

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

**SECOND APPEAL NO.773 OF 2018**  
**WITH**  
**CIVIL APPLICATION NO.11607 OF 2018**

Narendra Bhausaheb Marathe (Bhagat) **... Appellant**

**Versus**

Vikas Bhausaheb Marathe (Bhagat) and others **... Respondents**

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Mr. S. P. Bramhe and Mr. R. S. Devdhe, Advocates for appellant.  
Mr. G. S. Yadav, Advocate for respondent No.1.

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

**DATE : 8<sup>th</sup> February, 2021**

**ORDER :-**

. Present second appeal has been filed by original defendant No.2 to challenge the judgment and decree dated 04-07-2018 passed in Regular Civil Appeal No.59 of 2013 by learned District Judge-5, Dhule modifying the judgment and decree dated 08-04-2013 passed in Regular Civil Suit No.66 of 2012 (Old Special Civil Suit No.34 of 2008) by learned Joint Civil Judge Junior Division, Shirpur, District Dhule.

2. Before turning to the disputed facts, certain admitted facts are required to be considered. Relationship between the parties is admitted. Original plaintiff i.e. present respondent No.1 and present appellant and

other respondents are the legal heirs of Bhausahab Marathe and original defendant No.1 – Kalabai Bhausahab Marathe. Bhausahab Marathe expired on 06-07-1999 and Kalabai expired during the pendency of the suit i.e. on 08-10-2011. Original plaintiff had filed the said suit for partition and separate possession as well as declaration and perpetual injunction. Suit agricultural lands bearing Gut No.135/2 admeasuring 68 R and Gut No.67 admeasuring 1 Hectare 36 R situated in village Untawad and Savargaon stood in the name of Kalabai. It is further admitted position that the deceased Bhausahab was serving in Maharashtra State Road Transport Corporation and he had not inherited the agricultural lands.

3. The plaintiff had contended that there was a joint Hindu family of himself and the other legal heirs of Bhausahab. He was residing at Dhar in Madhya Pradesh in connection with his business. Under those circumstances, all the suit properties i.e. apart from the above-mentioned agricultural lands, there was Gut No.135/1 admeasuring 68 R situated at Untawad and two house properties were in possession of defendant No.1, the mother. Defendant Nos.2 and 3 i.e. the sons of defendant No.1 were residing separately, but used to look after Kalabai along with plaintiff. Due to the old age, Kalabai started residing with defendant No.2 four months prior to the institution of the suit. It is the

contention of the plaintiff that taking disadvantage of the said situation, defendant No.2 got executed sale deed dated 15-12-2007 of Gut No.67 by showing consideration of Rs.3,00,000/- by fraud on defendant No.1. Defendant No.1 is suffering from mental disorder and was under treatment from psychiatrist. He states that defendant No.1 – Kalabai was not the absolute owner of the said property and, therefore, had no right to sell out the said land. The said sale deed is not binding on the other heirs. He, therefore, prayed for partition and separate possession of his 1/7th share and consequential prayer in respect of declaration, permanent injunction was prayed.

4. Defendant No.1 – Kalabai herself had resisted the said suit by filing written statement. She denied that there existed a joint family as contended by the plaintiff. According to her, in the lifetime of father, the plaintiff had relinquished his right and interest in the suit properties by accepting money. It is stated by her that she had purchased the suit land Gut No.135/1 in the name of her husband out of love and affection. In fact, she had independent source of income. Agricultural land bearing Gut No.135/2 and Gut No.67 are her self acquired properties. Further, she had purchased plot No.32 from the income of landed properties. House No.355/1 has been inherited by her from her parental side. The salary of her husband was very much meager and even at the time of his

retirement, he was not getting sufficient income to meet the expenses of the family. The marriage of her daughters has been performed with her financial assistance by deceased – Bhausahab. Defendant No.2 was taking her care properly and, therefore, she has sold the agricultural land to him as she was in need of money. It is stated that the plaintiff has become greedy and, therefore, he want to grab the properties by harassing her. Defendant No.2 has also given the written statement separately on similar lines, however, later on after defendant No.1 – Kalabai expired, defendant No.2 has contended that defednant No.1 has executed will in his favour on 21-08-2009. By the said will, all the suit properties have been bequeathed by her to defendant Nos.2 and 6. After Kalabai's death, defendant Nos.2 and 6 have become absolute owner of those properties.

5. Defendant Nos.3 and 4 failed to appear and, therefore, the matter has proceeded *ex parte* against them, whereas defendant No.5 though appeared, failed to file her written statement.

6. Defendant No.6 has filed separate written statement, which is on the line of the written statement of defendant Nos.1 and 2.

7. After the parties had put their pleadings, issues came to be framed. Parties have led oral as well as documentary evidence. After

considering the evidence on record, the learned Lower Court has decreed the suit partly. It was held that the plaintiff is entitled to have 1/6th share in Gut No.135/1 and two house properties i.e. Plot No.32 and House No.355/1. Defendant Nos.2 and 6 were also entitled to hold 1/6th share each in those properties, however, the suit came to be dismissed in respect of the other two agricultural lands. The relief of declaration in respect of sale deed dated 15-12-2007 was rejected.

