands would become ancestral properties. Character of a joint family property cannot be changed by Karta by transferring the same without consent of other coparceners."

Further, in *Dhondu s/o Bhanu Barsagade and others v. Dharma s/o Bhanu Barsagade and another, reported in 2008 (2) B C J 460, it has been reiterated that,*

"There is presumption of jointness when it is proved

that the acquisition is from the joint family income."

Therefore, both the Courts erred in holding that the plaintiffs had failed to prove that the suit property was joint family property between them and defendant No.5.

6. Necessary particulars of the fraud were given by the plaintiffs and accordingly evidence was led. It ought to have been therefore held that the fraud was also proved and, therefore, the cancellation of the sale deed ought to have been ordered. Both the Courts went wrong in holding that the suit was not within limitation. In fact, the knowledge would be the starting point. Though certain witnesses have stated that the plaintiffs used to go to Parner where the property is situated, however, that itself does not mean that they had the knowledge about the execution of the documents.

7. Lastly it has been submitted on behalf of the appellants in view of the ratio laid down in :-

- 1) *Krishna Mohan Kul @ Nani Charan Kul an Anr. v. Pratima Maity and Ors., reported in 2003 SAR (Civil) 760, Supreme Court,*
- 2) *Kashimir Singh v. Harnamsingh and Another, reported in 2008 (2) B C J 547 (SC),*
- 3) *M. Manoharan Chetti and others v. M/s C.*

Coomaraswamy Naidu and Sons, Madras, reported in AIR 1980 Madras 212,

4) Hero Vinoth (minor) v. Seshammal, reported in AIR 2006 Supreme Court 2234,

5) Madan Lal v. Mst. Gopi and another, reported in AIR 1980 Supreme Court 1754,

that substantial questions of law are arising in this case requiring admission of the second appeal.

8. Per contra, the learned Advocate appearing for respondents No.1 to 5 relied on the reasons given by both the Courts below. It was submitted that ample opportunity was given to the plaintiffs to lead evidence, yet no other evidence was led in order to prove the further particulars of the fraud. Admittedly registered instrument has been executed by Sunderabai. In view of Section 14 (1) of the Hindu Succession Act, she was the exclusive owner of the suit properties. Why her own son defendant No.5 would go against her. It has not been shown that defendant No.5 has received any extraneous consideration. The entire litigation is because of plaintiff No.2 who is a lawyer by profession. It will have to be presumed that the Sub-Registrar in whose presence the sale deeds were got executed has done his duty as contemplated under the Registration Act and the endorsements have been put regarding asking the

mandatory questions. It shows that Sunderabai got the knowledge about execution of the sale deed immediately at that moment itself. Evidence has been led on record to show that Sunderabai had gone to the same office earlier also on several occasions when she had purchased the lands. Definitely she was able to make out the difference between the sub-Registrar's office and dispensary. Though it is stated that she has filed the suit initially, however, she was never examined when the matter was posted for hearing i.e. adducing evidence. She was intentionally kept away from the witness-box and the other plaintiffs had no personal knowledge About the alleged fraud. None of the attesting witnesses or other persons who were present at the time of execution of the sale deeds were examined by the plaintiffs to support their contention. Sunderabai though illiterate, had entered into sale and purchase transactions earlier cannot be said to be merely a Pardanashin lady or the rules applicable to transaction with or by Pardanashin lady will not be applicable in this case. As substantial questions of law are not arising in the second appeal, it deserves to be dismissed at the stage of admission itself.

9. At the outset, it is to be noted that there is no dispute that the

suit properties were standing in the name of Sunderabai alone. Plaintiffs had come with a case that though it was standing in her name, it was purchased from the joint family income and, therefore, it is joint family property. Consequently they say that Sunderabai alone could not have disposed of that property by executing sale deeds. Thus, burden was on the plaintiffs to prove that the said property was purchased out of joint family income. It has come on record that Sunderabai independently had no direct source of income, however, in her cross-examination PW.2 Housabai has stated that her mother-in-law i.e. Sunderabai had two agricultural lands at Ralegan Siddhi i.e. the suit properties and Sunderabai was owner of the same. PW.1 Mahav in his cross-examination has stated that when the suit property was purchased in the name of Sunderabai, her children i.e. the plaintiffs and defendant No.5 were minor. In specific words he has admitted that he has no knowledge from where his mother had brought money for purchasing those suit properties. PW.2 Housabai Madhav Thorat is also saying that she had no knowledge out of which amount her mother-in-law had purchased the suit properties. The other witness i.e. PW.3 Bhimrao Limbaji Thorat, PW.9 Madhukar are also admitting in specific words that the suit properties were purchased by Sunderabai and she was

the sole owner. Thus, there was no cogent, concrete and conclusive evidence with the plaintiffs to prove that joint family income was utilized by Sunderabai to purchase those two lands.

