

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**NAGPUR BENCH : NAGPUR**

**SECOND APPEAL NO.86 OF 2007**

**APPELLANT:-**

Org. Plff  
On R.A.

Saraswatibai w/o Ramdas Ingle,  
Aged about 47 years, Occu: Household,  
R/o Urja Nagar, Chandrapur,  
Tahsil & District Chandrapur.

**... VERSUS ...**

**RESPONDENTS:-**

Orig. defts  
On R.A.

1. Pradeep S/o Devidasrao Khandare,  
Aged about 27 years, Occ-Nil,
2. Rajdeep s/o Devidasrao Khandare,  
Aged about 24 years, Occ: Nil,
3. Devidas s/o Jagoji Khandare,  
Aged about 63 years, Occ: Cultivator

All R/o Harsharaj Colony, VMV Road, Amravati.

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Shri P.R. Agrawal, Advocate for the Appellant.  
Shri S.M. Vaishnav, Advocate for the Respondents.  
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**CORAM : S.M. MODAK, J.**

**RESERVED ON : 27<sup>th</sup> AUGUST, 2021**

**PRONOUNCED ON : 27<sup>th</sup> OCTOBER, 2021**

**JUDGMENT:-**

This Court while admitting the appeal on 23<sup>rd</sup> March, 2007  
has framed following substantial question of law—

| No. | Substantial Question of Law                                                                                                                                                                                                                                                                                                                   | Findings           |
|-----|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------|
| 1.  | <i>“whether the Courts were justified in holding that the suit property was the self-acquired property of Jagoji, when it was pleaded by the defendants in paragraph no.2 of the written statement that the property was purchased by late Jagoji and his brother Champatrao out of the joint family income, in the name of late Jagoji?”</i> | <b>Affirmative</b> |
|     | <b><u>Additional substantial questions of law</u></b>                                                                                                                                                                                                                                                                                         | <b>See para 19</b> |

On reading it, one can very-well understand that there is a pleading in the written statement filed by the defendants (para 2) to the effect that *“property was purchased by late Jagoji Khandare and his brother Champatrao Khandare out of joint family income”*. It also suggests that the properties were purchased in the name of late Jagoji Khandare. The substantial question of law further suggests *“in spite of this admission, both the Courts below have given a finding that suit property was self-acquired property of Jagoji Khandare and not a joint family property”*.

02] This substantial question of law was framed on the background of filing suit for partition by plaintiff-Saraswatibai Ingle

(present appellant). She was aggrieved by the decision of the trial Court for two reasons—

- a) She was not granted independent share in the suit properties but was granted share in the share of her deceased father Jagoji Khandare and
- b) She was granted share only in respect of one land i.e. Survey No.77/3 by excluding lands bearing Survey No.51 (Gat Nos.280 & 286) forming suit properties.

That is how, plaintiff-Saraswatibai Ingle filed the first appeal. Her appeal was dismissed. That is how, she had come to this Court by way of second appeal.

03] I have heard learned Advocate Shri P.R. Agrawal for the plaintiff/appellant and learned Advocate Shri S.M. Vaishnav for the defendants/respondents. So it needs to be seen what was the evidence adduced by both the sides about nature of suit properties, how they were acquired and to what extent the evidence of admission is considered by the Courts below.

### **Interference by the Second Appellate Court**

04] To refute the contentions, learned Advocate Shri Vaishnav submitted that the scope of second appeal is limited and the judgment

can be interfered with only in limited situation. To buttress his submission, he relied upon the following judgments—

1. *Keshar Bai Vs. Chhunulal*.<sup>1</sup> Hon'ble Supreme Court has emphasized on interference in the concurrent finding recorded by the Courts below only when there is perversity when question of title has been decided in the earlier suit, it amounts to *res-judicata*. Hence, the decision of the High Court in setting aside concurrent findings by the High Court was set aside (para 20).
2. *Shivaji Kashiram Jamdar through LRs. & Others Vs. Punja Kashiram Jamdar & Others*.<sup>2</sup> This Court has refused to interfere in the concurrent findings recorded by the Courts below. The Court exercising jurisdiction of second appeal cannot re-open the entire case and appreciate the evidence, converting itself to third Court of fact finding (para 12).

05] This Court while dealing with the arguments vis-a-vis the findings given by the first Appellate Court, will definitely consider the ratios laid down above.

