

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

SECOND APPEAL NO. 251 OF 2019

1. Ajinath Govind Godage
Age 76 years, Occ: Agri, (Dead),
2. Sou. Sudha Vishwanath Kangude
Age 43 years, Occ. Household,
3. Sou. Phulabai Ajinath Godage
Age 73 years, Occ. Nil
4. Vishwanath Ganpat Kangude
Age 48 years, Occ. Agri.
5. Vitthal Shripati Borade
Age 60 years, Occ. Agri.
6. Pradip Vishwanath Kangude
Age 24 years, Occ. Agri.
All Residing at Undargaon,
Taluka : Karmala, Dist. Solapur

..Appellants
(Orig. Defendant Nos.1 to 6)

Vs.

1. Smt. Sonabai Baburao Giramkar
(Dead) Legal Representatives
- 1A. Namdeo Baburao Giramkar,
Age 60 years, Occ.: Agri.
- 1B. Sou. Aruna Murlidhar Rakave
Age 42 years, Occ. Service
- 1C. Dipak Dattatraya Giramkar
Age 35 years, Occ. Business
- 1D. Sandip Dattatraya Giramkar
Age 27 years, Occ. Business
- 1E. Santosh Dattatraya Giramkar
Age 25 years, Occ. Business
- 1F. Mina Dattatraya Giramkar
Age 28 years, Occ. Business

1G. Smt. Kamal Dattatraya Giramkar
Age 57 years, Occ. Business
No.B Residing at Devlali, Tal. Nashik
District Nashik
No.1A, 1C to 1G residing at Bohari
Compound Manmad, Tal. Nandgaon
Dist. Nashik

2. Balasaheb Namdev Kokare
Age 33 years, Occ. Agri.
Residing at Ritewadi, Tal. Karmala
District Solapur.

...Respondents
(Orig. plaintiff & Deft. No.7)

Mr. Ashutosh Thipsay a/w. Kaustubh Javale, for the Appellants.
Mr. Shailendra Kanetkar a/w. Mr. Nikhil Dongre, for the
Respondents.

CORAM : C.V. BHADANG, J.
RESERVED ON : 27th JANUARY 2021
PRONOUNCED ON : 15th MARCH 2021

JUDGMENT:

. The challenge in this appeal is to the judgment and decree dated 22/3/2018 passed by the learned District Judge at Barshi in Regular Civil Appeal No.61/2014 (old RCA No.48/2009). By the impugned judgment, the appeal filed by the appellants came to be partly allowed, thereby modifying the judgment and decree dated 31/12/2008 passed by the learned Civil Judge, Junior Division at Karmala in RCA No.58/2000.

2. The appellants are the original defendant Nos.1 to 6. Late Sonabai Giramkar (respondent No.1) is the original plaintiff, while the second respondent, is the original defendant No.7. For the sake of convenience, the parties are referred to in their original capacity as plaintiff and defendants.

3. The plaintiff Sonabai filed the aforesaid suit for partition and separate possession of the suit property, more specifically described in the plaint. Late Ajinath Godage (appellant No.1) is the real brother of the plaintiff. Their father Govind expired on 8/7/1973 while the mother Gulabai (wife of Govind), predeceased her husband. The defendant No.2 is the daughter while defendant No.3 Fulabai is the widow of Ajinath. The defendant No.4 Vishwanath is the husband of Sudha (defendant No.2) while defendant No.6 Pradeep is their son.

4. The material case made out in the plaint is that the suit property is the ancestral property of the plaintiff and the defendant No.1. Upon death of Govind, a mutation entry No.653 was recorded in the name of the original plaintiff and the defendant No.1 in the revenue record. According to the plaintiff, she was cultivating the suit property jointly with her brother Ajinath, as their relations were cordial. It was contended that the defendant No.1 without the

consent of the plaintiff got the property mutated in his name alongwith his wife and daughter Sudha. It was contended that the defendant No.1 has executed a sale deed in favour of the defendant No.5 in respect of a portion admeasuring 2 H 43 Ares in the year 1981. In the year 1983, the defendant No.1 executed a sale deed in respect of 24 Ares of land from out of the suit property in favour of his son-in-law (defendant No.4). In the year 1993, in order to deprive the plaintiff from her share, her thumb impression was obtained on the pretext of the property being mutated in her name. However, it transpired that on the basis of that thumb impression, a sale deed in respect of land admeasuring 1H and 72 Ares from out of the suit property was executed in favour of the respondent No.6. The plaintiff learnt about the same in the year 1999. It was contended that the plaintiff is an old illiterate lady. The plaintiff instituted the aforesaid suit seeking partition and separate possession of her 1/4th share and declaration of sale deed of the year 1993 as null and void, being without consideration.

