

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

SECOND APPEAL NO. 268 OF 2019

1. Ganpati s/o Rama Ghatе,
Aged about 72 years, Occu: Cultivation,
R/o Shegaon, Tah. & Dist. Chandrapur.
2. Sunil s/o Ganpati Ghatе,
Aged about 45 years, Occu: Cultivation.
3. Anil s/o Ganpati Ghatе,
Aged about 44 years, Occu: Cultivation.
4. Sudhir s/o Ganpati Ghatе,
Aged about 43 years, Occu: Cultivation,
All r/o Bhoyegaon, Tah. Korpana &
District : Chandrapur.

.... **APPELLANTS.**

// VERSUS //

Sau Vandana w/o Suresh Shende,
Aged about 40 years, Occu: Household,
R/o Bibi, Tah. Korpana & Dist. Chandrapur.

.... **RESPONDENT.**

Shri Rohit Masurkar, Advocate for Appellants.
Shri Rohit Joshi, Advocate for the Respondent.

CORAM : ANIL S. KILOR, J.
DATED : DECEMBER 02, 2021

ORAL JUDGMENT :

1. In this appeal, a challenge is raised to the judgment and decree dated 25/02/2019 passed by learned District Judge-3, Chandrapur dismissing Regular Civil Appeal No. 16 of 2014 arising out of the judgment and decree dated 13th January 2014 passed by the Civil Judge Junior Division, Rajura in Regular Civil Suit No. 50 of 2011 decreeing the suit for partition and separate possession.

2. Brief facts of the case are as follows: (The parties are referred to as per their status before the trial Court)

It is the case of the plaintiff that she is a daughter of defendant No.1 and sister of defendants No. 2 to 4. The suit properties are agricultural land Survey No.12, admeasuring 1.80 HR at village Ekodi, Tah. Korpana as well as land Survey No.235 admeasuring 2.51 HR and land Survey No.207, admeasuring 1.10 HR both of village Bhoyegaon, Tah. Korpana. According to the plaintiff, the suit properties are ancestral properties which were

owned and possessed by her grandfather Rama Yadav Ghate. She claimed that after the death of Rama Ghate the coparcenary properties were partitioned between the defendant No.1 and her uncle Namdeo Ghate in which the suit properties came to the share of the defendant No.1. She claimed that the defendant No.1 illegally transferred the suit properties time to time to the defendant Nos. 2 to 4, without her consent. Following are the sale transactions claimed as illegal:

- (1) 0.90 R out of S.No.12 to the defendant No.3.
- (2) 0.90 R out of S.No.12 to the defendant No.2 by registered sale deed dated 10.6.2011.
- (3) 0.91 R out of S.No.235 to the defendant No.2 by registered sale deed.
- (4) 1.60 HR out of S.No.235 to the defendant No.4 by registered sale deed.

The plaintiff claimed that all the sale deeds were *void ab initio* and were not binding on her. She claimed to have demanded partition in March 2011 and issued notice to that effect on 05/09/2011. She claimed that despite the notice the defendant

No.1 executed the registered sale deeds. The plaintiff thus claimed partition and separate possession of the suit properties, by filing a suit.

3. The defendants filed Written Statement denying the suit claim however, the relations were admitted. The illegality of sale transactions are denied by the defendants. They claimed that the defendant No.1 was absolute owner and the properties were self acquired properties. They claimed that the suit properties were likely to be acquired by the Western Coal Fields Ltd. and it was necessary to make partition of the suit property amongst the son and daughter. They further claimed that the defendant No.1 had already given share to the plaintiff by purchasing 4 acres land at Naranda in the name of her husband Suresh Janardhan Shende who is the son of his sister Saraswati Janardhan Shende. They claimed that the plaintiff had consented to the sale deeds in favour of the defendants Nos. 2 to 4 and has no right to claim partition.

4. The learned trial Court, after appreciating the oral as well as documentary evidence available on record, was pleased to decree the suit declaring thereby that the plaintiff has 1/5th share in the suit properties i.e. agricultural land Survey No.12, admeasuring 1 H 80 R situated at village Ekodi, Tahsil : Korpana, land Survey No.235, admeasuring 2H 51R and land Survey No.207 admeasuring 1H 10R, both situated at village Bhoyegaon, Tahsil : Korpana, District : Chandrapur. It is also ordered that the defendant Nos. 1 to 4 are entitled to 1/5th share each in the suit properties subject to payment of necessary Court fees, proportionate to their share in the suit properties.

5. The defendants carried an appeal vide Regular Civil Appeal No.16 of 2014 before the District Judge-3, Chandrapur, which came to be dismissed vide judgment and decree dated 25/02/2019, the same is under challenge in this appeal.

6. This Court, on 25th July 2019, issued notices to the respondent and framed the following substantial questions of law:

“Whether suit filed by the respondent was maintainable in absence of prayer for cancellation of sale-deed by the respondent?”