#### Admission in Written Statement

06] Learned Advocate Shri Vaishnav also admits that in their

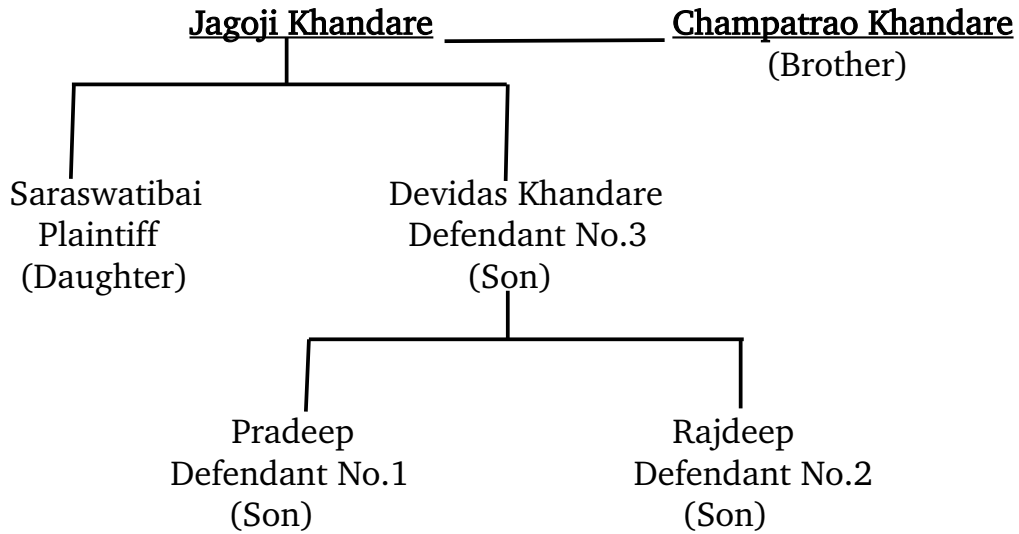
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1 (2014) 11 SCC 438

2 2018 SCC OnLine Bom 1018

written statement “*they have pleaded that Jagoji Khandare and Champrao Khandare purchased the area admeasuring 5 H. 94 R. from Survey No.51 out of joint family income*” (para 2) of the written statement. However, he submitted that the entire averments in the written statement need to be perused and this admission cannot be read in isolation. He also invited my attention to the averment (in the same para 2) of the written statement to the effect “*it is denied that this all properties are the ancestral properties*”. According to him, joint family income means the income of both the brothers Jagoji Khandare and Champtarao Khandare.

07] So, this Court is required to consider whether the admission given in the written statement as referred above relieves the plaintiff Saraswatibai Ingle from the burden of proving the nature of suit properties being joint family properties. So, whether plaintiff-Saraswatibai Ingle can rely upon this admission given in the written statement so as to persuade the Court to hold that the suit properties are joint family properties. This Court is required to consider whether the admission as referred above can be considered in isolation or whether other averments in the written statement need to be considered. Certain facts need to be stated in order to understand the controversy. The genealogical tree in between the plaintiff and the defendants is reproduced below—



08] Said Jagoji Khandare expired on 12<sup>th</sup> December, 2001. There is reference of two partitions in the pleadings of the defendants. They are as follows—

- a) One between Jagoji Khandare and his brother Champatrao Khandare in the year 1958.
- b) In between Jaogji Khandare, his son Devidas Khandare-defendant No.3 and grandsons Pradeep Khandare-defendant No.1 and Rajdeep Khandare-defendant No.2 – It was registered partition deed dated 29<sup>th</sup> October, 2001.

The description of the lands is as follows:

| Survey No. | Gat No. | Village                            |
|------------|---------|------------------------------------|
| 51/1       | 286     | Wagholi, Tq. & Distt. Amravati     |
| 51/3       | 280     | Wagholi, Tq. & Distt. Amravati     |
| 77/3       | 145     | Kapus Talni, Tq. & Distt. Amravati |

09] Before appreciating “*the consequences of admission given in the written statement*”, it will be material to consider the averments in the plaint about nature of the suit properties. Saraswatibai has made following averments—

“That from ancestral field Jagoji Khandare has purchased a filed out of Gat No.286. Another field Gat No.280, Gat No.145 were owned by Jagoji Khandare. All these lands were mutated in the name of Jagoji Khandare and he was cultivating those lands (para 2)”.

10] The plaintiff has further pleaded that “plaintiff being daughter having legal heirs and status and which was got by her by way of birth in the above said property of Jagoji Khandare. The plaintiff is claiming half share in the property of Jagoji Khandare. The document is of partition deed which the defendant Nos.1 to 3 in collusion has distributed amongst them. Plaintiff is having half share in the property (para 7)”.

11] The reply given by all the defendants in the written statement is as follows—

“It is denied that all the properties are ancestral properties. The field Survey No.51 previously was in the name of Ramkisan Marwadi and it was purchased by Jagoji Khandare

and Champatrao Khandare out of their joint family income in the name of Jagoji Khandare as per Madhya Pradesh Act, 1958 Rule 24 Vidarbha Patte Bill (para 2 - as reply to para No.2)”.

12] The defendant has further denied contents of para Nos.7 to 9 of the plaint. The property is self-acquired property and plaintiff has right to distribute as per his wish (para 6).

13] It will be material to consider how the trial Court has dealt with this averment. The trial Court observed—

*“11. Plaintiff also claim suit property as Joint family property. Surprisingly, it is to be noticed that, defendants, in their written statement Ex.19 have admitted that suit property as described in para 2 and 8 of the plaint, came to be passed to late Jagoji during his life time was purchased by Jagoji out of the joint family income. This admissions of the defendant support the contentions of the plaintiff that suit property is the joint family property, as rightly pointed out by learned counsel for the plaintiff.”*

14] So the trial Court had given more weightage to the admission by defendants as referred above rather than failure of the plaintiff to prove nature of suit property as ancestral property. Because in para Nos.6 to 10, trial Court had given reasons for arriving at a conclusion why the suit properties cannot be said to be ancestral properties.