10. Another important point to be noted is that in fact Sunderabai had filed the suit and she was alive till 27-01-2011. The recording of the plaintiff's evidence had started on 04-09-2010. Plaintiffs could have definitely examined her immediately when the matter came up for the recording of evidence. When her children were minor at the time when the suit properties were purchased then definitely whatever they have stated about acquisition of the said properties and the source thereof is hearsay which cannot be admitted in evidence. The ratio laid down in :-

- 1) *V. K. Surendra v. V. K. Thimmaiah and others, reported in (2013) 10 Supreme Court Cases 211,*
- 2) *Dhondu s/o Bhanu Barsagade and others v. Dharma s/o Bhanu Barsagade and another, reported in 2008 (2) B C J 460,*
- 3) *Mudigowda Gowdappa Sankh and others v. Ramchandra Revgowda Sankh (Dead) by his legal representatives and another, reported in AIR 1969 Supreme Court 1076,*

will not be applicable to the facts of this case as the evidence therein

was showing that the property was purchased out of either ancestral income or joint family income. The learned First Appellate Court has rightly relied on the decision in, *Suman Vishnu Pathak and others v. Usha w/o Prabhakar Rao Koparkar and others*, 2013 (2) Mh.L.J. 268, wherein the consistent view of the Apex Court was taken into consideration that :-

"If the property stands in the name of a coparcener of a Hindu Undivided Family, then presumption is that it is his self-acquired property, unless it is shown that it is acquired with the aid of nucleus of the joint family property."

11. Both the Courts below have also considered the point that even if for the sake of arguments it is accepted that the said property was purchased in the name of mother, yet in view of *V. Tulasamma & Ors vs V. Sesha Reddi (Dead) By L. Rs.*, reported in 1977 Supreme Court 1944, wherein it has been held that,

"The scope of Section 14 (1) is large and it covers every kind of acquisition of property by a female Hindu. It would be sufficient to show that the property was possessed on the date of the commencement of the Act or the property was subsequently acquired or possessed by the female then she would become the full owner of the property."

Taking into consideration the admissions given by the witnesses referred above together with the interpretation of Section 14 (1) of the Hindu Succession Act, it can be said that the suit properties were the exclusive properties of the Sunderabai and she had the authority to dispose them of.

12. Turning towards the allegation about fraud in respect of the sale deeds are concerned, it was the case of the plaintiffs that Sunderabai was taken by defendants No.1 to 5 under the pretext that she was to be taken for medical treatment. At the outset, the witnesses examined by the plaintiffs have not come with a case that just prior to the execution of the sale deeds, Sunderabai was suffering from any illness and there was need for some treatment to be given to her. Merely because she was hold, we cannot presume that she would have been in requirement of medical treatment. It is to be noted that as regards the allegation of fraud is concerned, the other plaintiffs that is the legal heirs of Sunderabai, had no personal knowledge since none to them had accompanied with Sunderabai. But then when they are coming with a case as the suit was filed by Sunderabai, then the same has been further reflected in the testimony of the witnesses that she was taken under the pretext of giving treatment to her. Both the Courts below have taken a note of

the fact that on many occasions earlier Sunderabai had gone to the same office i.e. the Sub-Registrar's office at Parner for purchase of the suit lands. Further, one more land bearing Block No.400 was sold by Sunderabai in the year 1987. It can be seen that plaintiffs are silent on the point that, that property was also a joint family property, that is the source of income for purchase of that property and whether Sunderabai had authority to sell the said land in the year 1987. The sale deeds have been produced on record at Exhibits 44, 46, 47 and 48 which show that Sunderabai had occasion to visit the same office on four occasions. It has been rightly observed by the First Appellate Court that she was in a position to differentiate between the dispensary and the office of the sub-Registrar in view of the fact that on earlier four occasion she had gone to the same office. Coupled with this fact, the admission given by PW.2 Housabai is required to be considered wherein she has stated that on the date of her evidence i.e. on 11-08-2010 Sunderabai's memory was intact and she was in a position to speak. When she alone had the personal knowledge about the alleged fraud, any evidence given to support that contention by some other person especially hearsay witnesses, will not be permissible/ believable.

13. The disputed sale deeds are the registered sale deeds having

requisite endorsements as required by law at the end of the document. Those endorsements are required to be made by sub-Registrar after making inquiry in a summary way, that too orally. Until the contrary is proved, we will have to presume that the said Sub-Registrar has done his duty as contemplated under the Act. The inquiry revealed that Sunderabai understood the consequences of the execution of those documents and reiterated the nature of transaction before the Sub-Registrar. She even accepted the receipts of consideration in presence of Sub-Registrar. Therefore, it cannot be said that the said sale deeds were got executed without payment of consideration. Plaintiffs have not produced any evidence in rebuttal to the presumption which the endorsements by Sub-Registrar have attracted under Section 58 of the Indian Registration Act.

14. At the cost of repetition it can be said that both the Courts below were justified in arriving at a conclusion that the plaintiffs had withheld the best possible evidence by not examining Sunderabai within permissible time.