5. The defendant Nos.4 and 5 filed Written Statement Exh.18 which was adopted by the defendant Nos.1 to 3 vide pursis Exh.19. The defendants resisted the suit. All the adverse allegations were denied. It was denied that in the month of May 1993 and December 1993, the thumb impression of the plaintiff was obtained taking

undue advantage of her illiteracy. It was contended that the plaintiff was fully aware of the sale deed in respect of 1H and 72 Ares of land in favour of respondent No.6.

6. It is the material defence that the plaintiff being the only daughter of late Govind, her marriage was performed by the defendant No.1 when she was 16 years of age. In so far as the sale of the suit property is concerned, it was contended that it was on account of legal necessity. It was also contended that the suit was barred by limitation and on the principle of estoppel.

7. It was next contended that in the year 1986-87 there was an oral partition between the plaintiff and the defendant No.1 and the land admeasuring 2H 52 Ares was given to the share of the plaintiff and in the year 1993 mutation entries were accordingly taken. It was thus contended that no case for further partition of the suit property was made out.

8. On the basis of the rival pleadings, the learned Trial Court framed as many as ten issues.

9. The plaintiff examined herself as P.W.1 while the defendant No.4 examined himself as D.W.1 alongwith Dyndev Pandurang Gavale (D.W.2). The parties produced documents on record.

10. The learned Trial Court by a judgment and decree dated 31/12/2008 decreed the suit granting $\frac{1}{2}$ share to the plaintiff.

11. Feeling aggrieved, the appellants challenged the same before the learned District Judge which appeal came to be partly allowed in the following terms.

ORDER

1. *Appeal is hereby partly allowed as follows*

2. *The judgment and decree passed by the Ld. CJJD Karmala in RCS No.52/2000 on 31/12/2008 is hereby modified as follows.*

3. *The suit is partly decreed and the plaintiff as well as the defendant No.1 are hereby declared that they have $\frac{1}{2}$ share each in the suit lands excluding the portions of suit lands sold by the defendant No.1 to defendant Nos.5 and 4 as per registered sale deed executed in the year 1979 and 1981 as well as portion of suit land sold by plaintiff to defendant No.6 as per sale deed dated 3/12/1993.*

4. *The plaintiff is hereby directed to deposit deficit court fee in respect of her $\frac{1}{2}$ share of suit property within one month.*

5. *After plaintiff deposited deficit court fee stamp the decree be sent to The Collector Solapur for*

effecting partition and separate possession of suit lands excluding the portion of the suit land sold by the defendant No.1 to defendant Nos.4 and 5 as well as portion of suit land sold by plaintiff to defendant No.6 as per the shares of plaintiff and defendant No.1 declared as above and the portion of suit land sold by plaintiff to defendant No.7 as per sale deed dated 23/9/1999 i.e. 80-R be kept on the share of plaintiff.

6. Inquiry of future mesne profits of remaining suit lands be held as per the provisions of O.XX R.12(1)(c) of CPC.

7. The rest of the reliefs sought by plaintiff are hereby dismissed.

8. Both parties shall bear their own costs.

9. Decree be drawn accordingly.

10. R and P alongwith copy of this judgment be sent to Lower Court.

Hence, this appeal.

12. This appeal is heard finally by consent of parties on the following substantial questions of law.

(i) Whether the First Appellate Court could have decreed the suit of the respondents in the manner done without the relief being claimed and without the plaint being amended ?

(ii) Whether the First Appellate Court, is justified in decreeing the suit and granting relief to the respondent-plaintiff in a capacity different than what it was claimed in the suit ?

(iii) Whether in the circumstances the Appellant No.2 Sudha Kangar would also be entitled to a share being a coparcener ?