**Appellate Court**

15] It will be also material to consider the findings given by the first Appellate Court on the aspect of admission. The first Appellate Court concluded that the suit properties are the self-acquisitions of deceased Jagoji Khandare. So, the first Appellate Court had confirmed the reasoning given by the trial Court about failure of the plaintiff to prove nature of suit properties as joint family properties. However, nothing from Appellate Court's judgment is pointed out to me about the finding given by the trial Court in respect of the admission.

16] learned advocate Shri Vaishnav relied upon the judgment in case of **Rakesh Wadhawan & Others Vs. Jagdamba Industrial Corporation & Others<sup>3</sup>**. It has been observed "admission is only a piece of evidence and can be explained. It does not conclusively bind a party unless it amounts to an estoppel. Value of an admission has to be determined by keeping in view the circumstances in which it was made and to whom (para 7)". In that case, Hon'ble Supreme Court came across the admission given in a letter written by tenants to earlier landlord. Whereas, learned advocate Shri Agrawal submitted that trial Court has rightly considered this admission and the first Appellate Court totally overlooked the admission as a piece of evidence.

17] It is true that as per the provisions of Section 17 of Indian Evidence Act, 1872, admission is described as a statement which suggests any inference as to fact in issue or relevant fact and made by any of the persons and under prescribed circumstances. No doubt, the admission is there in the written statement. But the said admission is not sufficient enough to relieve the plaintiff from discharging the burden to prove nature of the suit properties. There is one more reason not to prevent the defendants from making grievance about nature of suit properties. In the same paragraph i.e. para No.2 of the written statement the defendants have denied the nature of suit properties as ancestral properties. There is reason to believe that both the Courts below committed mistake. Trial Court only considered the admission in the written statement and overlooked the denial made by the defendants.

18] Whereas, the first Appellate Court has overlooked and has not commented anything about this admission. However, for the reasons stated above, this Court is not inclined to consider that admission sufficient enough to prevent the defendants from disputing nature of suit properties as joint family properties. Hence, the substantial question of law originally framed is answered in the affirmative.

**Additional Substantial Questions of Law**

19] Apart from laying emphasis on use of admission in the written statement, learned Advocate Shri Agrawal also laid emphasis on the following aspects—

- a) The first Appellate Court reversing the findings as to nature of properties as joint family properties given by the trial Court— without cross-objection being filed by the defendants/respondents.
- b) The first Appellate Court coming to its own findings that suit properties were self-acquisitions by deceased Jagoji Khandare.

20] It is true that trial Court has accepted the suit properties as joint family properties. It is also true that this finding is against the defendants. It is also true that they have neither filed substantive appeal nor cross-objection. It is also true that the first Appellate Court has reversed those findings. About the scope of power of first Appellate Court to interfere in the findings recorded by the trial Court, learned Advocate Shri Agrawal relied upon the following judgments—

1. **Bharti w/o Rameshlal Bajaj & Others Vs. Sultan Singh Aparsingh & Another<sup>4</sup>**.

**2. Biswajit Sukul Vs. Deo Chand Sarda & Others<sup>5</sup>.**

21] Whereas, according to learned Advocate Shri Vaishnav, there is no need to file substantive appeal or cross-objection. He relied upon a judgment in the case of **Ravinder Kumar Sharma Vs. State of Assam & Others<sup>6</sup>**. He also relied upon the provisions of Order XLI Rule 22 of CPC. On the point of powers of the first Appellate Court under the provisions of Order XLI Rule 33 of CPC, he relied upon the observations in the case of **Smt. Sindhutai Kesharao Pachpohar Vs. Dinesh s/o. Gulabsingh Chavan<sup>7</sup>**

22] On hearing their arguments, this Court realised that point canvassed by both of them are material points. But, unfortunately on those points, no substantial question of law has been framed. If at all this Court has to give a finding on any point raised before him, there has to be a substantial question involved in that appeal. As per the provisions of proviso 2 of Section 100(5) of CPC by giving reasons, this Court can formulate a substantial question of law. This Court feels that additional substantial questions of law needs to be formulated. It is for the reason that (a) first Appellate Court has reversed the findings on nature of properties and (b) though the original defendants have neither filed substantive appeal nor cross-objection. Hence, following

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5 (2018) 10 SCC 584

6 (1999) 7 SCC 435

7 2020(5) ALL MR 38

additional substantial questions of law are formulated—

| No. | Substantial Question of Law                                                                                                                                                                                                          | Findings           |
|-----|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------|
| 2.  | <i>Without filing cross-objection by the defendants to the findings given by the trial Court - whether the first Appellate Court was right in reversing the findings about nature of suit properties as joint family properties?</i> | <b>Affirmative</b> |
| 3.  | <i>Whether the first Appellate Court was right in concluding that suit properties were self-acquisitions of deceased Jagoji (by reversing the findings that suit properties were joint family properties)?</i>                       | <b>Affirmative</b> |

### **Necessity of Filing Cross-objection**

23] I have perused the observations in the judgments relied upon by both the sides and also read over the provisions of Order XLI Rule 22 of CPC. Whenever any judgment is pronounced, there is interpretation of the provisions of law and its application to the facts involved. There cannot be any dispute as to proposition of law laid down in all these judgments relating to necessity of filing a substantive appeal only when there is a decree passed against one of the party, the

manner of challenging a particular finding against you (when there is no decree against you) and remedy when the decree is partly in your favour and partly against you. On this background, when the observations made in all above judgments are perused, we may find that the law has been made applicable to the facts involved in those cases.