7. I have heard the learned counsel for the respective parties.

8. The learned counsel for the appellant submits that as there was no challenge raised to the Sale Deeds, executed by the defendant No.1 in favour of the defendant Nos. 2 to 4, the suit simpliciter for partition and separate possession is not maintainable.

9. It is further argued that during the lifetime of father, the daughter cannot claim partition and as such the suit is not maintainable.

10. On the other hand, the learned counsel for the respondent submits that as both the parties went to the trial knowing well the case of each of the parties and as the plaintiff has

claimed partition on the basis of having share in the suit property, which is an ancestral property, even in absence of challenge raised to the Sale Deeds executed by the father of the plaintiff in favour of her brothers i.e. defendant Nos. 2 to 4, is maintainable.

11. It is further submitted that it is now a well settled law that during the lifetime of father son or daughter can claim partition in the ancestral property. It is further submitted that as there are concurrent findings and as there is no perversity in recording the findings by both the Courts below, this Court may not interfere with the concurrent findings recorded by both the Courts below in favour of the plaintiff/ respondent.

12. To consider the rival contentions of the parties, I have perused the record and also the judgments and decree of both the Courts below.

13. The Hon'ble Supreme Court of India, in the case of *Rohit Chauhan ..vs.. Surinder Singh*¹, has observed thus :

¹ (2013) 9 SCC 419

“14. A person, who for the time being is the sole surviving coparcener as in the present case Gulab Singh was, before the birth of the plaintiff, was entitled to dispose of the coparcenary property as if it were his separate property. Gulab Singh, till the birth of plaintiff Rohit Chauhan, was competent to sell, mortgage and deal with the property as his property in the manner he liked. Had he done so before the birth of plaintiff, Rohit Chauhan, he was not competent to object to the alienation made by his father before he was born or begotten. But, in the present case, it is an admitted position that the property which defendant 2 got on partition was an ancestral property and till the birth of the plaintiff he was sole surviving coparcener but the moment plaintiff was born, he got a share in the father’s property and became a coparcener. As observed earlier, in view of the settled legal position, the property in the hands of defendant 2 allotted to him in partition was a separate property till the birth of the plaintiff and, therefore, after his birth defendant 2 could have alienated the property only as Karta for legal necessity. It is nobody’s case that defendant 2 executed the sale deeds and release deed as Karta for any legal necessity. Hence, the sale deeds and the release deed executed by Gulab Singh to the extent of entire coparcenary property are illegal, null and void. However, in respect of the property which would have fallen in the share of Gulab Singh at the time of execution of sale-deeds and release deed, the parties can work out their remedies in appropriate proceeding.”

14. Thus, it is clear that the moment plaintiff was born she got a share in the father's property. Therefore, the Sale Deeds executed by the father in favour of his sons and brothers of the plaintiff in respect of the share of the plaintiff are illegal, null and void and both the Courts below, after taking into consideration various authorities on this issue, has held that though there was no declaration sought as regards the Sale Deeds, the suit is maintainable for partition and separate possession. Accordingly, I have answered the substantial question of law framed by this court.

15. Moreover, in view of the judgment of this Court in the case of *Shivappa Mallappa Isapure and another ..vs.. Ganpat Mallappa Isapure and others*², wherein it has been held that it is not necessary for the plaintiff to seek declaration regarding the instruments which are *void ab initio*.

16. The single bench of this Court in *Jaywantabai ..vs... Raghunath*³ has held thus :

² 2010(7) Mh.L.J.772

³ 2006(3) Mh.L.J. 416

“11. It is settled that a person may sell even property which does not belong to him and the purchaser gets a title as and when the seller acquires title to the property. Therefore, the appellant/plaintiff could have got such part of the property as belonged to the respondent/defendant. It was plaintiff's worry. The respondent/defendant should not have been allowed to fight a proxy litigation on behalf of wife and son or to hide behind the imaginary rights of his wife and son to evade the consequences of his own actions, without saying that he had taken the money for any immoral purpose or to feed his vices. If after decree of specific performance is passed and the property passes to the appellant/ plaintiff, the respondent-defendant's wife and son feel aggrieved, they could file a suit, should they have a cause of action, for setting aside alienation so far as it related to their share, if any. First, there was no question of considering the claims of respondent-defendant's wife and son, who were not before the Court. Secondly, the respondent-defendant's wife would have been in a position to claim a share either upon a demand of partition by her son or upon the death of her husband, none of which events are shown to have occurred”.

17. It is thus clear that during the lifetime of father, son/ daughter can claim partition from his/her father and it cannot be at the sweet will of the father.

18. In the circumstances, I do not find any merit in the submission of the learned counsel for the appellant. Furthermore, as no perversity has been pointed out in recording the concurrent findings of both the Courts below, I am of the considered view that the present appeal needs to be dismissed.

The appeal is **dismissed**. No order as to costs.

In view of disposal of the Second Appeal, the Civil Application(s), if any, shall stand **disposed of**.

(ANIL S. KILOR, J)

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