13. It is submitted by the learned counsel for the appellant that the First Appellate Court could not have decreed the suit in the aforesaid terms, as no such relief was claimed in the plaint. In short, it is contended that the First Appellate Court could not have granted partition in respect of the balance land after excluding the lands sold by the defendant No.1 in favour of the defendant Nos.4 and 5 and the lands sold by the plaintiff in favour of the defendant Nos.6 and 7. For this purpose, the learned counsel has placed reliance on the decision of the Supreme Court in the case of **State of Orissa and Anr. Vs. Mamata Mohanty (2011) 3 SCC 436**. It is submitted that relief which is not claimed, cannot be granted. It is next submitted that the relief granted by the Appellate Court to the plaintiff is in a capacity different than the one in which the plaintiff had claimed the relief. In other words, it is submitted that, in the suit, as originally filed the plaintiff had sought partition and separate possession in respect of her $\frac{1}{4}$ th share. It is submitted that the First Appellate Court could not have granted $\frac{1}{2}$ share to the plaintiff in the capacity as a coparcener, based on the amended Section 6 of the Hindu Succession Act. It is next submitted that in that case even Sudha who is the daughter of the defendant No.1

Ajinath would be entitled to a share. The learned counsel for the appellant has placed reliance on the decision of the Supreme Court in the case of **Messrs. Trojan & Company Vs. RM. N. N. Nagappa Chettiar AIR 1953 SC 235, Om Prakash and Ors. Vs. Ram Kumar and Ors.(1991) 1 SCC 441, Bharat Amritlal Kothari and Anr. Vs. Dosukhan Samadkhan Sindhi and Ors. (2010) 1 SCC 234.**

14. On the contrary, the learned counsel for the respondents by placing reliance on the decision of the Supreme Court in the case of **Vineeta Sharma Vs. Rakesh Sharma and Ors. (2020) 9 SCC 1** has submitted that the suit has rightly been decreed in respect of the balance land. It is submitted that the First Appellate Court has properly moulded the relief.

15. I have carefully considered the rival circumstances and the submissions made.

16. The interse relationship between the parties is not in dispute. Thus, it is not in dispute that the defendant No.1 was the real brother of the plaintiff. Admittedly, the mother of the plaintiff and the defendant No.1 i.e. Gulabai died during the lifetime of her husband Govind. Govind expired on 8/7/1973, It may be mentioned that the plaintiff Sonabai died on 18/2/2007. It is not in

dispute that the suit property was the ancestral property of the father of the plaintiff and defendant No.1. The sale deed of the year 1979 by which the defendant No.1 has sold certain portion of the land to defendant No.5 and the sale deed dated 5/11/1981 by which the defendant No.1 has sold a portion of the suit land in favour of the defendant No.4 is proved on record. That apart, the plaintiff has also sold 80 Ares of land in favour of the defendant No.7 on 23/3/1999 and there is a sale deed said to be executed by the plaintiff in favour of the defendant No.6 on 3/12/1993 regarding a portion of the suit property. Broadly speaking, these are the facts, which are either undisputed or which have clearly come on record. The defence as raised by the defendant No.1 was essentially about the previous partition of the year 1986-1987 for which purpose the reliance is placed on a mutation entry No.1024. and the documents at Exh.27 and 28. The First Appellate Court has disbelieved the defence about the partition of the year 1986-87 and has found that the document at Exh.27 only indicates that the parties had applied for sub-division of the block. Be that as it may, the consideration in this appeal has to be confined to the substantial questions of law as framed above on which the parties had advanced their submissions.

17. As to Question No.1

A perusal of the judgment of the First Appellate Court shows that all the four sale deeds, two each by the plaintiff and the defendant No.1 have been accepted and acknowledged by the First Appellate Court. The First Appellate Court has found that the plaintiff Sonabai having expired on 18/2/2007, i.e. subsequent to the coming into force of the amendment to Section 6 of the Hindu Succession Act, on 9/9/2005, Sonabai would be entitled to get a share equal to that of a son i.e. her brother Ajinath. After this, the First Appellate Court seems to have moulded the relief by granting half share in the suit land, excluding the portion sold by the parties. In so far as sale deed dated 23/9/1999 in respect of 80 Ares of land sold by the plaintiff to defendant No.7 is concerned, the First Appellate Court taking note of the case made out by the plaintiff, has directed that the said portion may be allotted / assigned to the share of the plaintiff. Thus, essentially what the First Appellate Court has done, after accepting and acknowledging the four sale deeds, is to strike a balance and proceed to grant a decree of partition, in respect of the balance land. It is trite that in an appropriate case, the Court can mould the relief, which needs to be granted, depending upon facts and circumstances of the case. Thus, it cannot be said that the First Appellate Court has granted a relief which is entirely different or foreign to the one claimed by the

plaintiff. The suit was filed by the plaintiff essentially for partition and for declaration of the sale deed dated 3/12/1993 as invalid and inoperative. A perusal of the final relief granted by the Appellate Court does not show that the relief granted is at total variance with the claim of partition. Essentially the decree is one of partition after taking note of the four sale deeds and moulding the relief appropriately. I do not find that any exception can be taken to the impugned judgment and decree passed by the First Appellate Court on the ground that the Appellate Court has granted relief which is not claimed.