24] This Court feels that there was no need for the defendants to file cross-objection thereby challenging “*the findings as to nature of suit properties as joint family properties given by the trial Court*”. The defendants were justified in challenging those findings of the trial Court by advancing oral arguments (at the same time supporting the findings given by the trial Court which are in their favour) the latter part of the provisions of Order XLI Rule 22 of CPC will come into picture only when the respondent feels that a decree ought to have been passed in his favour. The latter part of that provision was added by 1976 amendment.

### **The Facts of the Case**

25] The trial Court gave following findings—

|    |                           |                            |
|----|---------------------------|----------------------------|
| 1. | Nature of suit properties | Joint family properties.   |
| 2. | Partition being illegal   | In the negative            |
| 3. | Operative order           | Plaintiff is granted share |

|  |  |                                                                                       |
|--|--|---------------------------------------------------------------------------------------|
|  |  | only in respect of Survey No.77/3 (refusing share in Survey No.51 Gat Nos.280 & 286). |
|--|--|---------------------------------------------------------------------------------------|

26] If we consider the findings and the decree, we may find that there is one finding in favour of the plaintiff and one finding in favour of the defendants. When we perused the decree, we may find that partly it is in favour of the plaintiff (because share is granted in Survey No.77/3) and partly in favour of defendants (because share is not granted in respect of Survey No.51 (Gat Nos.280 & 286). On these background, only plaintiff has preferred substantive appeal because she has not been granted share in one of the suit property. On these background, when we apply the provisions of Order XLI Rule 22 of CPC and consider remedy available to the defendants, we may find that—

- a) defendants could have preferred a substantive appeal in respect of granting of shares to the plaintiff in respect of one of the suit land.
- b) The defendants may challenge the findings about nature of suit properties by arguing or by taking cross-objection.

27] This Court finds the explanation offered by learned Advocate Shri Vaishnav as a proper explanation which fits in the scope laid down by the provisions of Order XLI Rule 22 of CPC, because learned

Advocate Shri Vaishnav submitted that they are not aggrieved for grant of share to the plaintiff in respect of one of the suit property and that is why, they have not preferred substantive appeal. Further he is right in his submission that findings as to nature of property even can be challenged by relying upon Part I of Order XLI Rule 22 of CPC (which precedes the word ‘and’). When the Part I is read, the following proposition is culled out—

- a) Respondent may support the decree.
- b) He may also state that particular finding against him ought to have been in his favour.
- c) He may do so even though he has not preferred an appeal.

28] As said above, the defendants do not want to challenge the decree for giving share in one of the suit property. The defendants certainly could have preferred an appeal, if they want to challenge that part of the decree. Why defendants should prefer an appeal in respect of part of the decree thereby not granting share in respect of one of the suit land to plaintiff? However, when the plaintiff prefers an appeal, defendants are justified in challenging those findings which are against them. As per second part, cross-objection is required only when he wants a decree ought to have been passed in his favour. In this case, defendants do not say that decree (in respect of not giving share to

plaintiff) ought to have been in his favour. So the defendants are justified as per the Part I— (a) by supporting the findings (partition is not illegal) and (b) by challenging the findings as to nature of property which are against him.

29] The observations made in the case of **Bharti Bajaj** referred above, are on the basis of facts of that case. First appeal had arisen at the instance of the claimants. Their claim was decreed, but they were interested in enhanced amount of compensation. That is why, first appeal was preferred by them. Whereas, the Insurance Company took a plea about breach of policy conditions and hence not liable to pay compensation. There was an award against the insurance company (though for insufficient amount as claimed by the claimant). This Court (Aurangabad Bench) refused to accept the plea of Insurance Company about breach of policy terms on account of not following the procedure laid down as per Order XLII Rule 2 of CPC. The reason was, there was not only an objection to the findings by the Claims Tribunal (breach of policy terms not proved), but there was an award against Insurance Company also.

30] In a particular contingency, it may happen that there is a finding against you and there is also an award against you. In such contingency, you cannot expect the Court to pass an award in your favour by simply challenging the findings (by not preferring a

substantive appeal or by not filing cross-objection as contemplated under Part II of Order XLI Rule 22 of CPC). The observations are not useful to the appellant/plaintiff.

31] In the case of **Biswajit Sukul** referred above, the Hon'ble Supreme Court has remanded the matter to the first Appellate Court to decide the first appeal. The trial Court dismissed the suit as defendant No.1 was not proved to a defaulter. The plaintiff filed first appeal and not challenged the findings about his relationship with the defendant as tenant. The defendants did not file cross-objection against the findings about relationship. The first Appellate Court cannot examine the findings about relationship unless it is challenged by the defendants by filing cross-objection. This Court feels that these observations pertains to facts of that case. On reading the judgment, it does not find that any earlier judgments are referred and any interpretation as to law has been made.

32] As against this, there is elaborate discussion by the Hon'ble Supreme Court in the case of **Ravinder Kumar Sharma (supra)**, Hon'ble Supreme Court has considered the law prior to 1976 and amendment brought in 1976. Even the recommendations of Law Commission were also considered. The effect of adding explanation to Rule 22 was also considered. On facts, it was held that "filing of cross-objection after 1976 is purely optional and not mandatory (para 23)". It has also been

held that 1976 amendment is merely clarificatory in nature and has not changed the law. This Court in the case of Smt. Sindhutai Kesharao Pachpohar as referred above, has refused to accept the objection of entertaining the discretion under Rule 33 on technical ground when appeal or cross-objection has not been filed.