15. The plaintiffs had even raised the point that defendants had no capacity to purchase the suit property as loan was taken by them earlier. The point has been properly dealt with by the First appellate

Court in paragraph No.23 of his Judgment.

16. Sunderabai had not executed the said sale deeds in the capacity as Karta of the family. In fact, she could not have been the Karta though for some practical purposes she would have been managing the affairs of the entire family. Question of legal necessity will not arise in this case since Sunderabai was the exclusive owner of the suit properties and she had authority/legal right to dispose of her property.

17. As regards the limitation is concerned, the point has been correctly assessed by both the Courts below. Article 58 of the Limitation Act would come into play. The sale deeds were executed on 29-01-2002 whereas the suit was filed on 17-12-2009. When we are considering that Sunderabai was healthy, her memory was intact, she was able to speak properly, then at least after her return from the town i.e. from Sub-Registrar's office and also from the return of plaintiff No.3 and his wife to their house, she would have disclosed where she had gone and with whom she had gone. Testimony of PW.1 Madhav is totally silent on this point. Thus, in spite of having knowledge that such document of sale deed has been got return from her, she had not taken any action against defendants No.1 to 5 within prescribed period of limitation. Further, it is to be

noted that as per the contention of the defendants, they were put in possession of the suit properties on the date of the sale deeds. Plaintiffs have not come with a case that that possession was given by dispossessing the plaintiffs. The plaintiffs were residing at Pimpri Jalsen Tq. Parner Dist. Ahmednagar. PW.1, PW.2 and other witnesses who have examined by the plaintiff have categorically stated that PWs.1 and 2 used to go frequently to Ralegaon Siddhi where the properties are situated. How they could not have noticed that the suit property is being cultivated by defendants No.1 to 4. Though other witnesses have denied, PW.12 Dnyandev Phatangade has admitted in the cross-examination that defendants No.1 to 4 are cultivating the suit lands since date of the sale and they have dug a well in the suit property, laid pipeline, levelled it and increased the quality of the soil. When all these things were happening, why no objection was taken by Sunderabai or the plaintiffs, has not been clarified by them. In order to come out this theory; then the plaintiffs have led evidence which was beyond the pleadings that they were getting the land cultivated through defendant No.4. Since that fact is beyond pleadings, the evidence led on that point cannot be considered at all.

18. It has come on record that Sunderabai's sons developed rivalry

with each other after 2006 and, therefore, it appears that it had given rise to the suit. After execution of the sale deed by Sunderabai in favour of defendants No.1 to 4, they were cultivating the lands and it was never objected by Sunderabai prior to 17-12-2009. Again it can be said that on this count also the suit is time barred.

19. The ratio laid down in : -

- 1) *Krishna Mohan Kul @ Nani Charan Kul an Anr. v. Pratima Maity and Ors., reported in 2003 SAR (Civil) 760, Supreme Court,*
- 2) *Kashimir Singh v. Harnamsingh and Another, reported in 2008 (2) B C J 547 (SC),*
- 3) *M. Manoharan Chetti and others v. M/s C. Coomaraswamy Naidu and Sons, Madras, reported in AIR 1980 Madras 212,*
- 4) *Hero Vinoth (minor) v. Seshammal, reported in AIR 2006 Supreme Court 2234,*
- 5) *Madan Lal v. Mst. Gopi and another, reported in AIR 1980 Supreme Court 1754,*

in spite of scope of second appeal, and when it can be admitted, cannot be denied at all. However, when this Court is coming to the conclusion that there is absolutely no perversity and wrong appreciation of evidence, it does not give rise to any substantial question of law. Even recently in, *Balasubramanian and Anr. v. M.*

Arockiasamy (dead) Through L.Rs., in Civil Appeal No.2066 of 2012, decided on 02-09-2021, it has been observed that,

“Question of law for consideration will not arise in abstract but in all cases will emerge from the facts peculiar to that case and there cannot be a strait jacket formula. Therefore, merely because the High Court refers to certain factual aspects in the case to raise and conclude on the question of law, the same does not mean that the factual aspect and evidence has been reappreciated.”

Further, in *P. Velayudhan and Ors. v. Kurungot Imbichia Moidu’s son Ayammad and Ors., (1990) Supp. SCC 9*, and *Tapas Kumar Samanta v. Sarbani Sen and Anr., (2015) 12 SCC 523*, it has been held that :-

“In a second appeal the High Court would not be justified in interfering with the finding of fact made by the First Appellate Court since such finding referred would be based on evidence.”

In other words, it can be said that from the catena of judgments of the Hon’ble Apex Court, it can be inferred that if the perversity is shown then definitely it may give rise to framing of substantial questions of law otherwise it will not. For the aforesaid reasons, plaintiffs have failed to prove the perversity. Both the Courts have appreciated the evidence properly and the legal points involved in the matter have been correctly assessed and, therefore, this case is

not giving rise to any substantial questions of law as contemplated under Section 100 of the Code of Civil Procedure requiring admission of the second appeal. Hence, second appeal deserves to be dismissed at the threshold, accordingly it is dismissed.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-