18. Reliance placed on the decision in the case of **Mamata Mohanty** (supra) is misplaced. That was a case involving the dispute as to employment, appointment and recruitment of teachers in private educational institutions. In my considered view, the case clearly turned on its own facts. Similar is the case with the decision in **Bharat Amritlal Kothari** (supra) which arose out of a petition under Article 226 of the Constitution of India, which involved an issue about the interim custody of animals seized in an offence under Section 4 of the Prevention of Cruelty to Animals Act. It was in the peculiar facts and circumstances of the case held that the approach of the High Court in granting relief not prayed for cannot

be approved and every petition under Article 226 of the Constitution must contain a relief clause.

19. In the case of **Om Prakash and Ors.** (supra), the landlord in spite of knowing the person in actual possession of the suit premises had filed an eviction application against another person, who was neither a tenant nor in possession of the premises. It was contended before the Supreme Court that it is not necessary for the appellants to specifically allege that the respondent No.2 therein was a tenant or that he had defaulted, in the matter of payment of rent and to seek an order of ejectment. The said contention was refuted by the Supreme Court on the ground that the tenant so impleaded in the absence of a definite allegation of non-payment of rent by him is not under obligation to pay or tender the rent stated to be in arrears. It was in these circumstances held that the parties cannot be granted relief which is not claimed.

20. Lastly, in the case of **Messrs. Trojan and Company** (supra) the dispute was between the Constituent of a firm of stock exchange. It was held that the decision of the case cannot be based on the grounds outside the pleadings of the parties and that it is the case pleaded that has to be found. In my considered view, even the said case clearly turned on its own facts.

21. At the cost of repetition, it is necessary to emphasise that the suit filed by the plaintiff in this case is essentially for partition and separate possession in which there were four sale deeds found to be executed two each by the plaintiff and defendant No.1 and there was a defence about prior partition. Necessary pleadings about execution of the sale deeds, which were either asserted or denied by the parties were already on record. The evidence regarding the sale deed was also put forth on record. Thus, all that the First Appellate Court has done is to mould the appropriate relief. In my humble view, a distinction has to be made in case where, the court has to mould the relief on the basis of the pleadings and the evidence on record and a case where the court proceeds to grant relief, which is entirely different from the one which is claimed and is unsupported by any pleadings and the evidence on record. In my considered view, the present case falls under the prior category and not the later one. Thus, I do not find that there is any error in the Appellate Court decreeing the suit in the manner done. The point is answered accordingly.

22. As to point to 2

Here again the Court has rightly taken note of the legal position as obtaining on the date of the decision. The law declared

by the Supreme Court in respect of Section 6 of the Hindu Succession Act in the case of **Vineeta Sharma** (supra) has rightly been taken note of. The Supreme Court has interalia held that if the daughter is alive on the date of the enforcement of the Hindu Succession (Amendment) Act, 2005 i.e. on 9/9/2005, she becomes a coparcener w.e.f. the date of such enforcement irrespective of whether she was born before the said amendment. It has interalia been held that the proviso to Section 6 confers status of a coparcener on a daughter born before or after the amendment. It is necessary to note that Sonabai died on 18/2/2007, that is after the date of enforcement of the amending Act. Thus, I do not find that any exception can be taken to the judgment on the ground that the relief is granted to the plaintiff in the capacity different than it was claimed in the suit.

23. As to point No.3

This ground was neither raised in the Trial Court nor before the Appellate Court. It is not even raised in the appeal memo in this appeal. That apart, admittedly, Govind had only one daughter (plaintiff) and the son (respondent No.1) and thus by impugned judgment, $\frac{1}{2}$ share has rightly been granted to each of them in terms of the decree order passed by the First Appellate Court. The point is answered accordingly.

24. In the result, the second appeal is dismissed with no order as to costs. A decree be drawn accordingly.

C.V. BHADANG, J.