33] For the above discussion, this Court do not find merit in the objection taken by learned Advocate Shri Agrawal about wrong committed by the first Appellate Court in reversing the findings of the trial Court without filing cross-objection. Hence, I answer the substantial question No.2 in the affirmative.

#### Nature of Suit Properties as Joint Family Properties

34] Learned Advocate Shri Agrawal submitted that there was no reason for the first Appellate Court to interfere in the findings recorded by the trial Court about nature of suit properties as joint family properties. To buttress his submission, his contention is two fold. One is about evidence adduced by the parties about nature of properties and second is the principles laid down in various judgments on the point of appreciation of evidence adduced to show the nature of properties as joint family properties.

35] Learned Advocate Shri Agrawal relied upon the following judgments—

1. *Rohit Chauhan Vs. Surinder Singh & Others*<sup>8</sup>. Coparcenary property means ancestral property. Coparcenary is a narrower body than the joint Hindu family. It becomes a separate property of a person after partition, but when son is born, the property becomes coparcenary property and son acquires interest as a coparcener (para 11).
  
2. *Adivappa & Ors. Vs. Bhimappa & Another*<sup>9</sup>. There is presumption that every Hindu family is joint in food, worship and estate and in absence of proof of division, such legal presumption continues to operate in the family. According to learned Advocate Shri Agrawal, it has to be presumed that suit property is the joint family property, because there existed a joint family consisting of defendants and plaintiff. It further says, burden lies on person who asserts that some of the properties are his self-acquired property (para 24). Whereas, according to learned Advocate Shri Vaishnav, these observations are on the basis of the facts of that case and the facts of the present appeal are different. In that case, a declaration was sought that suit properties were self-acquired properties of the plaintiff (para 7).

36] Learned Advocate Shri Vaishnav submitted that, in fact,

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8 (2013) 9 SCC 419

9 AIR 2017 SC 4465

burden to prove the suit properties as joint family properties rests on the shoulder of the plaintiff and, in fact, the plaintiff has not adduced any evidence. According to him, it is who, but they have adduced the evidence. According to him, there is a presumption about existence of joint family properties, but there is no presumption that joint family possesses joint family property. He relied upon the following judgments—

1. V.D. Dhanwatey Vs. The Commissioner of Income-tax, Madhya Pradesh, Nagpur and Bhandara<sup>10</sup>. The property acquired by coparcener with the aid of joint family assets is impressed with the character of joint family property. Corollary property acquired with the assistance of joint family property becomes self-acquired property(para 4).
2. D.S. Lakshmaiah & Another Vs. Balasubramanyam & Another<sup>11</sup>. There is no presumption that property is a joint family property only on account of existence of Hindu family. One who asserts that it is a joint family property acquired property from the nucleus, he has to prove it.
3. Suman Vishnu Pathak & Others Vs. Usha w/o Prabhakar Rao Koparkar & Others<sup>12</sup>. If the property sands in the name of

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10 AIR 1968 SC 683

11 (2003) 10 SCC 310

12 2013(2) Mh.L.J. 268

coparcener of HUF, then presumption is that it is his self-acquired property unless it is shown that it was acquired with the aid of nucleus of joint family property. There has to be some evidence that property is inherited or that property is originally belonged to ancestor (para 40 and 41).

4. *Gopal Bhagwandas Ahuja Vs. Jagdish Bhagwandas Ahuja &*

*Others*<sup>13</sup>. If the property stands in the name of individual member, there can be a presumption that it belongs to joint family provided has to be proved that joint family had sufficient nucleus at the time of acquisition. This presumption is not applied to business (para 27(e)).

5. *Jamarathbee w/o Ibrahim & Others Vs. Pralhad Dattatraya*

*Dadpe & Others*<sup>14</sup>. As per ancient Hindu Law, the properties are on to classes. One is joint family property (unobstructed heritage) and second is separate property (obstructed heritage). Joint family property is classified into (a) ancestral property, (b) property acquired jointly with or without the aid of ancestral property and (c) property acquired separately but thrown into common stock (para 27).

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13 2013 SCC OnLine Bom 1143

14 1978 Mh.L.J. 204

**Reversal of Finding about Nature of Properties**

37] On this background, the findings given by the first Appellate Court (thereby affirming part findings of the trial Court) about the nature of suit properties as self-acquisition of deceased Jagoji Khandare need to be looked into.

38] The first Appellate Court before arriving at the conclusion that suit properties are self-acquired properties, gave following reasonings—

|     |                                                                                                                                                                      |
|-----|----------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| (a) | Under the Customary Hindu Law there is a presumption of joint Hindu family, but there is no presumption of joint Hindu family property.                              |
| (b) | Consequently burden lies on the appellant to show that deceased Jagoji Khandare acquired suit lands with joint family funds or sufficient nucleus.                   |
| (c) | The appellant is absolutely having no evidence.                                                                                                                      |
| (d) | There is no evidence to show that deceased Jagoji Khandare was having property left behind by his father.                                                            |
| (e) | The appellant has no evidence to show that lands purchased by the Jagoji Khandare and his brother Champatrao were in their possession from the time of their father. |

|     |                                                                                                                                    |
|-----|------------------------------------------------------------------------------------------------------------------------------------|
| (f) | Suit lands acquired by Jagoji Khandare and his brother Champatrao were their <u>joint property and not joint family property</u> . |
|-----|------------------------------------------------------------------------------------------------------------------------------------|

39] The findings given by the first Appellate Court on the basis of above reasoning need to be assessed on the background of submission made by learned Advocates Shri Agrawal and Shri Vishnav. It will be material to consider the evidence adduced by both the sides and findings given by the Courts below.