8. Original plaintiff challenged the said judgment and decree in the aforesaid Civil Appeal. It will not be out of place to mention here that respondent No.2 therein i.e. present appellant had filed cross objections. After considering the submissions from both sides, the learned first Appellate Court has allowed the appeal in its entirety and rejected the cross objections. The suit came to be decreed in its entirety. Sale deed dated 15-12-2007 was declared as null and void. 1/6th share each was given to plaintiff as well as defendant Nos.2 to 6. Under the said circumstance, the present appellant is challenging the said judgment and decree.

9. Heard learned Advocate Mr. S. P. Bramhe and learned Advocate Mr. R. S. Devdhe for the appellant and learned Advocate Mr. G. S. Yadav for respondent No.1.

10. Learned Advocate for the appellant submitted that both the Courts have held that agricultural land Gut No.135/1 and the house properties are only the properties left by Bhausahab and agricultural land bearing Gut No.67 and 135/2 are the self acquired properties of Kalabai. But then, the learned first Appellate Court erred in holding that defendant No.1 – Kalabai was not mentally sound, when she executed sale deed as well as will. The evidence in respect of execution of the sale deed in her sound disposing state of mind was accepted by defendant No.1 herself in her written statement. It was a registered document and, therefore, heavy burden was on the plaintiff to prove that she was not in a sound disposing state of mind. Evidence of the medical practitioner would show that he had examined defendant No.1 on 24-11-2004. At that time, she was suffering from hallucination and psychosis, but said P.W.3 Dr. Pravin Salunkhe himself had admitted that schizophrenia is a curable disease. The sale deed came to be executed on 15-12-2007 i.e. almost three years after she was examined by P.W.3 Dr. Pravin Salunkhe. Therefore, only on the basis of the evidence of Dr. Pravin Salunkhe, the learned first Appellate Court ought not to have come to the conclusion that on the date of the execution of the sale deed, Kalabai was not having sound disposing state of mind. The will came to be executed two years later to the sale deed and, therefore, there is no proper

appreciation of evidence, which was then properly considered by the learned Trial Judge. Under these circumstances, substantial questions of law are transpiring requiring admission of the second appeal.

11. Per contra, the learned Advocate representing the original plaintiff submitted that a detailed and properly assigned reasons have been given by the first Appellate Court, which were not given by the learned Trial Judge. When the plaintiff had led evidence of Dr. Pravin Salunkhe to show that Kalabai had mental problem on 24-11-2004, the onus shifted on the shoulders of defendants to disprove that piece of evidence. But, he has not led any evidence except the evidence of the attesting witness, who cannot be said to be the expert. He has also examined witness to the sale deed, who is in fact brother-in-law of defendant No.2. Further, the another witness to the sale deed was also from his group or in such a relationship that he would support defendant No.2. There was no evidence led by defendant No.2 to show that he had paid consideration amount to the mother. When there is proper appreciation of evidence and the decision given by the learned first Appellate Court, it does not require to be interfered with. No substantial question of law is arising in this case.

12. At the outset, it is to be noted that we are not required to scan the evidence in detail at the stage of admission, but the provisions of Section

100 of the Code of Civil Procedure makes it mandatory for this Court to consider it on the basis of the record as well as the submissions as to whether questions of law have been raised or not, which then would be required to be gone into in detail at the time of final hearing by this Court. Here, on the same set of facts and evidence, both the Courts have come to the conclusion that only the two house properties and agricultural land bearing Gut No.135/1 are the properties left by Bhausahab. Agricultural land bearing Gut No.135/2 and Gut No.67 are hold to be the self acquired properties of Kalabai. Therefore, in respect of those self acquired properties, definitely, Kalabai would be having every right to dispose of them as per her choice. Now, the plaintiff had come with the case that the sale deed executed by her on 15-12-2007 in favour of defendant No.2 is illegal and she was not in sound disposing state of mind on the date of the alleged execution of the sale deed. He has examined P.W.3 Dr. Pravin Salunkhe, who had examined her on 24-11-2004. Definitely, the evidence will have to be scanned as to whether on the date of execution of the sale deed Kalabai had sound disposing state of mind, because there appears to be more than 2½ years of gap when she was examined by P.W.3 Dr. Pravin Salunkhe and the date of sale deed. Further, as regards the will that is alleged to be executed on 21-08-2009, it is also required to be considered as to

whether that is a legal transfer of rights in the property or legal bequeathing of the property to the exclusion of her own other children. Important point that is required to be gone into is that Kalabai had filed her written statement on 08-09-2009 and it is stated that she had executed will on 21-08-2009. No doubt, the effect of the will would be after the death of a person executing the will, but then non mentioning of execution of such document by her in her written statement has been taken as adverse fact by the learned first Appellate Court. Whether it was necessary for her to make a mention about the will that was left by her, is required to be considered and, therefore, taking into consideration over all aspects involved in the matter, definitely, case is made out to admit the second appeal.

13. Hence, **Admit.**

14. Following substantial questions of law have been framed :-

(i) Whether Kalabai (original defendant No.1) was in sound disposing state of mind at the time of execution of sale deed dated 15-12-2007 and will dated 21-08-2009?

(ii) Whether the said sale deed and will is binding on the parties to the suit and appeal?

(iii) Whether plaintiff and defendant Nos.2 to 6 have share in all

the suit properties? If yes, what is the share of each one of them?

(iv) Whether interference is required in the judgment and decree passed by the first Appellate Court?

15. In view of the fact that Second Appeal is admitted, Civil Application No.11607 of 2018 stands allowed in terms of prayer clause 'B' and 'C'.

**[SMT. VIBHA KANKANWADI, J.]**

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