40] Plaintiff-Saraswatibai gave evidence, whereas defendant No.3 Devidas Khandare entered into witness-box. Both have relied upon documentary evidence. There are three agricultural lands. They are Gat Nos.286 & 280 (both situated at Mauza Wagholi, Tq. & Distt. Amravati) and Gat No.145 situated at Mauza Kapus Talni Tq. & Distt. Amravati. Earlier Survey numbers of these lands are Survey Nos.51 & 77/3. It will be material to consider how the above suit lands were acquired by Jagoji Khandare and Champatrao Khandare. One can find this from the averments in the plaint and written statement.

Survey No.51 (Gat Nos.280 & 286)

It was obtained from Ramkisan Ambadas Marwadi on Patta as per the provisions of Madhya Pradesh Act, 1951 (No.24)

Vidarbha Kshetki Patte Niyaman Kayada. Extract of mutation entry at Exh.57 to that effect is filed. It was acquired from the joint income. As per the partition of 1958, it was divided in between Jagoji Khandare and Champatrao Khandare.

Survey No.77

It was purchased as per registered sale-deed dated 4<sup>th</sup> January, 1949. The registered sale-deed is at Exh.51. As per 1958 partition, this land was also distributed between Jagoji Khandare and Champatrao Khandare. In respect of Survey Nos.51/2 & 51/4, the appellant relied 7/12 extracts at Exhs.27 & 28.

In respect of Survey No.51, the appellant relied upon following documents:-

- a) Exh. 48, 49 & 50 (consolidation statement).
- b) Exh. 45 & 46 Challans of land revenue.
- c) Exh. 47 extract of mutation entry.

In respect of Survey No.77, the appellant relied upon following documents:-

- a) Registered sale deed dated 4<sup>th</sup> January, 1949 at Exh.51.
- b) 7/12 extract at Exh.29.

41] As said above, the trial Court had given a finding in respect of the nature of suit properties as joint family properties against the plaintiff (paras 6 to 10). However, on the basis of admission given by defendants in the written statement, the trial Court had given a finding in favour of the plaintiff (para 13). As said above, the first Appellate Court had given a finding that suit properties are self-acquisitions of deceased Jagoji Khandare.

42] From the above evidence, it is clear that the plaintiff has relied upon only 7/12 extracts. It will not show how the suit properties were acquired. Whereas, the defendants have adduced documents to show how the properties were acquired. From the above, one can say that Survey Nos.51/1 & 51/3 were acquired by Jagoji Khandare and Champatrao as per Patte Bill from then Government of Madhya Pradesh. Whereas, Survey No.77/3 was acquired by Jagoji Khandare and Champatrao by way of sale-deed at Exh.51. Even witness Devidas defendant No.3 has explained how these properties were acquired from the income of selling of cotton crop. It is very well clear that for the first time both these brothers have acquired the suit properties. It was not succeeded by them from their father.

43] Learned Advocate Shri Agrawal submitted that the Survey Nos.51/1 & 51/3 were obtained on a Patte Bill and, as such, they were holding that lands on behalf of the family. That is why, he laid

emphasis on the judgments of *Balagouda Alagouda Patil & Others Vs. Babasahed Ramagouda Patil*<sup>15</sup> and *Smt. Seetha Poojarchy & Another Vs. Panju Poojary & Others*<sup>16</sup>. It is true that High Court Karnataka in both the above judgments, observed that “if tenancy rights are acquired by a member of the family, it shall be held to be for the benefit of entire family”. It is true that the provisions of Section 48-A Karnataka Land Reforms Act, 1961 were considered.

44] In the second judgment, occupancy right was confirmed under Section 48-A of the Land Reforms Act by the Land Tribunal in favour of one Manja Billava was for and on behalf of joint family. The tenancy rights were framed from the time of ancestors of Manja Billava. Accordingly, the plea about separate property was negatived. Whereas, in first judgment, objection was taken on behalf of the defendant that land bearing Survey No.62/1 is self-acquired tenanted land and hence Civil Court cannot decide its nature. In para No.9, it was observed that “when tenancy rights are acquired by member of the family, it shall be held to be for the benefit of the entire family”.

45] So, there are three important factors to be considered. They are as follows:-

- a) Manner of acquisition of suit lands by Jagoji Khandare and his brother Champtarao Khandare.

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15 (1999) AIHC 276

16 2013(1) KantLJ 43

- b) Partition of those lands by them in the year 1958.
- c) Registered partition deed on 29<sup>th</sup> October, 2001.

### **Findings by the Trial Court**

46] About the evidence adduced by the plaintiff in respect of the suit lands, trial Court observed that *“plaintiff has failed to prove that they are ancestral properties”* (para 8 to 10). However, finally the trial Court concluded that suit properties were joint family properties (para 13). This finding is given on the basis of *“admission given by the defendants in the written statement”* (para 11). However, when the question of declaration of share by the parties have arisen, the trial Court has considered the registered partition-deed in between Jagoji Khandare and all the defendants (para 15). The trial Court negated the grievance of the plaintiff that the partition-deed was executed fraudulently from deceased Jagoji Khandare. Finally, the Court held that partition-deed is binding on plaintiff (para 16). So, being the daughter of Jagoji Khandare, the trial Court gave her ½ share and other half to defendant No.3-Devidas (brother). She was held entitled to half share only from Survey No.77/3 which had come to the share of Jagoji Khandare as per registered partition-deed.

### **First Appeal**

47] First appeal was filed by the plaintiff. She was not given

independent share (but given a share only in the share of father Jagoji Khandare). So also, she was not given the share in other two lands. On appreciation of the evidence, the first Appellate Court upset the observations of the trial Court to the effect that “the nature of the suit properties was joint family properties”. First Appellate Court concluded that properties were self-acquired properties of deceased Jagoji Khandare (para 8).

48] The Appellate Court had given various reasons for arriving at that conclusion. Though not expressly but impliedly, the Appellate Court has reversed the observations of the trial Court about nature of the suit properties as joint family property based on the admission in the written statement. The first Appellate Court simply based his findings on the basis of failure of the plaintiff to prove nature of suit the properties at joint family property. Any observations of the first Appellate Court “relating to admission given in the written statement” are not pointed out to me. Even I do not find it.

### **Finding of this Court on Nature of Properties**

49] As stated above, the trial Court as well as the first Appellate Court has observed that all the suit lands were not proved to be joint family properties. Both the Courts below have given several reasons which are reproduced in earlier part of the judgment. There is a little

scope to interfere in those findings. When the evidence and findings are perused, there is a little scope to opine that those findings are perverse. Survey Nos.51/1 & 51/3 were allotted to deceased Jagoji Khandare and his brother Champatrao Khandare on patta basis.

50] These lands could have been considered as joint family properties (thereby giving the plaintiff birth right and not a right through her father) provided there could have been evidence to show that those pattas were in existence in their family prior to both the brothers. The patta granted can be considered for the benefit of the family provided there should be evidence that both were holding the pattas for the benefit of the family and not in individual capacity. The provision similar to the provision of law referred by the High Court of Karnataka were not pointed out from the law in existence for this part. Hence, the objection cannot be considered.

**Nature of Registered Deed Dated 29/10/2001 and Considering it as Gift-Deed**

51] On another aspect, the first Appellate Court differed with the trial Court. The trial Court considered the deed dated 29<sup>th</sup> October, 2001 as a partition-deed. Whereas, the first Appellate Court considered it as a gift-deed. As the lands were belonging to Jagoji Khandare, the defendant Nos.1 and 2 being the sons (during lifetime of Jagoji) were held disentitled to claim share therein. Hence, the partition-deed was

considered as a gift-deed within the meaning of Section 122 of the Transfer of Property Act, 1882 (paras 8 & 9). Before arriving at this finding, the first Appellate Court confirmed the findings of the trial Court “*about not applying coercion or fraud on deceased Jagoji Khandare while executing the partition-deed*” and, in fact, it was executed in sound state of mind (paras 9 to 12).

52] Learned Advocate Shri Agrawal supported the observations of the first Appellate Court that “*registered partition-deed cannot be considered as partition deed*”. It is for the reason that defendant Nos.1 and 2 were not the sharers and they claim through their father defendant No.3. In support of that, he relied upon the observations in the cases of *Ramesh Arya Vs. Pawan Arya & Others*<sup>17</sup> and *Shub Karan Bubna @ Shub Karan Prasad Bubna Vs. Sita Saran Bubna & Others*<sup>18</sup>. There is no need to elaborate on the observations in the abovementioned two cases. There cannot be any dispute about the proposition enunciated in those two judgments. There can be a partition in between only those parties who are already having a share in the property. Because, the legal effect of partition is only division of property and demarcation of shares. The person who is not having a share in the property cannot be given a share by executing a partition deed with him. It can be given by executing a document titled

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17 2019(3) HLR 472

18 2009(6) ALL MR 502 (S.C.)

differently. Even learned Advocate Shri Vaishnav has not disputed this proposition of law.

**Considering the Document as Gift-Deed**

53] According to learned Advocate Shri Agrawal, the first Appellate Court was wrong in considering the registered partition-deed as a gift-deed as per the provisions of Sections 122 and 123 of the Transfer of Property Act, 1882. According to him, the witnesses to gift-deed are necessary to be examined. He relied upon the provisions of Section 67 of the Indian Evidence Act, 1872.

54] To buttress his submission, he relied upon the judgment in the case of ***K. Laxmanan Vs. Thekkayil Padmini & Others***<sup>19</sup>. In that case, defendant No.5 pleaded about execution of gift deed. Its execution is denied by the plaintiff. One attesting witness has expired and another attesting witness though alive was not examined. In that case, the execution was specifically denied by the plaintiff. Apart from gift deed, there was also a Will-Deed executed on same day.

55] This Court does not feel that it was necessary to examine the attesting witnesses to the registered deed. Section 68 of Evidence Act lays down the manner of proof of document required to be attested. It is by examining at least one attesting witness. However, if the

document is registered one, there is no need to examine even one attesting witness. There are two exceptions to this rule. When such document is Will, examination of at least one attesting witness is mandatory. So also, examination of one attesting witness is mandatory when the document is specifically denied by the person by whom it purports to have been executed.

56] In this case, even though it is true that the plaintiff has challenged the registered deed titled as partition deed, she is not the person who purports to have executed that document. Hence, the proviso will not be applicable. Defendant No.3 is one of the executant to that registered deed. He has entered into witness-box. He has also been cross-examined. Hence, the registered document in question need not be proved in the manner laid down under Section 68 of Indian Evidence Act. I am fortified in taking this view on the basis of observations by Hon'ble Supreme Court in the case of *Surendra Kumar Vs. Nathulal & Another*<sup>20</sup>. They were followed by High Court of Punjab and Haryana in the case of *Giano Vs. Puran & Ors.*<sup>21</sup> The observations in two judgments relied upon by the appellant are on the basis of facts of those cases. The objection taken on behalf of the appellant is not entertained. The findings given by the first Appellate Court that the registered deed is considered as gift deed are upheld.

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20 (2001) 5 SCC 46

21 AIR 2006 P & H 160

**Absence of Declaration about Legality of Partition-Deed**

57] Learned Advocate Shri Vaishnav emphasized on the conduct of the plaintiff in not seeking declaration that registered partition-deed is not binding on the plaintiff. In support of this, he relied upon a judgment in the case of **Anathula Sudhakar Vs. P. Buchi Reddy (Dead) by L.Rs.**<sup>22</sup>

58] Whereas, according to learned Advocate Shri Agrawal, there was no need to seek declaration to that effect. For that purpose, he relied upon a judgment in the case of **Venigalla Koteswaramma Vs. Malampati Suryamba & Ors.**<sup>23</sup>. The Hon'ble Supreme Court reiterated the main issues required to be considered while dealing with the partition suit. They are—

- a) whether the plaintiff is having share or interest in the suit property?
- b) whether he can ask for division?
- c) the manner in which properties will be divided.

59] When we talk about declaration in a partition suit, it relates to declaration of plaintiff's share in the suit properties (para 38). The defendant pleaded in the written statement about execution of the agreement for sale and Will. It is for the defendant to prove those

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22 AIR 2008 SC 2033

23 (2021) 4 SCC 246

documents. The plaintiff can ignore those documents and there was no necessity for the plaintiff to seek relief of declaration against the agreement set up by the defendant (para 39).

60] The trial Court (issue No.2) and the first Appellate Court (point No.2) have framed issue on the aspect of “*execution of the registered partition-deed by applying coercion, fraud and undue influence on deceased Jagoji Khandare, sound state of mind of Jagoji Khandare at that time*” (point Nos.2 and 3 by the Appellate Court) and the partition-deed executed by Jagoji Khandare, illegality (issue No.2) by the trial Court.

61] I have read the reasoning given by the trial Court on that issue (para 14 & 19). Whereas, reasoning finds place in the Appellate Court’s judgment in para 9 to 12. Both the Courts have discussed and appreciated the evidence adduced by the plaintiff on that aspect and negatived the grievance of the plaintiff to that effect. It is true that declaration about partition deed is not sought by the plaintiff. At the same time, it is true that grievance about partition deed is made in the plaint and both the Courts below gave its observation. In a partition suit, Court has to declare shares of the sharers as per the personal law.

62] So, main issue is who are the sharers and what are their shares. In doing that exercise if any of the parties relied upon any

document and if it comes in the way of declaration of shares, Court is bound to express its opinion about that document. Both the courts below proceeded on the background that specific declaration about partition-deed was not sought. I do not find the findings perverse and given after non-consideration of any material on facts. On the above background, I do not find any merit in the submission of learned Advocate Shri Vaishnav. I reject it.

63] For the above discussion, I do not find any perversity in the findings given by the first Appellate Court that suit properties were the self-acquisitions of deceased Jagoji. The finding on that issue cannot be said to be a concurrent finding. Because the trial Court has concluded that suit properties were joint family properties. Whereas the first Appellate Court concluded that they were not the joint family properties. Hence, this Court has undertaken the exercise of ascertaining the correctness of the findings recorded by first Appellate Court. In that exercise, this Court do not find any reason to interfere in those findings. Hence, substantial question No.3 is answered in the affirmative.

### Final Conclusion

64] So far as the findings on the point of partition deed being illegal is recorded in the negative by both the Courts below. This can be said to be a concurrent finding (first Appellate Court considered the

registered deed as a gift-deed). These findings are not interfered as there is no perversity in it. So, the judgment giving share to the plaintiff only in one suit land as held by the trial Court needs to be confirmed. Appeal in respect of claim for partition in respect of other suit property needs to be dismissed. Hence, the following order is passed—

### **ORDER**

1. The appeal is dismissed.
2. Rejection of claim of plaintiff for partition in respect of land bearing Survey Nos.51/1 & 51/3 (Gat Nos.280 & 286) by both the Courts below is confirmed.
3. Rejection of claim by both the Courts below about share in the suit properties independently and not as one of the heir of father Jagoji Khandare is also confirmed.
4. Parties to bear their own costs.

**(S.M. MODAK, J.)**

Vijay